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# A Matter for Interpretation: An Inquiry into Confederate Symbolism and the Florida State Flag

Nicholas Mignanelli\* and Sarah C. Slinger\*\*

*Are the red bars found on Florida's state flag a remnant of early-twentieth-century nostalgia for the Confederacy? Who first proposed this design and why? What did this change mean to the citizens who witnessed it? This Article is an attempt to answer these questions by approaching them through the lenses of original intent and original meaning. In doing so, the Authors advance new strategies for decision-makers interested in uncovering the motives of those who first erected or affixed allegedly Confederate monuments and symbols.*

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INTRODUCTION ..... 117

I. ORIGINAL INTENT ..... 120

II. ORIGINAL MEANING ..... 130

*Fixed Meaning*..... 130

*Reference to Similar Statute of Another State* ..... 134

CONCLUSION ..... 137

## INTRODUCTION

The June 2015 shooting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, ignited a national debate over the proper place of state-sanctioned Confederate monuments and symbols in American life.<sup>1</sup> Weeks after the tragedy, the State of South Carolina removed the Confederate battle flag that had flown adjacent to the South Carolina Confederate Monument.<sup>2</sup> In the months and years that followed, other structures and emblems came under fire, with states and municipalities removing, demolishing, or renaming many of them.<sup>3</sup> One subject of this ongoing controversy is the state flag of Florida, described under statute as “[t]he seal of the state . . . [in] . . . the center of a white ground . . . [with] . . . [r]ed bars . . . extend[ing] from each corner toward the center, to the outer rim of the seal.”<sup>4</sup>

The dispute over Florida’s state flag began with a letter by popular historian T. D. Allman published in the *Miami Herald* on June 23, 2015. Allman writes,

South Carolina and Mississippi are not the only states that flaunt pro-slavery symbolism. Though no one seems to notice, Florida’s familiar state flag, with its red diagonal

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<sup>1</sup> On June 17, 2015, Dylan Roof, a white supremacist with a history of posing for photos with the Confederate battle flag, entered the Emanuel African Methodist Episcopal Church and opened fire on a group of parishioners at Bible study, murdering nine and injuring three others. See Nick Corasaniti, Richard Pérez-Peña & Lizette Alvarez, *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html> [https://perma.cc/RW7U-URFK]; Jason Horowitz, Nick Corasaniti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html> [https://perma.cc/N345-7E4M].

<sup>2</sup> See Act of July 9, 2015, No. 90, § 2, 2015 S.C. Acts 425, 426; see also Stephanie McCrummen & Elahe Izadi, *Confederate Flag Comes Down on South Carolina’s Statehouse Grounds*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/watch-live-as-the-confederate-flag-comes-down-in-south-carolina/?utm\\_term=.64711c9e079f](https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/watch-live-as-the-confederate-flag-comes-down-in-south-carolina/?utm_term=.64711c9e079f) [https://perma.cc/4MCS-GLD3].

<sup>3</sup> See Christopher Ingraham, *Map: The 110 Confederate Symbols That Have Come Down Since Charleston, and the 1,728 Still Standing*, WASH. POST (June 6, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/06/map-the-110-confederate-symbols-that-have-come-down-since-charleston-and-the-1728-still-standing> [https://perma.cc/S5VF-WYPR].

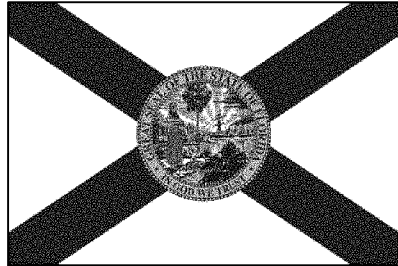
<sup>4</sup> FLA. STAT. § 15.012 (2019).

cross, or saltire, is the most overtly racist state symbol in the United States.<sup>5</sup>

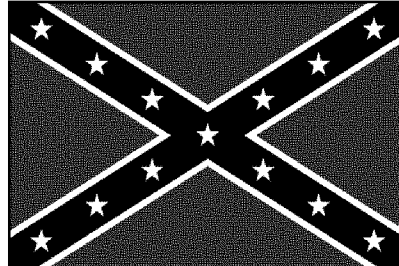
Allman attributes the red bars on Florida's state flag to "a whites-only referendum in 1906 [sic] . . . the culmination of a white-supremacy campaign by former Gov. Francis Fleming."<sup>6</sup>

This was not the first time Allman had made such a claim. In his 2013 tome *Finding Florida*—incorporated by reference in his letter to the *Herald*—Allman recounts how

Francis Fleming's most enduring achievement was visual. Florida's state flag acquired its distinctive red diagonal cross, or saltire, at the ex-governor's persistent behest . . . . Back then the Florida flag, except for the seal, was entirely white. Some considered this feature an appropriate assertion of white supremacy. To Fleming, white signaled surrender to Yankees. After leaving office he devoted his energies to eliminating what he considered the Florida flag's defeatist aspects. In a whites-only referendum Fleming's campaign to superimpose the red-crossed Confederate war flag on the white Florida flag was crowned with success.<sup>7</sup>



*Modern Florida State Flag*



*Battle Flag of the Army of Northern Virginia*

The only source Allman cites to support this account, however, is an article published in the *Jacksonville Observer* on October 2, 2009.<sup>8</sup> In this article,

<sup>5</sup> Letter, T.D. Allman, *Florida's Racist State Flag*, MIAMI HERALD (June 23, 2015), <https://www.miamiherald.com/opinion/letters-to-the-editor/article25363219.html> [<https://perma.cc/8M9H-TGG5>].

<sup>6</sup> *Id.* (as we will see in the pages below, the ratification of this change to the state flag actually took place in 1900).

<sup>7</sup> T. D. ALLMAN, *FINDING FLORIDA: THE TRUE HISTORY OF THE SUNSHINE STATE* 306–07 (2013).

<sup>8</sup> *Id.* at 503.

one Joseph E. Miller writes, “[t]he Governor responsible for th[e] addition [of the red bars], Governor Francis Fleming, requested that State adopt this change in order to avoid its flag from appearing like a white flag of surrender. He may have had an ulterior motive since he was a proud Confederate Veteran.”<sup>9</sup>

In an article published in the *Miami Herald* on June 23, 2015, reporter Glenn Garvin profiles several historians who dispute Allman’s claim.<sup>10</sup> James C. Clark, a lecturer in history at the University of Central Florida, tells Garvin that

... [the] St. Andrew’s Cross that Fleming added, the red X, dates back to the original flag the Spanish flew over Florida in the 16th century ... I think Fleming, who was a former soldier, would have been genuinely sensitive about the white flag of surrender. Certainly there’s nothing written down anywhere that I’ve ever seen that suggests he had any other motive.<sup>11</sup>

W. Fitzhugh Brundage, then-chairman of the history department at the University of North Carolina at Chapel Hill, opines,

... [i]t could be that the cross was intended to invoke/evoke the Lost Cause, but if so, we might wonder why white Floridians didn’t incorporate a more explicit reference to it. After all ... there was no political reason to not do so because Confederate commemoration was commonplace and uncontroversial in 1900.<sup>12</sup>

Garvin concludes his article with Florida historian Canter Brown Jr. commenting, “I’ve seen no specific evidence linking [Florida’s state] flag to the Confederate one.”<sup>13</sup> Notice, however, that neither Allman nor his critics have proffered evidence to firmly establish whether the red bars found on Florida’s state flag are a relic of early-twentieth-century

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<sup>9</sup> Joseph E. Miller, *Governor Francis P. Fleming (1841–1908)*, JACKSONVILLE OBSERVER (Oct. 2, 2009), <http://www.jaxobserver.com/headstones/2009/10/02/governor-francis-p-fleming-1841-1908/> [<https://web.archive.org/web/20091122023935/http://www.jaxobserver.com/headstones/2009/10/02/governor-francis-p-fleming-1841-1908/#more-91>] [<https://perma.cc/V2WH-927B>].

<sup>10</sup> Glenn Garvin, *Historians Differ on Whether Florida Flag Echoes Confederate Banner*, MIAMI HERALD (June 24, 2015), <https://www.miamiherald.com/news/state/florida/article25444405.html> [<https://perma.cc/U98Q-QTFP>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

nostalgia for the Confederacy, a symbol of Spanish heritage, a means for distinguishing the flag from the white flag of surrender, or some combination thereof.

This Article is an attempt to shed light on the original intent of the legislators who proposed the addition of the red bars and the original understanding of the citizens who witnessed this change to their state's flag. While this Article does not provide a definitive answer to the mystery of the red bars emblazoned on Florida's state flag, it does present new strategies for decision-makers who wish to interrogate the motives of those who first erected or affixed allegedly Confederate monuments and symbols.

## I. ORIGINAL INTENT

“The subjective intention of the framers or ratifiers of a legal instrument . . . .”<sup>14</sup>

Although almost a century old, the debate over the legitimacy of legislative history remains a heated one. While intentionalists and purposivists believe that legislative history may be properly used to discover the legislature's intent or purpose, respectively,<sup>15</sup> textualists hold the use of legislative history to be illegitimate, futile, and riddled with the potential for confirmation bias.<sup>16</sup> In 2015, Associate Justice Elena Kagan, giving the Justice Antonin Scalia Lecture at Harvard Law School, announced, “. . . we're all textualists now.”<sup>17</sup> Yet, as recently as 2018, a skirmish over legislative history broke out at the U.S. Supreme Court in *Digital Realty Trust, Inc. v. Somers*, a case that hinged on the definition of

<sup>14</sup> *Original Intent*, ANTONIN SCALIA & BRYAN A. GARNER, *Appendix B: A Glossary of Legal Interpretation*, in *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 425, 435 (2012) (here we broadly construe original intent to encompass both the legislative intent of the Florida Legislature and the motives of Governor Francis P. Fleming).

<sup>15</sup> For a brief introduction, see Lawrence B. Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON, [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2017/05/theories-of-statutory-interpretation.html](https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html) [<https://perma.cc/5CL9-HUYQ>] (last updated Dec. 2, 2018) (“. . . intentionalism is a subjective approach that emphasizes legislative history as guide to the will of the legislature whereas purposivism is an objective approach that focuses on an inquiry into the purposes that an ideal legislature would have had if it had enacted the statute to achieve the public good.”).

<sup>16</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (1997); see also Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998).

<sup>17</sup> See Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/R3JL-9Q8N>].

“whistleblowers” under the Dodd-Frank Act.<sup>18</sup> Arguing that the Court should not use legislative history to determine whether the petitioner constituted a whistleblower, Associate Justice Clarence Thomas reiterates that “[w]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.”<sup>19</sup> To this, Associate Justice Sonia Sotomayor replies, “[l]egislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law.”<sup>20</sup>

Whether or not legislative history is a proper tool for judges, it remains the first source a competent researcher should consult when confronted with an ambiguous statute. Certainly, the text of the statute dictating the design of Florida’s state flag—Section 15.012 of the *Florida Statutes*—lends no clue as to why it has “[r]ed bars . . . extend[ing] from each corner toward the center.”<sup>21</sup> Thus we are compelled to consult the statute’s history section, which points us to Section 2 of Chapter 70-299 of the *Laws of Florida*.<sup>22</sup> However, this session law simply serves to enact the current statute without explanation.<sup>23</sup>

Yet this language first appeared in Article XVI, Section 12, of the Florida Constitution of 1885.<sup>24</sup> Therefore, Section 2 of Chapter 70-299 simply enacted a provision of the earlier state constitution that the framers of the Florida Constitution of 1968 had omitted in the course of their revision.<sup>25</sup> Consequently, we must refer to the history section of Article XVI, Section 12, of the Florida Constitution of 1885, which last appeared in the 1967 *Florida Statutes*.<sup>26</sup> This history section references a joint resolution proposing a constitutional amendment found in the 1899 *Laws of Florida* and a Senate joint resolution proposing a constitutional amendment found in the 1965 *Laws of Florida*.<sup>27</sup> The latter of these resolutions simply added language regarding “standard commercial

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<sup>18</sup> 583 U.S. \_\_\_, 138 S. Ct. 767, 772.

<sup>19</sup> *Id.* at 783 (Thomas, J., concurring) (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring)).

<sup>20</sup> *Id.* at 782 (Sotomayor, J., concurring).

<sup>21</sup> See FLA. STAT. § 15.012 (2019).

<sup>22</sup> *Id.*

<sup>23</sup> See Act effective Oct. 1, 1970, ch. 70-299, 1970 Fla. Laws 925–26.

<sup>24</sup> FLA. CONST. of 1885, art. XVI, § 12 (1900), *superseded by constitutional revision*, FLA. CONST. of 1968.

<sup>25</sup> Compare Act effective Oct. 1, 1970, ch. 70-299, 1970 Fla. Laws 925–26 with FLA. CONST. of 1885, art. XVI, § 12 (1900).

<sup>26</sup> FLA. CONST. of 1885, art. XVI, § 12 (1900), in FLA. STAT. (1967).

<sup>27</sup> *Id.*



sizes.”<sup>28</sup> Therefore, it is the first of these resolutions that gave the flag its “red bars.”<sup>29</sup>

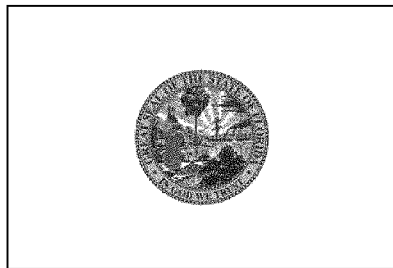
The text of the resolution in question reads:

*Be it Resolved by the Legislature of the State of Florida:*

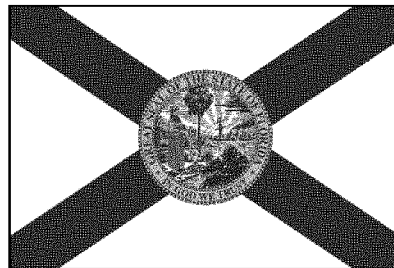
That the following amendment to the Constitution of the State of Florida, be and the same is hereby agreed to, and shall be submitted to the electors of the State at the general election in November, A.D. 1900, for ratification or rejection.

Section 12, of Article XVI, of the Constitution of the State of Florida is amended to read as follows:

Section 12. The present seal of the State shall remain the seal of the State of Florida. The State flag shall be of the following proportions and description: Depth to be three-fourths length of fly. The seal of the State, of diameter one-third the fly, in the center of a white ground. Red bars, in width one-eighth the length of fly extending from each corner toward the center, to the outer rim of the seal.<sup>30</sup>



*Previous Florida State Flag*



*Modern Florida State Flag*

On Monday, May 15, 1899, State Senator Thomas Palmer of District 11 (Tampa, Hillsborough County) first introduced this resolution as Senate Joint Resolution No. 221 in the Florida Senate,<sup>31</sup> where it was read for the first time and referred to the Committee on Constitutional Amendments.<sup>32</sup>

On Tuesday, May 16, 1899, in his capacity as Chairman of the Senate Committee on Constitutional Amendments, Senator Palmer submitted a

<sup>28</sup> See Fla. S.J. Res. 433 (1965), 1965 Fla. Laws 1820–21.

<sup>29</sup> See Fla. J. Res. 4 (1899), 1899 Fla. Laws 359.

<sup>30</sup> *Id.*

<sup>31</sup> FLA. S. JOUR. 689 (Reg. Sess. 1899).

<sup>32</sup> *Id.*

report to Florida Senate President Frank Adams conveying the Committee's recommendation that the resolution ought to pass.<sup>33</sup> Accordingly, the Senate placed the resolution on the calendar for a second reading.<sup>34</sup> On Thursday, May 18, 1899, on Senator Palmer's motion, as agreed to by a two-thirds vote of the Chamber, the Senate waived the rules and the resolution was "read for a second time by its title only."<sup>35</sup> Senator Palmer then moved, and the Chamber agreed, that the resolution "be placed on Calendar of bills on third reading without being engrossed."<sup>36</sup> Senator Palmer further moved "that the rules be waived and Senate Joint Resolution No. 221 be taken up out of its order and considered."<sup>37</sup> On the agreement of two-thirds of the Chamber, the resolution "[w]as taken up and read a second time in full."<sup>38</sup> Senator Palmer then "moved that the rules be further waived and that Senate Joint Resolution No. 221 be read a third time and put upon its passage."<sup>39</sup> On agreement of two-thirds of the Chamber, the resolution was read a third time and the presiding officer took a roll call vote.<sup>40</sup> The Yeas were 24, and the Nays were 0.<sup>41</sup> Therefore, the resolution, "having received a majority of three-fifths of all the members elected to the Senate," passed.<sup>42</sup>

On Thursday, May 18, 1899, the Florida Senate sent a message to the Florida House of Representatives reporting that it had passed the resolution and "respectfully request[ing] the concurrence of the House thereto."<sup>43</sup> On Friday, May 19, 1899, the House read the resolution and referred it to the Judiciary Committee.<sup>44</sup> On Saturday, May 27, 1899, the House received a report from State Representative Frank Clark of Duval, Chairman of the House Committee on Constitutional Amendments, conveying the Committee's recommendation that the resolution ought to pass.<sup>45</sup>

On Wednesday, May 31, 1899, the House took up the resolution and it was read a second time.<sup>46</sup> Representative Clark "moved that the rules be waived by a two-thirds vote and that the resolution be read the third time

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<sup>33</sup> *Id.* at 708–09.

<sup>34</sup> *Id.* at 709.

<sup>35</sup> *Id.* at 775.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 775–76.

<sup>39</sup> *Id.* at 776.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> FLA. H.R. JOUR. 874–75 (Reg. Sess. 1899).

<sup>44</sup> *Id.* at 875.

<sup>45</sup> *Id.* at 1142–43.

<sup>46</sup> *Id.* at 1247.

and put upon its passage.”<sup>47</sup> The Chamber agreed, and the presiding officer took a roll call vote.<sup>48</sup> The Yeas were 45, the Nays were 0, and “the resolution, having received the requisite three-fifths vote . . . was passed and ordered certified to the Senate.”<sup>49</sup>

Having passed both houses, the resolution was published as Resolution No. 4 in the 1899 *Laws of Florida*.<sup>50</sup> In accordance with Article XVII, Section 1, of the Florida Constitution of 1885, the resolution was “submitted to the electors of the State, for approval or rejection.”<sup>51</sup> Subsequently, Florida voters ratified Article XVI, Section 12, by a margin of 5,088 to 3,819 in the election of November 6, 1900.<sup>52</sup>

The above is a skeletal—and somewhat dry—account of the legislative origins of the red bars. After all, a researcher rarely finds useful material in the records of the proceedings of the legislature. More often, a researcher must look to committee reports. In an ideal world, if one wished to use legislative history to determine the intent of the legislature in proposing the red bars, he or she would simply consult the materials created by the Senate Committee on Constitutional Amendments over the course of debating Senate Joint Resolution No. 221. Likewise, if one wished to use legislative history to determine the meaning of an ambiguous phrase in a Florida statute enacted in the last several decades, a researcher would begin by accessing the corresponding “staff analysis.”<sup>53</sup> Unfortunately, the State of Florida has only preserved legislative documents dating to 1969,<sup>54</sup> so any legislative materials created by the Senate Committee on Constitutional Amendments during the 1899 Regular Session have been lost to history.<sup>55</sup>

What, then, of the assertion made by Allman and Miller that it was Governor Francis Fleming who first conceived of the red bars?<sup>56</sup> Allman and Miller were not the first to make this claim. Indeed, the website of the Florida Department of State describes how,

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1248.

<sup>49</sup> *Id.*

<sup>50</sup> Fla. J. Res. 4 (1899), 1899 Fla. Laws 359.

<sup>51</sup> FLA. CONST. of 1885, art. XVII, § 1, *superseded by constitutional revision*, FLA. CONST. of 1968.

<sup>52</sup> REPORT OF THE SECRETARY OF STATE OF THE STATE OF FLORIDA FOR THE PERIOD BEGINNING JANUARY 1, 1899, AND ENDING DECEMBER 31, 1900, at 18 (1901).

<sup>53</sup> See BARBARA J. BUSHARIS, JENNIFER LAVIA, & SUZANNE E. ROWE, FLORIDA LEGAL RESEARCH 64–65 (4th ed. 2014).

<sup>54</sup> See *id.* at 67.

<sup>55</sup> See E-mail from State Archives of Florida Reference Staff to author Nicholas Mignanelli (June 14, 2019, 11:02 EST) (on file with authors).

<sup>56</sup> See Allman, *Florida’s racist state flag*, *supra* note 5; ALLMAN, FINDING FLORIDA, *supra* note 7, at 306–07; Miller, *Governor Francis P. Fleming (1841–1908)*, *supra* note 9.

[b]etween 1868 and 1900, Florida's state flag consisted of a white field with the state seal in the center. During the late 1890s, Governor Francis P. Fleming suggested that a red cross be added, so that the banner did not appear to be a white flag of truce or surrender when hanging still on a flagpole.<sup>57</sup>

A 1965 book published by the University of Florida Press, *Your Florida Government: 500 Questions and Answers*, contains a similar account, attributing its source to the "State Librarian."<sup>58</sup> Authors Allen Covington Morris and Ann Waldron write that "the addition of diagonal red bars by constitutional amendment in 1900 was suggested by former Governor Francis P. Fleming, who had noted that when a flag with a white field 'hung limp to the staff,' it gave the appearance of being a flag of truce."<sup>59</sup>

Morris and Waldron took this information from a 1936 letter from John P. Stokes, a prominent attorney and former state legislator,<sup>60</sup> to Frances H. Miner, a district supervisor of the Federal Writers' Project, on file with the State Library of Florida.<sup>61</sup> Miner had written to Stokes inquiring about the origins of the red bars.<sup>62</sup> To find an answer to Miner's question, Stokes wrote to Chief Justice J. B. Whitefield of the Florida Supreme Court.<sup>63</sup> In turn, Chief Justice Whitefield corresponded with Governor Fleming's son Frank P. Fleming, who explained that his father was both "the person who suggested that the 'red bars' be incorporated in the State Flag" and "the gentleman who suggested the amendment to the Constitution of 1900."<sup>64</sup> Regarding Governor Fleming's motives, Stokes writes,

... while the Governor was serving in the Confederate Army, he saw a white flag used by the Confederacy, and that when there was no wind blowing the flag "hung limp to the staff," and the flag gave the appearance of being a flag of truce, the symbol of surrender. Because the Florida

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<sup>57</sup> *State Flag*, FLORIDA DEPARTMENT OF STATE, <https://dos.myflorida.com/florida-facts/florida-state-symbols/state-flag/> [<https://perma.cc/K672-ZD3Y>] (last visited Apr. 2, 2020).

<sup>58</sup> ALLEN COVINGTON MORRIS AND ANN WALDRON, *YOUR FLORIDA GOVERNMENT: 500 QUESTIONS AND ANSWERS* 9 (1965).

<sup>59</sup> *Id.*

<sup>60</sup> *See John P. Stokes*, 13 FLA. L.J. 155 (1939).

<sup>61</sup> Letter from John P. Stokes, Attorney, Law Offices of Loftin, Stokes & Calkin, to Frances H. Miner, District Supervisor, Federal Writers' Project (Oct. 30, 1936) (on file with the State Library of Florida).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Flag had a white field, Governor Fleming suggested that “red bars” be added to it so as to negative [sic] the idea that it was a flag of truce.<sup>65</sup>

Copied on this letter was William T. Cash, the state librarian of Florida at that time.<sup>66</sup>

Although Stokes wrote the above explanation some thirty-six years after Florida added the red bars to its state flag, one contemporaneous newspaper article also supports the proposition that Governor Fleming suggested this change. An article entitled “Constitutional Amendments” published in *The Pensacola News* on September 20, 1900, states that “Ex-Governor Francis P. Fleming, who took more interest in the military interests of the state than any Florida governor since the civil war, was the author of the amendment.”<sup>67</sup> Unfortunately, this is the closest we come to establishing Governor Fleming’s authorship. His preserved papers contain no documents relating to the change, nor any correspondence with State Senator Thomas Palmer.<sup>68</sup>

Francis Phillip Fleming, a Southern Democrat and a Confederate veteran living at the turn of the twentieth century, was a product of his time and place. A Florida native, his paternal grandfather George Fleming had immigrated to Spanish Florida from Ireland in 1785.<sup>69</sup> For his military service to the province, Spanish Governor of East Florida José María Coppinger granted George Fleming 20,000 acres of land along the St. Johns River in 1816.<sup>70</sup> At that time, Spanish forces in the Americas would have served under the Cross of Burgundy.<sup>71</sup> When the United States took control of Florida in 1821, the United States Government recognized

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also E-mail from Laura Baas, Librarian Specialist, State Agency Publications Section of the State Library of Florida, to author Nicholas Mignanelli (Dec. 7, 2018, 2:58 EST) (on file with authors).

<sup>67</sup> *Constitutional Amendments*, PENSACOLA NEWS, Sept. 20, 1900, at 4.

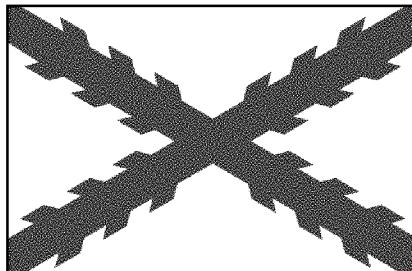
<sup>68</sup> See E-mail from Steve Hersh, Public and Support Services Assistant, Special and Area Studies Collections at the George A. Smathers Libraries (University of Florida), to author Nicholas Mignanelli (June 17, 2019, 1:45 EST) (on file with authors); E-mail from Jennifer Bibb, Special Collections & Archives at the Thomas G. Carpenter Library (University of North Florida), to author Nicholas Mignanelli (June 26, 2019, 11:03 EST) (on file with authors); E-mail from Ben DiBiase, Director of Educational Resources and Archivist at the Florida Historical Society, to author Nicholas Mignanelli (Aug. 6, 2019, 11:33 EST) (on file with authors).

<sup>69</sup> *In Memoriam: Francis Philip Fleming*, 2 FLA. HIST. Q. 3, 3 (1909).

<sup>70</sup> See *Fleming, George, Heirs of*, 3 SPANISH LAND GRANTS IN FLORIDA 121 (1941).

<sup>71</sup> See WHITNEY SMITH, *FLAGS THROUGHOUT THE AGES AND ACROSS THE WORLD* 124–28 (1975).

Spanish land grants like George Fleming's in accordance with the Adams-Onís Treaty.<sup>72</sup>



*Cross of Burgundy*

Following in his family's military tradition, Fleming enlisted in the Confederate States Army before reaching the age of twenty.<sup>73</sup> Serving in the Second Florida Infantry and then the First Florida Cavalry, he attained the rank of first lieutenant.<sup>74</sup> Over the course of his service, Fleming fought in the battles of "Peach Orchard, Williamsburg, Seven Pines, Second Manassas, Fredericksburg, Chancellorsville, Harper's Ferry, the Wilderness, Spotsylvania, Cold Harbor, Petersburg, Seven Days' Fight around Richmond, Antietam and Gettysburg."<sup>75</sup> It was during this period that he likely encountered the above-mentioned "white flag used by the Confederacy."<sup>76</sup> This flag was almost certainly the second national flag adopted by the Confederate States of America on May 1, 1863.<sup>77</sup> The young Fleming was not alone in noticing this flag's resemblance to a white flag of surrender, however, and the Confederacy adopted a third national flag on March 4, 1865, only weeks before the end of the war.<sup>78</sup>

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<sup>72</sup> See Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty art. 8, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252, 258 ("All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty.").

<sup>73</sup> *In Memoriam: Francis Philip Fleming*, *supra* note 69, at 4.

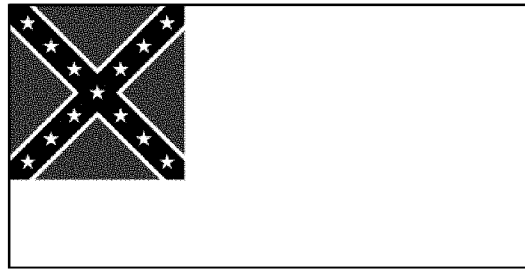
<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 4–5 (note that the "Peach Orchard" mentioned by the author of Fleming's memorial likely refers to an episode of the Battle of Gettysburg, where part of the battlefield is known as "The Peach Orchard").

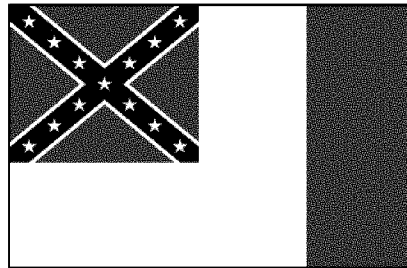
<sup>76</sup> Letter from Stokes to Miner, *supra* note 61.

<sup>77</sup> JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA'S MOST EMBATTLED EMBLEM 17 (2005).

<sup>78</sup> *Id.* at 18–19.



*Second National Flag of the C.S.A.*



*Third National Flag of the C.S.A.*

Returning to Florida after the war, Fleming took up the practice of law and became active in the Democratic Party, “being prominent among those determined and undaunted Democrats who led the way to deliverance of Florida from carpetbag misrule.”<sup>79</sup> Elected Governor of Florida in 1888 by a record margin,<sup>80</sup> his Administration is now infamous for approving laws that disenfranchised African-American voters<sup>81</sup> and removing Florida’s only African-American judge for allegedly performing an interracial marriage.<sup>82</sup> After completing his term, Governor Fleming resumed the practice of law and, although he remained a prominent public figure, never returned to elected office.<sup>83</sup> It was in this period of his life that he would have proposed the addition of the red bars to Florida’s state flag.

In his retirement, Governor Fleming was an active member of several Confederate veterans’ organizations, serving as commander of the Robert E. Lee Camp of Confederate Veterans, aide-de-camp to General John B. Gordon (commander-in-chief of the United Confederate Veterans),

<sup>79</sup> *In Memoriam: Francis Philip Fleming*, *supra* note 69, at 5.

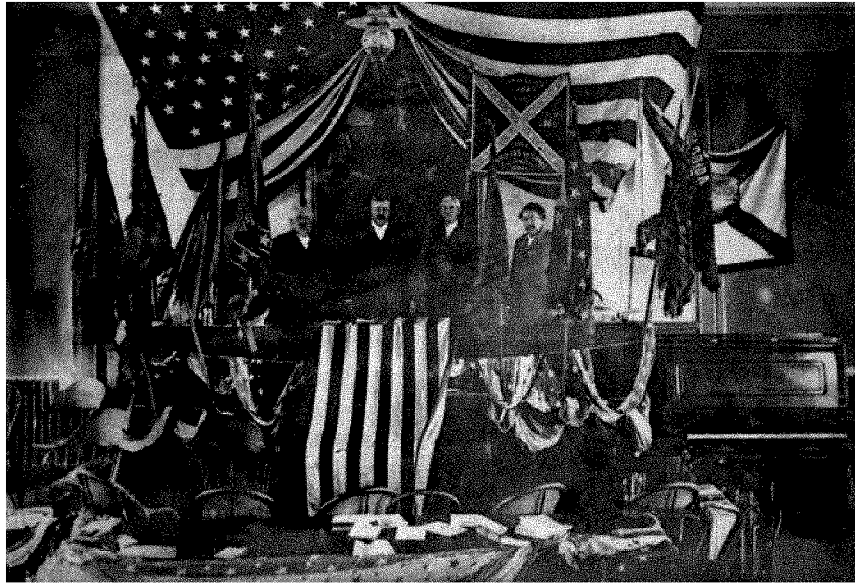
<sup>80</sup> *Id.*

<sup>81</sup> See Act of May 25, 1889, ch. 3850, 1889 Fla. Laws 13; Act of June 4, 1889, ch. 3879, 1889 Fla. Laws 88.

<sup>82</sup> See Canter Brown, Jr. & Larry E. Rivers, *The Pioneer African American Judge Who Almost Became a Bishop: Florida’s Judge James Dean, 1858–1914*, 87 FLA. HIST. Q. 16, 32–34 (2008).

<sup>83</sup> *In Memoriam: Francis Philip Fleming*, *supra* note 69, at 8.

commander of the Florida Division of the United Confederate Veterans, and president of the Old Confederate Soldiers' and Sailors' Home Association.<sup>84</sup> In 1905, the War Department returned eight Confederate battle flags captured from Florida during the Civil War.<sup>85</sup> On May 5, 1905, "Impressive Ceremonies" were held at the state capitol to receive "the war-worn banners under which the gray-coated troops of Florida [had] fought."<sup>86</sup> Chief among the dignitaries present was Governor Fleming, "who delivered an eloquent tribute to the flags."<sup>87</sup>



*Governor Fleming (center-right) Receiving the Returned Battle Flags*

Though it is likely that Governor Fleming suggested that the State of Florida add the red bars to its flag, his precise objective in doing so remains elusive. Although he was a committed Confederate and a white supremacist, it is also likely that he was aware of his Spanish heritage and the Cross of Burgundy that had flown over the Florida territories for three centuries. Furthermore, the explanation that Stokes provides in his letter seems highly plausible in view of the above-discussed change to the Confederate States flag. Accordingly, discovering Governor Fleming's intent, to say nothing of the intent of the legislators who proposed and passed Senate Joint Resolution No. 221, has proved a disappointing

<sup>84</sup> *Id.*

<sup>85</sup> See *Union and Confederate Battle Flags*, in 1 ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1906, at 630–31 (1906).

<sup>86</sup> *Banners of Glory*, TAMPA TRIB., May 3, 1905, at 1.

<sup>87</sup> *Id.*



endeavor. Perhaps, then, a different approach is necessary, an approach that asks not what the authors intended by this change but how their contemporaries understood it. Thus, we turn to original meaning.

## II. ORIGINAL MEANING

“The understanding of a text, esp. an important text such as the Constitution, reflecting what an informed, reasonable member of the community would have understood at the time of adoption . . . .”<sup>88</sup>

The quest for original meaning differs from the pursuit of original intent in that, while original intent is an inquiry into the intentions of the promulgators, original public meaning refers to that which the language of the text in question would have meant to informed citizens living during the period of enactment. Whereas the tools of original intent are archeological in nature, the original-meaning approach exclusively focuses on the text itself, often relying on the canons of construction that involve using contemporaneous public documents to decipher it.

In using original meaning to analyze the red bars found on Florida’s state flag, we face a unique dilemma. Whereas original meaning typically deals with the text of a document, our subject is a symbol. If we limit our investigation solely to the words used to describe that symbol, we come no further than we did when we sought after original intent. For instance, the statute establishing the second national flag of the Confederate States of America refers to the bars found on the battle flag in the top-left corner as “a broad saltier.”<sup>89</sup> In fact, the phrase “red bars” does not appear in any statute enacted in a United States jurisdiction prior to 1899.<sup>90</sup> Therefore, the following analysis deals more broadly with the symbol itself.

### *Fixed Meaning*

The cornerstone of originalism is the canon of fixed meaning, according to which “words must be given the meaning they had when the text was adopted.”<sup>91</sup> As noted above, a jurist may do so by consulting the “writings” of “intelligent and informed people of the time” to ascertain

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<sup>88</sup> *Original Meaning*, SCALIA & GARNER, *Appendix B: A Glossary of Legal Interpretation*, *supra* note 14, at 435.

<sup>89</sup> Act to Establish the Flag of the Confederate States, Public Laws of the Confederate States of America, 1st Cong., 3d Sess., ch. 88, at 163.

<sup>90</sup> Full Text Search for “Red Bars,” HEINONLINE, <https://heinonline.org/> (limit documents to those created prior to 1899 and review results).

<sup>91</sup> SCALIA & GARNER, *supra* note 14, at 78.

how a word or phrase “was originally understood.”<sup>92</sup> The greatest example of this is Associate Justice Antonin Scalia’s use of *The Federalist Papers* in interpreting various provisions of the United States Constitution.<sup>93</sup> Yet the individual Federalist papers did not begin their lives in a bound volume but as “ephemeral newspaper articles [printed] amid factional clamor.”<sup>94</sup> Therefore, it would make great sense to consult editorials about Article XVI, Section 12, published in Florida newspapers in the months leading up to the election of 1900.

Unfortunately, there are only a handful of such articles. The earliest appeared in *The Morning News* of Savannah, Georgia, on April 17, 1900.<sup>95</sup> Describing the pending change, the author writes, “[i]t is said by well-informed persons to be a fact that only a small proportion of the people of Florida know what their state seal and flag have been all these years.”<sup>96</sup> On September 20, 1900, the previously discussed article found in the pages of *The Pensacola News*—the one that attributes the idea for the change to Governor Fleming—characterizes the proposed state flag as “a very handsome and appropriate state emblem.”<sup>97</sup> On October 5, 1900, a review of the proposed constitutional amendments on the ballot that November appeared in the *Florida Star* (Titusville).<sup>98</sup> Regarding “Section 12 of Article XVI, relating to the state seal and emblem,” the author advises that “[t]he voter can use his judgement on this matter as his fancy dictates, it is a matter of no great importance, and no harm will come whether adopted or not.”<sup>99</sup>

Taken together, the above commentary suggests that the design of the state flag was not widely known, that the change was perceived to be aesthetic in nature, and that the ratification of Article XVI, Section 12, was of little consequence. Yet these three brief comments can hardly be said to definitively represent the understanding of the citizenry as a whole. Although certainly not a proper tool of originalism, in our case it might be

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<sup>92</sup> SCALIA, *supra* note 16, at 38.

<sup>93</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 910–915 (1997) (Scalia, J.). For criticism of this approach to constitutional interpretation, see William N. Eskridge Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

<sup>94</sup> See Robert A. Ferguson, *Introduction* to ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS*, xiii, xiii (Barnes & Noble Classics 2006) (1788).

<sup>95</sup> *Florida’s Flag and Seal: Changes Will Be Voted Upon in the November Election*, MORNING NEWS (Savanna, Ga.), Apr. 17, 1900, at 2.

<sup>96</sup> *Florida’s Flag and Seal: Changes Will Be Voted Upon in the November Election*, *supra* note 95, at 2.

<sup>97</sup> *Constitutional Amendments*, PENSACOLA NEWS, Sept. 20, 1900, at 4.

<sup>98</sup> *Constitutional Amendments*, FLA. STAR (Titusville), Oct. 5, 1900, at 4.

<sup>99</sup> *Id.*

useful to compare voting data sets in an attempt to determine which voters opposed the change.

In the years following the Civil War, the Republican Party in the South consisted of a coalition of African Americans, white natives of the South who supported Reconstruction (derided as “scalawags”), and white outsiders who had immigrated to the South from northern states (derided as “carpetbaggers”).<sup>100</sup> Notwithstanding the widespread disenfranchisement of African Americans in Florida after 1889,<sup>101</sup> if the red bars were widely understood by voters to be a symbol of Confederate sympathy and white supremacy, it is likely that a substantial number of Republican voters would have opposed Article XVI, Section 12. However, there is no apparent correlation between counties that voted against the constitutional amendment and counties that cast the most votes for the Republican presidential ticket in the election of 1900.

Yet it is also possible that “Lily-Whites,” i.e., “southern industrialists who . . . sought to ‘purify’ the GOP of African Americans in order to bring competitive two-party politics to the South,”<sup>102</sup> had come to dominate the Republican Party of Florida by 1900. If this is the case, correlation with votes cast for the Republican ticket would be a poor barometer of meaning, as “there were few differences between Lily-Whites and race-baiting Democrats” when it came to “issues of white supremacy.”<sup>103</sup> Intriguingly, eight of the twelve counties that had African-American majorities at the time of the 1900 census voted against the constitutional amendment.<sup>104</sup> Unfortunately, there is no data to indicate how many African-American citizens were still able to vote in the election of 1900 in spite of disenfranchisement measures.

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<sup>100</sup> See generally RICHARD L. HUME & JERRY B. GOUGH, *BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION* (2008) (describing each of these factions and their interactions in the course of writing and ratifying Reconstruction-era state constitutions throughout the South).

<sup>101</sup> RUSSELL BROOKER, *THE AMERICAN CIVIL RIGHTS MOVEMENT 1865—1900: BLACK AGENCY AND PEOPLE OF GOOD WILL* 61 (2017); see also *supra* note 81.

<sup>102</sup> JOSHUA D. FARRINGTON, *BLACK REPUBLICANS AND THE TRANSFORMATION OF THE GOP* 14 (2016).

<sup>103</sup> *Id.*

<sup>104</sup> Namely the counties of Columbia, Gadsen, Jackson, Jefferson, Leon, Madison, Nassau, and Wakulla.

COUNTY	ART. 16, SEC. 12 <sup>105</sup>		1900 PRESIDENTIAL ELECTION <sup>106</sup>		1900 AFRICAN-AMERICAN POPULATION (%) <sup>107</sup>
	Against	For	Rep. (%)	Dem. (%)	
Alachua	189	405	334 (19%)	1,346 (77%)	18,905 (59%)
Baker	8	62	112 (33%)	198 (58%)	1,191 (26%)
Bradford	41	91	276 (24%)	734 (63%)	2,727 (26%)
Brevard	68	125	121 (17%)	513 (74%)	1,074 (21%)
Calhoun	48	51	35 (12%)	196 (67%)	2,040 (40%)
Citrus	26	212	16 (4%)	413 (92%)	2,637 (49%)
Clay	15	71	91 (21%)	308 (71%)	1,832 (17%)
Columbia	107	104	252 (25%)	663 (67%)	9,321 (55%)
Dade	104	258	389 (28%)	806 (59%)	1,293 (26%)
DeSoto	48	131	134 (16%)	526 (64%)	672 (8%)
Duval	302	513	773 (28%)	1,857 (66%)	22,417 (56%)
Escambia	140	365	432 (19%)	1,435 (63%)	11,925 (42%)
Franklin	-	-	146 (34%)	239 (56%)	2,242 (46%)
Gadsen	275	47	61 (8%)	684 (91%)	9,856 (64%)
Hamilton	67	35	96 (20%)	322 (68%)	5,376 (45%)
Hernando	22	52	18 (6%)	252 (88%)	1,185 (33%)
Hillsborough	179	463	349 (11%)	2,257 (70%)	8,449 (23%)
Holmes	22	44	69 (15%)	339 (73%)	1,281 (17%)
Jackson	269	183	178 (14%)	978 (78%)	12,276 (53%)
Jefferson	439	68	143 (17%)	711 (82%)	12,620 (78%)
Lafayette	73	29	21(6%)	326 (89%)	763 (15%)
Lake	55	98	143 (20%)	492 (70%)	2,636 (35%)
Lee	36	63	39 (11%)	278 (81%)	188 (6%)
Leon	329	200	162 (14%)	932 (80%)	15,999 (80%)
Levy	62	74	157 (28%)	383 (67%)	3,282 (38%)
Liberty	4	4	10 (7%)	127 (88%)	1,497 (51%)
Madison	74	38	44 (7%)	510 (77%)	8,904 (58%)
Manatee	55	123	60 (9%)	535 (82%)	458 (10%)
Marion	153	302	264 (18%)	1,132 (75%)	15,047 (62%)
Monroe	25	101	252 (22%)	747 (66%)	5,788 (32%)
Nassau	58	53	149 (24%)	441 (71%)	5,092 (53%)
Orange	96	323	402 (29%)	857 (62%)	4,027 (35%)
Osceola	23	59	42 (11%)	266 (72%)	431 (13%)
Pasco	21	84	32 (6%)	492 (85%)	1,679 (28%)
Polk	123	159	133 (11%)	983 (80%)	2,948 (24%)
Putnam	92	48	250 (25%)	648 (65%)	5,621 (48%)
St. Johns	35	59	234 (22%)	764 (70%)	3,621 (40%)

<sup>105</sup> REPORT OF THE SECRETARY OF STATE OF THE STATE OF FLORIDA FOR THE PERIOD BEGINNING JANUARY 1, 1899, AND ENDING DECEMBER 31, 1900, at 18 (1901) (combined county results listed do not equal total listed).

<sup>106</sup> EDGAR E. ROBINSON, PRESIDENTIAL VOTE, 1896–1932, at 156–61 (1947) (percentages calculated by authors and rounded to the nearest one).

<sup>107</sup> CENSUS REPORTS VOLUME I: TWELFTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1900: POPULATION, Pt. 1, Table 19, at 532–33 (1901) (percentages calculated by authors and rounded to the nearest one).

Santa Rosa	46	147	38 (6%)	519 (88%)	2,466 (24%)
Sumter	16	67	53 (13%)	343 (81%)	2,280 (37%)
Suwannee	<b>110</b>	3	153 (16%)	677 (71%)	6,577 (45%)
Taylor	21	21	105 (25%)	253 (60%)	438 (11%)
Volusia	100	160	255 (23%)	755 (67%)	3,464 (4%)
Wakulla	<b>57</b>	37	10 (3%)	254 (86%)	2,790 (54%)
Walton	31	70	139 (25%)	382 (68%)	2,039 (22%)
Washington	<b>57</b>	49	291 (37%)	387 (49%)	2,886 (28%)
<b>Total</b>	3,819	5,088	7,463 (19%)	28,260 (71%)	280,730 (41%)

### *Reference to Similar Statute of Another State*

Our original-meaning analysis cannot end with the canon of fixed meaning, however, as the State of Alabama adopted a flag that bears a striking resemblance to Florida's red bars in 1895.<sup>108</sup> Indeed, one commentator has even suggested that "the recently-adopted Alabama state flag" inspired Floridians to add red bars to their flag in 1900.<sup>109</sup> These circumstances call to mind the canon of *in pari material* ("upon the same subject"). This canon holds that "laws dealing with the same subject . . . should if possible be interpreted harmoniously."<sup>110</sup> As Associate Justice Felix Frankfurter described it, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."<sup>111</sup> Yet this canon applies to two statutes on the same subject within the same *corpus juris*, not two similar statutes found in different jurisdictions.<sup>112</sup>

A new and related canon has developed in recent decades, however, as "[c]ourts have noted that similar statutes of other states comprise a type of extrinsic aid which may deserve special attention."<sup>113</sup> This emerging canon recognizes that, although "[d]ifferent states have separate and independent legal systems,"<sup>114</sup> "statutes frequently are copied from state to state."<sup>115</sup> In the spirit of this canon, we consider whether Florida transplanted the red bars from Alabama's state flag to its own and whether the people of Alabama understood their state's flag to be of Confederate origin at the time of its adoption. We begin with the second inquiry first.

<sup>108</sup> COSKI, *supra* note 77, at 79.

<sup>109</sup> Robert M. Jarvis, *The History of Florida's State Flag*, 18 NOVA L. REV. 1037, 1059 n.105 (1994).

<sup>110</sup> SCALIA & GARNER, *supra* note 14, at 252.

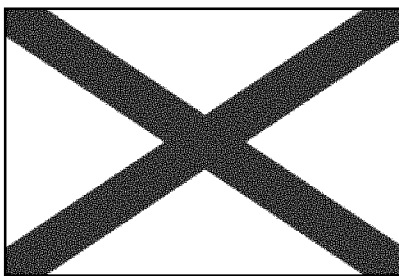
<sup>111</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMBIA L. REV. 527, 537 (1947).

<sup>112</sup> See SCALIA & GARNER, *supra* note 14, at 252.

<sup>113</sup> 2B NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION 318 (7th ed. 2015).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*



*Alabama State Flag*

The design of the Alabama state flag is governed by Section 1-2-5 of the Alabama Code, which defines it as “a crimson cross of St. Andrew on a field of white.”<sup>116</sup> Interestingly, another section of the code recounts the history of the flag, attributing its origins to “Act No. 383 of the 1895 Legislature of Alabama” and providing the following explanation of the cross of St. Andrew:

The St. Andrew’s Cross resembles the letter “X” in the English alphabet and is also referred to as the “saltier” or “Crux Decussata.” According to tradition, Andrew, the brother of Peter, was crucified on a cross of this shape. Andrew did not feel worthy enough to die on the same style of cross on which Christ died and requested a cross of another shape. His request was granted and he was crucified upside down on a cross which now bears his name. Rather than using nails to secure his limbs to the cross, Andrew was bound to the cross with ropes. His suffering was thus prolonged. St. Andrew’s Cross came into wide use during the Medieval Period and became the national cross of Scotland, since St. Andrew was the patron saint of Scotland.<sup>117</sup>

Notice, however, that this explanation makes no mention as to what significance the cross of St. Andrew holds for the State of Alabama.

The surviving legislative history of Alabama’s state flag is as follows: State Representative John W.A. Sanford Jr. of Montgomery introduced Act No. 383 as H. 1051, entitled “[t]o adopt a flag for the use of Alabama,” on January 29, 1895.<sup>118</sup> On February 7, 1895, the Alabama House of Representatives voted to pass H. 1051 by a margin of 52 to 5.<sup>119</sup> On

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<sup>116</sup> ALA. CODE § 1-2-5 (2018).

<sup>117</sup> ALA. CODE § 1-2A-2 (2018).

<sup>118</sup> ALA. H. JOUR. 666 (1894–1895 Sess.).

<sup>119</sup> *Id.* at 856.

February 14, 1895, the Alabama Senate voted to pass H. 1051 by a margin of 14 to 4.<sup>120</sup> On February 16, 1895, Alabama Governor William C. Oates approved H. 1051 and it became Act No. 383.<sup>121</sup>

Much like the case of Florida's red bars, the adoption of Alabama's state flag garnered little attention from the press. Although no newspaper article explains the meaning of the design, one article attributes its adoption to "[a] wave of patriotism."<sup>122</sup> This article situates the adoption of the flag in the context of the passage of two other bills: one attempting to institute state holidays dedicated to Jefferson Davis and Robert E. Lee, respectively, and another proposing a state seal commemorating the assistance Emma Sansom rendered Confederate General Nathan Bedford Forrest in capturing Union Colonel Abel Streight and his forces.<sup>123</sup> Another newspaper article from this period notes that the flag's designer was Mrs. John W.A. Sanford Jr.<sup>124</sup>

Twenty years after the adoption of the flag, Dr. Thomas Own, then the director of the Alabama Department of Archives and History, inquired about the meaning of the flag in preparation for publishing the *Alabama Official and Statistical Register* for the year 1915.<sup>125</sup> It was his conclusion that "the flag was intended by the Legislature to preserve in permanent form some of the more distinctive features of the Confederate battle-flag, particularly St. Andrew's cross."<sup>126</sup> In 1987, almost a century after the adoption of the flag, Alabama Attorney General Don Siegelman issued an opinion concluding that "Representative John W. A. Sanford, Jr., [sic] the sponsor of [H. 1051] served in the 60th Alabama Infantry Regiment in the Civil War and modeled the flag after the Regiment's battle flag."<sup>127</sup> Of

<sup>120</sup> ALA. S. JOUR. 784 (1894–1895 Sess.).

<sup>121</sup> Act No. 383, 1894–1895 Ala. Laws 719 (codified at ALA. CODE § 1-2-5 (2018)).

<sup>122</sup> *The General Assembly*, MONTGOMERY ADVERT., Feb. 8, 1895, at 7.

<sup>123</sup> *Id.*

<sup>124</sup> *Legislative News*, MONTGOMERY ADVERT., Jan. 30, 1895, at 7.

<sup>125</sup> *Official Symbols and Emblems of Alabama: State Flag of Alabama*, ALA. DEP'T ARCHIVES & HIST., [https://archives.alabama.gov/emblems/st\\_flag.html](https://archives.alabama.gov/emblems/st_flag.html) [<https://perma.cc/5G3R-6LGG>] (last updated Feb. 6, 2014).

<sup>126</sup> THOMAS M. OWEN, ALABAMA OFFICIAL AND STATISTICAL REGISTER 1915, at 13 (State of Alabama Department of Archives and History 1915).

<sup>127</sup> State Flag—Rectangular in Shape, 87-00238 Ala. Op. Att'y Gen. 2 (1987). Attorney General Siegelman mistook John W.A. Sanford Jr. (or III, depending on the source) (1860–1912) for his father John W.A. Sanford Sr. (or Jr., depending on the source) (1825–1913). See Thomas McAdory Owen, *Sanford, John William Augustine*, in 4 THE HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 1500–01 (1921); see also *The Alabama Night Program*, in 21 CONFEDERATE VETERAN: PUBLISHED MONTHLY IN THE INTEREST OF CONFEDERATE VETERANS AND KINDRED TOPICS 212–13, 213 (S. A. Cunningham ed., 1913) ("Mrs. John W. A. Sanford, Jr., a daughter-in-law of General Sanford, is the designer of the State flag of Alabama . . .").

course, these conflicting explanations only serve to tempt us back down the rabbit's hole of original intent.

While there is evidence to suggest that Alabama's state flag is Confederate in origin, there is no clear nexus between the adoption of Alabama's state flag in 1895 and the addition of the red bars to Florida's state flag in 1900. It appears, for instance, that no Florida newspaper reported on the adoption of Alabama's new flag at the time. Nor, in the months leading up to the election of 1900, did any Florida newspaper comment on the resemblance that Florida's red bars would bear to the St. Andrew's cross found on Alabama's state flag. Finally, even if one wished to revert once more to the original intent approach, there is no surviving correspondence between Fleming and Sanford.<sup>128</sup>

### CONCLUSION

Although we have come short of a definitive answer, maybe we have achieved a deeper understanding of the historical circumstances surrounding the addition of the red bars to Florida's state flag. Perhaps, then, persistent ambiguity in the face of thorough research and analysis might, in and of itself, aid interested parties in determining the best course of action. Above all, it is the hope of the Authors that the strategies presented in this Article might prove fruitful in similar situations in which the passionate assertion of competing claims compels decision-makers to seek objective standards of inquiry.

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<sup>128</sup> See *supra* note 68. It is likely, however, that the two men were acquainted, as Fleming and Sanford the elder contemporaneously served as leaders of neighboring divisions of the United Confederate Veterans. See ORGANIZATION OF THE UNITED CONFEDERATE VETERANS WITH NAMES OF THE DEPARTMENT, DIVISION AND BRIGADE COMMANDERS, THEIR ADJUTANTS GENERAL, AND ADDRESSES 2 (United Confederate Veterans 1905).



