

AN OPPORTUNITY LOST: TAX REFORM AND THE 1997-1998 CONSTITUTION REVISION COMMISSION

ROBERT L. NABORS*

I. THE UNIQUE OPPORTUNITY PRESENTED	478
A. <i>Revision Commission</i>	478
II. PROPOSAL 6, TAX FAIRNESS INITIATIVE: EXEMPTIONS AND EXCLUSIONS FROM THE GENERAL STATE SALES TAX.....	479
III. CONCLUSION: THE RULES, THE PROCESS AND THE RESULTS.....	484

This Article documents and describes the only tax reform proposal considered by the 1997-1998 Constitution Revision Commission.¹ The proposal for a specific constitutional amendment forcing the Florida Legislature to reform the general state sales tax failed to receive sufficient votes for adoption by the Revision Commission.² The rejected proposal was designed to permit the people to direct legislative action.³ In the proposal, the legislature was constitutionally required to reduce the general state sales tax rate and maintain revenue neutrality by taxing currently excluded services or exemptions that fail to advance a state public purpose. Included in this Article is a detailed description of the rejected proposal, an explanation of the schedules before the Revision Commission intended to demonstrate the feasibility of achieving the mandated revenue neutrality requirement and a summary of the votes taken and the barriers that led to a rejection of the proposal. Also included is a brief analysis of the power reserved to the people to revise the Florida Constitution by

* Mr. Nabors was a member of the 1997-1998 Constitution Revision Commission and a sponsor of Proposal No. 6. He is a Shareholder in Nabors, Giblin & Nickerson, P.A. and practices in the area of governmental finance and taxation.

1. While not a tax reform proposal, another proposal directing and limiting the legislature in its adoption of the state budget was CS for Proposal Nos. 138 and 89. This proposal amended article X, section 15 of the Florida Constitution to provide that, with certain exceptions for existing uses, state lottery proceeds shall be used only to enhance public education programs, to provide pre-kindergarten programs, or to provide quality early childhood care and education programs. To ensure that the state lottery proceeds were used to enhance existing programs, the proposal, in various subsections, defined education programs as those not existing on the effective date of the amendment or at levels in excess of the state appropriations provided in state fiscal year 1998-1999 from state revenues. The proposal failed to receive sufficient votes for adoption. See 1997-1998 FLA. CONST. REVISION COMM'N JOUR., at 176 (Feb. 11, 1998), available at <http://www.law.fsu.edu/crc/pdf/crc22.pdf> [hereinafter REVISION COMM'N JOUR.].

2. Hereinafter in this Article, the 1997-1998 Constitution Revision Commission will be referred to as the Revision Commission.

3. To this extent, the tax reform proposal is similar to several of the proposed constitutional amendments that appeared on the ballot by initiative petition and were approved by the electors at the November 5, 2002, general election. See proposed amendment number 8 amending article IX, section 1 of the Florida Constitution (requiring the State to offer voluntary pre-kindergarten education), and proposed constitutional amendment number 9 amending article IX, section 1 of the Florida Constitution (requiring the legislature to provide funding to reduce classroom size).

the establishment of a constitution revision commission and a comparison to the power of the people to propose a constitutional amendment by initiative.

I. THE UNIQUE OPPORTUNITY PRESENTED

A. *Revision Commission*

Every twenty years the people of Florida are given the unique opportunity to revise any part of the Florida Constitution by the establishment of a constitution revision commission.⁴ Once the members of the constitution revision commission are selected, there is no executive or legislative oversight over or approval of the constitutional amendments or revisions proposed.⁵ The constitution revision commission adopts its own rules and its proposals have direct access to the next general election ballot held more than ninety days after its report.⁶ While the tax and budget reform commission also has direct access to the general election ballot, its power to propose revisions to the Florida Constitution is limited to matters “dealing with taxation or the state budgetary process.”⁷ Additionally, any proposal to revise the constitution requires an affirmative vote of two thirds of the full commission.⁸

A similar reservation of power to the people to amend or revise the constitution is the initiative provision.⁹ While the citizen initiative process provides direct ballot access, its implementation is time consuming and expensive, and the power of a single initiative petition to revise or amend the constitution is restricted by a one subject matter limitation. The Florida Supreme Court has declared that this “single-subject provision is a rule of restraint designed to insulate Florida’s organic law from precipitous and cataclysmic change” and thus constitutes a safeguard against multiple constitutional revisions by a single citizen initiative.¹⁰ Such single subject limitation on an initiative petition was established to prevent log-rolling—“to prohibit

4. While article XI, section 4(a) of the Florida Constitution reserves to the people “[t]he power to call a [constitutional] convention to consider a revision of the entire constitution[,]” the procedure to invoke such power is cumbersome and awkward and is not likely to be utilized.

5. The thirty-seven members of the constitution revision commission are selected as follows: fifteen members by the governor; nine members by the speaker of the house of representatives; nine members by the president of the senate; and three members by the chief justice of the supreme court. FLA. CONST. art. XI, § 2(a). The attorney general is a mandatory member. *Id.* The governor designates one commission member as chairman. *Id.*

6. See FLA. CONST. art. XI, § 5(a).

7. FLA. CONST. art. XI, § 6(e).

8. See FLA. CONST. art. XI, § 6(c).

9. See FLA. CONST. art. XI, § 3.

10. See *Advisory Opinion to the Attorney General—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994).

the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage.”¹¹ The constitutional principle underlying this policy of restraint is that a constitutional change proposed by an initiative petition does not undergo a filtering process or provide an opportunity for input in the proposal drafting. Thus, without the single subject rule, the judiciary would be granted broad discretionary authority to determine the “effect of a proposed amendment or revision” without the aid of “legislative history or debate.”¹² This court recognized such a problematic result when it said:

We do not believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of re-drafting substantial portions of the constitution by judicial construction. This, in our view, would be a dangerous precedent.¹³

None of the policy issues underlying the rule of restraint of the single subject restriction in initiative amendments shackle the deliberations of a constitution revision commission.¹⁴ A proposal adopted pursuant to its rules of procedure is placed directly on the general election ballot. The commission debate frames and defines the constitutional intent.

II. PROPOSAL 6, TAX FAIRNESS INITIATIVE: EXEMPTIONS AND EXCLUSIONS FROM THE GENERAL STATE SALES TAX

Proposal 6 was an attempt to stabilize state tax revenues in Florida by expanding the transactions subject to the general state sales tax.¹⁵ To maintain its character as a tax reform initiative, no new revenues were generated by the proposal. The proposal’s thrust was to achieve state revenue stability and tax fairness by broadening the

11. See *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

12. *Id.* at 989.

13. *Id.*

14. The supreme court has jurisdiction at the request of the attorney general to render an opinion on the validity of any initiative petition under issues as provided by general law. See FLA. CONST. art. IV, § 10; FLA. CONST. art. V, § 3(b)(10). Section 16.061, *Florida Statutes*, provides the procedure for the attorney general to request an advisory opinion “regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161.” The Florida Supreme Court has prohibited a proposed initiative from appearing on the ballot because the ballot title and summary violated section 101.161, *Florida Statutes*. See *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). The procedure provided in section 16.061, *Florida Statutes*, does not apply to proposals of a constitution revision commission. It is a doubtful whether the supreme court or the legislature has the constitutional power to bar from the ballot a proposal of a constitution revision commission.

15. While a reference to chapter 212, *Florida Statutes*, in its entirety is required, section 212.05, *Florida Statutes*, is the general law defining the general state sales tax and section 212.08, *Florida Statutes*, contains the general enumerations of exemptions.

general state sales tax base. The underlying philosophy was that if all taxpayers pay their fair share of the state sales tax, tax fairness is advanced and state tax revenues are stabilized.

While beyond the scope of this Article, the most elementary student of the Florida tax structure recognizes its inadequacy. Constitutionally, no personal income tax can be levied in Florida in excess of the amount allowed to be credited upon or deducted from the federal income tax or that of any other state.¹⁶ The primary state revenue source is the general state sales tax. Exempted or excluded from the sales tax by statute are not only perceived necessities such as food, prescription drugs, medical services and residential household rent, electricity and heating fuel, but also the sale or delivery of virtually all services.¹⁷ Thus, the high growth portions of the economy escape in Florida since taxes are levied primarily on the sale of goods. Compounding the inadequacy of the state sales tax base is the reality that the Florida state budget is heavily dependent upon sales tax revenue generated by tourism. As a consequence, a national or regional recession or economic slowdown is felt more severely in Florida and the ability of state budget forecasters to project available state tax revenues to fund essential services is undermined by the swings within economic cycles.

The mechanism incorporated in Proposal 6 to broaden the general state sales tax base was to force the legislature to review the public purpose advanced by existing sales tax exemptions or exclusions. Once such legislative labor was completed, the proposal required future legislatures to declare in a single bill the public purpose advanced in the enactment of any new exemption or exclusion. The following is the final version of Proposal 6 considered by the Revision Commission:¹⁸

. . . A proposal to create ARTICLE VII, s. 19, Fla. Const.; providing limits on the adoption of exemptions and exclusions from the general state sales tax; reducing the rate of the general sales tax to 5 percent[] [for state fiscal year 2000-2001; providing an effective date.]

. . . .
[Section 1. Section 19 is added to Article VII of the Florida Constitution to read:]

16. FLA. CONST. art. VII, § 5(a).

17. See FLA. STAT. § 212.08 (2002).

18. The final version of Proposal 6 was considered on March 17, 1998, on reconsideration. See REVISION COMM'N JOUR., *supra* note 1, at 210-11 (Mar. 17, 1998). A prior version had failed on February 25, 1998, and was before the Revision Commission on March 17, 1998, by adoption of a motion for reconsideration on February 26, 1998. The final version considered on March 17, 1998, was a revision of the defeated version drafted by Commissioner John F. Lowndes, an attorney in Orlando.

ARTICLE VII

FINANCE AND TAXATION

SECTION 19. Tax Fairness Initiative: Exemptions and Exclusions from General State Sales Tax.—

(a) PUBLIC DISCLOSURE OF EXEMPTIONS AND EXCLUSIONS. Each general law granting and [sic] exemption to or exclusion from the state sales tax shall contain only one exemption or exclusion and shall contain a declaration that the exemption or exclusion advances the state public purposes of encouraging economic development and competitiveness; supporting educational, governmental, religious, or charitable initiatives or institutions; or securing tax fairness.

(b) TAX FAIRNESS INITIATIVE. The legislature shall reduce the general state sales tax rate in one or more general bills to a rate not greater than five percent for the state fiscal year 2000-2001 and shall maintain revenue neutrality for such fiscal year by taxing currently excluded services or currently exempted sales of goods, other than food, prescription drugs, medical services, and residential household rent, electricity and heating fuel.

(c) REVENUE NEUTRALITY GUARANTEE. The general state sales tax revenues provided for by general law for state fiscal year 2000-2001 shall be the same as such tax revenues which were collected during the prior fiscal year, as adjusted by average historical growth during the last five years. General state sales tax revenues for state fiscal years 2001-2002, 2002-2003, or 2003-2004 in excess of this revenue neutrality guarantee shall be appropriated to reduce the ad valorem millage for school purposes under the established public school funding formula.

(d) This section shall become effective upon approval by the electors.¹⁹

Proposal 6 has three primary components. First, in subsection (b) the legislature is directed to reduce the general sales tax rate by at least one percent prior to state fiscal year 2000-2001.²⁰ In achieving such sales tax rate reduction, the legislature is constitutionally mandated to maintain revenue neutrality by taxing currently excluded services or the exempted sales of goods other than food, prescription drugs, medical services and residential rent, electricity and heating fuel.

Second, in subsection (c) the legislature is constitutionally mandated to provide by general law the same general state tax revenues for state fiscal year 2000-01 that were collected during the prior fis-

19. *Id.*

20. The state fiscal year begins July 1. Thus, the legislature's labor would have been constitutionally mandated to be completed prior to July 1, 2000.

cal year plus an increase equal to the average historical growth that occurred during the prior five years. Such revenue neutrality is also required to be maintained for state fiscal years 2002-03 and 2003-04. The revenue neutrality guarantee incorporated in subsection (c) of the proposal placed a floor and a ceiling on general state tax revenues generated for three state fiscal years at the sales tax rate reduction constitutionally mandated in subsection (b).²¹ Any general sales tax revenues during any of the three state fiscal years in excess of the revenue neutrality guarantee would be required to be appropriated to reduce ad valorem millage for school purposes established under the public school funding formula for the ensuing state fiscal year.²²

Third, subsection (a) provides that in the future, each general law granting an exemption or exclusion from the sales tax shall contain only one exemption or exclusion and shall contain a declaration that the exemption or exclusion advances one of the following three state public purposes: encouraging economic development and competitiveness; supporting educational, governmental, religious, or charitable initiatives or institutions; or securing tax fairness.²³

The feasibility of reducing the general state sales tax rate while maintaining revenue neutrality by the elimination of currently excluded services or exempted sales on goods was demonstrated to the Revision Commission by schedules that quantified the general sales tax revenues estimated to be produced annually by eliminating the individual exemptions and exclusions. Such schedules listed each currently excluded services or exempted sales on goods and provided

21. The end result would be no additional general sales tax revenues for the three state fiscal years specified except for the average historical five-year growth adjustment. The constitutionally mandated sales tax rate reduction applied only to the general state sales tax revenues and not the myriad of authorized local option sales taxes. *See, e.g.*, FLA. STAT. § 212.055 (2002). All local option sales tax revenues are required to be voter approved and the sales tax proceeds are restricted as to use. No limitation was placed on the legislature under Proposal 6 on its power to change the local option sales tax rate or base or on its power to authorize or repeal such local option sales taxes. Proposal 6 only directed and limited the legislature on matters relating to the general state sales tax. The local option sales taxes remained creatures of the legislature unaffected by the provisions of the proposal. For example, the legislature could elect not to exclude services from the local option sales tax base.

22. Section 1011.60(6), *Florida Statutes*, requires the legislature to establish, in each year's General Appropriations Act, the minimum financial effort on non-voted school operating millage required in the Florida Education Finance Program.

23. The target of subsection (a) was the increasing common practice of last minute amendments to a related general law of a special interest exemption or exclusion to the state sales tax. While such amendment might satisfy the one subject requirement of article III, section 6 of the Florida Constitution, it would insulate the special interest exemption or exclusion from veto by the Governor. Under such practice, the Governor would be required to veto the entire law to reach the undesired exemption or exclusion. Such process has been increasingly used to undermine the general sales tax base by the enactment of exemptions or exclusions without adequate legislative debate or public disclosure.

an annualized revenue estimate at both a six percent and five percent sales tax rate.²⁴

The schedules created three categories of sales tax exemptions and exclusions. The first category listed a total of twenty-one specific sales tax exemptions comprising the sale of goods and services excluded from taxation under the general description of food, prescription drugs, medical services and residential household rent, electricity and heating fuel. The second category listed a total of 148 exemptions from the general state sales tax. The third category listed a total of seventy-six services excluded from the general state sales tax. Additionally, for each of the seventy-six excluded services listed in the third category, the portion that was taxed by the legislature in 1987 was identified.²⁵ An estimate of the annualized revenue to be generated during state fiscal year 1997-1998 at both a five percent and six percent sales tax rate was provided for each exemption or exclusion listed within all three categories. Additionally, an estimate of the annualized revenue to be generated during state fiscal year 1997-1998 was provided on the assumption that the portion of the seventy-six excluded services taxed in 1987 were taxed at both a five percent and six percent sales tax rate.

The state tax revenues estimated to be lost in state fiscal year 1997-98 by a sales tax rate reduction from six percent to five percent was \$2,137.3 million. The general sales tax revenues estimated to be generated at a five percent rate during state fiscal year 1997-98 by taxing the 148 currently exempted sales of goods was \$2,466.9 million. The general sales tax revenue estimated to be generated at a five percent rate during fiscal year 1997-98 by taxing that portion of the currently excluded services that were taxed by the legislature in 1987 was \$2,501 million. In summary, to meet the revenue neutrality guarantee of subsection (c) of Proposal 6, the legislature would have to tax currently exempted sales of goods or excluded services to replace an estimated reduction of \$2,157.3 million in general state sales tax revenue resulting from a decrease of the sales tax rate from six percent to five percent. The legislature would have available the

24. An annualized estimate of the revenues generated by exemptions or exclusions is provided in the *2002 Florida Tax Handbook (Including Fiscal Impact of Potential Changes)* prepared jointly by the staffs of the Senate Finance and Taxation Committee, the House Committee on Fiscal Policy and Resources, the Office of Economic and Demographic Research, and the Office of Research and Analysis of the Department of Revenue. The publication is updated annually. FLA. SENATE FIN. & TAXATION COMM. ET AL., 2002 FLORIDA TAX HANDBOOK INCLUDING FISCAL IMPACT OF POTENTIAL CHANGES, available at www.state.fl.us/edr/Reports/Special_Reports/2002handbook.pdf (last visited March 7, 2003) (on file with author).

25. The 1987 short-lived taxation on the sale or delivery of services was provided in chapter 87-6, Florida Laws. Chapter 87-101, Florida Laws, was a bill correcting errors and omissions in the prior law. The 1987 sales tax on services was repealed by Act effective Jan. 1, 1988, ch. 87-548, 1998 Fla. Laws 19.

taxation of the 148 currently exempted sales of goods with an aggregate sales tax revenue estimate of \$2,466.9 million or taxation of that portion of the seventy-six currently excluded services that were taxed in 1987 with an aggregate sales tax revenue estimate of \$2,501 million or to tax a combination within both categories.²⁶ Thus, the ability of the legislature to choose among currently excluded services or currently exempted sales of goods in order to achieve revenue neutrality at a sales tax reduction from six percent to five percent was feasible and was achieved by the legislature in 1987.²⁷

III. CONCLUSION: THE RULES, THE PROCESS AND THE RESULTS

The initial draft of Proposal 6 was defeated by a vote of fifteen affirmative and sixteen negative votes.²⁸ On motion for reconsideration, a revised draft of Proposal 6 was defeated by vote of seventeen affirmative and eighteen negative votes.²⁹ Under the Rules of the Revision Commission, final adoption of a proposal required an affirmative vote of at least twenty-two members.³⁰

The rules adopted by the Revision Commission and the procedure applied in its review and consideration of filed proposals did not facilitate an extensive Revision Commission debate nor allow broad public input after a proposal was filed. While the Revision Commission conducted numerous public hearings throughout the state, the primary purpose of the public hearing process was to allow the public to identify constitutional issues with the potential of being finalized as proposals. Rule 3.3 of the Revision Commission Rules provided that "constitutional issues raised by the public be identified and listed in numerical order according to the article and section of the Constitution" affected.³¹ Under Rule 3.3, each such public proposal that received an affirmative vote of at least 10 commissioners was

26. If the seventy-nine excluded services were taxed in full rather than that portion taxed in 1997, the aggregate sales tax revenue estimated to be generated would be \$4,019.0 million.

27. The fundamental difference between the legislative action in 1987 and the thrust of Proposal 6 was that in 1987, the legislature, while taxing excluded services, did not lower the sales tax rate.

28. See REVISION COMM'N JOUR., *supra* note 1, at 196 (Feb. 25, 1998).

29. See *id.* at 210-11 (Mar. 17, 1998).

30. See Fla. Const. Revision Comm'n Rule 5.4. The Report of the Rules and Administrative Committee, dated February 24, 1998, adopted by the Revision Commission on February 24 provided that any proposal considered during the week of February 23-27, 1998, that received less than a simple majority was defeated. The Report further provided that any proposal that received a simple majority but less than twenty-two votes was available for re-vote on March 17, 1999, at the request of five members. REVISION COMM'N JOUR., *supra* note 1, at 187-88 (Feb. 24, 1998). Proposal 6 failed by one vote to receive a simple majority upon final vote on the motion for reconsideration and was thus not available for any additional vote on March 17, 1998, at the request of five members. See *id.* at 196 (Feb. 25, 1998).

31. Fla. 1997-1998 Const. Revision Comm'n, Proposed Rules at 3.3 (June 17, 1997).

filed for consideration by the full Revision Commission.³² Most public proposals could garner the ten affirmative votes and thus were filed for consideration. The moving commissioner of a public proposal was deemed its sponsor. Additionally, an individual commissioner could generate and file a proposal for consideration by the full Revision Commission.³³

Proposals were assigned to one or more of the standing substantive committees.³⁴ Any public testimony on a proposal occurred at the committee level. No proposal was defeated or rejected by a committee. A proposal was reported out of a committee with a vote of approval, disapproval or no consideration.³⁵ A commissioner who was not a member of the substantive committee or present when a proposal was debated, did not participate in or witness the proposal debate nor hear the public comment for or against the proposal. The only debate beyond the substantive committee level was that which occurred on the floor when the proposal was considered by the full Revision Commission. Often, debate on a proposal by the full Revision Commission was limited. For example, when Proposal 6 was defeated on February 25, 1998, the debate was extended two and one-half minutes per side for a total of five minutes by motion approved by two-thirds vote.³⁶ While such process maximized public input, it did not allow time for in-depth education and consideration of the policy ramifications and the tax and economic complexities imbedded in Proposal 6.³⁷

Proposal 6 faced several additional obstacles. Some commissioners were concerned that the Proposal was too controversial and its presence on the ballot would endanger proposals less controversial. This concern was fed by interest groups that enjoyed the current privilege granted by a particular exemption or exclusion. Such interests lobbied against approval and threatened to muster a public information program in opposition if Proposal 6 was placed on the ballot. Other commissioners recalled the political controversy that surrounded the 1987 attempt to expand the general state sales tax base by taxing a portion of excluded services. These commissioners were more easily persuaded that the presence of Proposal 6 on the ballot might place at risk a proposal that they favored. Lastly, a few commissioners felt

32. *Id.*

33. *See id.* Rules 3.3, 3.5.

34. *See id.* Rule 2.1 (listing the standing substantive committees).

35. *See id.* Rule 2.12. Each committee also had the power to approve and recommend that a substitute proposal be considered in lieu of the original proposal. *Id.*

36. *See* REVISION COMM'N JOUR., *supra* note 1, at 196 (Feb. 25, 1998).

37. Proposal 6 was not a public proposal and thus the full Revision Commission had less exposure to its scope and impact than those presented in detail at the numerous public hearings.

that the legislative direction embodied in Proposal 6 was inappropriate as a constitutional provision.

In the final votes taken on February 25 and March 17, 1998, all commissioners appointed by the speaker of the house of representatives voted no and all but one commissioner who was a current or former representative or senator voted no.³⁸ All three members appointed by the supreme court and the attorney general voted yes.

It was difficult to promote or implement tax reform in the good economic times enjoyed in Florida during 1997 and 1998. Proposal 6 raised no new revenues and was not fueled by a visible crisis—the intent was to stabilize Florida's tax revenues. The need for additional tax revenue would be left to future legislative debate on whether to increase the sales tax rate. While the opportunity for tax reform was lost, the need to stabilize Florida's tax base persists and must now await a future political awareness.

38. The only exception was Commissioner Jon Mills, who was Speaker of the House of Representatives in 1987. Mr. Mills currently serves as Dean of the College of Law at the University of Florida.