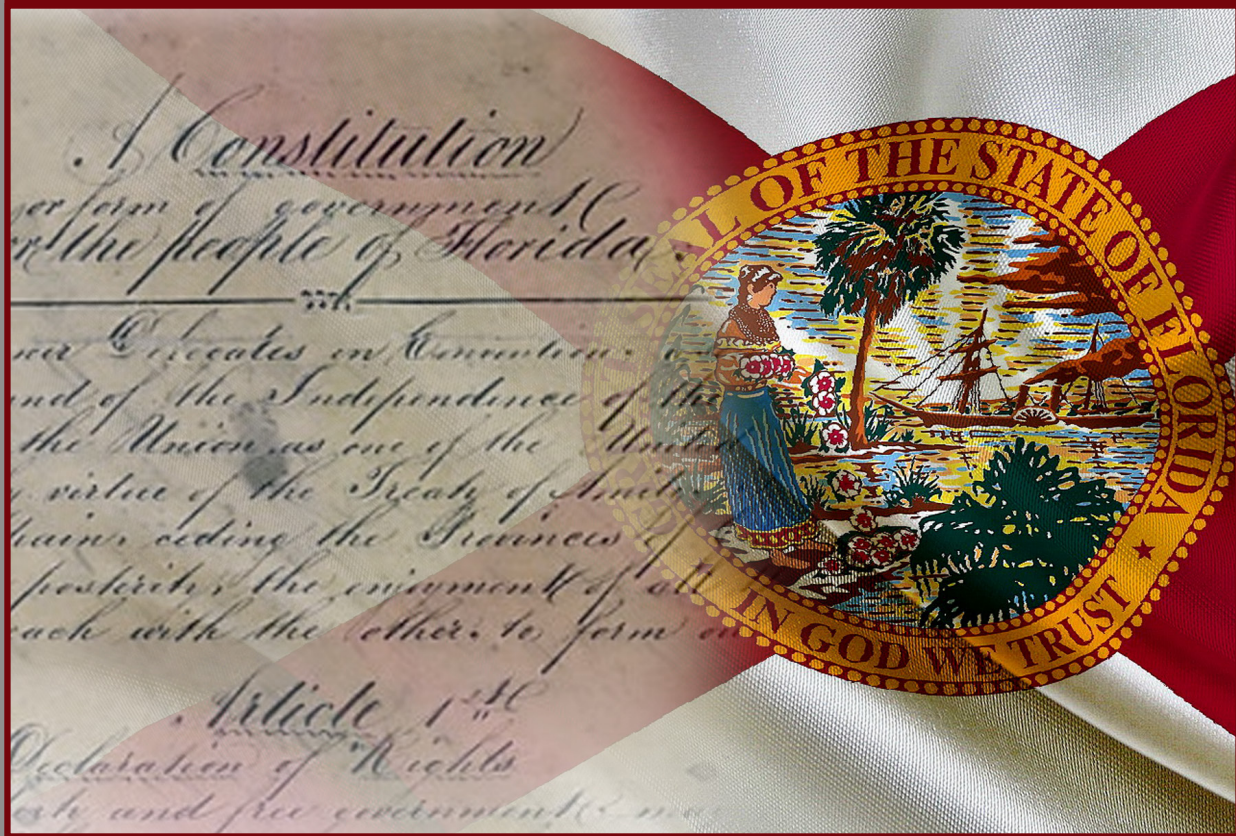


A Guide to Amending Florida's Constitution



Building a Strong
Foundation for
the Future of
Florida Business



FAIF.org



Justice
Kenneth B. Bell

Ken is a former Florida Supreme Court Justice, serving from 2002-2008. Prior to serving on Florida's highest court, Ken was a circuit judge in Florida's First Judicial Circuit from 1991-2002. In 1991, he became the youngest Circuit Judge in the history of the First Circuit. During his twelve years on the circuit court bench, Ken handled more than 27,500 cases as a general jurisdiction judge, and was actively involved in seeking to improve the judicial system.

In addition to serving as appellate counsel, Ken is also called upon to serve as an arbitrator and civil mediator. His personal commitment to problem-solving and dispute resolution is marked by a steadfast focus on delivering a balanced and fair assessment of each party's position.

SHOULD THE PROPOSED AMENDMENT BE ADDED?

I. Introduction

Proposals to add amendments to The Constitution of the State of Florida are offered almost every general election. Florida voters, having sworn “to protect and defend” that constitution, have little guidance on how to decide if it is healthy to add another proposal to the highest law in Florida (a separate question than the merits of the proposal). This document provides the needed guidance.

If weighed in words, Florida’s constitution is again obese. By 1968, the 1885 Florida Constitution had grown to 55,000 words. Because it could no longer do its job, Floridians trimmed it down that year to 23,000 words by adopting a fully modernized constitution. Unfortunately, it has since grown to over 44,000 words. In comparison, the average state constitution has 26,000 words; and, after 230, years the United States Constitution has just 8,770 words (4,543 words when adopted in 1787).

On the merits, most revisions to Florida’s Constitution have been consistent with its purpose. But, other revisions, like the infamous amendment to protect pregnant pigs, are contrary to its purpose.

An obese constitution cannot efficiently and effectively achieve its primary purpose. So, before adding more weight to the 1968 Constitution, let’s look at the primary purpose of our state Constitution and the process to decide if it would be healthy or harmful to amend it further.

II. The Purpose of Our State Constitution

The first step is to recall why we have a state constitution.

A. What is a state constitution?

Simply put, a state constitution establishes the basic structure and limitations of state and local government. It first declares the basic rights of the people. It then distributes and limits that government’s inherent powers by establishing the three branches of government. A constitution is harder to change than statutory laws, making it the highest and most permanent law of the state.

B. What is the purpose of our state constitution?

Unlike the United States Constitution which delegates limited powers to a federal government, Florida’s constitution provides the structure and limitations on the state’s otherwise virtually unlimited, inherent governmental power.

Both constitutions find their genesis in one of our nation’s most formative documents. In the July 4, 1776 Declaration of Independence are these immortal words:

“We hold these Truths to be self-evident, that all **Men are created equal, that they are endowed by their Creator with certain inalienable Rights**, that among these are Life, Liberty, and the Pursuit of Happiness—**That to secure these Rights**,

Governments are instituted among Men, deriving their just powers from the Consent of the Governed (who have the right) to alter or abolish it, and to institute new Government.”

“Hold on, my friends, to the Constitution and to the Republic for which it stands. Miracles do not cluster and what has happened once in 6,000 years, may not happen again. Hold on to the Constitution, for if the American Constitution should fail, there will be anarchy throughout the world.” – *Daniel Webster*

Allegiance to these core principles galvanized the 13 original states in their revolt against British rule. After winning independence, these principles became the cornerstone of our constitutional federal republic:

1. Every person is created equal;
2. Every person has rights granted by God, not their government; and
3. To secure these rights, people come together to form of a government.

To help secure these rights, the 13 original states came together in 1778 to form a “league of friendship” with each other. They did this by adopting the “Articles of Confederation and Perpetual Union” for the league they named “The United States of America.” The league’s name lasted, but not its first constitution. A decade later, these states convened to write another constitution. The result was The Constitution of the United States of America that still serves us today.

Our federal constitution, which guarantees that each state will have a republican form of government, begins with this important preamble (the introductory statement that tells the document’s purpose or aim):

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish the Constitution of the United States of America.”

Florida has echoed this same purpose in preambles to each of its six constitutions. Since 1868, that preamble has been:

“We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefit, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.”

In sum, the purpose or aim of Florida’s Constitution as revealed by this preamble and as guaranteed by the United States Constitution is fourfold:

1. To provide the general framework of a republican form of government;
2. To assign and limit the power of each branch of that government;

-
3. To provide how the government is to carry out its functions; and
 4. To declare and secure each person's inalienable rights.

With this purpose in mind, the second step in knowing whether to add another proposed amendment to Florida's Constitution is to understand the seven foundations of a state constitution.

III. The Seven Foundations of a State Constitution

To achieve its purpose, a state constitution has seven foundations. Each is important, but focus your attention on the sixth foundation:

1. Consistency with the United States Constitution (which includes the guarantee of a republican form of government in each state);
2. A declaration of rights (enumerating basic personal and property rights);
3. A sound balance of powers among the three branches of the republican government it forms (legislative, executive and judicial);
4. A clear expression and provision for ample authority of each branch to perform its functions;
5. A provision for local forms of self-government (our tradition is county and city governments);
6. Limited to the core or fundamental law of the state, with more detailed measures left to statutory law; and
7. A power to amend.

Limiting the Florida Constitution to the fundamental law of the state and leaving more detailed measures to statutory law is essential to our republican form of government. In our republic, we elect and send representatives to the Florida Legislature to help us achieve the societal goals in the preamble. The broad powers of this representative body should be curtailed or restrained only if necessary to protect personal and property rights. The Executive branch, headed by our elected Governor and Cabinet members administers or carries out the statutory law enacted by the Legislature. The Judicial branch helps assure the other two branches exercise their powers as limited by the Florida and United States Constitution. The members of all three branches are ultimately accountable to the people at the ballot box.

Besides establishing a sound balance of powers between the three branches of government, our state constitution needs a sufficient level of detail on taxation, finance and education.

Knowing the purpose of our state constitution and these seven foundations, especially the sixth one, a voter has the background necessary take the third and final step in answering the question, "Should it be added to the constitution?"

IV. Should it be Added to Florida's Constitution?

As discussed above, adding a revision or clause in Florida's Constitution has serious consequences because it: (1) takes the matter out of the hands of our elected representatives; (2) places it into highest, hardest to change law of the state; and, (3) increases the burden of an already obese constitution.

Whether helpful or harmful, taking an issue out of the hands of our representative government is why deciding the “should it be added” question is so important. Florida’s Constitution should empower the representative government to achieve its purpose — “to insure domestic tranquility, maintain public order, and guarantee civil and political rights to all.” Taking this freedom and flexibility away should only be done with utmost care.

The third and final step is to carefully weigh the factors that favor and disfavor inclusion:¹

“The Constitution was made to guard people against the dangers of good intentions.”
– *Daniel Webster*

A. Factors Favoring Inclusion of a Proposed Amendment

Five factors should be balanced when considering inclusion:

1. Is it a sufficiently important and enduring public interest?
2. Is it written so it will not interfere with proper government function?
3. How significant is it to effective government?
4. Does it address ecological, geographic or historical factors unique to Florida?
5. **Are there are other means to achieve the desired end rather than inclusion in the constitution?**

Examples of provision significant to effective government include finance and taxation, local and state tax and debt limitations, reapportionment, civil service, education, etc.

Examples of unique ecological, geographic or historical factors in Florida would include fish and wildlife conservation, protection of natural resource protection, etc.

The fifth factor is the most important. If ordinary legislation, executive action or judicial rulings can achieve the desired end, then the revision or clause should usually not be included. If there is any doubt, the amendment should be rejected.

B. Factors Disfavoring Inclusion of a Proposed Amendment

“A Constitution that embodies a series of what are essentially legislative enactments inevitably reduces the elasticity of government, rendering it less capable of adaptation to unforeseeable changes in the area of its operation.”² In other words, embedding a subject into the Florida Constitution limits the flexibility needed to properly address new situations. And, with no power to control those situations, it reduces the representative government’s responsibility. Both consequences violate the primary purpose of the government as established.

When, from whatever motive, legislatures are denied power to deal effectively with the emergent issues of the day, they are absolved of responsibility for untoward

¹ This section is largely a summation of Chapter 2 in the excellent treatise, Frank P. Grad and Robert F. Williams, *State Constitutions for the Twenty-first Century*, Vol. 2, *Drafting State Constitutions, Revisions, and Amendments*. (2006).

² *Id.* at 24 citing INTER_LAW SCHOOL COMMITTEE REPORT ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION, Staff Report No. 1, Special Legislative Committee on Revision and Simplification of the Constitution, N.Y. leg. Doc. No. 57, at 8, as cited in.

developments. Only by enforcing responsibility, rather than by withholding power, can the people hope for vigilant government in the public interest. As Edmund Burke wrote long ago, “It is not from impotence that we are to expect the tasks of power.”³

Besides this inflexibility problem, “Excessively frequent amendment . . . creates situations where amendment breeds amendment in a continuing vicious cycle.”⁴

To avoid these adverse consequences, five factors must be considered:

1. Do the favorable consequences outweigh these negative ones?
2. Is the provision so important that it justifies any conflicting legislative or other governmental action?
3. Will the respect for the constitutional republic be lessened by the amendment?
4. Is the proposal one of general and universal application or is it specific and detailed with respect to an issue?
5. Is the provision “self-executing” or is it limited to legislative and administrative implementation?

A provision that is “self-executing” is not subject to legislative implementation and oversight. It does not allow our elected representatives to address issues that may arise after adoption. To avoid this problem, the clause must have sufficient detail to guide the government, including the judicial branch, on how the desired outcome is to be accomplished. However, if too detailed, the legislature will not have the flexibility needed to properly implement the desired policy and correct problems that will inevitably arise. For example, policy impacting technology inevitably fails to respond to evolving opportunities, including automobiles, planes, fax machines and cell phones or examples since our first constitution was enacted.

V. Conclusion

We hope this guide will help you decide if a proposed amendment should be added to an already obese Florida Constitution. Constitutions can and should be revised when necessary to further secure our liberties, improve our government, insure peace and maintain public order. But, given our oath “to protect and defend” the Florida Constitution, any revision must be done cautiously, respectfully and wisely. Any doubt about adding yet another amendment to Florida’s already obese constitution should be resolved against inclusion. Doing so preserves the flexibility that our republican form of government must do what it is intended to do:

To secure (the benefits of our constitutional liberty), perfect our government, insure domestic tranquility, maintain public order, and guarantee civil and political rights to all.

The Preamble to Florida’s Constitution.

³*Id.* at 24 citing INTER_LAW SCHOOL COMMITTEE REPORT, *supra*, note 57, at 8.

⁴ *Id.* at 24.

Building a Strong Foundation for the Future of Florida Business



The Foundation of Associated Industries of Florida was formed in 2008 to address the educational and development needs of Florida's business community. FAIF is governed by an independent board of directors. The Foundation does not engage in any political activities.

The private business sector's support is critical to the success and continuance of FAIF's initiatives and programs. Florida businesses cannot afford to rely on public opportunities alone to train and prepare their future employees and leaders. FAIF will foster programs that identify business needs today and create solutions that will last into the future.

We are confident you will want to be part of these programs and opportunities. We welcome your participation and suggestions as we move forward. Your contributions to FAIF are tax deductible and can be made by visiting FAIF.org or contacting our executive director, Stephen Trickey at 850.224.7173.

FAIF is a 501 (c)(3) organization. Registration Number: CH28665. A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY CALLING TOLL-FREE (800.435.7352) WITHIN THE STATE. REGISTRATION DOES NOT IMPLY ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE. FAIF may use a percentage of your contribution to support required administrative costs, direct costs, and/or activities.