

Question: When an amendment to the Florida constitution, which has been approved by voters, contains a section that is inconsistent with the rest of the amendment, how can the inconsistent section be legally challenged and removed?

Answer: The rules of constitutional interpretation, the single subject doctrine, and the statutory defects doctrine should prove helpful in initially deciding if a section of an amendment is inconsistent and hence invalid. If a section is found to be invalid, instead of declaring the entire amendment invalid, a severability analysis should be utilized to determine if the invalid portion can be severed from the remaining amendment—in effect, leaving the valid portion of the amendment standing.

I. Severability

Florida law favors severability of an invalid section when possible. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004). “Severability” is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. *Ray v. Mortham*, 742 So.2d 1276, 1280 (Fla. 1999). The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Id.* Under the severability doctrine, the parties challenging an amendment have the burden of proving that the remaining portions of the amendment are not severable from the portions that have already been found unconstitutional. *Id.* at 1281.

In *Ray*, the Florida Supreme Court adopted and applied the test of *Smith v. Department of Insurance*, used for legislative enactments, to this case—specifically, constitutional amendments. *Id.* at 1280; *Smith v. Department of Insurance*, 507 So.2d 1080, 1089 (Fla. 1987). That test is: when a part of a statute is declared unconstitutional, the remainder of the act will be permitted to stand provided that (1) the unconstitutional provisions can be separated from the remaining valid provisions; (2) the legislative purpose expressed in the valid provision can be accomplished independently of those which are void; (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and; (4) an act complete in itself remains after the invalid provisions are stricken. *Ray*, 742 So.2d at 1281. The severability analysis answers the question of whether “the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail.” *Lowe v. Broward County*, 766 So.2d 1199, 1210 (Fla. 4th DCA 2000) (quoting *Schmitt v. State*, 590 So.2d 404, 414 (Fla. 1991)).

In *Coral Springs*, the plaintiff challenged provisions “scattered throughout the Sign Code.” *Coral Springs*, 371 F.3d at 1348. The court said, however, that the Florida Supreme Court has allowed severance of individual sentences or phrases when it was possible to do so without defeating the purpose of the statute as a whole. *Id.* at 1349.

In *Village of Wellington*, the challenged provision of the Palm Beach County Charter contained a clause entitled the “Savings Clause,” which stated: “If any provision of this Charter is held invalid, in whole or in part, such holding shall not affect any other provision of this Charter.” Furthermore, Part IV of the Charter Amendment ordinance contained a section entitled “Severability,” which states that “[i]f any section, paragraph, sentence, clause, phrase, or word of this Ordinance is for any reason held by a Court of competent jurisdiction to be unconstitutional, inoperative or void, such holding shall not affect the remainder of this Ordinance.” Such

severability clauses have been found to indicate an intent to retain the legislation without the invalid portions. *Vill. of Wellington v. Palm Beach County*, 941 So.2d 595, 600 (Fla. 4th DCA 2006). In *Ray*, the court said: “The initiative petition in this case specifically contained a severability clause, which is persuasive of the fact that the framers intended severability to save the amendment in case portions of it were declared invalid.” *Ray*, 742 So.2d at 1283.

II. Constitutional Interpretation

The doctrine of *in pari materia* requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature’s intent. *Fla. Dep’t of State v. Martin*, 916 So.2d 763, 768 (Fla. 2005). Each provision in the constitution was inserted with a definite purpose and all its sections and provisions must be construed together in order to determine its meaning, effect, restraints, and prohibitions. *Sylvester v. Tindall*, 18 So.2d 892 (1944). Thus, a construction of the constitution that renders superfluous or meaningless or inoperative any of its provisions should not be adopted by the courts. *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998).

Where a constitutional provision will bear two constructions, one of which is consistent and the other of which is inconsistent with another section of the constitution, the former must be adopted so that both provisions will stand and have effect. *Broward County v. City of Fort Lauderdale*, 480 So.2d 631 (Fla. 1985). Overbroad language in the statute may be excised instead of the entire statute being declared facially invalid. *Brown v. State*, 358 So.2d 16 (Fla. 1978).

III. Single Subject Doctrine¹

Single Subject rules generally restrict the subject matter of an enactment to one general topic. Downey, Rachael et. al. “A Survey of the Single Subject Rule as Applied to Statewide Initiatives.” 13 *J. Contemp. Legal Issues* 579 (2004).

Article XI, section 3 of the Florida Constitution states that “[t]he 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.” *Id.* at 588. In Florida, the Attorney General is required to petition the Florida Supreme Court for an advisory opinion regarding the validity of any constitutional amendment proposed by initiative petition. *Id.* at 589; Fla. Stat. Ch. 16.061 (West 2003). In these proceedings, the Florida Supreme Court has the authority to determine whether the proposed amendment complies with the ballot and title requirements of section 101.161 and the single subject rule of article XI, section 3. Downey, 13 *J. Contemp. Legal Issues* at 589; Fla. Const. art. XI, § 3; Fla. Stat. § 101.161(1) (West 2003). The court has jurisdiction to determine the validity of a proposed amendment pursuant to article V, section 3 of the Florida State Constitution. Downey, 13 *J. Contemp. Legal Issues* at 589.

The requirement that the Florida Supreme Court review each amendment proposed by initiative before it is presented to the voters gives the court the opportunity to apply a strict interpretation of the single subject rule. *Id.* Also, once the voters have adopted an initiative, Florida allows for the severability of the invalid part of a law adopted through the initiative process. *Id.*; *Ray*, 742 So.2d at 1280-85 (holding that just because the amendment satisfied the

¹ The following section is taken from: Downey, Rachael et. al. “A Survey of the Single Subject Rule as Applied to Statewide Initiatives.” 13 *J. Contemp. Legal Issues* 579 (2004).

single subject rule does not mean that none of its provisions may be severed without destroying the ability of the amendment to accomplish its overall purpose).

Unlike some states, the people of Florida may amend more than one section of their constitution at a time (the single subject requirement was changed in 1972 to allow revisions to “any portion or portions” of the constitution). See *Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So.2d 337, 339-40 (Fla. 1978); Downey, 13 *J. Contemp. Legal Issues* at 590. However, since the Court's decision in *Fine v. Firestone*, the Court's interpretation of the Florida Constitution's single subject provision has been very strict. 448 So.2d 984 (Fla. 1984) (partially overruling *Floridians*, 363 So.2d at 337); Downey, 13 *J. Contemp. Legal Issues* at 590.

The *Fine* court accepted the *Floridians* requirement that an initiative have a “logical and natural oneness of purpose,” and that the effect of article XI, section 3 was to place a “functional” rather than a “locational” restraint on the subject matter of amendments proposed by initiative. Downey, 13 *J. Contemp. Legal Issues* at 591; *Fine v. Firestone*, 448 So.2d 984, 990 (Fla. 1984); *Floridians*, 363 So. 2d at 340, 341. If the initiative petition “may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme,” then the single subject requirement of article II, section 3 is met. *Id.*; *City of Coral Gables v. Gray*, 19 So.2d 318, 320 (Fla. 1944).

To determine whether a particular initiative petition violates the single subject rule, the court looks at the purposes of the rule. If there is a danger of logrolling, or if the petition will create a “capricious or precipitous” change in the constitution or laws of the state, then the initiative will be struck down as violating the single subject rule.² Downey, 13 *J. Contemp. Legal Issues* at 592.

According to the Florida Supreme Court, the reason that the single subject requirement is applied more stringently to initiated amendments than to laws enacted by the legislature, which are also subject to a single subject rule, is that in the initiative process there is no chance for deliberation or public debate.³ Downey, 13 *J. Contemp. Legal Issues* at 592.

IV. Statutory Defects

The courts are reluctant to declare a constitutional amendment that has been adopted by the people invalid on technical grounds. *State ex rel. Landis v. Thompson*, 163 So. 270 (1935).

² Footnote in article: If the petition has parts that could be separated into independent units on which the citizens of the state could vote, and especially if the petition contains proposals about which the citizens of Florida could reasonably be expected to have differing opinions, then the proposal will likely be struck down as violative of the single subject rule. Also, if the initiative proposes changes that will substantially alter or perform the duties of multiple branches of government, it is possible that the initiative proposal violates the single subject rule by changing the constitution of Florida too much at once. See *Advisory Opinion to the Att'y Gen. re Voluntary Universal Pre-Kindergarten Educ.*, 824 So.2d 161 (Fla. 2002); but see *Advisory Opinion to the Att'y Gen. re Adequate Pub. Educ. Funding*, 703 So.2d 446 (Fla. 1997).

³ Footnote in article: *Fine*, 448 So.2d at 988-89 (“The legislative, revision commission, and constitutional convention processes ... all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes in the state constitution.”). Also, the language of the single subject provisions are different. The single subject requirement applicable to constitutional amendments proposed by citizen initiative is phrased to allow “one subject and matter directly connected therewith,” whereas the requirement applicable to legislative enactments allows “one subject and matter properly connected therewith.” Fla. Const. art. XI, § 3 (initiative amendments) (emphasis added); art. III, § 6 (legislative acts) (emphasis added).

The favorable vote by the electorate has the effect of curing defects in the form of the submission of the amendment. *Id.*; *Sylvester v. Tindall*, 18 So.2d 892 (1944). Furthermore, a failure to challenge an amendment to the constitution on the ground that it was not validly proposed and adopted by the electorate may be waived, where such objection is not raised until after the amendment was adopted by a vote of the people. *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997). A constitutional amendment that has been duly adopted after passage by the legislature will not be declared invalid because of an unsubstantial defect in the wording of the amendment. *Revels v. De Goyler*, 33 So. 2d 719 (1948).

For example, in *Armstrong v. Harris*, Florida citizens brought an action against the Secretary of State for a judgment that a proposed constitutional amendment on the death penalty was inaccurate. 773 So.2d 7 (Fla. 2000). The court held that the amendment did not comply with the accuracy requirement and that the voters' approval of the amendment did not cleanse the proposal of defect. *Id.* The court stated that where a proposed constitutional amendment contains a technical and minor defect in form, a vote of approval by the electorate may in some cases cleanse the amendment of the defect. *Id.* at 18. The court went on to state the general rule: "Once an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission." *Id.* (quoting *Sylvester*, 18 So.2d at 895). This rule however, is subject to a stipulation: the defect in form must be technical and minor. *Id.* at 19. Where the defect goes to the heart of the amendment, the flaw may be fatal. The court also reaffirmed their holding in *Wadhams* that a favorable popular vote standing alone does not confer automatic validity on a defective amendment. *Id.*; *Wadhams v. Board of County Commissioners*, 567 So.2d 414 (Fla.1990). The court held that when a defect goes to the very heart of the amendment, as it did in both *Wadhams* and in this case, it is impossible to say with any certainty what the vote of the electorate would have been "if the voting public had been given the whole truth." *Armstrong*, 773 So.2d at 21; *Wadhams*, 567 So.2d at 417.

See the following cases for examples of severability:

1. *Ray v. Mortham* 742 So.2d 1276 (1999). This case involved a citizen-initiated constitutional amendment regarding term limits. The amendment passed. The petition contained a severability clause. After approval, part of the Florida amendment was declared unconstitutional. The court concluded that the severability analysis does apply to constitutional provisions, that the amendment satisfies the analysis, and that the valid portions can be severed from the invalid portions.
2. *Vill. of Wellington v. Palm Beach County*, 941 So.2d 595 (Fla. 4th DCA 2006). The plaintiffs in this case challenged the validity of an amendment to the county's charter. The court severed three provisions. There was a severability clause in this case.
3. *Fla. Dep't of State v. Martin*, 916 So.2d 763 (Fla. 2005). Democratic Party members brought action for injunction requiring the Department of State to declare that congressional candidate's withdrawal created a vacancy and to allow party to designate nominee to fill vacancy. One section granted the Department of State absolute discretion to allow a candidate to withdraw after the 42nd day before an election while another section required the Department of State to place on the ballot the name of a replacement candidate that is provided by the party's executive at least 21 days before the election.

The issue was whether the constitutionally invalid second sentence of the first section could be severed from the remainder of the statute or whether it was essential to the statute's operation. The court held that severing the statute was completely inconsistent with the Legislature's intent to allow for withdrawal after the time period specified in the statute; therefore, the entire section had to be stricken.

4. *Homestead Hosp. v. Miami-Dade County*, 829 So. 2d 259 (Fla. 3rd DCA 2002). Private hospitals brought declaratory judgment action after county refused to comply with the 2000 Surtax Amendment which established a nominating committee and governing board to administer aid designated for private hospitals. The court held that a review of the legislative history and the text of the 2000 Surtax Amendment clearly indicated that the Legislature intended that this amendment would apply only to Miami-Dade County, not this county. Therefore, severing the unconstitutional provision regarding the "nominating committee" would defeat the Legislature's "clear purpose in enacting the statute." The 2000 Amendment in its entirety was stricken.
5. *Lowe v. Broward County*, 766 So.2d 1199 (Fla. 4th DCA 2000). Lowe argued that section 16 1/2-158(c) of the Domestic Partnership Act (DPA) conflicted with another statute. The court held that to the extent that the DPA overrides the order of priority established by section 765.401, it is in conflict with it. However, the court observed that the Act contained a severability provision and concluded that section 16 1/2-158(c) is severable from the remainder of the DPA.
6. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004). An outdoor advertising company sued the city, claiming that the sign code violated the company's commercial speech rights. The court held that the purpose of the Amended Sign Code was not defeated by the removal of the purportedly unconstitutional provisions, which made up but a small part of the whole. The Sign Code contained a severability clause.
7. *VFW John O'Connor Post #4833 v. Santa Rosa County, Florida*, 2007 WL 781356 (N.D.Fla. March 12, 2007). The Post is a corporation that held an alcoholic beverage license to sell wine and beer. The voters of the county subsequently approved a referendum for the sale of all liquor. The Post then applied to the State to obtain a broader license. Post made a facial due process challenge to section 7.01.13 of an ordinance. It argued that section (E) of the ordinance permitted the Board to waive the distance requirement upon a "proper showing" that a waiver should be granted but failed entirely to define the criteria for the standard. Post claimed therefore that (E) is void for vagueness. Furthermore, the Post argued, that the offending provision could not be severed because it was "inextricably intertwined" with the remainder of the ordinance and that "the County structured the ordinance so that the waiver provisions were essential to the application for a certificate of zoning." The court did find that (E) was unconstitutional, but further concluded that (E) is severable from the rest of § 7.01.13. First, the court noted that both the Santa Rosa County Ordinance Book and Ordinance 89-04, the first iteration of the distance requirements ordinance, contain severability clauses. Secondly, the court held that because the general ordinance and the waiver were sufficiently separable in substance, the court concludes that "it can be said that the [the Board] would have passed the one without the other."