

FLORIDA'S CITIZEN CONSTITUTIONAL BALLOT INITIATIVES: FISHING TO CHANGE THE PROCESS AND LIMIT SUBJECT MATTER

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I. INTRODUCTION

During the November 1994 general election a tidal wave swept through the small fishing fleets of Florida. The tidal wave took the form of a two-to-one voter approval of the Limiting Marine Net Fishing Amendment ¹ (Amendment) to the Florida Constitution.²

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1. See Bob Marshall, Reform Needs to Get on Fast Track; Florida Voters Putting Louisiana on Notice, *NEW ORLEANS TIME-PICAYUNE*, Nov. 20, 1994, at C18.

2. See FLA. CONST. art. X, § 16. The Amendment, now enshrined in the Florida Constitution as section 16 of article X, provides as follows:

Section 16. Limiting Marine Net Fishing—

(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish,

Following the passage of the Amendment, outraged commercial shrimp and mullet fishermen³ flocked to Tallahassee to protest the net ban.⁴ They claimed that the ban would put them out of work, violating their right to due process and equal protection under the United States Constitution.⁵ They also contended that voters did not fully understand the Amendment before voting on it because they were never told of the possible economic impact of the ban.⁶ A spokesman for Governor Lawton Chiles claimed that the disruptions would be charged but peaceful because the real fight over the net ban was being fought in court.⁷ However, the court battle over the language of the net ban amendment had already been waged and the commercial fishermen of Florida had failed to put up a fight.⁸ Earlier, when the Florida Supreme Court heard arguments over the validity of the Limiting Marine Net Fishing initiative before it was voted on, no briefs were filed in opposition.⁹

Although the fishing industry missed its chance to wage war on the subject matter or language of the Amendment,¹⁰ the battle was not over. On January 18, 1996, the Florida Supreme Court issued its first interpretation of the Amendment in Department of Environ-

and other marine animals from unnecessary killing, overfishing, and waste.

(b) For purposes of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:

(1) No gill nets or other entangling nets shall be used in Florida waters; and

(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.

(c) For purposes of this section:

(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in meshes of the net by the gills, and "entangling net" means a drift net, trammell net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill or an entangling net.

3. Fishermen is used for both men and women who fish.

4. See Phil Willon, *Anglers Poised for Net Ban Protest*, TAMPA TRIB., June 27, 1995, at B3.

5. See Phil Willon, *Net-Ban Foes File Appeal; Fishermen Win a Compromise on Trawls and Await a Ruling on an Injunction*, TAMPA TRIB., June 28, 1995, at B1.

6. See *id.*

7. See *id.* When the governor's spokesperson made this statement, the Amendment had already been voted on. In spite of the spokesperson's claim, the best opportunity to attack the Amendment was before it was voted on, not after. See *infra* Part III.

8. See Advisory Op. to the Att'y Gen. re Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993).

9. See *id.* at 997 n.1.

10. See discussion *infra* Part III.B. (explaining that an advisory opinion on a citizen ballot initiative will only consider these two legal questions).

mental Protection v. Millender.¹¹ In *Millender*, the court determined the meaning of “meshes open.”¹² *Millender* is a prime example of the problems inherent in legislating through the state constitution. Like all common resources, marine life is finite and proper management is important.¹³ However, this problem cannot be effectively managed through the state constitution.

This Comment uses the Florida Supreme Court’s advisory opinion on the Limiting Marine Net Fishing ballot initiative to suggest changes to the process of putting citizen initiatives on the ballot. Furthermore, this Comment uses the Florida Supreme Court’s *Millender* decision as an example of the need to limit the subject matter of citizen ballot initiatives.

Part II provides a brief history of the fishing industry in Florida and profiles the marine net fishing interest groups. Part III flushes out the process used to bring the Amendment to the voting booth in 1994, and focuses on the Florida Supreme Court’s role in providing an advisory opinion to the attorney general. In order to highlight flaws in the current initiative process, this Comment presents a hypothetical challenge to the Amendment that might have been offered by the fishing industry had they filed a brief during the supreme court’s review of the initiative.

Part IV shifts to previous constitutional attacks on fishing laws and regulations by detailing prior due process, equal protection, Commerce Clause, and administrative overreach cases. This section describes the difficulty groups could face if they were to challenge the Amendment on constitutional grounds.

Part V considers *Millender*, an unprecedented challenge to the state’s ability to regulate fishing gear. The *Millender* court’s interpretation of the Amendment is unique and in stark contrast to the decisions discussed in Part III.

Part VI concludes by suggesting changes to the process used to bring ballot initiatives to voters. Additionally, the Constitution Revision Commission (CRC) is encouraged to look at *Millender* as an example of the need to restrict the subject matter of citizen constitutional ballot initiatives.¹⁴

11. 666 So. 2d 882 (Fla. 1996).

12. See *id.* at 885-86; see also discussion *infra* Part IV.

13. See, e.g., Bob Slaff, *Fish a Limited Resource*, CAPITAL, June 3, 1996, at C10 (discussing that the world’s ocean fish resource is finite and is the prize in a developing tug-of-war for control of the resource).

14. This Comment does not explore the different processes and methods used in other states. For an excellent discussion of alternatives based on the schemes in other states see P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida’s Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417 (1995).

II. SAVE OUR SEALIFE - THE COMMERCIAL FISHING INDUSTRY SWIMS AGAINST THE TIDE

A. Fish: An Uncommon Resource

“Welcome to Niceville, Florida, Home of the Boggy Bayou Mullet Festival.”¹⁵ Mullet is a commercial fish product with a long history in Florida. In *Holland v. Roberts*,¹⁶ Justice Terrell of the Florida Supreme Court pointed out the importance of the mullet to the people of Florida:

It is common knowledge that the salt water fishing industry is one of the leading businesses in the coastal counties of the State at which hundreds of fishermen make their living, and that mullet is the principal product of the industry. The mullet is to the south-eastern sector of the country what the cod is to the northeastern sector and the salmon is to the northwestern sector. The real fundamental difference between the Southeasterner and the New Englander is not in political and social philosophy but the difference between mullet and “tater” and cod and “tater.”¹⁷

Justice Terrell felt that the right to take fish from Florida’s salt waters was one common to all that could be regulated in the interest of all, but that regulations should affect all alike.¹⁸

Florida’s commercial fishing industry was well established when Justice Terrell wrote his dissenting opinion in *Holland*.¹⁹ The annual mullet harvest has consistently ranged in the twenty million pound range since 1895 with a brief expansion during World War II when the demands of war resulted in annual harvests up to fifty-five million pounds.²⁰ Around 1900, commercial shrimping began in Florida and evolved into a twenty-one million dollar industry by 1953.²¹ Overall, Florida’s total commercial fish landings have fluctuated between 175 million and 225 million pounds for decades.²²

There is no doubt that Florida’s marine resources need to be protected through regulation. One commentator posed the problem in the form of a fable:

Once upon a time in a faraway land there was a pond called

15. Painted on the Water Tower in Niceville, Florida. The Boggy Bayou Mullet Festival is famed for its “Mullet Dogs.”

16. 149 Fla. 308, 5 So. 2d 608 (1942).

17. *Id.* at 323, 5 So. 2d at 614 (Terrell, J., dissenting).

18. *See id.*, 5 So. 2d at 615.

19. *See* Robert P. Jones, *Florida’s Net Ban—A Study of The Causes and Effects*, (visited July 30, 1997) <<http://www.southeasternfish.org/commfish.html>> (copy on file with FLA. ST. U. L. REV., Tallahassee, Fla.). Jones notes that “[b]y 1895, Florida had a well established infrastructure available to the commercial net fishing industry.” *Id.*

20. *See id.*

21. *See id.*

22. *See id.*

Bubba's Lake. There were 10 fishermen who lived around Bubba's Lake. They were strong, stubborn people who made their livings from the big fish they caught. For many years, they had a gentleman's agreement: Each would catch 10 fish a month. No more. But one day, a fisherman named Einstein realized that if he caught 11 fish a month instead of 10, he would increase his pay by 10 percent. 'Just one measly fish,' he said to himself. 'That's not going to hurt anyone.' Being a smart guy, he did some calculations. 'If there are 100 fish in the pond, and I take one extra, the value of the pond decreases by only 1 percent, but my pay goes up 10 percent. I'd be a fool not to catch more fish. . . . But, across the lake, another fisherman comes up with the same idea. . . . Pretty soon, all the fish were gone.'²³

This fable is based on the centuries old principle that economists call The Tragedy of the Commons.²⁴ As Justice Terrell pointed out, when the Legislature or an administrative agency places a restriction on the methods and devices allowed for fishing, rights to a common resource are diminished.²⁵ The common resource becomes a little less common; we start to fence in the fish by fencing out some of the interested parties.

B. The Fishing Derby Players

Commercial fishermen are not the only parties interested in Florida's fish resources. Interested parties include the boaters who fish, the recreational marine industry that builds the boats, the support industry that services recreational fishermen and their boats, and the infrastructure of fishing equipment and bait suppliers.²⁶ Interested parties also include the consumer who does not fish, the commercial fisherman who supplies the non-fishing consumer, the infrastructure of commercial boat builders and equipment suppliers, the distribution chain that directs fish off the boat into the processing chain, and the market place that puts fish on the consumer ta-

23. Tony Bartelme, *The Economics of a Sea Tragedy*, POST & COURIER (Charleston, S.C.), June 23, 1996, at A20.

24. See *id.*

It's a principle that shows how self-interest overpowers community interest, how a common area is easily destroyed when it's owned by everyone. It shows why people build more boats than they need, catch more fish than they should --why people eat their seeds. This is what's happening in our oceans. . . . [W]e have trawlers as long as football fields with nets that scoop up 100 tons of fish in one pass. We have millions of recreational anglers catching fish. We have pollution taking fish, and developers and dam builders destroying marine habitats.

Id.

25. See *Holland v. Roberts*, 149 Fla. 308, 324, 5 So. 2d 608, 615 (1942) (Terrell, J., dissenting).

26. See Slaff, *supra* note 13.

ble.²⁷ The Amendment was a successful effort by the recreational fishermen to grab a greater piece of the pie by fencing commercial fishermen out of a significant portion of the commons. As a result, the rights of commercial fish boat builders, distributors, marketers, and consumers were affected.

The battle between commercial and recreational fishermen has been waged for years.²⁸ The Florida Conservation Association (FCA), a group headed by prominent sports fisherman Karl Wickstrom, the editor of Florida Sportsman Magazine, initiated the Amendment.²⁹ Other parties seeking to curtail the commercial fishing industry included General Norman Schwartzkopf of Gulf War fame; John Mecom, former owner of the New Orleans Saints; and Captain Dan Kepnis and Dr. William Fox of the Florida Marine Fisheries Commission (MFC).³⁰ Together, they provided the impetus to Save Our Sealife (SOS), the committee organized to gather votes and campaign for the ballot initiative to ban net fishing in Florida's coastal waters.³¹

Faced with the growing organization of the recreational fishing industry, the commercial fishing industry attempted, but failed, to group for the coming battle.³² In the end, the commercial fishing industry was no match for the forces arrayed against it.

III. CLEAR SAILING THROUGH THE FLORIDA SUPREME COURT

A. The Ballot Initiative Process

The power of the people to amend the constitution is implicit in article I, section 1 of the Florida Constitution.³³ Article XI of the Florida Constitution allows the electorate to adopt revisions or amendments to the Florida Constitution.³⁴ Section 3 of article XI empowers voters to consider initiatives proposed directly from citizen groups:

The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people,

27. See *id.*

28. See, e.g., Jones, *supra* note 19 (stating that there has always been controversy in Florida between commercial and sport fishermen).

29. See *id.*

30. See *id.*

31. See *id.*

32. See *id.* ("There was no single, unified, statewide anti-net ban commercial fishing organization. There were only two statewide non-profit groups in Florida, Southeastern Fisheries Association and Organized Fishermen of Florida. There were numerous local commercial fishing groups without any professional representation or formalized structure.").

33. See Talbot "Sandy" D'Alemberte, Commentary to Art. I, § 10, Vol. 25A FLA. STAT. ANN. 16 (West 1991) (stating "[a]ll political power is inherent in the people").

34. FLA. CONST. art. XI, § 5.

provided that, any such revision or amendment [except for those limiting the power of government to raise revenue] 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 such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.³⁵

The citizen ballot initiative process is the most restrictive method for amending the constitution because initiatives are limited to a single subject and strict rules govern the petition process.³⁶ In order to qualify, the initiative requires signatures from eight percent of the voters statewide and at least eight percent of the voters in at least half of the congressional districts.³⁷ The members of FCA were energized by General Schwartzkopf at an FCA banquet where he stated: "You need 400,000 signatures? I can get them in a week."³⁸ The general was prophetic; on November 10, 1992, SOS collected over 200,000 signatures outside polling sites throughout Florida.³⁹

Article XI, section 5 provides a schedule for placing an initiative on the ballot, publicizing the initiative, and then implementing it if approved.⁴⁰ After an initiative is filed with the secretary of state, it must be placed on the ballot in the next election held more than ninety days after the filing.⁴¹

The attorney general is required to ask the Florida Supreme Court for an advisory opinion on each initiative.⁴² The justices shall, subject to the rules of procedure, permit interested parties to argue or comment on the initiative.⁴³ This procedure is designed to provide an automatic method of challenging a proposed amendment by requiring the attorney general to test the validity of an initiative through the supreme court and in turn requiring the supreme court to issue an opinion after hearing from interested parties.⁴⁴

In response to the attorney general's petition, the Florida Supreme Court issued an order permitting interested parties to file

35. *Id.* §3.

36. See TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 148 (1991) [hereinafter *GUIDE*].

37. See FLA. CONST. art. XI, § 3.

38. See Jones, *supra* note 19.

39. See *id.* (noting that members of SOS claimed that this was the most successful one day petition event in the history of America).

40. See FLA. CONST. art. XI, § 5.

41. See *id.* § 5(a).

42. See *id.* art. IV, § 10; FLA. STAT. § 16.061 (1995).

43. See *id.* art. V, § 3; FLA. STAT. § 16.061 (1995).

44. See *GUIDE*, *supra* note 36, at 71.

briefs.⁴⁵ SOS and the Sierra Club Legal Defense Fund filed briefs in support of the initiative. However, no parties filed briefs in opposition.⁴⁶

B. Supreme Court Review of Amendment Structure

When the court provides an opinion on the validity of a ballot initiative, its analysis is limited to two legal issues: whether the proposed amendment's title and summary are "printed in clear and unambiguous language,"⁴⁷ and whether the proposed amendment addresses a single subject.⁴⁸ The court will not consider or rule on the merits of a proposed amendment.⁴⁹ On June 17, 1993, the Florida Supreme Court issued an advisory opinion stating that the Amendment satisfied the statutory ballot title, summary, and single-subject requirements.⁵⁰

1. Ballot Title and Summary

Section 101.161(1), Florida Statutes, states, in relevant part:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot. . . . The substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.⁵¹

The court reads the statute to require a title and summary that are "accurate and informative."⁵² Furthermore, "[t]he summary must give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots."⁵³ The court's responsibility "is to determine whether the language as written misleads the public."⁵⁴ This section discusses why this requirement can represent a significant hurdle.⁵⁵

45. See Advisory Op. to the Att'y Gen. re Limited Marine Net Fishing, 620 So. 2d 997 (Fla. 1993).

46. See *id.* at 997 n.1.

47. FLA. STAT. §101.161(1) (1995).

48. See Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation, 656 So. 2d 466, 468 (Fla. 1995).

49. See Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So. 2d 71, 73 (Fla. 1994).

50. See Limited Marine Net Fishing, 620 So. 2d at 998-99 (Fla. 1993).

51. FLA. STAT. § 101.161(1) (1995).

52. *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992).

53. *Id.* at 620.

54. *Casino Authorization, Taxation and Regulation*, 656 So. 2d at 468.

55. See generally *id.*

Without opposition, the court's analysis of the ballot title and summary to the Amendment was perfunctory.⁵⁶ The court found that the ballot title and summary provided electors "with sufficient information to make an informed decision on how to cast their ballots."⁵⁷ The ballot title and summary stated:

LIMITING MARINE NET FISHING

Limits the use of nets for catching saltwater finfish, shellfish, or other marine animals by prohibiting the use of gill and other entangling nets in all Florida waters, and prohibiting the use of other nets larger than 500 square feet in mesh area in nearshore and in-shore Florida waters. Provides definitions, administrative and criminal penalties, and exceptions for scientific and governmental purposes.⁵⁸

Had the commercial fishing industry contested the initiative, there were several avenues open for attack. For example, while reviewing another proposed amendment regarding casinos, the court considered a petition filed by a group called Proposition for County Choice Gaming, Inc.⁵⁹ The court found numerous problems with the language of the ballot summary, which read as follows:

CASINO AUTHORIZATION, TAXATION, AND REGULATION

This amendment prohibits casinos unless approved by the voters of any county or Tourist Development Council district who may authorize casinos on riverboats, commercial vessels, within existing pari-mutuel facilities and at hotels. It mandates legislative implementation and requires net license and tax proceeds to be appropriated for crime prevention and correctional facility construction, education, senior citizens' services and state tourism promotion. The amendment becomes effective upon adoption, but prohibits casino gaming before July 1, 1995.⁶⁰

The court found this language misleading for three reasons.⁶¹ First, although the summary said voters may authorize casinos "on riverboats, commercial vessels, within existing pari-mutuel facilities and at hotels,"⁶² the text of the amendment went further and allowed casinos in "transient lodging establishments."⁶³ The court felt that the statutory definition of hotel was "substantially different" from the definition of transient lodging establishments.⁶⁴ Thus, the court

56. See Limited Marine Net Fishing, 620 So. 2d at 998-99.

57. Id. at 999.

58. Id.

59. See Casino Authorization, Taxation and Regulation, 656 So. 2d at 468.

60. Id. at 467.

61. See id. at 468.

62. Id.

63. Id.

64. See FLA. STAT. § 509.242(1)(a) (1995) (defining a hotel as "any public lodging establishment containing sleeping room accommodations for 25 or more guests and provid-

believed that the summary would lead people to understand that casinos would only be able to operate in hotels, while the strict wording of the proposed amendment would theoretically allow casinos to operate in "bed and breakfast" types of inns.⁶⁵

Second, the court believed that the summary's claim that casinos may be authorized on "riverboats [and] commercial vessels" could lead voters to believe that only operational, floating vessels may be used to house casinos.⁶⁶ The voter might not realize that the initiative would actually authorize casinos "on board stationary and non-stationary riverboats and U.S. registered commercial vessels."⁶⁷ The court was concerned voters might unintentionally authorize stationary riverboat gambling.⁶⁸

Finally, the court was concerned with the first line of the summary, which read: "This amendment prohibits casinos unless approved by the voters"⁶⁹ When reviewing initiatives, the court looks at the summary for what it does not say as well as what it does say.⁷⁰ The summary did not say that casinos were banned in Florida and thus it could create the false impression that casinos were allowed in Florida.⁷¹ Stated differently, the language did not say that casinos were already prohibited, and therefore, according to the court, the use of the word "prohibits" was simply "political rhetoric" which might mislead voters.⁷²

Arguably, the use of the word "limiting" in *Limiting Marine Net Fishing* was "political rhetoric." It suggests marine net fishing in Florida's coastal waters was "unlimited." Actually, net use was already heavily regulated. The Florida Marine Fisheries Commission (MFC) has full statutory authority to promulgate rules to protect and recover marine resources in furtherance of state public policy.⁷³ The MFC aggressively regulated the industry and courts generally gave the MFC wide latitude. For example, in *State v. Davis*⁷⁴ the court upheld an MFC emergency ruling that required turtle excluder devices in shrimp nets.⁷⁵ *Davis* argued that the MFC did not have

ing the services generally provided by a hotel and recognized as a hotel in the community in which it is situated or by the industry"). However, the statutory definition of transient lodging is broader and includes some hotels and many types of motels, resort condominiums, transient apartments, rooming houses, and resort dwellings.

65. See *Casino Authorization, Taxation and Regulation*, 656 So. 2d at 469.

66. *Id.*

67. *Id.*

68. See *id.*

69. *Id.*

70. See *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982).

71. See *Casino Authorization, Taxation, and Regulation*, 656 So. 2d at 469.

72. *Id.*

73. See FLA. STAT. §§ 370.021, .025, .027-.028 (1995).

74. 556 So. 2d 1104 (Fla. 1990).

75. See *id.* at 1105.

statutory authority to make provisions regarding endangered species.⁷⁶ The court looked at the language of the statute and determined that the plain meaning of the reference to endangered species in the act was to modify the commission's otherwise "full" and "exclusive" rulemaking authority relating to all marine life.⁷⁷ The court was persuaded that the commission's rulemaking power was only circumscribed by the requirement to act reasonably.⁷⁸ The MFC had the power to "manage a species for 'future' generations" and the power to "protect and recover marine resources through fishing gear regulations just as it has the power to do so through season closures, bag limits, or fishery management plans."⁷⁹

Amendment opponents could have attacked the term "Limiting" in the ballot title because it is misleading. The text of the Amendment as it now exists in the constitution actually says "[n]o gill nets or other entangling nets shall be used in Florida waters,"⁸⁰ and "no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters."⁸¹ Coupling "limiting" with "marine net fishing" appears to be an attempt to conceal the fact that the initiative was actually designed to ban the use of nets in Florida waters. A more appropriate title would have been Ban on Net Fishing in Florida Waters.

Any attack on the title must include a reference to the summary. The court interprets section 101.161(1), Florida Statutes, to mean that the ballot title and summary are to be read together to determine if the ballot information properly informs the voter.⁸² Although the text of the Limiting Marine Net Fishing summary began with the word "Limits," it subsequently used the words "prohibiting the use of gill and other entangling nets . . . and other nets larger than 500 square feet in mesh area"⁸³

Previously, opponents launched a successful attack on the use of the term "limited access" against the "Authorization For and Regu-

76. See FLA. STAT. § 370.027(1) (1995) ("[T]he Marine Fisheries Commission is delegated full rulemaking authority over marine life, with the exception of endangered species.").

77. See Davis, 556 So. 2d at 1106.

78. See *id.* However, Florida recently revised its Administrative Procedures Act (APA). Courts will probably hold agency rules to a higher standard in the future. For an excellent discussion of Florida's new APA, see Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283 (1997).

79. Davis, 556 So. 2d at 1107. Strangely, during the net ban campaign, the MFC was silent on the extent and scope of fish regulations already in force.

80. FLA. CONST. art. X, § 16(b)(1) (emphasis added).

81. *Id.* § 16(b)(2) (emphasis added).

82. See Advisory Op. to the Att'y Gen. re Limited Casinos, 644 So. 2d 71, 73 (Fla. 1994).

83. Advisory Op. to the Att'y Gen. re Limited Marine Net Fishing, 620 So. 2d 997, 999 (Fla. 1993).

lation Of Statewide System of Limited-Access Riverboat Gambling Casinos.”⁸⁴ The court found that the use of the term “limited-access” was misleading because it failed to inform the public that the amendment would require patrons to pay an admission charge, to remain on board for a minimum amount of time as prescribed by law, and to depart after a “maximum time certain” as prescribed by law.⁸⁵ The use of the term “limited access” left the voter without an understanding of the clear meaning of what they were voting for.⁸⁶ The court concluded that, “based on the ballot title and summary, the voter [might not be able] to discern the meaning of a term that appears critical to understanding the extent of the proposed initiative petition.”⁸⁷

The Limiting Marine Net Fishing amendment is likewise misleading because it tends to lead the voter to believe that commercial fishing would still be viable if the amendment passed. The impact of a 500 square foot limitation on the total mesh size of other nets is meaningless to the average voter. It may have led voters to believe that smaller nets would still be commercially viable. Thus, the voter might not have been able to discern the meaning of a term that appears critical to understanding the extent of the initiative petition. The combination of an ambiguous title and misleading term might have been enough to pull the Amendment from the ballot.

2. The Single-Subject Requirement

Unless a ballot initiative fails for some other reason, the court considers whether it meets a single-subject requirement.⁸⁸ Article XI, section 3 of the Florida Constitution provides that a proposed amendment “shall embrace but one subject and matter directly connected therewith.”⁸⁹ In an earlier advisory opinion, the court said that a proposed amendment must have a “natural relation and connection as component parts or aspects of a single dominant plan or scheme”⁹⁰ in order to pass a single-subject test.⁹¹ In *Fine v. Firestone*,⁹² the court stated: “The purpose of the single-subject require-

84 See Advisory Op. to the Att’y Gen. re Authorization For and Regulation of Statewide System of Limited-Access Riverboat Gambling Casinos, 650 So. 2d 989, 991 (Fla. 1994).

85. See *id.* at 991.

86. See *Id.*

87. *Id.*

88. See Advisory Op. to the Att’y Gen. re Limited Marine Net Fishing, 620 So. 2d at 998-999.

89. FLA. CONST. art. XI, § 3.

90. *City of Coral Gables v. Gray*, 19 So. 2d. 318, 320 (Fla. 1949).

91. See Advisory Op. to the Att’y Gen. re Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991).

92. 448 So. 2d 984 (Fla. 1984).

ment is to allow the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support.”⁹³ To comply with the one subject limitation, the proposed amendment must have a “logical and natural oneness of purpose.”⁹⁴

The court found that the net amendment was designed to protect certain types of marine life from “unnecessary killing, overfishing, and waste.”⁹⁵ Therefore, it passed the “single-subject test.”⁹⁶ The court’s analysis was short and lacked substance.

Successful challenges to ballot initiatives based on violations of the single-subject rule are routine. Of the ten initiatives the court reviewed prior to 1994, it denied ballot position to six, two of which were rejected for failing to meet the single-subject test.⁹⁷

In *Chapter Review Commission v. Scott*,⁹⁸ an initiative was struck down because, among other things, it changed “the status of the property appraiser, the tax collector, and the sheriff from constitutional officers to charter officers”⁹⁹ The court found that the fact that the initiative called for consideration of “three separate, independent, and unconnected constitutional offices” might mean that it was unconstitutionally calling on the voters to consider three separate amendments, forcing them “to choose all or none of the proposed amendments.”¹⁰⁰ The court’s analysis in *Scott* points out the impact a carefully crafted brief can have in guiding and shaping the court’s opinions.

A possible line of attack might have combined the court’s logic in *Scott* with *Advisory Opinion to the Attorney General re Restricts Laws Related to Discrimination*.¹⁰¹ In the latter case, the proposed ballot title and summary stated: “LAWS RELATED TO DISCRIMINATION ARE RESTRICTED TO CERTAIN CLASSIFICATIONS: Restricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status. Repeals all laws inconsistent with this amendment.”¹⁰²

The court concluded that the amendment violated the single-

93. *Id.* at 993.

94. *Id.* at 990.

95. *Advisory Op. to the Att’y Gen. re Limited Marine Net Fishing*, 620 So. 2d 997, 999 (Fla. 1993).

96. *See id.*

97. *See Jameson & Hosack, supra note 14, at 454.*

98. 627 So. 2d 520 (Fla. 5th DCA 1993).

99. *Id.* at 524.

100. *Id.*

101. 632 So. 2d 1018 (Fla. 1994).

102. *Id.* at 1020.

subject requirement because “it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed.”¹⁰³ The voter was being asked to give a “yes” or a “no” answer to a proposal that listed ten separate classifications.¹⁰⁴ Requiring voters to choose classifications that they felt strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment defied the purpose of the single-subject limitation.¹⁰⁵

The Limiting Marine Net amendment likewise contained multiple subjects. Opponents could have argued that the Amendment forced voters to decide several issues because it asked them to prohibit the use of gill nets, entanglement nets and, other nets exceeding 500 square feet. One of the initiative’s purposes was to protect both finfish and shellfish. The voter desiring to protect the finfish would have no choice but to protect the shellfish as well. The voter favoring net fishing in the nearshore areas of the Atlantic but opposing net fishing in the nearshore areas of the Gulf would not have a choice either.

The court’s advisory opinion is not a binding judicial precedent, but, it is frequently very persuasive and usually lower courts adhere to it.¹⁰⁶ Thus, “the relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and almost always will result in [the court] refusing to exercise its discretionary jurisdiction.”¹⁰⁷ Frustrated commercial fishermen felt the effect of this philosophy when “a flurry of last-second lawsuits failed to stop enforcement of the ban.”¹⁰⁸

3. Ballot Initiatives and Advisory Opinions: Is There A Better Way?

A Florida Supreme Court advisory opinion on the validity of a ballot title, summary, and single-subject requirement is merely an opinion of the technical quality of the initiative. The court’s opinion does not mean the initiative, if passed, will be constitutional.¹⁰⁹ The

103. *Id.*

104. *See id.*

105. *See id.*

106. *See Lee v. Dowda*, 155 Fla. 68, 73, 19 So. 2d 570, 572 (Fla. 1944). The court’s opinion will only be persuasive as to issues it actually addressed. *See Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

107. *League of Cities*, 607 So. 2d at 399.

108. Mike Williams, *Caught in the Gill Net-Ban: Florida Fishermen Say Conservation is Ending a Way of Life*, ATLANTA J. & CONST., July 3, 1995, at 7B.

109. *See generally*, *Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994). The court does not have jurisdiction to rule on the constitutionality of a proposed amendment when the case challenging the amendment originates upon a petition of the attorney general filed pursuant to section 16.061, Florida Statutes. *See* FLA. STAT. §

court only has jurisdiction to determine whether the proposed amendment complies with the technical requirements concerning the single-subject rule and the clarity of the ballot title and summary.¹¹⁰ Challenges to the constitutionality of the initiative have to wait until after it is enshrined in the state constitution.

This does not make sense. The process allows citizen groups to expend tremendous energy and resources on an initiative that may subsequently fail in a constitutional challenge. During the process, the electorate can be polarized through misleading attack ads, blaming one side or the other for the destruction of Florida's environment or culture. The citizen ballot initiative process should be revised to require the supreme court to determine the constitutionality of an initiative before it becomes part of the Florida Constitution.

There are three ways to accomplish this change: constitutional revision, statutory revision, and judicial interpretation of "single-subject." Article XI, section 3 of the Florida Constitution could be modified to state that:

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, and that such revision or amendment shall not violate the basic rights provided by this constitution or the Constitution of the United States.

This change would give justices the power to consider the constitutionality of an amendment under article IV, section 10. Similarly, section 101.161(1), Florida Statutes,¹¹¹ could add a requirement for ballot initiatives to be "clear and unambiguous" and constitutional.

Judicial interpretation of the "single-subject" rule is another method of reaching this objective. The supreme court may be moving in this direction already. For example, in *Advisory Opinion to the Attorney General re Restricts Laws Related to Discrimination*,¹¹² Justice Kogan pointed out that "collateral" effects may cause an initiative to fail. He followed by saying:

It is beyond question that the initiative process does not exist as a method for yanking away or substantially altering part of Florida's legal machinery regardless of the consequences to the rest of our governmental system. The various parts of the Constitution require a harmony of purpose both internally and within the broader context of the American federal system and Florida law itself. Any initiative that tends to undermine that harmony most probably

16.001 (1995).

110. See *Restricts Laws Related to Discrimination*, 632 So. 2d at 1019.

111. FLA. STAT. § 101.161(1) (1996 Supp.).

112. 632 So. 2d 1018 (Fla. 1994).

will violate the single-subject and ballot summary requirements, because the initiative is proposing to do something that may have a broad and unstated “domino effect.”¹¹³

Justice Kogan then posed a simple five-word amendment that would make Florida’s governmental structure unconstitutional and hence chaotic: “The legislature is hereby abolished.”¹¹⁴ The domino effect on Florida law and government would be catastrophic. He cited *Florida League of Cities v. Smith*¹¹⁵ as authority for the proposition that “serious undisclosed collateral effects of an initiative can be reason enough to remove it from the ballot.”¹¹⁶

League of Cities was a mandamus attack on the “Homestead Valuation Limitation.” The court’s original opinion¹¹⁷ had not considered whether the amendment might “repeal part of Florida’s homestead exemption.” The court allows renewed litigation on ballot initiatives when “a vital issue was not addressed in the earlier opinion.”¹¹⁸ Mandamus was only available to enforce a right that was both clear and certain.¹¹⁹ In this case, opponents of the initiative claimed that the repealer would be activated by the amendment and have “sweeping ramifications for taxpayers and local governments.”¹²⁰ The court agreed that if the amendment triggered the repealer it would render the ballot summary defective for “failing to specify exactly what was being changed, thereby confusing voters.”¹²¹ The ballot summary made no mention of the possible loss of a portion of the homestead exemption and was defective if the amendment would actually trigger the repealer.¹²² The court went on to conclude that the amendment might not activate the repealer and that the ballot summary was not defective.¹²³

The possible “domino effect” of an amendment appears to lay the groundwork for broader assaults on proposed amendments to include attacks based on an amendment’s constitutionality. The logic of *League of Cities* seems to recast the court’s ruling based on an earlier version of article XI, section 3 when an initiative was blocked from the ballot for “daisy-chaining” or impacting more than one article of

113. *Id.* at 1022 (Kogan, J., concurring).

114. *Id.*

115. 607 So. 2d 397 (Fla. 1992).

116. *Restricts Laws Related to Discrimination*, 632 So. 2d at 1023 (Kogan, J., concurring).

117. *Advisory Op. to the Att’y Gen. re Homestead Valuation Limitation*, 581 So. 2d 586 (Fla. 1991).

118. *League of Cities*, 607 So. 2d at 399.

119. *See id.* at 400.

120. *Id.* at 398.

121. *Id.* at 399.

122. *See id.*

123. *See id.*

the constitution.¹²⁴ Whether you call it daisy-chaining or domino effect, the argument has potential. The Limiting Marine Net Fishing amendment had effects that extended to statutory provisions requiring regulation of the state's fishery resources. Taxpayers coughed up forty million dollars in a failed effort to ease the burden on the commercial fishing industry.¹²⁵ The Amendment had the domino effect of taking away the power to legislate from the Legislature and the power to regulate from the administration. The Amendment made no mention of the domino effect on the commercial fishing industry, state fishing regulations, consumers, or taxpayers. An attack based on this logic essentially amounts to a due process and equal protection challenge to the Amendment.

4. What About An Objective Entity?

League of Cities pointed out another problem with the ballot initiative process. In a scathing dissent, Justice Overton voiced displeasure that the court was "placed in the position of determining at the last minute the validity of proposed constitutional amendments and, as a result, requested to remove proposals from the ballot."¹²⁶ Justice Overton was concerned that a substantial issue was being raised just weeks prior to the election.¹²⁷ He felt that the repealer issue was serious, had merit, and should have been addressed much earlier in the process.¹²⁸ Indeed, why allow an organization to spend great sums of money in the promotion of (or opposition to) an initiative petition while it is still open to collateral attack through mandamus? Taking the logic further, why allow a citizen group to go to the expense of gathering signatures and preparing an initiative that violates the state or federal constitution?

In Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation,¹²⁹ Justice Overton suggested the "process of amending the constitution through the initiative process would benefit if an objective entity, such as the Secretary of State or Attorney General, were authorized by the Legislature to prepare an objective ballot title and summary for all initiative petitions"¹³⁰ Furthermore, he suggested that the supreme court should be given the "authority to modify the language to eliminate any such defects."¹³¹

124. See *Adams v. Gunter*, 238 So. 2d 824, 829 (Fla. 1970).

125. See *Jones*, supra note 19.

126. 607 So. 2d at 401 (Overton, J., dissenting).

127. See *id.*

128. See *id.*

129. 656 So. 2d 466 (Fla. 1995).

130. *Id.* at 469-70.

131. *Id.* at 470.

The attorney general and supreme court should be involved early in the process to avoid many of the problems associated with ballot initiatives. The attorney general should draft a neutral title and summary for ballot initiatives. The supreme court should have the authority to modify the language in an initiative to correct defects. Assuming an initiative meets constitutional and single-subject requirements, it seems ridiculous to strike it from the ballot for technical defects that can be corrected before going to a vote.

IV. CHALLENGES TO FISHING RESTRICTIONS PRIOR TO MILLENDER

As mentioned in the preceding section, Florida's commercial fishing industry is heavily regulated. As a result, the state's marine life jurisprudence is rich with attacks on regulations and statutes involving due process, equal protection, Commerce Clause, "one-man, one-net," and regulatory overreach challenges. These challenges inevitably failed and similar attacks on the Limiting Marine Net Fishing amendment seemed bound for the same failure.

A. C.E. Malloy: A Due Process Challenge

On May 27, 1941, officers of the Florida Department of Game and Fresh Water Fish seized personal property and fishing devices allegedly used for unlawful fishing.¹³² The operators of the boats and equipment escaped into the woods.¹³³ It turned out that a gentleman named C.E. Malloy was the owner of the property and Malloy wanted it back. However, the equipment was seized under the authority of sections 372.01-.73, Florida Statutes (1929).¹³⁴ Malloy claimed that his due process rights had been violated because his equipment was seized without first convicting him of any criminal wrongdoing.¹³⁵

Section 9 of the Florida Constitution's Declaration of Rights provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."¹³⁶ Malloy was deprived of his property, although the property itself was not illegal to own, just illegal to use in a certain fashion.

132. See *Bruce v. Malloy*, 150 Fla. 157, 158, 7 So. 2d 123, 124 (1942).

133. See *id.* at 158, 7 So. 2d at 124.

134. See *id.*

When any illegal net, trap or fishing device, or illegally used net, trap or fishing device is found in the fresh waters of the State of Florida and the owner of the same shall not be known to the officer finding the same, such officer shall immediately procure from the County Judge an order forfeiting said net, trap or fishing device to the Department of Game and Freshwater Fish.

See *id.* at 160, 7 So. 2d at 125.

135. See *id.* at 158, 7 So. 2d at 124.

136. FLA. CONST. art. I, § 9.

The Malloy court may have had *Hadacheck v. Sebastian*¹³⁷ in mind when it decided to label the fishing equipment a nuisance. The Malloy court addressed the issue of whether a criminal conviction was a condition precedent to the forfeiture of the otherwise legal fishing devices and said:

The Legislature has the power to enact laws regulating fishing in the fresh waters of Florida for the use and benefit of the people. It is contemplated that such regulatory measures will advance the industry, develop its resources, and add to its wealth. The duty was on the Legislature to enact laws for the protection of fish in fresh water, as well as breeding places, and their migrations to and from their breeding places, and such measures usually are enacted under the police power for the benefit of the people. Chapter 13644 was designed and enacted to accomplish these several purposes.¹³⁸

The court went on to consider whether fishing devices that had other legal uses could be summarily taken by the state.¹³⁹ Fishing nets were equated to dice and other things used for gambling.¹⁴⁰ Items like dice are “perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed.”¹⁴¹ Fishing nets and other devices could become nuisances when put to an illegal use. The summary abatement of nuisances without judicial process or proceeding was well known to the common law prior to the adoption of the constitution, and the court felt that it “has never been supposed that [the due process required by the constitution] was intended to interfere with the established principles in that regard.”¹⁴² The court held that Malloy’s due process rights were not violated. The court also observed that Malloy was not without legal remedy. If the state had acted improperly, he had a right to an action for replevin to collect the seized property or damages if the state destroyed it.¹⁴³

Presumably, a challenge to the Amendment based on due process would have fallen in a similar fashion. If the Legislature has the power to turn fishing gear into a nuisance and take it away, then certainly citizens have the power to do the same through a constitutional amendment. The state may have foreclosed an attack on due

137. 239 U.S. 394 (1915) (stating that even if a business is not a nuisance per se, it is clearly within the police power of the State to regulate it, and to that end to declare that it is a nuisance).

138. *Malloy*, 150 Fla. at 161, 7 So. 2d at 125.

139. See *id.* at 162, 7 So. 2d at 125-26.

140. See *id.* at 164, 7 So. 2d at 126.

141. *Id.* at 165, 7 So. 2d at 126.

142. *Id.* at 164, 7 So. 2d at 126.

143. See *id.*

process when it offered a net-buying program designed to alleviate the impact of the Amendment on fishermen.¹⁴⁴

B. Joe Roberts: An Equal Protection Challenge

Malloy was not the first to fight efforts to control rights to the “common” resources in the fresh and salt waters off the shores of Florida. A mullet fisherman named Joe Roberts listened with dismay on January 16, 1942, when the supreme court held that a general law creating a closed season for the catching of mullet is not discriminatory and does not deny equal protection of the law.¹⁴⁵

Roberts had complained that the law discriminated because it contained “provisions that [were] local in character and application; that it [was] discriminatory and unreasonabl[y] destroy[ed] uniformity of application and attempt[ed] to delegate legislative powers to three different agencies: The State Game Commissioner, The Wild Life Conservation Commission, and the Department of Game and Fresh Water Fish.”¹⁴⁶ The court’s sympathies were with the fishermen, but determining what was best for their benefit in regard to the fishing industry was a matter for legislative action and consideration.¹⁴⁷ The Legislature’s wisdom in deciding which areas to open for fishing was not within the province of the court. Thus, the court found no violation of the state constitution on equal protection grounds.¹⁴⁸

C. Eugene Raffield: A Commerce Clause and Void for Vagueness Challenge

Eugene Raffield owned a fish processing plant in Gulf County, Florida.¹⁴⁹ Raffield had a valid federal permit to catch redfish in federal waters off the coast of Louisiana.¹⁵⁰ He landed the fish in Louisiana and shipped them by truck to his processing plant in Port St. Joe.¹⁵¹ When the fish arrived, Raffield was arrested and charged with violating section 370.08(3), Florida Statutes, which prohibits the taking of “food fish within or without waters of [Florida] with a purse seine, purse gill net, or other net using rings or other devices . . . or have any food fish so taken in his possession for sale or shipment.”¹⁵²

144. See Frank Sargeant, “Netscam” Saga Gets Increasingly Tangled, TAMPA TRIB., May 10, 1996, at D5.

145. See *Holland v. Roberts*, 149 Fla. 308, 322, 5 So. 2d 608, 614 (1942).

146. *Id.* at 319, 5 So. 2d at 613.

147. See *id.* at 321, 5 So. 2d at 614.

148. See *id.* at 322, 5 So. 2d at 614.

149. See *State v. Raffield*, 515 So. 2d 283, 284 (Fla. 1st DCA 1987).

150. See *id.*

151. See *id.*

152. FLA. STAT. § 370.08(3) (1995).

Raffield made numerous attacks on the statute, arguing, *inter alia*, that it was preempted by federal law and unconstitutional.¹⁵³ Judge Ervin dismissed the preemption claim by saying the federal act in question¹⁵⁴ did not preempt the right of the State of Florida to regulate state-registered commercial fishing outside the territorial limits of this state.¹⁵⁵ When Raffield was arrested, the federal regulation specifically stated that it “does not supersede any state landing laws which apply to red drum.”¹⁵⁶ Therefore, the state law was not preempted.

Judge Ervin then considered whether the statute violated the federal Commerce Clause by placing an undue burden on interstate commerce. He cited to *State v. Millington*,¹⁵⁷ in which the Florida Supreme Court held that a statute banning the importation of undersized shrimp taken from outside the territorial limits of Florida was not an unconstitutional burden on interstate commerce.¹⁵⁸ Judge Ervin concluded that any burden placed on interstate commerce was incidental to the statute’s primary purpose of protecting the state’s supply of food fish.¹⁵⁹

Raffield also contended that the statute was void for vagueness and violated his due process rights because members of the Florida Marine Patrol gave varying interpretations of the statute.¹⁶⁰ Judge Ervin disagreed, and stated that if the statutory language is sufficiently clear, different interpretations do not make it void for vagueness.¹⁶¹ Citing to *Gardner v. Johnson*,¹⁶² the judge wrote: “[s]mall variances in the understanding of individual officers which could possibly be clarified on closer reading of the statute does not necessarily show vagueness. A statute must be definite enough to apprise a person of common intelligence of the activity sought to be proscribed.”¹⁶³

Judge Ervin looked at the wording of the statute: “[s]ection 370.08(3) plainly states that “no person may take food fish within or without the waters of the state with a purse seine . . . , or have any

153. See Raffield, 515 So. 2d at 284.

154. See Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1994).

155. See Raffield, 515 So. 2d at 284.

156. *Id.* at 285.

157. 377 So. 2d 685 (Fla. 1979).

158. See *id.* at 688. (“[T]o the extent that [the statute,] as it relates to possession of ‘small shrimp,’ may affect interstate or foreign commerce, we find that this result is purely incidental, indirect, and beyond the purpose of the legislation and does not invalidate the statute.”).

159. See Raffield, 515 So. 2d at 285.

160. See *id.*

161. See *id.*

162. 451 So. 2d 477 (Fla. 1984).

163. Raffield, 515 So. 2d at 285-86.

food fish so taken in his possession for sale or shipment.”¹⁶⁴ Because Raffield had taken red fish from federal waters (without the state) using a purse seine and shipped them to Florida, he had violated the clear wording of the statute.¹⁶⁵ The conduct proscribed was clear; thus, the statute was not void for vagueness.¹⁶⁶

Finally, Judge Ervin considered whether selective enforcement of the statute against Florida citizens and not others violated Raffield’s equal protection rights.¹⁶⁷ Looking to *Skiriotes v. Florida*¹⁶⁸ for guidance, he found that the statute did not violate Raffield’s right to equal protection.¹⁶⁹ In *Skiriotes*, the U.S. Supreme Court held that states have the right to proscribe the conduct of its citizens on the high seas if the state has a “legitimate” interest, provided there is no conflict with acts of Congress.¹⁷⁰ Judge Ervin found that Florida had a legitimate interest in the conservation of a fishery resource and dismissed the equal protection challenge.¹⁷¹

D. John Noyes: The One-Man, One-Net Challenge

In 1987, John Wolmer and John Noyes challenged the constitutionality of a net fishing statute that regulated salt water fishing in Broward County.¹⁷² The plaintiffs argued that the law was “overly broad, ha[d] no redeeming protective quality for protection of the resource, and [was], therefore, an unreasonable regulation of their right to fish for ballyhoo in salt waters of the State of Florida.”¹⁷³ The statute made it unlawful to even possess a net in the waters of Broward County.¹⁷⁴ The trial court had enjoined the enforcement of the statute as it applied to John Wolmer and John Noyes, fishermen who sold varied species of fish to the aquarium and research market.¹⁷⁵

The first issue the court considered was whether the trial court had erred in entering a permanent injunction against the enforcement of the statute against plaintiff Noyes.¹⁷⁶ The court concluded that the trial court was in error because “[c]ourts are not authorized to enjoin the operation of a statute which has been adjudged consti-

164. *Id.* at 286.

165. *See id.*

166. *See id.*

167. *See id.*

168. 313 U.S. 69 (1941).

169. *See Raffield*, 515 So. 2d at 286.

170. *See Skiriotes*, 313 U.S. at 77.

171. *See Raffield*, 515 So. 2d at 286.

172. *See Graham v. Wolmer*, 505 So. 2d 637 (Fla. 4th DCA 1987).

173. *Id.* at 638.

174. *See id.* at 637.

175. *See Wolmer*, 505 So. 2d at 638.

176. *See id.* Wolmer did not contest the state’s appeal.

tutional and operative, unless the statute is being illegally applied or unless the statute or the challenged part of it is unconstitutional on unadjudicated grounds.”¹⁷⁷

The trial court had found the statute constitutional but had held that, as applied to Noyes, it was unconstitutional because it was a “violation of interstate commerce because it impinge[d] on his trade, and that the statute [was] unreasonable and arbitrary”¹⁷⁸ The trial court’s logic seemed to be that the statute was unreasonable and arbitrary because one fisherman with one net was not likely to deplete the resources of Broward County.¹⁷⁹ Noyes’ argument failed because under this reasoning, “every marine life fisherman could have the statute declared unconstitutional as to himself, as he, alone, could not deplete the resources of Broward County.”¹⁸⁰

Noyes tells us that if the Limited Marine Net Fishing amendment is constitutional, the court will not take action unless it is being illegally applied. It is possible that an agency’s interpretation of the Amendment could be subject to attack if it is illegally applied.

V. MILLENDER AND THE GOLDEN-CRUM NET

Following an outcry from supporters of the net ban,¹⁸¹ Governor Lawton Chiles decided to forbid the use of trawl nets that scoop up life along the ocean floor unless they are small and used only to catch shrimp.¹⁸² Many thought that commercial fishing nets would disappear from Florida waters.¹⁸³ Raffield had already conceded the state has a legitimate interest in protecting the fisheries.¹⁸⁴ Malloy would allow the state to declare illegal fishing devices a nuisance and summarily seize them.¹⁸⁵ The courts might be sympathetic to the fisherman’s plight, but Roberts made it clear that regulating the fishing industry was a matter for state action and consideration.¹⁸⁶ Wolmer made it clear that technical constitutional challenges would not work unless the application was incorrect.¹⁸⁷ What would it take for an agency to incorrectly apply a constitutional amendment? This

177. *Id.*

178. *Id.* at 639.

179. *See id.*

180. *Id.*

181. Although the amendment is supposed to be called Limiting Marine Net Fishing, most literature on the subject refers to it as the fish net ban. *See, e.g.,* Bob Hutchinson, *An Industry is Watching Florida and Its Net Ban*, VIRGINIAN-PILOT, Nov. 13, 1994, at C15.

182. *See* Larry Kaplow, *Ruling Limits Trawl Nets to Shrimpers*, PALM BCH. POST, Nov. 30, 1995, at 12A.

183. *See* *Beyond the Net Ban*, ST. PETE. TIMES, Nov. 16, 1994, at 14A.

184. *See* *State v. Raffield*, 515 So. 2d 283, 286 (Fla. 1st DCA 1987).

185. *See* *Bruce v. Malloy*, 150 Fla. 157, 167, 7 So. 2d 123, 127 (1942).

186. *See* *Holland v. Roberts*, 149 Fla. 308, 321, 5 So. 2d 608, 614 (1942).

187. *See* *Graham v. Wolmer*, 505 So. 2d 637 (Fla. 4th DCA 1987).

appeared to be a new problem for the court.

The first successful challenge to an MFC rule based on the Limiting Marine Net Fishing amendment took place prior to the enactment of Florida's latest Administrative Procedures Act (APA). Administrative law and procedures spelled out the necessary showing for challenging an MFC ruling:

To successfully challenge a rule promulgated by an agency in the exercise of its delegated legislative authority the challenger must make three showings: (1) that the agency adopting the rule has exceeded its authority, (2) that the requirements of the rule are inappropriate to the ends specified in the legislative act, and (3) that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation but are arbitrary and capricious.¹⁸⁸

If the court required these three showings, MFC interpretations of the Amendment would seem immune to attack. A showing that the agency's interpretation of "open meshes" was not "reasonably related" to preventing the "unnecessary killing, overfishing, or waste" would be a significant hurdle. Moreover, there was no requirement for a rule to be fair and equitable; the fact that it has an "overwhelmingly adverse" effect on commercial fishermen, the exclusive victims, is irrelevant.¹⁸⁹ An uneven impact on differing groups would not be a sufficient basis for invalidating the Commission's rules based on specifically delegated authority.¹⁹⁰

Based on the past, it seemed likely that any challenge to MFC rules based on the Amendment would be fruitless. However, the court's historical analysis and the APA played no part in the court's first look at the Amendment.

A. How to Measure a Net

The first challenge to the Amendment to reach the state supreme court was unique.¹⁹¹ A fisherman named Ronald Crum hired Buford Golden, an experienced net maker, to construct a shrimp trawl¹⁹² that would meet the requirements of the Amendment.¹⁹³ The product of Golden's creativity and Crum's investment became known as the Golden-Crum net and was the subject of the Florida Supreme

188. *State v. Organized Fishermen of Fla.*, 503 So. 2d 935, 938 (Fla. 1st DCA 1987).

189. See *id.*

190. See *id.* at 939.

191. See Williams, *supra* note 108.

192. A shrimp trawl is a conical shaped, bag-type net that is dragged along the ocean bottom with the shrimp being funneled through the open mouth of the net and captured in the closed end or bag of the net.

193. FLA. CONST. art. X, § 16.

Court's first interpretation of the Amendment.¹⁹⁴ Commercial shrimpers brought action against the Department of Environmental Protection, seeking a declaration that the Golden-Crum net was in compliance with the state constitution.¹⁹⁵ In order to answer the question, the court had to determine the appropriate method of measuring trawl nets under the Amendment, the meaning of "with the meshes open," and whether the Golden-Crum net was prohibited.¹⁹⁶

1. How Do You Measure a Net?

The trial court concluded that the Golden-Crum net contained less than 500 square feet of mesh area. In reaching that determination the court relied on subsections (b)(2) and (c)(2) of the Amendment.¹⁹⁷ Subsection (b)(2) says that "no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters."¹⁹⁸ Subsection (c)(2) defines mesh area as the

total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. . . . Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height.¹⁹⁹

2. The Open Meshes Clause

The basis of the state's appeal concerned the method used to determine slant height.²⁰⁰ Three methods were suggested to the court.²⁰¹ The state argued that the "meshes open" language could be harmonized with the "maximum length" language by using its "open mesh diagonal method" to calculate slant height. The state claimed the measurement would be correct because the net mesh is oriented and hung on the diagonal.²⁰² The state's conversion factor had the Golden-Crum net exceeding the 500 square foot maximum size,

194. See Department of Env'tl. Prot. v. Millender, 666 So. 2d 882 (Fla. 1996).

195. See id.

196. See id. at 884.

197. See id.

198. FLA. CONST. art. X, § 16(b)(2).

199. Id. § 16(c)(2).

200. See Millender, 666 So. 2d at 885. The parties agreed that the appropriate formula is C (circumference) \times SH (slant height)/2 and that the circumference equals 65.75 feet. See id. n.3.

201. See id.

202. See id.

stretching out to cover 673.6 square feet.²⁰³ The Florida Conservation Association (FCA), who intervened on the state's behalf, proposed an alternative method.²⁰⁴ Relying on the "maximum length" language, the FCA calculation used a conversion based on the length of the stretched net. When the FCA conversion factor was applied the Golden-Crum net stretched out to a magnificent 953.3 square feet.²⁰⁵ Millender's proposed conversion factor used half of the stretched net length and brought the net in under the ban with a total area of 476.6 square feet.²⁰⁶

What did the electorate mean when they voted for "open meshes" as the standard for determining a net's surface area? Should the meshes form a diagonal or a square shape? The FCA would have the court ignore this issue and just stretch the net out as far as possible.

If at the time, had the court chosen to treat the MFC's ruling as one based on statutory authority, the challenge would have failed because the rule is reasonably related to the purpose of the Amendment. However, the court was not looking at an MFC grant of authority under a statute. The analysis under a constitutional amendment is apparently quite different.

3. The Court's Statutory Construction of "Maximum Length"

The supreme court concluded that the trial judge was attempting to construe the Amendment in a manner that was true to the intent of its drafters and to those who voted on the Amendment.²⁰⁷ The court said that if the stretched mesh method or the open mesh diagonal method was the intended method that the drafters meant to use, then it would have been spelled out in the Amendment.²⁰⁸ "[V]oters could not have understood the language provided on the ballot summary to imply the complicated method of measurement the state proposes."²⁰⁹ Voters were equally unlikely to comprehend the fact that a trawl constructed of less than 500 square feet of raw stock of net mesh would not be permitted under the Amendment.²¹⁰ Therefore, the voters would "most likely understand that a trawl constructed from 500 square feet or less of net mesh would be permitted under the Amendment."²¹¹

203. See *id.* n.5.

204. See *id.* at 884.

205. See *id.* at 885.

206. See *id.* n.6.

207. See *id.*

208. See *id.* at 886.

209. *Id.*

210. See *id.*

211. *Id.*

4. "Limiting" Marine Net Fishing

While an "overwhelmingly adverse" effect on a party was not relevant under the existing APA,²¹² the Millender court looked to the purpose of the constitutional amendment. The court felt the Amendment's stated purpose was to "limit" rather than prohibit shrimp trawl fishing.²¹³ Therefore, the court considered whether shrimp fishing would be commercially viable if the state or FCA method of computing slant height was adopted. Justice Shaw concluded that "if either the state's method or FCA's method . . . [was] adopted" then shrimp trawling would be rendered commercially non-feasible.²¹⁴ Therefore, "evidence of commercial viability [is] relevant [to the decision] and [was] properly considered by the court."²¹⁵

Commercial viability is relevant to the analysis of rulings under the Amendment because it includes the word "limiting." For that reason, the MFC's interpretation of "meshes open" was wrong because it effectively had an overwhelmingly adverse impact on commercial fishermen. As a result, Florida's state constitutional jurisprudence now oddly includes: "slant height equals one half the stretched mesh length from the mid-point of the net mouth to the tail end of the net, and that the Golden-Crum net complies with the Amendment's specifications."²¹⁶

B. Millender: What's Going On?

Millender is more important for what it says about the ballot initiative process than what it says about measuring nets. There is no doubt that the MFC could have banned the use of the Golden-Crum net prior to the Amendment. Now, however, there is a problem. In Millender, the supreme court was construing a constitutional amendment as opposed to a statute. The court has less latitude when construing constitutional provisions than when construing statutes; it is presumed that constitutional provisions have been more carefully and deliberately framed.²¹⁷ Therefore, the court looked at the Amendment as a whole in order to ascertain the general purpose and meaning of each part.²¹⁸

Mullet fishermen were not far behind in working around the

212. See *State v. Organized Fishermen of Fla.*, 503 So. 2d 935, 938-39 (Fla. 1st DCA 1987).

213. See FLA. CONST. art. 10, § 16 (providing in relevant part: "the people hereby enact limitations on marine net fishing . . .").

214. Millender, 666 So. 2d at 887.

215. *Id.*

216. *Id.*

217. See *id.* at 886.

218. See *id.* ("[E]ach subsection, sentence, and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous.").

Amendment. They invented a special net that used tarps, like those around tennis courts, to net baitfish.²¹⁹ The MFC “unanimously passed a rule that would have limited the use of more than 500 square feet of any material to net mullet.”²²⁰ The MFC felt that the tarp-net combinations violated the “spirit” of the Amendment.²²¹

In a ruling on the legality of the tarp-net combination, Gulf County Judge Robert M. Moore said that the Amendment only addressed nets as understood in the common sense of the word.²²² Judge Moore wrote: “Nothing which is not clearly described in [the Amendment] may be read into it. It is the net that is regulated, not the conduct or activity of attempting to capture fish.”²²³

Supporters of the Amendment complained that the fishermen were “thumbing their noses at the voters of Florida by using tarpaulins to replace gill nets . . . outlawed by the net ban imposed through the state constitution.”²²⁴ They argued that the recreational fishermen had successfully promoted the petition drive and, since there were more recreational fishermen than commercial fishermen, the commercial fishermen were “goading the monster of public opinion which, enraged by similar commercial fishing abuses, squashed their industry.”²²⁵

Millender is a strong argument for limiting the subject matter of constitutional amendments. Initiatives written to garner votes through ambiguous language will become self-defeating, much as the Limiting Marine Net Fishing initiative has become. Justice Parker Lee McDonald of the Florida Supreme Court prophetically wrote:

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society’s consensus on general, fundamental values. Statutory law, on the other hand, provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society.²²⁶

Justice McDonald said that the Amendment was more appropri-

219. See Steve Waters, *Emergency Tarp Ban Proposed*, FT. LAUD. SUN SENT., Oct. 1, 1996, at C6.

220. *Id.*

221. See *id.*

222. See Frank Sargeant, *Some Holes Have Been Found in Net Ban*, TAMPA TRIB., Aug. 4, 1996, at C16.

223. *Id.*

224. *Tarp Fishing*, SARASOTA HERALD-TRIB., Aug. 26, 1996, at A8.

225. *Id.*

226. *Advisory Op. to the Att’y Gen. re Limited Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

ate for inclusion in Florida's statute books than in the constitution.²²⁷ He was concerned that the "permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments."²²⁸ He expressed the hope that the next Constitution Revision Commission would "have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people."²²⁹ Mil-lender is now a part of Florida's constitutional jurisprudence and a perfect example of the problems Justice McDonald presaged.

C. Recreational Fishing and Limiting Marine Rod Fishing

Judge Moore's decision did not sit well with Karl Wickstrom, publisher of Florida Sportsman magazine and chairman of the Amendment petition drive.²³⁰ Wickstrom called the judge's decision "ludicrous" and claimed that the voter's clear intent was to "eliminate large-scale harvest of fish with just such devices."²³¹ Conservationists urged the MFC to make an emergency ruling deeming all gear illegal unless it is specifically allowed by the Commission.²³² Arguing that the MFC should "fix" the problems with the wording of the Amendment simply reinforces the notion that the Amendment doesn't belong in the constitution to start with. The MFC had the power to regulate nets prior to the Amendment. Any rules it promulgates at this point will come under special "constitutional" scrutiny that looms as a hurdle. Moreover, Wakulla County Judge Jill C. Walker found a "gray area" in the Amendment because it does not specify statute or nautical miles.²³³ Under a statute, the MFC's decision to use nautical miles would certainly seem reasonable, hardly arbitrary and capricious. However, Judge Walker expressed her opinion that "[C]riminal laws must clearly inform citizens of the limits on appropriate behavior. Laws which leave a question as to whether certain behavior is legal fail as void for vagueness."²³⁴

Wickstrom's status as the publisher of Florida Sportsman magazine makes him more of an interested party than the average voter. By taking away the rights of the commercial industry, the sports

227. See *id.*

228. *Id.*

229. *Id.*

230. See *id.*

231. *Id.*

232. See *id.*

233. See David Olinger, Fisherman Wins Case By A Mile, *ST. PETE. TIMES*, Sept. 11, 1996, at B1. The MFC defines the zone covered by the ban in nautical miles, which are 796 feet longer than statute miles.

234. *Id.*

fishing industry expected to increase their share.²³⁵ It did for a period of time; however, overfishing by anglers soon led the MFC to reduce limits on certain types of fish early in 1996.²³⁶ Recreational fishermen complained that “snowbird” anglers started tying up huge chunks of beachfront with multiple surf rigs.²³⁷ Some people began urging a limit on the number of rods a person could use to fish.²³⁸

VI. CONCLUSION

The process of placing a citizen initiative on the ballot is ripe for change. The ballot title and summary should be drafted by a neutral entity. The electorate would be better informed, and the ballot title and summary would explain the initiative without trying to obfuscate the intent. Additionally, parties should be allowed to revise an initiative if the title and summary do not meet technical language requirements. Furthermore the process should require the Florida Supreme Court to look at the initiative to determine its constitutionality. Finally, if limits are placed on the subject matter eligible for citizen amendments, the court should address that issue.

The statutory and regulatory-based decisions in Malloy, Roberts, Davis, and Wolmer contrasted to Millender and the “meshes open” decision demonstrates the need to limit the subject matter of citizen ballot initiatives. The Constitution Revision Commission should take Justice Parker Lee McDonald’s advice and propose a limit to the subject matter of citizen-initiated constitutional ballot initiatives.

235. See Don Wilson, *Net Result of Commercial Ban Yields Big Catches for Anglers*, ORLANDO SENT., Jan. 19, 1996, at C11 (stating that Pompano fishers hoped to see more of the commercial catch diverted to their hooks).

236. See *id.*

237. See *id.*

238. See *id.* Perhaps this problem could lead to another ballot initiative entitled the “Limiting Marine Rod Fishing” initiative.