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## Constitutional Law

Clifford C. Alloway  
*University of Miami School of Law*

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# CONSTITUTIONAL LAW<sup>1</sup>

CLIFFORD C. ALLOWAY\*

## INTRODUCTION

The juridical activity in recent Florida constitutional law is startling—for the Supreme Court of Florida decided several hundred cases, in the past two years, involving our state constitution. There are, perhaps, several factors which explain this total: (1) The Florida Constitution is quite long,<sup>2</sup> very diversified in subject<sup>3</sup> and poorly written;<sup>4</sup> (2) our constitution is definitely antiquated,<sup>5</sup> and (3) the Florida Supreme Court, dedicated to reviewing practices which died in the United States Supreme Court many years ago, attempts a grandiose judicial activity.

The language added to the constitution by amendment was not significant during this period;<sup>6</sup> recent growth in our constitutional law must, then, be found in those few hundred decisions—which decisions were the result of unplanned controversies, conclusions of scattered judges and lay juries, generally vague and ambiguous constitutional language and the personalities of the justices on our State Supreme Court. The organization of this paper is not particularly unique—the decisions easily, however, fitted into the plan utilized.

## SEPARATION OF POWERS

The body of the classic separation of powers tradition is still warm in Florida.<sup>7</sup> This is an interesting example of the static qualities of Florida Constitutional law. It is difficult to imagine a state supreme court, in 1952, placing language<sup>8</sup> in a decision that “under our form of government—the Executive, the Legislative and the Judicial—no one of them have the right to invade the sphere of operation of . . . the

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\*Associate Professor, University of Miami School of Law.

1. Volumes 49 through 66, Southern Reporter, second series. This article is merely a *survey*.

2. The 6000 (approximately) words in the United States Constitution loom small in comparison.

3. Subjects run from the clerk of the criminal court of record to, of all things, the qualifications for sureties upon state bonds.

4. Read the beautiful language (comparatively) in the much earlier Federal Constitution.

5. Florida before 1900 was extraordinarily different, in a social and economic sense, from 1954 Florida.

6. FLA. CONST. Art. III, § 16 and FLA. CONST. Art. VII, § 5 were amended in 1950, FLA. CONST. Art. V, § 16a; FLA. CONST. Art. V, § 50 (48) (juvenile courts); FLA. CONST. Art. V, § 51 (48) were adopted in 1950. FLA. CONST. Art. XII, § 18 (aid to school system) was adopted in 1952. See the 1953 Florida Legislative Service for indication of some of the constitutional legislative activity in the last session.

7. If the separation ever did exist it was in a setting which was not modern. See, generally, Dodd, *Administrative Agencies as Legislators and Judges*, 25 A.B.A.J. 923 (1939).

8. *White v. Johnson*, 59 So.2d 532, 534 (Fla. 1952).

other." This assumes of course that only legislatures "make" the law, courts "interpret" the law and only executives "execute" the law. With a mountain of legal writings in the twentieth century maintaining that judges "make" an appreciable portion of our law, that executives have to "interpret" to enforce the law and "make" law by enforcement policies, and that administrative agencies the world over handle, with equal ease, all the traditional governmental powers, it is discouraging to find that the issue has not quietly been laid to rest in Florida.

This section will be divided, as are the Florida cases, into the traditional functional fields.

### I. Judicial Power

*Judicial question.*—Declaratory decrees present the major problem. The judicial power only extends to judicial questions. What is a judicial question? In *Ervin v. Taylor*,<sup>9</sup> law enforcement officers who were not permitted a law practice petitioned for a declaration of their rights. The petition named no defendants. The attorney general and states attorney filed answers. The Florida Supreme Court held that real "adversaries" were necessary or there would be no "actual controversy." These, then, seem necessary to a judicial question. Mr. Justice Terrell, dissenting,<sup>10</sup> pointed out that many cases were permitted which were not adversary, such as a bond validation; that, since "definite issues" were raised here between able law firms with the assistance of the attorney general and states attorney, the petition should have been allowed. The decision would seem to foreclose much chance for suit by state employees who want to test possibly invalid laws before acting under them at their peril.<sup>11</sup> The factor of unnamed defendants seemed to be important. *Ervin v. North Miami*<sup>12</sup> disallowed a similar petition. This decision called for "concrete legal issues" to create a "justiciable controversy." The judiciary could not give "free legal advice." This language presently means nothing—it is too vague; with time we may assume that decisions will define this area.

Who has an adequate *interest* to raise a constitutional question, in a declaratory decree petition, is a problem which infiltrates into when a question is justiciable. In a way they are inseparable. *Ervin v. Taylor* may mean that law enforcement officers do not have sufficient interest under the law sought to be invalidated to be in court. Perhaps there

9. 66 So.2d 817 (Fla. 1953).

10. *Id.* at 817, 818.

11. The officer can be sued for injury to a citizen, whether he acts, or not, under an invalid law if he guesses wrong on the state court's action.

12. 66 So.2d 235 (Fla. 1935). *But cf.* *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952) (all groups here in doubt as to meaning of a law permitting expenditures of public funds).

13. 62 So.2d 696, 698 (Fla. 1952); *accord*, *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952).

is a valid distinction. In *Overman v. State Board of Control*<sup>13</sup> the court held that the declaratory decree was properly invoked where "one's rights, immunities, status or privileges are . . . in doubt or are obscured." This language simply is not definite. Used car dealers who opened for business on Sunday in contravention of a state law were held to have sufficient interest to test the law's validity—petitioners having alleged they were "threatened with arrest."<sup>14</sup> The existence of another possible remedy did not seem to affect the interest of a petitioner in testing one law by declaratory decree.<sup>15</sup>

A taxpayer was permitted to test the validity of a spending law because of the possibility of "increasing the burden of his taxes."<sup>16</sup> This is unfortunate. The federal rule<sup>17</sup> has permitted the overworked Federal Supreme Court to avoid these cases for years. A theatre owner was found not to have sufficient "standing" to test a tax laid on the theatre patron.<sup>18</sup>

Failure to raise a constitutional question at the trial court level was held to affect the sufficiency of the interest one has in a constitutional case.<sup>19</sup> The court recognized the danger of "gratuitous rulings" by the judiciary. The judicial power does not apparently extend to such a situation.

Another related field here is *when* is it possible to raise constitutional questions. This is important since the more liberal the court is the more reviewing power the court has, in fact. At least where private property<sup>20</sup> was affected the court permitted the invalidation of public expenditures even though the public contract involved was "tentative."<sup>21</sup> "threatened injury" was sufficient.

In zoning cases it generally was held necessary to exhaust the administrative remedies before attempting to invalidate an ordinance where the attack was limited to the ordinance's effect on plaintiff's property.<sup>22</sup> Also, one's interest to raise constitutional issues was seriously jeopardized by inaction—the time element involved being uncertain.<sup>23</sup> Is this a bastard estoppel?

14. *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952); cf. *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952) (charges filed, but no hearing had).

15. *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445 (Fla. 1952).

16. *Lewis v. Peters*, 66 So.2d 489 (Fla. 1953). But cf. *Bryan v. Miami*, 56 So.2d 924 (Fla. 1951).

17. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

18. *Paramount-Gulf Theatres v. Pensacola*, 62 So.2d 431, 434 (Fla. 1951) (on re-hearing).

19. *Henderson v. Antonacci*, 62 So.2d 5, 7 (Fla. 1952); accord, *Lightfoot v. State*, 64 So.2d 261 (Fla. 1952) (on rehearing court decided validity question properly in issue).

20. The court has not been so swift in enforcement of the Federal equal protection clause, U. S. CONST. AMEND. XIV, § 1.

21. *Lewis v. Peters*, 66 So.2d 489, 491 (Fla. 1953); cf. *Miami Beach v. Perell*, 52 So.2d 906 (Fla. 1951).

22. *De Carlo v. West Miami*, 49 So.2d 596 (Fla. 1950).

23. *Greene v. Alexander Film Co.*, 65 So.2d 53 (Fla. 1953); accord, *Chastain v. Mayo*, 56 So.2d 540 (Fla. 1952) (possible waiver); *Roché v. Hollywood*, 55 So.2d 909 (Fla. 1952) (possible estoppel). See note 18 *supra*.

A rather interesting statement in a concurring opinion by Justice Terrell<sup>24</sup> relates the weight in a precedent sense, given an advisory opinion to the governor. Advisory opinions then, even when constitutionally inspired, do not present a full judicial question.<sup>25</sup>

*Generally.*—Study of judicial power in the United States is fascinating.<sup>26</sup> There have been periods in our legal history when our judiciary has expanded greatly its office, at times overshadowing the supposedly “equal” executive and legislature. The courts have ravaged legislation from behind a wall of judicial supremacy. There are some vestiges of that judicial pedestal in our Florida legal scene. The area is multifaceted, running from who has a justiciable interest to political and judicial questions, judicial restraint, judicial attitudes toward law-making, and the general question of judicial power against a background of expanding legislative power. The possible expansion or contraction in any is inevitably felt in all.

The Supreme Court has not taken a definite stand on restraint as a law-maker. In *Miami v. Bethel*<sup>27</sup> the court had a splendid opportunity to depart from the doctrine of municipal immunity for torts, committed by employees engaged in a governmental function. The court determined that law-making is for the legislature. The court restricted, in one case,<sup>28</sup> changing the common law to issues where the “rules of the common law are in doubt” or “not within the established precedents.” The court concluded that changes were possible to reflect present day needs only when applying “general principles,” whatever that means. Yet in *Bower v. Bower*<sup>29</sup> a rule was fashioned simply from the constitutional language that every person “shall have . . . justice.” Conscious law making by judges is *not* frowned upon by the scholars.<sup>30</sup>

Related herewith is the relationship between the judicial and legislative powers. Both cannot remain at a legal high-tide mark. In several cases the court appropriately weakened its review powers over

24. *Petition of Kilgore*, 65 So.2d 30, 31 (Fla. 1953).

25. See also, *United States Casualty Co. v. Maryland Casualty Co.*, 55 So.2d 741 (Fla. 1951).

26. See, generally, POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

27. 65 So.2d 34 (Fla. 1953).

28. *Ripley v. Ewell*, 61 So.2d 420, 422-423 (Fla. 1952).

29. 55 So.2d 797 (Fla. 1951) (FLA. CONST. DECL. OF RIGHTS, § 4).

30. See note 26 *supra*. FLA. CONST. DECL. OF RIGHTS, § 4 (1951), provides that “all courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, . . . and right and justice shall be administered without sale, denial or delay.” What power does this grant to the Florida judiciary? See, generally, *Wilson v. Lee Memorial Hospital*, 65 So.2d 40 (Fla. 1953) (suggestion that this language requires that complaints not be “overthrown by technical impediments”); *Bower v. Bower*, 55 So.2d 797 (Fla. 1951) (language used to obtain a just result under a law); *cf. Hettenbaugh v. Airline Pilots Ass’n International*, 52 So.2d 676 (Fla. 1951); *Woods v. City of Palatka*, 63 So.2d 636 (Fla. 1953) (invalidation of city charter provision leaving a plaintiff without remedy for a sidewalk hole injury); *Williams v. City of Green Cove Springs*, 65 So.2d 56, 58-61 (Fla. 1953) (Justice Hobson, dissenting, suggested the constitutional words be used to obtain a just result under a statute). *But cf. Miami v. Bethel*, 65 So.2d 34, 35-38 (Fla. 1953) (Justice Hobson, concurring specially).

legislative action. In *Moore v. Draper*,<sup>31</sup> the court validated an exercise of the legislative police power, with reference to health, stating that "the exercise of the police power is a matter resting in the discretion of the Legislature . . . the courts will not interfere . . . except where the regulations . . . are . . . unreasonable." The case means little since from the common law the subject of health has been grandly regulated and the case language is limited to health. The court did<sup>32</sup> place a presumption in favor of the legislative action. In another case<sup>33</sup> the court validated a legislative authorization to spend for recreational facilities. Here, too, the test was whether the legislative power extension was "reasonable." The court made the somewhat naive statement that, on the question of review on reasonableness, "all the will the courts have is freed from personal, political or economic bias." If a court were able to free itself of these factors in reviewing legislation under a test of "reasonable" the court would approach the objectivity of God.<sup>34</sup> Where the subject matter was more controversial than public health the legislative police power did not fare so well. *State v. North Miami*<sup>35</sup> was a case wherein the court invalidated (under a vague test of "public purpose") expenditures of public funds to assist private enterprise. The antipathy of the court for the legislatively authorized activity was apparent.<sup>36</sup> *Seagram Distillers Corp. v. Benn Greene, Inc.*<sup>37</sup> held that even when the legislature makes a legislative finding of fact in a law, the court will severely review the police power action. Apparently the situation was the same with or without a finding.<sup>38</sup> Judicial review is generally thought to be *sharply* limited with such findings.<sup>39</sup>

Court review of administrative action should be somewhat similar to that of legislative action since both are legislatively authorized and must depend, finally, upon the legislative power. The court recently very wisely stopped the circuit courts from substituting their judgment for that of zoning boards, on the theory that otherwise the courts would "eventually become the zoning boards."<sup>40</sup> Why have administrative experts, otherwise? An excellent decision, which *increased* judicial power,

31. 57 So.2d 648, 649 (Fla. 1952). On this subject, generally, see Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

32. *Id.* at 650.

33. *State v. Jacksonville*, 53 So.2d 306, 307 (Fla. 1951).

34. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 550 (1948).

35. 59 So.2d 779 (Fla. 1952).

36. *Id.* at 785.

37. 54 So.2d 235 (Fla. 1951).

38. Court held such findings were "presumptively correct," *id.* at 236. "This is the situation *without* a finding, I would suppose.

39. See Beckles, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924). See the Substantive Due Process materials.

40. *Miami Beach v. Hogan*, 63 So.2d 493, 495 (Fla. 1953). This weakened the *Miami Beach v. First Trust Co.*, 45 So.2d 681 (Fla. 1950), approach; accord, *Segal v. Miami*, 63 So.2d 496 (Fla. 1953).

was *Carnegie v. Department of Public Safety*<sup>41</sup> wherein the circuit court was ordered to make a finding of fact, independent of the agency; here the administrative hearing on suspension of a license was *ex parte*. The court long has been confused as to whether to follow the widely adhered to principle that administrative action backed by "substantial evidence" carries with it a presumption of correctness.<sup>42</sup>

The court rather obviously found that a circuit judge should not amend the residence for divorce period<sup>43</sup> and that the power to regulate or review suspensions, removals or reinstatements of officers by the governor was not in the judiciary but the governor and the senate.<sup>44</sup> The court broadened administrative power by refusing to interfere with the administrative procedures used to obtain a rate.<sup>45</sup> Placing a defendant on parole was found to be "strictly a function of the executive branch."<sup>46</sup>

The "inherent" power of the judiciary was stated to be the "power to do anything that is reasonably necessary to administer justice within the scope of the court's jurisdiction." More particularly, this power had to do with "incidents of litigation, control of . . . process and procedure, . . . conduct of the officers, and the preservation of order . . . with reference to its proceedings."<sup>47</sup> Of course, each of the three great departments has an implied power area. The problem simply does not arise often.<sup>48</sup>

How broad is the Florida judicial power? Certainly it is that the

41. 60 So.2d 728 (Fla. 1952). The dissent in *Town of Crescent City v. Green*, 59 So.2d 1, 2-7 (Fla. 1952), perhaps would set administrative law back to the Civil War. There was suggested no correctness presumption for an agency finding. The recent *Thronhill v. Kirkman*, 62 So.2d 740 (Fla. 1953), showed almost complete judicial reliance upon the agency finding; *Carnegie v. Department of Public Safety*, 60 So.2d 728 (Fla. 1952) (disregard of administrative finding).

42. Parsons, *The Substantial Evidence Rule in Florida Administrative Law*, 6 FLA. L. REV. 481 (1953). See, generally, SWENSON, *FEDERAL ADMINISTRATIVE LAW* (1952), for an excellent survey on the relationship between judicial power and administrative power in the Federal system, with its up-to-date procedures.

43. *Pepper v. Pepper*, 66 So.2d 280 (Fla. 1953); cf. *Petition of Florida Bar*, 61 So.2d 646 (Fla. 1952).

44. *State v. Sullivan*, 52 So.2d 422 (Fla. 1951).

45. *Jacksonville Gas Corp. v. Florida R. R. & Public Utilities Commission*, 50 So.2d 887 (Fla. 1951).

46. *Marsh v. Carwood*, 65 So.2d 15, 21 (Fla. 1953) (case details constitutional powers of the Parole Commission).

47. *Petition of Florida Bar*, 61 So.2d 646, 647 (Fla. 1952).

48. The Florida Constitution has, if anything, too many specifically mentioned constitutionally determined judicial jurisdictions. The court in *Comer v. State Road Department of Florida*, 66 So.2d 257 (Fla. 1953) (condemnation) construed FLA. CONST. ART. V, § 11; accord, *Peeler v. Duval County*, 66 So.2d 247 (Fla. 1953); and *National Juice Corp. v. Gilligan*, 63 So.2d 914 (Fla. 1953). FLA. CONST. ART. V, § 22, was dealt with in *State v. Ferguson*, 58 So.2d 145 (Fla. 1952) (invalidation under vague constitutional language of small claims court authorization). In *Johnson v. Hayes*, 52 So.2d 109 (Fla. 1951), the court dealt with the jurisdiction of a county judge to set aside dower under FLA. CONST. ART. V, § 17. FLA. CONST. ART. V, § 1 received attention in *State v. Burnes*, 56 So.2d 506 (Fla. 1951), and *Hanson v. State*, 56 So.2d 129 (Fla. 1952). The decision of *In re Advisory Opinion to the Governor*, 58 So.2d 319 (Fla. 1952), was similar to *State v. Ferguson*, *supra*, in that the jurisdictional amount of the court had importance in determining duties of the judge in other courts. See also, *McQueen v. Forsythe*, 55 So.2d 545 (Fla. 1951).

federal judicial power—with expanded executive and legislative functions, development of the so-called political question and effective judicial self-restraint—is less. A federal court would be unlikely, in 1952, to use a quotation to the effect that the court enforces the “spirit as well as the letter” of the constitution.<sup>49</sup> Splendid is the court which can objectively determine the “spirit” of a constitution.<sup>50</sup>

## II. Legislative Power

The court recently stated that “under our State Constitution it is not necessary that the constitution contain specific grants of power to the Legislature; that the Constitution is a limitation upon power rather than a grant of power. For example, had there been absolutely nothing in the Constitution . . . the Legislature would have been all-powerful.” Then the court nullified this grant of power to the legislature by adopting Cooley’s famous doctrine of *implied* constitutional restrictions.<sup>51</sup> The federal courts develop implied *powers* and the Florida courts develop implied *limitations*. In *Brooks v. Pan American Loan Co.*,<sup>52</sup> the court stated that “greater power is vested in the judiciary” than in the legislature, an interesting constitutional thesis.

*Delegation of legislative power.*—Delegation validity is generally included with separation of powers problems since the concept of unconstitutionality here depends on a true separation. Delegation of legislative power as an argument is passé in the federal system<sup>53</sup> and is not strong in Florida. The court recently stated that the “commission may make rules and regulations within the yardstick” furnished by the legislature. However, the agency could not adopt an unlikely construction of the “yardstick.”<sup>54</sup> Another issue was whether a legislative standard could be ambulatory. The court answered in the negative. The legislative words were “accredited school . . . of pharmacy holding membership in the American Association of Colleges of Pharmacy.” The act was saved by making it static as of its enactment. The decision also prohibited delegations of power to private citizens.<sup>55</sup> A standard that the board “shall . . . examine under such rules . . . as such board may prescribe” was held definite enough

49. *Thomas v. State*, 58 So.2d 173, 178 (Fla. 1952).

50. See note 34 *supra*.

51. See note 49 *supra*.

52. 65 So.2d 481, 482 (Fla. 1953) (in the case a legislative direction that legislative member attorneys, during the session, could have cases continued was validated as not an “invasion” of judicial power).

53. *Yakus v. United States*, 321 U.S. 414 (1944) (possibly a war power case) gave it a death blow; all that case required was that the Congress lay out an area for the agency to work in. The legislative standards can be quite indefinite, permitting the agency to experiment on the particular socially troubled subject matter.

54. *Diamond Cab Owners Ass’n v. Florida Railroad & Public Utilities Commission*, 66 So.2d 593, 596 (Fla. 1953).

55. *Attwood v. State*, 53 So.2d 825, 827 (Fla. 1951).



in *Levine v. Hamilton*<sup>56</sup> on the theory that the expert pharmacists on the board could work out the necessary subjects to test applicants better than the legislature; an excellent decision giving full weight to the administrative expertise. These standards obviously cannot be too narrowly drawn and still be enforceable. Agencies need *some* discretionary area within which to experiment.

A statement in *Paramount-Gulf Theatres v. Pensacola*<sup>57</sup> that "The Legislature cannot abdicate the power to a city" is strange<sup>58</sup> as large grants of power to cities were well known at common law. In *Gough v. State*<sup>59</sup> the court restricted a canvassing board with legislative authority to "judge the election and returns" to mathematics rather than judging the validity of returns, indicating the legislature could not grant judicial power. Separation of powers was said to demand this. Why? Administrative boards everywhere handle such judicial functions through delegated legislative power.<sup>60</sup>

### III. Executive Power

There was very little activity here.<sup>61</sup> Agencies were required to remain within the legislative authority delegated to them, in several cases, since otherwise the agencies would "modify" a legislative act.<sup>62</sup> Also it was held that only the judiciary may order probation<sup>63</sup> and that the beverage director, under the separation of powers principle, could not determine the constitutionality of ordinances. This was held a judicial question.<sup>64</sup> The court did broaden administrative power by demonstrating restraint when petitioned to invalidate agency rules *before* the agency had commenced any proceedings under the rules.<sup>65</sup> Insistence that

56. 66 So.2d 266, 267 (Fla. 1953); *accord*, *Simmons v. Hanton*, 65 So.2d 42 (Fla. 1953).

57. 62 So.2d 431 (Fla. 1951) (on rehearing a legislative ratification of the city's action was found).

58. *Brodhine v. Revere*, 182 Mass. 598, 66 N.E. 607 (1903).

59. 55 So.2d 111 (Fla. 1951).

60. *Jaffe, An Essay on Delegation of Legislative Power: I and II*, 47 *COL. L. REV.* 359 (1947).

61. *See*, generally, *Thomas v. State*, 58 So.2d 173 (Fla. 1952), and *Hanchey v. State*, 52 So.2d 429 (Fla. 1951). The appointive powers of the governor were dealt with in the following cases: *In re Advisory Opinion to the Governor*, 63 So.2d 321 (Fla. 1953) (invalidated law by-passing election by people, or appointment by the Governor, of officer); *cf. State v. Squarcia*, 66 So.2d 263 (Fla. 1953) (judge of civil court of record); *Palm Beach v. West Palm Beach*, 55 So.2d 566 (Fla. 1951). Removal powers: *In re Advisory Opinion to the Governor*, *supra*; *In re Advisory Opinion to the Governor*, 52 So.2d 646 (Fla. 1951) (member of Game and Fresh Water Fish Commission); *State v. Sullivan*, 52 So.2d 422 (Fla. 1951) (sheriff). The Court detailed the Governor's general powers to remove, suspend and reinstate).

62. *See* note 54 *supra*; *accord*, *Lee v. Delmar*, 66 So.2d 252 (Fla. 1953); *Jones v. Kind*, 61 So.2d 188, 191 (Fla. 1952) (a fairly close case. The standard was "rules . . . for the control . . . of all applicants . . . and for the conducting . . . of all race tracks . . ."); *Carnegie v. Department of Public Safety*, 60 So.2d 728 (Fla. 1952); *Atlantic Coast Line R.R. v. Mack*, 57 So.2d 447 (Fla. 1952).

63. *Marsh v. Garwood*, 65 So.2d 15 (Fla. 1953).

64. *Dade County v. Overstreet*, 59 So.2d 862 (Fla. 1952).

65. *Atlantic Coast Line R.R. v. Carter*, 66 So.2d 480, 482 (Fla. 1953).

administrative remedies be initially exhausted broadens administrative power by properly reflecting the agency's expertness on the "reasonableness" of the rule of regulation.

#### IV. Conclusion

The separation of powers doctrine in Florida depends for its strength upon the quantitative restraint the Florida Supreme Court exercises in maintaining its judicial power. The power to review legislative and administrative action can become a frankenstein of judicial power.<sup>66</sup> Substantive due process, procedural due process and separation of powers are but tools, in a final sense, with which the court employs the judicial power to, at times, drastically limit action by the perhaps more representative governmental departments.<sup>67</sup>

#### SUBSTANTIVE DUE PROCESS—THE POLICE POWER<sup>68</sup>

The denial to government to take or regulate life or property is a concern of substantive due process—the disagreement is not over the procedure to take, it is over the validity of the very taking.<sup>69</sup> The Supreme Court of Florida apparently does not distinguish between substantive due process and the state police power<sup>70</sup>—probably the court views the substantive due process as directly related to the constitutionally valid breadth of the police power.<sup>71</sup> At least in theory<sup>72</sup> the state constitution acts as a limitation on the generally broad state police power and the *limitation* is to be strictly construed.

The federal government, on the other hand, is theoretically one of constitutionally *delegated* powers; which *powers* are to be strictly construed. In fact,<sup>73</sup> the course of state and federal constitutional law has been very different. The federal powers have been immensely broadened by a Supreme Court which, until only recently, cooperated with state supreme courts in drastically limiting the state police power.<sup>74</sup>

66. See note 26 *supra*.

67. Examine the procedural and substantive due process sections with this thought in mind. A plea for state constitutional law which emphasizes the theoretically large grant of power to the legislature, in the state constitution, instead of that emphasizing the theoretically small restriction therein can be found in Saye, *The Extent of State Legislative Power*, 12 GA. B. J. 147 (1949). Judicial "interference" in the government process probably is not the best solution to legislative excesses, Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

68. For an excellent recent Survey of American due process of law, see WOOD, *DUE PROCESS OF LAW, 1932-1949* (1951).

69. The writer realizes that these concepts are not clearly distinguishable in fact, but believes this terminology is useful because of overwhelming pragmatic usage.

70. *Garvin v. Baker*, 59 So.2d 360, 364 (Fla. 1952).

71. At least this writer hopes so. A modern outlook would view the police power as limited by only a few basic constitutional limitations—rather than private property as an unlimited concern except for a few valid police power regulations. Life in Florida is no longer agrarian simplicity.

72. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 137 (1919).

73. *Ibid.*

74. See, generally, Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909).

This severe constitutional corset placed on state governmental power may well explain the heavy pressure on the federal government to do activities once thought of as local in nature.<sup>75</sup>

It is convenient to break down the general state police power into the various subject matters which seem, in Florida, to have the police power thrown around them.<sup>76</sup>

#### I. Regulation of Businesses Affected With a Public Interest

The Florida Supreme Court, unfortunately, is wedded to terminology which has generally lost its effectiveness elsewhere. The traditional view was that the police power was only broad enough to regulate a "business affected with a public interest." The modern industrial state and its attendant problems have cracked this concept—a valiant protector of private contract and private property.<sup>77</sup> The present Florida Supreme Court is dedicated, theoretically, to a weakened power to review (which mirrors judicial power, generally) the state police power by establishment of an equally strengthened presumption of correctness of legislative exercise of the police power.<sup>78</sup> If this presumption of correctness *means* anything then the terminology "public interest" carries with it *all* businesses and a heavy burden has to be carried by him who would show otherwise.

Regulation by the state of the liquor industry recently was again found constitutionally possible<sup>79</sup>—even to the extent of a waiver of a constitutionally guaranteed privilege—through an operating license, an agreement in advance to searches without warrant. The large police power over gambling enterprises conceivably can be exercised in an "arbitrary manner." The effect of one regulation was to establish a gambling monopoly in a large county.<sup>80</sup> These validations were obvious affairs

75. Witness the demolition of the old local area sacred from the Federal interstate commerce powers, *E.g.*, *United States v. South Eastern Underwriters Ass'n* 322 U.S. 533 (1944). The Florida police power and the federal power were in slight recent conflict. *Stewart v. Mack*, 66 So.2d 811 (Fla. 1953), sustained the Florida police power over Florida highways where interstate commerce was not unreasonably burdened. *But cf.* *Hettenbaugh v. Airline Pilots Ass'n*, 52 So.2d 676 (Fla. 1951). In *Tampa Bay Garden Apartments v. Gay*, 55 So.2d 739 (Fla. 1951), the court permitted taxation of housing rentals when the land involved had been conveyed by the state to the federal government. The injury to that government was found to be nil. The recent congressional activities in the field perhaps has strengthened the decision in *Carnation v. Paul*, 53 So.2d 304 (Fla. 1951). The problem was whether *United States v. California*, 332 U.S. 19 (1947) denied to the state a concurrent power to tax over the areas the California case affected. *Henderson v. State*, 65 So.2d 22 (Fla. 1953), invalidated the Florida Public Utility Arbitration Law because Congress had preempted the regulatory field of peaceful strikes in industries in interstate commerce. This decision was in line with recent Supreme Court of the United States law.

76. The Florida Supreme Court seems to so distinguish. Other states have trouble here, also; *McKinnon, Due Process of Law and Economic Legislation—North Carolina Style*, 1 *DUKE B.J.* 51 (1951).

77. *Hamilton, Affection with Public Interest*, 39 *YALE L.J.* 1089 (1930).

78. *E.g.*, *Smith v. Ervin*, 64 So.2d 166, 169 (Fla. 1953).

79. *Boyton v. State*, 64 So.2d 546 (Fla. 1953); *cf.* *Ragozzino v. Town of Lake Maitland*, 54 So.2d 364 (Fla. 1951). See *Pickerill v. Schott*, 55 So.2d 716 (Fla. 1951).

80. *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953); *cf.* *Simmons v. Hanton*, 65 So.2d 42 (Fla. 1953).

since the common law contains such a long tradition of regulation of liquor and gambling. *Feller v. Equitable Life Assur. Soc.*<sup>81</sup> held that the insurance business was similarly "affected with a public interest." In that case the legislative power over insurance was found such that the court applied a Florida law permitting a judgment for attorney's fees to an insurance contract made outside of Florida. In *Lee v. Pelmar*<sup>82</sup> another approach was used. There an agency attempted to regulate part-time real estate salesmen out of existence. The court admitted that the legislature had determined realty sales to be "clothed with the public interest." In opposition the court placed "the right to work . . . and acquire and possess property" as being more important. It would seem that there must be a connection between the public interest and every regulation of a business so affected, which should prove uniquely agonizing to the administrative agency. The presumption of correctness somehow got lost in this case.

Competition of private parking facilities with a city operated parking project did not invalidate the city endeavor. A public interest was found in such an enterprise.<sup>83</sup> The Florida police power, generally, over property would appear not too strong.<sup>84</sup>

## II. Zoning<sup>85</sup>

The modern approach<sup>86</sup> to zoning and planning demonstrates a judicial awareness that large cities necessitate planned growth. The whole subject is treated by the courts as expert in nature. Courts are not such experts. This requires a strong zoning board presumption of correctness. The Florida Supreme Court decisions were not consistent. *Miami Shores Village v. Bessemer Properties*<sup>87</sup> indicated a lack of judicial awareness of these fundamentals. Therein the court simply determined the unreasonableness of the village zoning plan and invalidated. *Cooper v. Sinclair*<sup>88</sup> demonstrated the more functional judicial attitude. The burden was placed on the erring citizen to show the unreasonableness of requiring house trailers to locate in designated areas. The general police power to zone and plan was referred to. Then the zoning ordinance survived.

The occasional conflict between private property and a zoning agency over the possible enforced use of the eminent domain procedure was

81. 57 So.2d 581 (Fla. 1952).

82. 66 So.2d 252, 255 (Fla. 1953) (since the court found the commission did not have legislative authority anyway, the case was weakened).

83. *Gate City Garage v. Jacksonville*, 66 So.2d 653 (Fla. 1953).

84. *State v. Town of North Miami*, 59 So.2d 779, 787 (Fla. 1952) (court depended on terms to determine if legislative exercise valid). This tendency of some of the state courts has been noted elsewhere; Note, *State Views on Economic Due Process*, 53 Col. L. Rev. 6 (1953).

85. One could argue over the inclusion of zoning powers.

86. E.g., Comment, *Municipal Zoning Law in Connecticut*, 35 CONN. B.J. 162 (1951).

resolved in the 1952 case, *Miami v. Romer*.<sup>89</sup> An owner of property fronting on a street claimed that a city ordinance, requiring no building closer than 25 feet to the center of the street, was invalid because the city should have condemned his property and compensated him. The presumption was correctly used and the attack failed.

Zoning power follows the general police power, of which it can be considered a part, in that if the zoning ordinance is not proven "unreasonable" it is validated.<sup>90</sup>

### III. Spending and Disposing<sup>91</sup>

The court apparently permitted the state authority to subsidize the first medical school established in Florida, even though that school be a privately endowed institution.<sup>92</sup> The employment of a financial advisor, by a city, to assist in a bond refunding program was validated.<sup>93</sup> A county's expenditure to purchase land, construct buildings thereon and lease the project to a private corporation was viewed kindly by the court.<sup>94</sup> City expenditures on possibly a very grandiose scale to develop recreational facilities—perhaps to the extent of constructing an entire resort—were validated.<sup>95</sup> In these latter cases there appeared to be a strong presumption that the attempted expenditure was reasonable.

There were recent cases, however, limiting sharply this police power area.<sup>96</sup> In *State v. North Miami*,<sup>97</sup> the powers to spend and of eminent domain were, in effect, equated, but *neither* was held sufficient to authorize expenditures to purchase land, construct an aluminum plant thereon and thereafter to rent the project to a private industry. Spending for a "public utility" or a "public service" would be proper. The old police power regulation terminology raises its ugly head again.

The case of *Adam v. Housing Authority of Daytona Beach*<sup>98</sup> employed the most disturbing rejection of an adequate police power. The court suggested that the spending power could be used to acquire land and

87. 54 So.2d 108 (Fla. 1951); *accord*, *Miami Beach v. Perell*, 52 So.2d 906 (Fla. 1951).

88. 66 So.2d 702 (Fla. 1953); *cf.* *Garvin v. Baker*, 59 So.2d 360 (Fla. 1952); *Glackman v. Miami Beach*, 51 So.2d 294 (Fla. 1951).

89. 58 So.2d 849 (Fla. 1952) (facts in these cases change the result so easily that precedent value here is weak).

90. *Garvin v. Baker*, 59 So.2d 360, 364 (Fla. 1952).

91. The writer has attempted to distinguish between the spending and borrowing powers. At times the court makes this distinction.

92. *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952).

93. *City of Avon Park v. Sullivan, Nelson & Goss*, 50 So.2d 122 (Fla. 1951).

94. *State v. Dade County*, 62 So.2d 404 (Fla. 1953).

95. *State v. Escambia County*, 52 So.2d 125 (Fla. 1951); *cf.* *State v. Jacksonville*, 53 So.2d 306 (Fla. 1951).

96. This is unlike the Federal situation; *Corwin, Spending Power of Congress*, 36 *HARV. L. REV.* 548 (1923).

97. 59 So.2d 779, 787 (Fla. 1952). *Lewis v. Peters*, 66 So.2d 487 (Fla. 1953), was similar. There the city was disallowed to acquire land to turn over to private interests to develop low-rent housing for service people.

98. 60 So.2d 663, 665 (Fla. 1952).

erect low cost housing thereon if the project were government operated and limited to lessees in the "low income tax brackets." However, the purchase by the housing authority of property, which the owners had permitted to decline into slums, was invalidated because the authority planned to sell the property to private individuals and corporations to develop into a commercial area under new zoning plans. Apparently the court determined the scheme as unreasonable because of the effect on the slum owners. This solicitation is not even admirable, and is still misplaced. The court indicated that the *North Miami* case limited expenditures for a public purpose. The possibility the city might "profit" perhaps made this project a non-public purpose. It is even difficult to justify the opinion as a support of "private enterprise" since the effect was to insist the *city government* operate the project, when completed.

The cases indicate, strangely, that expenditures are valid for "play," but not to enable a local government to build for the future.<sup>99</sup>

#### IV. Borrowing and Pledging<sup>100</sup>

The general governmental situation, constitutionally speaking, with borrowing is dealt with in another part of this article. Two cases did indicate an interesting limitation on the power to borrow. The court, in *Gate City Garage v. Jacksonville*,<sup>101</sup> stated that it was permissible to service bonds from parking meter revenues only if the project being financed had some close relationship to parking meters. Building parking facilities would have that contact while constructing streets would not. The distinction is puzzling. A similar decision disallowed servicing a bond issue to construct port facilities from parking meter revenues.<sup>102</sup> The court also held that a government unit may pledge the revenues from state property, to secure a debt, but may not pledge the property itself.<sup>103</sup>

#### V. Taxation<sup>104</sup>

As well as this writer can determine, in the case of *Panama City v. State*,<sup>105</sup> the court restricted the use of the tax power in aid of the more general police power (of which it is, I would assume, a part) so that "unjustified profits" could not be made. This is interesting. Involved was the use of parking meter revenues to service bonds to construct streets. The court referred to the "inherent right" of "ordinary

99. See also, *Hollywood v. Broward County*, 54 So.2d 205 (Fla. 1951).

100. See, generally, Patterson, *Legal Aspects of Florida Municipal Bond Financing*, 6 FLA. L. REV. 287, 311-313 (1953).

101. 66 So.2d 653, 656 (Fla. 1953).

102. *Chase v. City of Sanford*, 54 So.2d 320 (Fla. 1951).

103. *State v. Florida State Improvement Commission*, 60 So.2d 747, 754 (Fla. 1952).

104. Here, too, one might argue against inclusion under the police power. The Federal tax power is practically unlimited, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

105. 60 So.2d 658 (Fla. 1952).

use of the streets." It would seem that there is an ordinary right to smoke cigarettes, also, or to do, or use, any number of activities, or things, taxed. It was stated that the tax power and the less specific police power, when united, must be for the "welfare of the people." No one could argue with that generality.

There was other recent decisions. The power of the legislature to establish special taxing districts for "public purposes" was validated.<sup>106</sup> A "gross abuse of legislative authority" would be struck down. The property owners in the district created must, of course, be benefited. A legislative finding of benefits was of assistance unless "devoid of any reasonable basis."<sup>107</sup>

#### VI. Eminent Domain<sup>108</sup>

The most important decision in this section was *Adams v. Housing Authority of Daytona Beach*,<sup>109</sup> which has already been dealt with under the spending power. There the legislature authorized the city, by purchase and eminent domain, to acquire a "blighted area," plan a development for the area, re-zone it under that plan and sell or lease the project to private enterprise for general commercial usage. The decision is quite confused. The court distinguished between the police and eminent domain power—the former to be exercised without compensation (the power to regulate property "to promote the health, morals and safety"—what happened to the general welfare?), the latter requiring compensation. Assuming this to be true why are not the powers usable in aid of each other? The police power *alone* should be used, according to the court, to abate such an area's filthy slums. The eminent domain power was restricted to a "public use" which the court found not present. Yet the court also limited the spending power of government equally in the case.<sup>110</sup> So government, forced with a cancerous area in its midst, can apparently abate that ailment by condemnation as a nuisance (as unhealthy) or condemnation under eminent domain which leaves the land to be developed again by the same owners who originally permitted it to disintegrate. The crux seems to be the redevelopment by private enterprise which, under the vague terminology "public use," led the court to invalidate as a *disturbance* to "private enterprise."<sup>111</sup> The court, in a

106. *State v. Anna Maria Island Erosion Prevention District*, 58 So.2d 845, 846 (Fla. 1952).

107. *State v. Warren*, 57 So.2d 337 (Fla. 1951); *accord*, *Rosche v. Hollywood*, 55 So.2d 909 (Fla. 1952). The factor of taxation for a valid purpose was exemplified by *Palm Beach v. West Palm Beach*, 55 So.2d 566 (Fla. 1951). See Patterson, *Legal Aspects of Florida Municipal Bond Financing*, 6 FLA. L. REV. 287, 311-313 (1953). See, also, *Chase v. Board of Public Instruction*, 52 So.2d 122 (Fla. 1951).

108. The great power might well be considered separately from the general police power. The convenience in not so doing rests upon the fact that substantive and procedural due process reach into both, and the eminent domain action is generally *in aid* of some facet of the general welfare.

109. 60 So.2d 663, 666, 668 (Fla. 1952).

110. See note 98 *supra*.

111. See note 109 *supra*, at page 669.

later case,<sup>112</sup> suggested that much the same result could be accomplished if private enterprise were permitted to utilize the fruits of eminent domain in a *small* way. On reading this case one is not certain whether the general police power, the spending power, or the eminent domain power—or all three—are the basis for decision.<sup>113</sup> The spending and eminent domain powers have been equated by the court.<sup>114</sup>

#### VII. The Police Power, Generally<sup>115</sup>

*Health.*—The police power exercise in connection with health was validated where a statute authorized confinement of individuals affected with a contagious disease.<sup>116</sup> A heavy presumption in favor of the law crushed a religious freedom argument. Where private property or contract rather than a “civil right” was concerned the court came to a quite different conclusion.<sup>117</sup> The court’s language was reminiscent of that in the famous *Lochner v. New York* case.<sup>118</sup> An ordinance required barber-shops to close after 7:00 P.M. The particular barbershop catered to an evening trade. The court held the ordinance was “not shown” to have any relation to the health of the barber or public. Mr. Justice Peckham, in the *Lochner* case, when he similarly reversed the presumption of legislative correctness, said about the same with bakers. The court even admitted the “relation” of the barber to the public interest; insult after injury it would appear.

The case of *Gustafson v. Ocala*<sup>119</sup> was more attractive on its facts, for there the presumption referred to above was fairly overcome. The health of an area was referred to in invalidating a prohibition of pasteurized milk sales therein where the milk was pasteurized elsewhere. The milk industry involved adequately demonstrated the lack of basis, in health, for the ordinance. The court correctly utilized the presumption.

*Safety.*—There have recently been several traffic meter revenue cases, under the police power as related to safety. In the *Panama City v. State*<sup>120</sup> case the police power, with reference to traffic control, was not held sufficiently strong to permit construction of streets financed by a bond

112. *Gate City Garage v. Jacksonville*, 66 So.2d 653, 656 (Fla. 1953).

113. See Note, 54 A.L.R. 7 (1928), for a collection of these public use eminent domain cases. See *Redevelopment Agency of City and City of San Francisco v. Hayes*, 22 U.S.L. Week 2390 (U.S. Jan. 29, 1954).

114. *State v. Town of North Miami*, 59 So.2d 779, 785 (Fla. 1952). See, generally, Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Note, 7 GEO. WASH. L. REV. 520 (1939).

115. This breakdown seems to mirror the distinctions of the Court. This is disturbing, for if the Court followed its own professed limitations on judicial review, such emphasis on subject to validate a police power exercise would not be necessary. See notes 71, 72, and 73 *supra* and the text related thereto.

116. *Moore v. Draper*, 57 So.2d 648 (Fla. 1952).

117. *Miami v. Shell's Super Store*, 50 So.2d 883 (Fla. 1951).

118. 198 U.S. 45 (1905). One could almost close one's eyes and be back in 1905.

119. 53 So.2d 658 (Fla. 1951).

120. 60 So.2d 658, 659 (Fla. 1952); *accord*, *Gate City Garage v. Jacksonville*, 66 So.2d 453 (Fla. 1953).



issue serviced from parking meter revenues. The court's strange reasoning ran this way: Streets are for movement of traffic and secondarily for parking. Meters are placed on streets "as a consequence of the existence of said streets." The police power cannot get the "cart before the horse." Why? The court worried that control of traffic is "too remote" from street construction. Mr. Justice Terrell's dissent suggested that the court had ignored the principle that the legislature is the "judge of its scope" on police power matters.<sup>121</sup> Why the construction and improvement of streets is unrelated escapes this writer. A similarly handled decision was *Loftin v. Miami*.<sup>122</sup> A safety ordinance was passed which limited the speed of trains within the city and required trains to come to a complete stop at crossings, unless certain safety devices were installed. The court found that the plaintiff's trains were involved in only a few accidents in 1950. The court found the "expense" would be great for the plaintiff to conform to the ordinance. This "expense" was made a factor in determining the "reasonableness" of the ordinance. The ordinance was invalidated.

Property "rights" apparently received a somewhat stronger resistance to the police power exercise than "civil rights," where safety was concerned. The state through a court injunction<sup>123</sup> was permitted to crush a picket line, in connection with a labor dispute, even though the picketing was peaceful and no evidence connected the union with violence. The police power, in connection with safety, was not dwarfed here.

*Morals.*—In *Pickerell v. Schott*,<sup>124</sup> the court upheld a severe regulation of the relationship between liquor retailers and the rest of the liquor industry. Normal credit arrangements were almost abrogated. That these restrictions might promote "temperance" assisted the court's rationale.

121. *Id.* at 660-662.

122. 53 So.2d 654, 656 (Fla. 1951).

123. *Miami Typographical Union No. 430 v. Ormerod*, 61 So.2d 753 (Fla. 1952). How this restriction of free-speech can be justified, when the union was not connected to the violence, is difficult to explain.

#### Police Power and Labor's "Civil Rights"

For convenience to readers here are collected several of the more important decisions in the police power vs. labor's "civil rights" area. This is, of course, generally a part of freedom of speech. (The federal and state decisions indicate that this area is not free speech, *as such*.) *Miami Typographical Union No. 430 v. Ormerod*, *supra*, held that picketing for an unlawful purpose (to force employer to coerce employees to join union) was not protected as part of free speech. The violence in the case was not related to the union or the picket line area. The picket signs language was directed more toward "scabbing" by the still employed employees. *Hotel & Restaurants Employees & Bartenders Union v. Cothron*, 59 So.2d 366 (Fla. 1952), held that picketing an employer who fired union employees was constitutionally (the Florida cases generally fail to distinguish between the State and Federal Constitutions) protected. *Carpenters' Dist. Council v. Miami Chapter of Associated Gen. Contractors of America*, 55 So.2d 794 (Fla. 1951), held that an injunction may be utilized in Florida to rather drastically interfere in inter-union affairs where the union is breaking a contract with an employer group. The Florida Constitutional language on closed shop arrangements was implemented in *Local No. 234 v. Henley & Beckwith*, 66 So.2d 88 (Fla. 1953).

124. 55 So.2d 716 (Fla. 1951).

125. *State v. Ucciferri*, 61 So.2d 374, 375 (Fla. 1952).

The court also upheld a limitation on reporting race track information.<sup>125</sup> Severe restriction of activities "injurious to the public morals" was held possible.

*Generally.*—The Florida Supreme Court held that legislative power is inadequate to extend a restriction, in a private contract, after the normal expiration.<sup>126</sup> A prohibition on construction, to eliminate noise, was held invalid<sup>127</sup> as being beyond the police power scope.<sup>128</sup> It appeared that the court set up a presumption *against* the reasonableness of the ordinance. Thus, the court refused to uphold a Miami ordinance designed to stop the heavy inconvenience to motorists from train crossing delays.<sup>129</sup> This inconvenience, it would seem, simply was beyond the reach of the police power. The citizens were told to "adjust themselves" to it, and any possible presumptions were in favor of the railroads. In *Chase v. Sanford*,<sup>130</sup> the court indicated that the city could not contract in a bond issue, to keep parking meters fixed for a long period of time. This was a reasonable decision since the police power in connection with safety has been traditionally sacred from such irrevocable arrangements. At issue again was the Florida fair trade agreements law.<sup>131</sup> The legislature had added a "finding of fact" that the law was a lawful exercise of police power and would not create monopolies. The law was again crippled. The fact findings by the legislature were brushed aside since the findings were conclusions, not "facts." The court took judicial notice of "contrary . . . truths." These acts do seem to have trouble in the courts.<sup>132</sup>

The power of the legislature over elections and politics was referred to by the court to sustain the 1951 election code, under which contributions to candidacies for political office in the state have to be made in a certain manner.<sup>133</sup> Of course these laws are easily determined necessary in times of enormous political expenditures.<sup>134</sup> The suit concerned a radio station and a newspaper. Obviously involved were freedom of press and speech. An extremely strong presumption was pronounced in favor of the legislative restriction. In view of the court's weak stand where private property is concerned the validity of the statement "beyond all reasonable doubt that, under any rational view . . ." seems doubtful. The court also validated as a "municipal function" a city's operation of a radio-television station.<sup>135</sup>

126. *Griffin v. Sharp*, 65 So.2d 751 (Fla. 1953).

127. *Town of Bay Harbor Island v. Schlakik*, 57 So.2d 855, 857 (Fla. 1952).

128. This writer is not sure—the case is confused.

129. *Loftin v. Miami*, 53 So.2d 654 (Fla. 1951). See note 122 *supra*.

130. 54 So.2d 370 (Fla. 1951).

131. *Seagram-Distillers Corp. v. Ben Green*, 54 So.2d 235 (Fla. 1951).

132. The power to determine minimum prices seems to be in trouble, Note, 1 U.S.L. Rev. 100 (1953).

133. *Smith v. Ervin*, 64 So.2d 166, 168, 169 (Fla. 1953) and *Ervin v. Finley*, 66 So.2d 175 (Fla. 1953).

134. See, generally, Comment, 41 CALIF. L. REV. 300 (1953).

135. *State v. Jacksonville*, 50 So.2d 532 (Fla. 1951).

Agency determination of value basis for rate-fixing was tolerated in a 1951 case wherein the rate had an "end result" of reasonableness.<sup>136</sup> The police power over civil service employees sustained a civil service rule regulating an employee's activities off of the job.<sup>137</sup> The power of the legislature to authorize inclusion of lands in a municipality was at issue in two cases.<sup>138</sup> Only lands that were so "wild," "unoccupied" and "unimproved" that inclusion would result in no benefits thereto could resist the legislative power. Presumption of correctness was in favor of the legislature.

### VIII. Conclusion

The state police power is not presently at the strength one would expect in a modern non-agrarian state. The Florida Supreme Court's distaste for analysis is probably one reason therefor—from the cases it is impossible to determine if there is one general police power or a number of powers tenuously related to some vague general police power. The court's uneasy use of the legislative presumption of correctness adds to the haze. Why also should government power be *broader* in regulation of the human "rights" area, as opposed to the property "rights" area?<sup>139</sup> Since a valid police power exertion, in the last analysis, must not be "unreasonable" and since that test almost directly will mirror the justices' personal tastes and distastes, it is not "unreasonable" to state that incorrect usage of presumptions in the police power field results in a vast increase in judicial power.<sup>140</sup>

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136. *Jacksonville Gas Corp. v. Florida R.R. & Public Utilities Commission*, 50 So.2d 887, 892 (Fla. 1951). This is something of a procedural due process concern.

137. *Johnson v. Trader*, 52 So.2d 333 (Fla. 1951).

138. *Gillette v. Tampa*, 57 So.2d 27, 29 (Fla. 1952) and *State v. Hollandale*, 52 So.2d 797 (Fla. 1951) (presumption not involved in case. Lands were excluded).

139. For convenience to readers here are collected several of the more important (*none* are world-shaking) decisions in the police power vs. constitutional "civil rights" field. Religious freedom: *Henderson v. Antonacci*, 62 So.2d 5, 8 (Fla. 1952), indicated that laws closing businesses on Sunday are valid *only* under the police power as related to health. The police power must not be based upon "any religious principle". The Court made the rather naive statement that the Federal and State Constitutions require "the complete separation of church and state". *Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952), validated the location of a private chapel in a public school building. In view of *McCullum v. Board of Education*, 333 U.S. 203 (1948), the decision is questionable. *Moore v. Draper*, 57 So.2d 648 (Fla. 1952), crushed a religious freedom argument by validating a police power confinement of a diseased individual. See the excellent article, Steinhardt, *Religious Freedom and State Control*, 6 *MIAMI L.Q.* 385 (1952). Speech and press freedoms: *Ervin v. Finlay*, 64 So.2d 175 (Fla. 1953), and *Smith v. Ervin*, 64 So.2d 166 (Fla. 1953), validated slight regulation of radio broadcasting and newspaper publishing with reference to expenditures and assistance in furtherance of political candidates. Under a strong legislative presumption of correctness the law as held reasonable—police power over elections was invoked. The state police power over morals validated, in *State v. Occiferri*, 61 So.2d 374 (Fla. 1952), a law regulating the flow of race track information. Cf. *Southern Bell Tel. & Tel. Co. v. State*, 53 So.2d 863 (Fla. 1951).

140. See note 74 *supra*. *Tel. & Tel. Co. v. State*, 53 So.2d 863 (Fla. 1951).

## PROCEDURAL DUE PROCESS

I. Administrative Due Process<sup>141</sup>

The inter-action between substantive (police power) due process and procedural due process is quite interesting. The cases illustrate that the state police power breadth definitely relates to the strength of procedural due process.<sup>142</sup>

In 1953, the court held<sup>143</sup> that a law providing for "the automatic suspension of a beverage license, without notice and hearing, but after some communication facility has been removed from the premises by a law having for its purpose the elimination of . . . gambling" did not violate procedural due process conceptions. The state power over the liquor business was referred to to sustain the agency action under the law. The decision needs that reference. A similar liquor regulation case<sup>144</sup> validated the omission of an agency hearing, on the issue of constitutionality of the agency's action, where an independent suit for that purpose was possible. The state power over the highways was insufficient, strangely, to justify a summary disposal of a truck by state officers (no hearing) to satisfy a fixed penalty for overloading. The court indicated<sup>145</sup> that such procedure would be valid where no factual issues could arise. When would this be possible? The accuracy of the truck scales, being open to question, invalidated the summary procedure. The court cited the famous *Lawton* case<sup>146</sup> but refused to follow that approach. The director of the department of public safety was permitted<sup>147</sup> to suspend a driver's license without notice or hearing because the holder had a "privilege" rather than a "right." Obviously, the real basis for the decision was the extent of the state police power over highways and traffic problems. Similar to these cases was *Chastain v. Mayo*<sup>148</sup> which held that conditional pardon holders can be rearrested and recommitted by the board of pardons without generally followed administrative due process procedures. The police power reference here was simple to locate. Happily, civil service employee severance demanded notice and hearing.<sup>149</sup> The federal cases make similar demands.<sup>150</sup>

141. See, generally, Stone, *An Introduction to the Administrative Process*, 6 *MIAMI L. Q.* 281 (1952).

142. See, generally, McKinnon, *Due Process of Law and Economic Legislation—North Carolina Style*, 1 *DUKE L.J.* 51 (1951).

143. *Holloway v. Schott*, 64 So.2d 680 (1953) (the decision was strengthened by the fact that a hearing had been had before another agency before the communications were pulled out).

144. *Pickerill v. Shott*, 55 So.2d 716 (Fla. 1951). This is unfortunate. Agency expertise is helpful to courts, even on the question of validity of agency action—this is particularly true when the reasonableness of the agency action is tested.

145. *Youngblood v. Darby*, 58 So.2d 315 (Fla. 1951).

146. *Lawton v. Steele*, 152 U.S. 133 (1894) (perhaps the value of the property made a difference).

147. *Thornhill v. Kirkman*, 62 So.2d 740 (Fla. 1953).

148. 56 So.2d 540 (Fla. 1952).

149. *Johnson v. Trader*, 52 So.2d 333, 336 (Fla. 1951) (may be dictum).

150. Perhaps. See *Bailey v. Richardson*, 341 U.S. 918 (1951).

The court also held<sup>151</sup> that an agency which serves charges upon a regulated individual, who defaults thereafter, may act adversely to that individual without a finding of fact to support the agency action. This reasonable extension of agency power was more than counter-balanced by the invalidation<sup>152</sup> of an attempted action by a city council to fine or jail employees found guilty of disobedience "by a two thirds vote" of the council. Some agencies<sup>153</sup> have been permitted rather direct judicial power, but the lack of judicial procedural safeguards would easily seem to negate much justification for this particular ordinance.

## II. Judicial Due Process (Civil)

An agency sought to enjoin in a circuit court a defendant from practicing dentistry without a license.<sup>154</sup> Under the law the injunction should issue when the agency certified the lack of the license. The court may have held there was a lack of due process in this issuance, on such evidence.<sup>155</sup> In *Denzen v. Slatcoff*,<sup>156</sup> it was held that a fraudulent conveyance of personal property by a defendant in a civil action could be set aside, as to the receiver thereof, in a proceeding supplementary to the civil suit. The only notice was service to the receiver of a rule to show cause, which stated the claim of the plaintiff and the hearing date. This was "sufficient notice." In *Peeler v. Duval County*,<sup>157</sup> procedural due process was not denied in eminent domain proceedings wherein the jury was allowed to evaluate the pieces of property and the attorneys' fees without specifically determining the ownership of each piece of property. The question of ownership and division of attorney's fees was left to a future proceeding. The court stated that the same judge could handle this function in the process of apportioning the money in the registry of the court. In another eminent domain decision<sup>158</sup> a state agency was permitted a speedy procedure for obtaining possession of property. The procedure was supplementary to the main action, and, under it, defendants were served and had counsel, appraisers were appointed and no less than twice the property's appraised value was deposited in the court registry. This latter amount, if not equal to a later jury evaluation, could be increased by the court by deficiency judgment. This summary procedure

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151. *Hime v. Florida Real Estate Commission*, 61 So.2d 182 (Fla. 1952).

152. *Jones v. Slick*, 56 So.2d 459 (Fla. 1952).

153. *Albertsworth, Administrative Contempt Powers*, 25 A.B.A.J. 955 (1939).

154. *Peters v. Brown*, 55 So.2d 334 (Fla. 1951).

155. It is difficult to say from the language. The agency, at the trial, also sought to enter the evidence of two witnesses who had been hired by the agency to solicit dental work from the defendant. Such deliberately purchased evidence seemed to reach to due process limitations, also.

156. 66 So.2d 483, 485 (Fla. 1953).

157. 66 So.2d 247 (Fla. 1953).

158. *State Road Dept. v. Forehand*, 59 So.2d 901 (Fla. 1952).

is necessary in the execution of public work contracts wherein it is sometimes necessary to acquire use of land on short notice.

### III. Judicial Due Process (Criminal)

A number of factors were determined to be a part of the total picture of adequate criminal judicial due process. In *Gerde v. State*,<sup>159</sup> it was held that "the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime" was part of a "fair and impartial trial." In *Cacciatore v. State*,<sup>160</sup> a concurring opinion shed some light on confused decisional language. The suggestion was that separating a negro juror from white jurors under circumstances which subtract from the "importance of his station as a juror clothes him with" might deny procedural due process. A somewhat different adverse effect on procedural due process was<sup>161</sup> the statement in argument by the prosecution that "The time to stop a sexual fiend . . . is in the beginning and not . . . after some poor little child . . . lost her life." The charge was fondling an infant. A fair trial, then, was denied where "prejudicial emotion" or "punitive or vindictive exhibitions of temperament" were involved in the trial. *Gluck v. State*<sup>162</sup> was analogous in that the prosecution's continued remarks about the defendant's "religion, character and occupation" reflected on a fair trial.

The most interesting case<sup>163</sup> had to do with change of venue. The defense offered an expert, on public opinion polls, who was rejected by the court. A survey had been made in the trial community to determine if the defendant negro could possibly receive a fair trial in a white-woman-rape situation. The problem seemed to be whether there was a dearth of unprejudiced jurors. The poll was representative. The actual questioned, or questioners, were not offered in evidence. It is unfortunate that more care was not taken on the preparation for trial of this evidence—poll evidence on change of venue necessity quite conceivably may be the most accurate. The danger of hearsay was noted.<sup>164</sup> The court stated that such a trial "cannot be expected to be a pure procedural gem."<sup>165</sup> It certainly was not. The lack of court control over the newspaper press in this country makes solution of due process requirements, with reference to change of venue, quite urgent.<sup>166</sup>

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159. 64 So.2d 915, 916 (Fla. 1953) (intent, with charge of breaking and entering with intent to commit rape, left out).

160. 49 So.2d 588, 589-591 (Fla. 1950).

161. *Stewart v. State*, 51 So.2d 494, 495 (Fla. 1951).

162. 62 So.2d 71, 73-75 (Fla. 1952) (concurring opinion aired the matter).

163. *Irvin v. State*, 66 So.2d 288, 291 (Fla. 1953).

164. Yet the witnesses accepted let in hearsay.

165. See note 163 *supra*, at page 296.

166. Holtzoff, *The Relation Between the Right to a Law Trial and the Right of Freedom of the Press*, 1 SYRACUSE L. REV. 369 (1950).

IV. Clarity or Definiteness of Expression<sup>167</sup>

In *State v. Sumter County*<sup>168</sup> the court validated as not too vague and indefinite a tax "not to exceed five mills per annum." A legislative authorization to the parole commission of power to supervise defendants released from the state hospital failed<sup>169</sup> since the manner of exercising the power was omitted. The court<sup>170</sup> also voided a city ordinance which provided that no multiple parking garages should be built except upon "approval . . . by the city council . . . after a public hearing at which due consideration shall be given to the effect upon traffic." In a 1952 case<sup>171</sup> the court apparently related the ambiguous features in an ordinance forbidding construction to exercise by the city of the police power to regulate private property. The distaste of the court for the regulation attempt probably was more responsible for the decision, since the ordinance, in view of its purpose, was fairly certain.<sup>172</sup> The suggestion was made by Justice Drew, concurring,<sup>173</sup> that a law closing only certain businesses on Sunday was invalid for lack of an "ascertainable standard of guilt." Since the words were "outlying grocery store" it seems the Justice should be deferred to. His test was when "men of common intelligence must guess." The cases in this small field of the law are of slight precedent value since each depends upon unique facts.<sup>174</sup>

## SELF-INCRIMINATION, BILL OF ATTAINDER AND RETROACTIVE LAWS

In *Florida State Board of Architecture v. Seymour*<sup>175</sup> an architect involuntarily testified before a grand jury and at the trial, for bribery, of county officials. The Florida testimonial immunization law exempted one from any "penalty or forfeiture" on account of certain involuntary disclosures. The court held that a proceeding by the board of architecture to revoke the architect's license was a "penalty or forfeiture." Since the board under its statutory authority has a duty to the public which is somewhat similar to the duty which the Florida Bar apparently has, with reference to lawyers and the public, the decision may have consequences which are unfortunate.<sup>176</sup> This immunization law was sensibly restricted in *State v. Grayson*.<sup>177</sup> The law was stated to be applicable only when

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167. One might argue over where to place this section.

168. 60 So.2d 529 (Fla. 1952).

169. *Marsh v. Garwood*, 65 So.2d 15 (Fla. 1953).

170. *Drexel v. Miami Beach*, 64 So.2d 317, 318 (Fla. 1953) (arbitrary action possibility by Commission helped).

171. *Town of Bay Harbor Islands v. Schlapek*, 57 So.2d 855, 856 (Fla. 1952).

172. The words were "during said period of time."

173. *Henderson v. Antonacci*, 62 So.2d 5, 9-10 (Fla. 1952).

174. See, generally, Note, 62 HARV. L. REV. 77 (1948).

175. 62 So.2d 1, 2 (Fla. 1952).

176. Would a lawyer similarly be immune from any proceedings to revoke or suspend his license?

177. 55 So.2d 554, 556 (Fla. 1951); accord, *McKown v. State*, 54 So.2d 54 (Fla. 1951).

the person testifying does so under "compulsion, coercion, or an offer of immunity." In applying the immunization law in *State v. Willard*<sup>178</sup> the court determined that the use of a search warrant to seize records for later use in a criminal prosecution violated the privilege against self-incrimination. The court needlessly held that both the privilege against self-incrimination and the privilege against illegal search and seizure were violated. In another case<sup>179</sup> a corporation was held not entitled to the benefits of the privilege, which is in line with the quite general rule on this subject.

There were two decisions related to the prohibited bill of attainder in the past two years. In *Jones v. Slick*,<sup>180</sup> an ordinance was in issue which provided that all ordinances of the city council should be obeyed by city officials and that any official who should be found guilty of disobedience "by a two-thirds vote of the city council" would be fined or imprisoned. It was held a bill of attainder and invalidated. In *Peters v. Brown*<sup>181</sup> a law which ordered a court to issue an "injunction against one in the exercise of his business on the certificate of an officer that he does not have a valid license and gives him no opportunity to be heard" was stated to come "near" to violating the inhibition against Bills of Attainder."<sup>182</sup>

One civil decision<sup>183</sup> presented the possibility of retroactive application of a law. A civil service board promulgated a rule inhibiting civil service employees from engaging in the sale of alcoholic beverages. The plaintiff was a policeman. The city sold him a license to sell liquor and passed an ordinance zoning his premises for that purpose. The issue was whether the civil service rule could be applied to plaintiff to sever his connections with the police department. The court held not—at least not until plaintiff had "ample" time within which to choose between his civil service position or continuance in the liquor business. The court, fortunately, did not foreclose retroactive application of laws reasonably necessary to preserve the integrity of the civil service system when, as in this case, the blow to the employee can be softened.

#### CONSTITUTIONAL FACETS OF PROCEDURE<sup>184</sup>

##### I. Trial by Jury<sup>185</sup>

There was one somewhat unusual decision involving the privilege of trial by jury. In *Sneed v. Mayo*<sup>186</sup> a petitioner sought to obtain release

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178. 54 So.2d 179 (Fla. 1951).

179. *State v. Willard*, 54 So.2d 183 (Fla. 1951).

180. 56 So.2d 459, 461 (Fla. 1952).

181. 55 So.2d 334, 335 (Fla. 1951).

182. See Norville, *Bill of Attainder*, 26 ORE. L. REV. 78 (1947), for a good article on this law.

183. *Johnson v. Trader*, 52 So.2d 333 (Fla. 1951).

184. This assembly of constitutional privileges and rights is treated as well here as not.

185. This law is well developed in some states. See Mayers, *The Constitutional Guarantee of Jury Trial in New York*, 7 BROOKLYN L. REV. 180 (1937).

186. 66 So.2d 865, 870-871 (Fla. 1953).



from imprisonment on original habeas corpus proceedings in the Florida Supreme Court. The element of unusualness was that petitioner convinced the court that a hearing on the merits of his arguments was imperative. Petitioner's letter to one of the justices mentioned that he was poor, uneducated, only 21 years old at trial and unfamiliar with things legal. He insisted he so informed the trial judge and that he objected to trial without jury. The prison custodian's answer denied the essentials in petitioner's letter. Attached to the answer was a certified copy of what trial testimony there was and an affidavit by the trial judge to the effect that petitioner had waived a jury trial. The lower court record showed only that there was no jury trial. The supreme court stated a preference to rely on the "official court record—the only vehicle through which a court of general jurisdiction can speak officially." This was silent on any waiver of the "right" to trial by jury made in "open court." This silence was held to throw serious doubt on the legality of trial. Obviously, judges will have to insist that waiver be made in open court and that it appear "affirmatively either from the record proper or from the transcript." The judge's affidavit was held incompetent. The burden of proof at the hearing on the merits of petitioner's claim was placed on the petitioner. Speculation on the number of records which do not reflect such waivers is fascinating. There were several other cases on the constitutional privilege of trial by jury.

In *Dezen v. Slatcoff*<sup>187</sup> the court held that a jury trial on controverted fact issues could be delayed, in proceedings summary in character. In a supplementary proceeding to set aside a fraudulent transfer, a jury trial could be requested *after* the sheriff had levied on the property and after claimant had filed answer and bond. Also, a request for a jury trial could be made in "a separate document from the complaint or answer"—even after, and separate from, the amended complaint.<sup>188</sup>

The concurring opinion<sup>189</sup> in *Cacciatore v. State* indicated that the entrance into jury duty of the law of segregation of colored and white citizens may well invalidate a trial proceeding since trial by jury is on a constitutional basis and humiliation of jurors would cripple their proper functioning. The door was left ajar for *some* discriminatory practices.<sup>190</sup>

## II. Privilege of Counsel

The Florida Constitution, Declaration of Rights, section 2, states that the accused "shall be heard by himself, or counsel, or both." The above-mentioned petitioner, in *Sneed v. Mayo*,<sup>191</sup> used this constitutional

187. 66 So.2d 483 (Fla. 1953) (civil case).

188. *Messana v. Maule Industries*, 50 So.2d 874 (Fla. 1951) (civil case).

189. 49 So.2d 588, 589-590 (Fla. 1950).

190. *Ibid.*

191. See note 186 *supra*, at pages 871, 872, 874. For survey of the somewhat confused federal and state law see Comment, 28 TEX. L. REV. 236 (1949).

avenue, also. He claimed that he requested counsel, in addition to the allegations already mentioned. The custodian's answer was similar on this issue, as was the trial judge's affidavit. The court spelled out a good deal of general law on this subject, and, being the latest pronouncement, is of interest. Waiver is possible when accused is of "mature age and judgment." Otherwise? There is no absolute duty for court appointment of counsel "for indigent defendants except where capital punishment is involved." Record silence infers that defendant waived benefit of counsel. This amounts to a presumption, which is overcome by a "showing that the accused was incapable, because of age, ignorance, or lack of mental capacity, of representing himself." Defendant's capacity is a factual issue. A finding on this point by the "trier of facts," supported by evidence of record, will stand on review. Lack of such "finding" means the competency issue may be raised in a "post conviction proceeding." The court made a plea for complete trial transcripts, which is understandable. The trial judge's affidavit was held incompetent. Case was set for hearing on the merits. The burden on this issue, too, was placed upon petitioner. It is difficult from reading the decision to determine whether the conclusion was based upon state or federal constitutional law.

### III. Constitutional Privilege to Cross Examination and the Grand Jury

In *Coco v. State*<sup>192</sup> the court held that an adequate cross examination in a criminal trial was "an absolute right." This was a "right of a full . . . cross examination of a witness upon subjects the door to which is pushed ajar on direct examination." The court referred to the Florida Constitution, Declaration of Rights, section 2, which provided that the accused shall have the right to "meet the witnesses against him face to face" in open court. The area of permissible cross examination is generally dealt with as one over which the trial court has a large discretion. Assuming this, the decision, on the facts, was not too impressive.

The Florida Constitution, Declaration of Rights, section 10, provides that, "No person shall be tried for a capital crime unless on presentment or indictment by a grand jury." There is also authorization to the legislature to regulate the number of grand jurors. A grand jury of 23 members was recently held valid.<sup>193</sup>

### IV. The Bail Situation

After a conviction for rape a defendant applied to the trial court for supersedeas bond pending appeal.<sup>194</sup> Rape is a capital offense. The Florida Constitution, Declaration of Rights, section 9, states that, "All persons shall be bailable by sufficient sureties, except for capital offense

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192. 62 So.2d 892, 896 (Fla. 1953).

193. *Lightfoot v. State*, 64 So.2d 261, 265-266 (Fla. 1953) (on rehearing).

194. *Gray v. State*, 54 So.2d 436, 437 (Fla. 1951).

where the proof is evident or the presumption great." The issue was whether the defendant was "entitled to bail pending appeal despite the fact he was recommended to mercy and sentenced to fifteen years." The court held that this matter was within the "sound discretion of the (trial) court." The Florida Supreme Court then exercised *its* discretion and made this fact situation bailable. In *Larkin v. State*<sup>105</sup> the petitioner was charged with murder. The court determined that such a charge placed the burden of proof on the petitioner to show that proof of his guilt was not "evident or the presumption great." If the evidence showed no more than a "probability of guilt" bond should be granted. The evidence in this case was taken at a coroner's inquest and with a confession demonstrated "evident" guilt.

### V. Double Jeopardy

There were several cases involving the Florida Constitution, Declaration of Rights, section 12, which provides that "No person shall be subject to be twice put in jeopardy for the same offense." In *State v. Cootner*,<sup>106</sup> the defendant was charged with burning the personal property of William Cootner. The court, at the conclusion of the states evidence, granted a motion for directed verdict on the ground that the allegation of ownership was quite material. A motion to quash a second information was filed on the ground of double jeopardy—that the particular ownership of the property was not material, and the same evidence except as to ownership would be used in the second case. The court disallowed the defendant's inconsistent stand. The two informations were held to charge separate offenses. There was then no double jeopardy. The court also referred to a doctrine of estoppel. *State v. Anders*<sup>107</sup> was a similar case. The rule was stated to be that "if the facts charged in a subsequent information would, if found to be true, have warranted a conviction upon a prior information, a prosecution under the subsequent information is barred." The court refused to consider an estoppel argument.

The issue in *State v. Lewis*<sup>108</sup> was whether one was immunized "from a second trial on the ground of double jeopardy" where the court "declared a mistrial because he was convinced that the rights of the defendant were prejudiced, account of the false swearing" of defendant's witnesses. A discharge of jury was held to be authorized only because of "manifest necessity." Lacking this, a plea of double jeopardy would prevail. The discretion of the judge was held to be large and defendant's consent to discharge was an important factor. Here it was held that the jury

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195. 51 So.2d 185 (Fla. 1951).

196. 60 So.2d 734 (Fla. 1952).

197. 59 So.2d 776, 777 (Fla. 1952) (a larceny of automobile charge).

198. 55 So.2d 118, 119 (Fla. 1951).

determines veracity of witnesses so the defendant was "placed in jeopardy." Generally, it would seem, the trial judge's determination of "manifest . . . necessity" will not be interfered with by the reviewing court.<sup>199</sup>

#### EQUAL PROTECTION SITUATION<sup>200</sup>

The strength of the equal protection limitation on governmental power to a greater or lesser degree depends upon the relative strength of the governmental police power.<sup>201</sup> Probably no law is applied to all persons at one and the same time. Children, the insane, women, men, the unhealthy, corporations and wage earners, to name a few, have been the basis of classification in the operation of law. So the basic premise we start with is that *some* classifications, in application of law, are legally possible. That delightfully vague statement is made even more ephemeral by the test, which is in vogue in Florida,<sup>202</sup> that a classification is valid unless demonstrated to be not "reasonable." It would probably be impossible to draw a line between the "reasonable" of police power exercise and the "reasonable" of equal protection. Both are, finally, a matter of how the Florida Supreme Court subjectively thinks. As with the review, by the court, of police power regulations the review of equal protection situations lies largely in the self-restraint the court chooses to impose upon itself.

#### I. The Non-Negro Cases<sup>203</sup>

Where the Florida Supreme Court generally permits a large police power activity in the state the equal protection limitation is quite limp. In *Rodriguez v. Jones*<sup>204</sup> the court validated a distance limitation between gambling enterprises which had the effect of creating a gambling monopoly in the state's largest county. A city ordinance, passed as a health measure, required that only milk pasteurized within the county be sold within the city. The plaintiff dairy, which had a pasteurization plant located some miles away, met every conceivable health requirement. The court placed the burden of establishing invalidation upon the plaintiff.<sup>205</sup> This burden the plaintiff carried well. The court held the ordinance invalid under the Federal and State Constitutions, without any

199. *State v. Lewis*, 54 So.2d 199, 200, 201 (Fla. 1951) (unlawful attempt to communicate with jury led to mistrial).

200. The statement in FLA. CONST. DECL. OF RIGHTS, § 1, is that "all men are equal before the law . . ." The federal equal protection clause, applicable to state action, is found in U.S. CONST. AMEND. XIV, § 1.

201. An impressive article on the federal concept can be found in Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

202. E.g., *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953). Whether a law is "reasonable" is still the test for economic due process, Note 53 COL. L. REV. 6 (1953).

203. This classification is a natural in Florida.

204. See note 202 *supra*.

205. *Gustapon v. Ocala*, 53 So.2d 658 (Fla. 1951). One disturbing note was that the court apparently reversed the presumption of validity with *city ordinances*. Why?

particular differentiation in policies or aims. This ambiguity was found in practically all of the non-negro decisions in this area. A law imposing a limitation on tort actions against a municipality was held constitutional even though the limitation was not common to actions against private individuals and corporations.<sup>206</sup> The state power over municipalities is, of course, extraordinarily broad. It was held that equal protection of the laws was not denied by the operation of a 23 man grand jury which required, for one county, more dissenting members to preclude an indictment than with grand juries in other counties.<sup>207</sup> Classification under the state taxation power proved relatively simple to maintain.<sup>208</sup>

Two important invalidations occurred. In one<sup>209</sup> the court invalidated several sections of the "Sunday Closing Laws." These legally unhealthy exemptions ran from newspaper publishing to tourist concessions. The court appeared to have reversed the presumption of validity. "It is necessary that there be a . . . substantial reason to make such laws operate *only* upon certain classes." The law was a health measure. The court thought that individuals working for the exempted businesses needed just as much rest. Honesty compels the admission that the *Mikell v. Henderson*<sup>210</sup> invalidation was not important, but it is rewarding. A penal law on cruelty to animals stated that it should not apply to "poultry shipped on steamboats or other crafts." The court found no distinction "between the fighting of roosters on a steamboat . . . and the fighting of roosters on land."

## II. The Negro Cases<sup>211</sup>

In these cases, one can say that Florida constitutional law and federal constitutional law separate. The possible local equal protection of the laws restriction on governmental power is practically as if it did not exist. The march of the United States Supreme Court up the broad equal protection of the laws avenue, with reference to equal treatment for citizens regardless of color,<sup>212</sup> has not been matched by the Florida Supreme Court. The Federal Supreme Court has, slowly, been crushing the once wide discretionary segregation fields within the states' police power. This leaves the quite larger private action discretionary field of

206. *Coleman v. St. Petersburg*, 62 So.2d 409 (Fla. 1953); *cf.* *Johnson v. Livingston*, 65 So.2d 744 (Fla. 1953).

207. *Lightfoot v. State*, 64 So.2d 261, 265 (Fla. 1952) (rehearing).

208. *Orlando v. Natural Gas & Appliance Co.*, 57 So.2d 853 (Fla. 1952); *accord*, *Gasson v. Gay*, 49 So.2d 525 (Fla. 1950).

209. *Henderson v. Antonacci*, 62 So.2d 5, 7-8 (Fla. 1952).

210. 63 So.2d 508, 509 (Fla. 1953). The dissent of Mr. Justice Mathews in *Smith v. Ervin*, 64 So.2d 166, 171-5 (Fla. 1953), discussed the possibility of the denial of equal protection of the laws in the recently enacted election code. That law provided for supervision of funds expended in "furtherance" of a candidate, but was silent on funds expended in "opposition" to a candidate.

211. With few exceptions, and this is one, this paper does not deal with the Florida Supreme Court's determination of federal constitutional law.

212. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

segregation. Some state legislation has dealt there perhaps even more harshly.<sup>213</sup> The recent Florida decisions cannot be characterized as particularly sympathetic to the aspirations of colored citizens to weaken the legal and social segregation framework presently existent in Florida. This attitude on the part of our highest state court is not unnatural considering the mores of the community.<sup>214</sup>

The vocational school cases<sup>215</sup> excluded the negro citizens from a state supported school on the ground of lack of qualifications. In both cases the school authorities admitted that no negro citizens would be admitted. In one case under the school rules the petitioner's occupation was not related sufficiently to the class to which he sought admittance. In the second case the court found the relator had a physical disability which under school rules disqualified him. Appropriate evidence was introduced on the trial level to bolster the court's factual findings. Since the denial was not based "solely" on color the decisions were under the shadow of United States Supreme Court decisions.

Perhaps the University of Florida College of Law cases were not that fortunate.<sup>216</sup> In *State v. Board of Control*<sup>217</sup> the court, in effect, held that exclusion of a negro citizen from the state supported college of law was legal after finding that a state supported college of law had been "established" for negro citizens which was not merely on "paper." The court blandly determined that *Sweatt v. Painter*<sup>218</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*<sup>219</sup> did not indicate that "any segregation was unlawful" in a state supported graduate college of law.<sup>220</sup> Legal opinion on the effect of those United States Supreme Court decisions is plentiful.<sup>221</sup> The Florida Supreme Court, in 1951, analyzed these decisions with little difficulty—in a case to which application would not be absolutely necessary.<sup>222</sup> The relator, in *State v. Board of Control*, was before the court three times. The procedural hurdles which he was forced to overcome were impressive.<sup>223</sup> Lack of adequate qualifications and procedural problems plagued the petitioners and relators in these actions. The slowness with which state supreme courts respond to United States Supreme Court determinations, on segregation in public schools, is not unique to the Florida Supreme Court; it is highly unlikely,

213. Comment, 56 *YALE L.J.* 837 (1947).

214. Which the court can but reflect.

215. *State v. Anderson*, 62 So.2d 343, 345 (Fla. 1952); *State v. Anderson*, 61 So.2d 920 (Fla. 1952).

216. *State v. Board of Control*, 60 So.2d 162 (Fla. 1952) (case before the court three times—appeal pending before United States Supreme Court).

217. *Ibid.*

218. 339 U.S. 629 (1950).

219. 339 U.S. 637 (1950).

220. *Rice v. Arnold*, 54 So.2d 114, 120 (Fla. 1951).

221. Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 *U. OF PA. L. REV.* 949 (1951); Note, 30 *B.U.L. REV.* 565 (1950).

222. See note 220 *supra*.

223. This was the third appearance of the case in the court.

regardless of actual decision, that cases pending before the United States Supreme Court will result in immediate monumental change.<sup>224</sup>

There was a municipal golf course case in 1951<sup>225</sup> in which the court, directed by the United States Supreme Court to reconsider, re-evaluated its former position. The conclusion of the court was the same. The *Sweatt* and *McLaurin* decisions were held limited to graduate law schools. Segregation on a municipal golf course was held valid if reasonable hours were granted the negro relator. In effect the relator was told to go to a lower court and petition for more time (segregated) on the golf course. This decision did not manhandle the applicable United States Supreme Court decisions.

As the writer has already suggested, the Florida law on equal protection of the laws and negro segregation doubtless is practically non-existent. At least in practice, Federal constitutional law rides alone.

#### UNREASONABLE SEIZURES AND SEARCHES

This provision<sup>226</sup> in our Florida Constitution has had a healthy life during the past two years. Perhaps a few more years of such judicial activity and law enforcement officers who operate under it will stride confidently up to erring citizens, march triumphantly into court with the results of a legal search and seizure and, later, not be disciplined by the Florida Supreme Court for a certain lack of prognostic powers<sup>227</sup>—powers which, this writer believes, no one could demonstrate on present materials.<sup>228</sup>

##### I. The Automobile Cases

The searches and seizures restriction on government power insures that in a great number of ordinary police searches there has been a prior entrance on the scene by a magistrate who has been convinced that there is sufficient<sup>229</sup> *reason* for bothering a citizen and his effects. This checks the momentum of the police action. The laws requiring the magistrate to make a similar entrance soon after arrest have much the same purpose. But universal usage of the search warrant is impractical in several instances

224. Leflar and Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377 (1954) (an excellent survey article).

225. See note 220 *supra*.

226. FLA. CONST. DECL. OF RIGHTS, § 22 (1951): "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized."

227. I hesitate to cite Frank. The less controversial Dickinson, in *The Law Behind Law*, 29 COL. L. REV. 114, 284 (1929), will do as well on rules and judicial discretion.

228. The decisions do not lay out a pattern sufficient for predictive purposes. There are any number of good articles covering many phases of this troubled legal restriction. E.g., Rudd, *Present Significance of Constitutional Guarantees Against Unreasonable Searches and Seizures*, 18 U. OF CIN. L. REV. 387 (1949).

229. The amount of sufficiency depends on the particular state policy.

—and the fast moving automobile is one of these. Are all automobiles beyond the protection of a search warrant? If the occupants of a moving automobile may be stopped, and arrested, may there be a search without warrant? If so, when is the arrest legal? Will legality of arrest create so many exceptions to the rule that eventually the policies behind valid arrests will dominate validity of searches and seizures? This writer wishes the recent cases *did* answer these questions. Some trends in the automobile cases are discernible.

The "naked eye" exception is the easiest to justify. For example, in *Fletcher v. State*<sup>230</sup> officers had watched the defendant for some time. Defendant was suspected of bolita dealings. As defendant entered his car an officer stopped him. Before arrest or search the officer *saw* bolita equipment protruding from defendant's pocket and on the car seat. Arrest and search followed without warrant. The court held that the officer *saw* a crime committed in his presence. *This* validated the arrest. This, in turn, validated the search and seizure. The arrest is important then. In *Collins v. State*,<sup>231</sup> officer had information defendant was a bolita gambler and followed defendant's car a mile. Defendant drove a foot over the center line on the highway three times. Defendant was halted. An officer picked up a raincoat on the back seat of defendant's car; gambling materials were under it. The arrest was on a traffic charge. The court properly distinguished between prerequisites for search warrants for houses and cars. The test for arresting officers was "probable cause." The officer had to have "trustworthy information" the car carried contraband; or "reasonable belief" the car was so engaged. The "probable cause" test followed the language of the law on issuance of search warrants. This brought the magistrate into the picture without his actual presence. An officer must, then, have had sufficient reasons to convince a magistrate a warrant should issue, if he had applied for one. A magistrate would have rightfully refused here since all the officer could say was that he had been "informed" about the car's contents. If the arrest is illegal everything after that, in the way of a search and seizure, is probably illegally obtained.<sup>232</sup> These traffic violation possibilities may be over-emphasized. The court has refused to consider whether it is necessary to have even a slight relationship between the seized property and the crime for which defendant is arrested.<sup>233</sup> However, the court has gone to some lengths to *fail* to find a traffic violation in these cases.<sup>234</sup>

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230. 65 So.2d 845, 847 (Fla. 1953). The effect of such laws as FLA. STAT. § 901.21(2) (1951) is difficult to assay.

231. 65 So.2d 61, 64 (Fla. 1953).

232. *Brown v. State*, 62 So.2d 348 (Fla. 1952), was similar—a traffic violation. Here, however, the officers had no suspicions at all. *Accord*, *Graham v. State*, 60 So.2d 186 (Fla. 1952) (crossing center line); *Burley v. State*, 59 So.2d 722 (Fla. 1952) (passing on curve).

233. See note 231 *supra*.

234. See note 232 *supra*.



A somewhat different factual situation was *Kramer v. State*.<sup>235</sup> There, an officer had an anonymous tip that two cars stopped at a locality each night for a month. Later, when the cars stopped the officers ran up. One car escaped and was lost to pursuit. The pursuing officer "took a chance" that a moving car was the same one and stopped it. The officer flashed his light in the car's interior and picked up a package there. Later one of the car's occupants attempted to hide a package. These parcels later were found to contain lottery numbers. The court held an illegal search started when the officer picked up the package. There was no search warrant and no lawful arrest.<sup>236</sup> The action of the occupant in trying to hide the package was not sufficient to validate the arrest since the illegal "search" had started and all that followed was illegal. Later the court distinguished this case under similar facts.<sup>237</sup> Officers followed the defendant's car without his knowledge. He parked and became frightened when the officer's car parked and its lights were turned on. He threw bolita tickets a distance of 20 to 30 feet into brush. Arrest and search followed. The arrest and search were held legal since the defendant's action apparently gave the officers probable cause for belief that a crime was being committed. The important difference from the *Kraemer* case was held to be that the attempted concealment there *followed* the illegal search. It also made a difference, as to when a search starts, if the defendant knows he is being followed. The officer's intention did not matter. This is a rather strange distinction—the defendant's state of mind. The court, also, de-emphasized the arrest. The probable cause involved may not be necessary for the arrest here, but for a search for a package thrown by defendant on land not owned or controlled by him.<sup>238</sup> The decision is not a thing of clarity.

## II. Non-Automobile Cases

Here, as in the automobile cases, a valid arrest eliminated the search warrant necessity. The court seemed more likely to declare the arrest illegal where the officers brashly operated without a search warrant, probably with high hopes of obtaining that magical legal arrest.<sup>239</sup> This was, of course, not difficult to manage when the officer actually saw the crime committed; this was true even when what was seen was innocuous without unique knowledge in the officer of criminal methods.<sup>240</sup> One restriction the court placed on the privilege, which conceivably could grow to

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235. 60 So.2d 615, 616 (Fla. 1952).

236. Since the packages were not opened until the officers reached the station.

237. *Mitchell v. State*, 60 So.2d 726, 728 (Fla. 1952).

238. *Id.* at 728. Another case, *Kersey v. State*, 58 So.2d 155, 156 (Fla. 1952), had a similar approach.

239. *Dickens v. State*, 59 So.2d 775 (Fla. 1952) (the officers trespassed before seeing the gambling equipment, and arresting).

240. *Rodriguez v. State*, 58 So.2d 164 (Fla. 1952); *accord*, *Burnside v. State*, 55 So.2d 107 (Fla. 1951).

dwarf it, was that the privilege only extended to one's "dwelling house" and not to those who are "at most visitors in an empty house."<sup>241</sup> To be able to claim the privilege "one must claim and prove himself to be the owner, occupant, or lessee of the premises searched." What does this mean?

The invalid search warrant cases were more complicated. In *Borrego v. State*,<sup>242</sup> an affidavit for search warrant stated that:

... affiant, for the past two weeks, in the course of an investigation ... has seen a number of persons known to be bolita peddlers, entering and leaving the house . . . and has learned from the aforesaid investigation that there are within the house gambling implements . . . and that affiant has information from other persons that unlawful gambling . . . is actually being operated within said building . . .

This was held insufficient. The affidavit had to state "sufficient reasons" why the officer believed laws were being violated. It was necessary to state "evidence" (apparently competent in a jury trial) which would "lead a man of prudence . . . to believe" an offense was being committed.<sup>243</sup> This language is quite restrictive on police activities. It eliminates, for example, all hearsay evidence. The court's position on this judicial limb is shaky.

The most delightfully confused case was *State v. Willard*.<sup>244</sup> A Dade County Grand Jury employed an individual who believed relators were operating gambling houses. He obtained a circuit court search warrant authorizing him to enter realtors' offices in an office building, not owned or used by them for gambling purposes, and to seize their books "for use as evidence . . . before the . . . grand jury and in any prosecution which [might] follow." He seized the records under the warrant. Information found therein was used to return an indictment and an information was filed based upon the indictment. The court stated the problem to be whether this use of a search warrant violated the constitutional privilege against self-incrimination.<sup>245</sup> It was held that warrants cannot be utilized to search "solely for the purpose" of securing evidence to be used in a later criminal trial. Warrants validly could be used to seize property only when the public or complainant had an interest therein or when possession thereof was unlawful. Otherwise the court feared the use of such seizures amounted to compelling a defendant to be a witness against himself. This holding is predicated on the rule that the privilege against self-incrimination does extend to documents. The

241. *Mixon v. State*, 54 So.2d 190, 192 (Fla. 1951).

242. 62 So.2d 43 (Fla. 1953) (petition for clarification, pp. 45-47).

243. Cf. *Shaw v. State*, 53 So.2d 772 (Fla. 1951); accord, *Averill v. State*, 52 So.2d 791 (Fla. 1951).

244. 54 So.2d 179, 180, 182 (Fla. 1951).

245. FLA. CONST. DECL. OF RIGHTS § 12 (1951).

246. *Boyd v. U.S.*, 116 U.S. 616 (1886).

disturbing factor in the decision, to this writer, is the mixing of concepts. Self-incrimination and search and seizure are quite distinct privileges. The policies underlying each are different. The earlier similar confusion by the United States Supreme Court was not spectacularly successful.<sup>246</sup> The court did state here that the search was illegal, so perhaps that factor was the real basis for the decision.<sup>247</sup> The court gave weight to the "harmless . . . character" of the records. Would a gun be different? Why? The fundamental question is why mix the concepts. Exclusion of the seized property under either privilege would be sufficient.

### III. The Beverage License Consent Cases

The state police power is naturally broad enough to condition liquor licensing and acceptance of such licenses means that the "places of business of licensees shall always be subject to . . . search during business hours by Beverage Department" supervisors or police officers.<sup>248</sup> This little known provision recently created some legal business. In *Boynton v. State*,<sup>249</sup> officers entered the front door of the Flamingo Club building, which led to a small bar. They omitted inspection for beverage act violations and walked through the club rooms, 150 feet, to a small back room. The club was leased to several of the defendants. It was not open for business. The small bar was open for business. The back room door was shut; the officers pushed it open. They did not see gambling equipment until well into the room. Arrest and search and seizure followed. The court invalidated the arrest, search and seizure. The decision was reasonable. There was no search warrant involved. The club was leased to some of the defendants, but was not open for business; the small bar in which beverages were sold had no connection with the club, or the back room. The rest of the defendants had no connection with the bar or club. The beverage act stated that "places of business of licensees" should be open for inspection without warrant "during business hours." This language was not met here. All rooms under one roof are not affected by the liquor license; only those having some connection with the liquor license. Here no defendants had this license. The licensee had no "control" over the back room. There was no valid arrest. Presence of citizens in liquor establishments did not make them subject to search. The court indicated that it might make a difference if beverage officers really entered to investigate beverage act violations.<sup>250</sup>

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247. I doubt it. The immunization statute, for forced disclosures, was applied in the case; see note 244 *supra*, at page 182.

248. *Boynton v. State*, 64 So.2d 536, 541 (Fla. 1953), recites beverage act.

249. *Id.* at 536.

250. *Lopez v. State*, 66 So.2d 807, 810 (Fla. 1953) amplified the *Boynton* case. The charge was gambling. Beverage agents went to a liquor lounge in the morning to make a moonshine investigation. License not issued to defendants, but one defendant

The court dealt with a few non-beverage license consent cases. It was held not necessary to object to search of the person where guns were displayed.<sup>251</sup> A wife's statement in the place of business to "look anywhere" did not extend to the family home, a separate nearby house.<sup>252</sup> Consent after the illegal search had begun was held inoperative.<sup>253</sup> It is possible that the court held that a consent to search unaccompanied by any prior knowledge of the crime in the officer was insufficient.<sup>254</sup> In *Irvin v. State*,<sup>255</sup> the defendant, in a rape case, told officers the clothes he wore the night before were at his home. An officer appeared at his mother's house and requested the clothes. She, followed by the officer, went to the defendant's room, for which he paid rent, and, after securing the clothes, handed them to the officer. The family relationship impressed the court. It is interesting to speculate how far the court meant to go. Just who can consent for whom? The fact that the woman was colored and might have been somewhat awed by the uniform received slight consideration.

#### IV. Conclusion

It is to be hoped that decisional activity will eventually demonstrate to police officers a safe path to search and seizure. Wrong guesses generally release criminals to try again. The court did one very fine thing in this area recently and that was to discover that the Federal Constitution fails to limit these Florida activities.<sup>256</sup> The court, unfortunately, failed to distinguish between due process and the search and seizure privilege in the same case.<sup>257</sup>

#### BOND FINANCING AND THE FLORIDA CONSTITUTION, ARTICLE IX, SECTION 6

The legal developments in Florida during the last two years in state, county and municipal bond financing have not been startling. Public works and improvements are evil necessities which have to be financed. Without constitutional restrictions the various creatures of government could, and

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was in charge (bartender). On the officer's entrance the bartender ran to a spot behind the bar and pushed a buzzer, which made a sound in a back room. The agents thought he was after a gun, that he signaled to destroy evidence, and they seized him. One agent announced who he was, heard activity behind the door, and kicked the door to the backroom in. The other defendant was there. So were bolita slips. Court held that since the agents here were after liquor violation evidence, the buzzer connected the lounge and the backroom, the bartender was so suspicious, the backroom was "contiguous to the bar" and under the bartenders control, the entrance into the backroom was legal. The arrest, after sight of the bolita slips, was also legal. (This weakened the consent application). The seizure was legal. Cf. *Rivers v. State*, 59 So.2d 740 (Fla. 1952).

251. See note 249 *supra* (a beverage case, but actual consent was an issue).

252. *Rivers v. State*, 59 So.2d 740 (Fla. 1952) (a beverage case).

253. *Collins v. State*, 65 So.2d 61 (Fla. 1953).

254. *Escobia v. State*, 64 So.2d 766 (Fla. 1953) (It is difficult to determine what the case holds).

255. 66 So.2d 288, 293 (Fla. 1953).

256. See note 248 *supra*.

257. *Id.* at 554.

would, borrow money without reference to the tax structure the future would bear. The Florida Constitution, Article IX, Section 6, contains the major restrictions on such bond issues:

The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, and the Counties, Districts, or Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts, or Municipalities shall participate . . .

This provision refers only to "bonds," practically insures no *state* bond issues and definitely relates the business of paying for public improvements to the local people who will bear the tax burdens. The legal history of this constitutional endeavor can be characterized in terms of the devices the Supreme Court of Florida has fashioned to get around it.<sup>258</sup> The description given the instrument in the particular decision will be followed—generally "bond" or "certificate."

### I. State Agency Financing

Various state agencies have been permitted by the court to enter bonding arrangements which do not involve general obligations of the state.<sup>259</sup> The recent cases in this area were not unique. In *State v. Board of Control*<sup>260</sup> the legislature authorized the building of a demonstration school on the Florida State University campus. The Florida Board of Control authorized issuance of revenue certificates to pay for the construction. Leon County and the Board of Control contracted for the board to build and staff the school and for the county to send approximately 700 children to the school at \$141 a child, each year. The court held these certificates not to be "bonds." The test whether the certificate was a "bond" was ". . . whether or not the taxing power of the State may be called on to service or discharge it." The decision was not difficult since the certificates stated that payment was to be solely from the project's revenue and that the credit of the State was not involved.<sup>261</sup>

A slightly more unusual case was *State v. Florida State Improvement Commission*<sup>262</sup> wherein the improvement commission contracted to build a bridge, and to issue revenue bonds therefor, with the Florida State

258. Patterson, *Legal Aspects of Florida Municipal Bond Financing*, 3 FLA. L. REV. 287 (1953). This article is excellent—it covers the subject in a quite complete sense.

259. *Id.* at 301-304.

260. 65 So.2d 469 (Fla. 1953).

261. *State v. Board of Control*, 66 So.2d 209 (Fla. 1953), is a similar case. Here the board issued revenue certificates to finance construction of university dormitories. The board's resolution stated the certificates were to be serviced solely from the project's net revenues and were not state obligations. The court held no freeholders' election was necessary.

262. 52 So.2d 277 (Fla. 1951).

Road Department. The road department leased the bridge from the improvement commission with the department's rental and purchase payments to be the bridge operation's gross toll. The road department was to pay maintenance costs. The court found these bonds not the constitutional "bonds" since the tolls were to be used, solely, to service them. To this writer it appears that such an arrangement—with the gross tolls to service the bonds and a state agency contracting to pay maintenance costs for many years—approaches utilization of the state's general credit.

## II. County Financing

In a very real sense about all one can state that occurred in this area of constitutional debt was that quite a number of counties borrowed money. Some possible decisional distinctions were drawn, however, in the court's ever present efforts to write exceptions into this constitutional restriction.

*Certificates payable from improvement revenues.*—*State v. Escambia County*<sup>263</sup> exemplifies this judicial exception quite well. There the county, desiring to develop a resort beach area, issued revenue bonds to finance the project, the bonds to be paid by revenues from the project. The court's finding that the bonds would not be a "debt of the county" and that the "taxing power . . . is in no manner . . . obligated" apparently was enough to validate.<sup>264</sup> In these situations attorneys writing the particular financial obligation apparently will be safe if they incorporate language of sufficient strength to restrict debt servicing to revenues from the improvement so that the holder of the obligation cannot later force the county to tax.<sup>265</sup>

*Financing on a necessity basis.*—This judicial exception to the constitution means, quickly, that Article IX, section 6, does not apply when a county wishes to finance an improvement which is "necessary," in something of a vital sense, to the county. In *State v. Florida State Improvement Commission*<sup>266</sup> the court stated that a city jail or courthouse is in "a different class from any other . . . county undertaking," that they are an "absolute . . . county necessity." The test on "necessity" was whether "private individuals . . . have . . . authority . . . to provide" the improvement. In the decisional language the court drastically<sup>267</sup>

263. 52 So.2d 125 (Fla. 1951).

264. *Bessemer Properties, Inc. v. MacVicar*, 63 So.2d 647 (Fla. 1953); *State v. Dade County*, 62 So.2d 404 (Fla. 1953); and *Bessemer Properties v. Peters*, 51 So.2d 786 (Fla. 1951), are quite similar.

265. See *Bessemer Properties, Inc. v. MacVicar*, *supra*.

266. 60 So.2d 747 (Fla. 1951).

267. The earlier case was *State v. Florida State Improvement Commission*, 48 So.2d 165, 167 (Fla. 1950). In *Sunshine Const. of Key West v. Board of Comm'rs, Munroe County*, 54 So.2d 524 (Fla. 1951), a jail and courthouse certificate issue got safely by, at least as a strong county necessity. The case did limit these "necessity" bonds so that (p. 526) "the full faith . . . of said County" could not be "irrevocably pledged."

limited an earlier statement on "necessity" which made the "necessity" parallel to a valid "county purpose." The court indicated these particular bonds probably would give holders power to force the county into a mandatory duty to tax, so the issue failed without an approving vote by local freeholders. Strangely, voting machine purchases were held in *State v. Broward County*<sup>268</sup> not to be "essential governmental necessities." One could argue with this conclusion.

*In general.*—Two recent cases are difficult to reconcile. In *State v. Volusia County School Bldg. Authority*<sup>269</sup> the court invalidated a revenue bond issue which obligated the county to pay for bonds from funds of the county board of public instruction since the board had no discretionary surplus. In *State v. Board of Control*<sup>270</sup> a county board obligated itself to pay for certificates "from the current revenues or other funds first available to the board . . . in the next succeeding year." The concurring opinion<sup>271</sup> of Mr. Justice Matthews indicated that the validating decree cured this—certainly a novel approach; if carried very far this constitutional area will soon be passé. Perhaps in both situations the county could be forced to levy taxes.

### III. Municipal Financing

It is difficult to determine whether the county-municipal problems, inherent in governmental bonds under Article IX, Section 6, are distinguishable on any basis founded in reality. Constitutional municipal financing has followed, however, the general exceptions laid down by the supreme court for counties.

*Certificates payable from other than ad valorem taxation.*—*State v. Jacksonville*<sup>272</sup> well demonstrates the variable limits to this exception to Article IX, Section 6. There the city issued certificates in the amount of \$400,000 to acquire recreational facilities, to be payable solely from a fund to which the city covenanted to appropriate \$100,000 annually for four years in the city budget, from revenues not already pledged other than ad valorem and cigarette taxes. The court validated the issue, apparently holding that such certificates do not have to be payable from the project financed or from a pledge of a designated excise tax. The court did require that the arrangements be financially sound—finding Jacksonville's unpledged revenues, running over \$3,000,000 annually, were adequate. Lawyers handling city bonding will, here also, find it necessary to write the certificates so as not to obligate the city ad valorem tax power. The court emphasized that no approving local vote was necessary

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268. 54 So.2d 512 (Fla. 1951).

269. 60 So.2d 761 (Fla. 1952) (Fla. CONST. Art. XII, § 17, was also dealt with).

270. See note 260 *supra*.

271. *Id.* at 474.

272. 53 So.2d 306 (Fla. 1951).

if any tax basis, other than "ad valorem taxes," was utilized since Article IX was "designed to protect the home and real estate owner." There were several other similar recent cases.<sup>273</sup> Probably, bonds "payable . . . from revenues derived from the utilities service, excise taxes, licenses or other sources than ad valorem taxes" will gain in municipal popularity.<sup>274</sup> Making certificates payable solely from the proposed project's revenue was, of course, found valid.<sup>275</sup> The court seldom proved troublesome. In one case<sup>276</sup> a city's stockade certificates, serviced from a "sinking fund supported solely from the proceeds of fines "from municipal court sentences," required an approving vote. Perhaps the closeness to a governmental function as opposed to the proprietary function explains the decision. In *Chase v. Sanford*<sup>277</sup> the court indicated that revenue bonds which approach negotiability under the Negotiable Instruments Law, in containing a promise to pay "unconditionally," will fail. The possible future duty of the city to tax was the apparent concern of the court.

*Financing on a necessity basis.*—The recent cases involving this exception to Article IX were not unusual. The court, as in the past, determined<sup>278</sup> that "provisions for governmental needs" do not require an approving vote. The unpredictability here is a proper city "need." The construction of an incinerator and a garbage disposal project was validated. The dicta was confusing for the court suggested that even in this exception servicing the debt certificates from other than ad valorem taxes was important.

A questionable decision was *State v. Miami*<sup>279</sup> wherein the court held the construction of a stockade not an "essential" governmental need, such as a jail or courthouse. This was a doubtful conclusion.<sup>280</sup>

#### IV. Miscellany

The court held that Article IX, Section 6, in stating that "the Counties, Districts or Municipalities . . . shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders . . . shall participate"

273. *Gate City Garage v. Jacksonville*, 66 So.2d 653 (Fla. 1953) (specifically pledged revenue here, however); *State v. Miami Shores Village*, 60 So.2d 541 (Fla. 1952) (revenue certificates payable solely from city utilities franchise); *State v. City of Homestead*, 59 So.2d 742 (Fla. 1952) (cigarette tax revenues pledged).

274. *State v. Miami*, 62 So.2d 407 (Fla. 1953).

275. *State v. St. Petersburg*, 61 So.2d 416 (Fla. 1952); *State v. Jacksonville*, 50 So.2d 532 (Fla. 1951) (same). See *State v. Fort Lauderdale*, 60 So.2d 32 (Fla. 1952), where the court permitted financing from the project's revenues and a specially pledged utilities tax.

276. *State v. Miami*, 63 So.2d 333 (Fla. 1953).

277. 54 So.2d 370, 373 (Fla. 1951).

278. *Jacksonville v. Nichols Engineering & Research Corp.*, 49 So.2d 529, 530 (Fla. 1950).

279. See note 276 *supra*.

280. See, generally, *State v. City of North Miami Beach*, 63 So.2d 281 (Fla. 1953); *Nelson v. Fort Lauderdale*, 54 So.2d 207 (Fla. 1951).



means just that.<sup>281</sup> The effect of re-registration of freeholders of a county before an election under Article IX, Section 6, was discussed in *State v. County of Sarasota*,<sup>282</sup> in which it was held that all that was necessary was a "reasonable opportunity to the citizens to register."<sup>283</sup> The amount of publicity, quantitatively and qualitatively, was a matter of concern to the court—a reasonable prerequisite to re-registration.

### V. Conclusion

Unless one is particularly interested in governmental financing this constitutional provision, as such, means little. Yet to the initiated there is much of import here. Prior to the adoption of Article IX, Section 6, it has been stated that the "only acts necessary for the issuance of . . . bonds and the levy . . . and collection of ad valorem taxes were to have a delegation in the Legislature from the county who would put through a special act . . . and then bonds could be issued . . . without any vote of the freeholders or the people who had to pay the bill."<sup>284</sup> The differing rationale behind the various twists<sup>285</sup> the supreme court has taken are simply that "to suggest that the freeholders will not wisely determine the matter is to suggest the unwisdom of democratic government"<sup>286</sup> as opposed to the attitude that democracy has been exercised when the local people vote for local representation. The pressure by the counties and cities to finance needed long-range improvements—and without "democratic governments" second chance vote—is presently mirrored in the Florida decisions.

#### THE RELATIONSHIP OF STATE FUNDS AND CREDIT TO PRIVATE ENTERPRISE

The important constitutional restriction here is Article IX, Section 10, which states that:

The credit of the state shall not be pledged or loaned to any individual, company, corporation, or association; nor shall the State become a joint owner or stockholder in any company . . . . The Legislature shall not authorize any county, city . . . to become [such] a stockholder . . . or to obtain or appropriate money for, or to loan the credit to, any corporation, association, institution or individual.

This restriction received surprising judicial activity recently. In *State v. Escambia County*,<sup>287</sup> the county issued certificates of indebtedness to pay for the development, into a general recreational-resort area, of certain beaches owned by the county. The county had legislative authority to

281. *State v. Dade County*, 54 So.2d 57 (Fla. 1951).

282. 62 So.2d 708 (Fla. 1953).

283. *Id.* at 711. There is a great deal of discretion, constitutionality, in local officialdom; *Ryan v. State*, 60 So.2d 188 (Fla. 1952) (redistricting of a county).

284. *State v. Florida State Improvement Commission*, 60 So.2d 747, 750 (Fla. 1952).

285. See note 258 *supra*.

286. See note 284 *supra*, at page 759.

287. 52 So.2d 125 (Fla. 1951).

purchase or construct by itself or with private enterprise by contract or lease facilities running from harbors to hotels and store buildings. The certificates were to be paid for by revenues from operating the project. The decision validating this project is reasonable under the constitutional language. However, in the 1952 case of *State v. Town of North Miami*<sup>288</sup> the court invalidated a similar project under the same constitutional language. There the town desired to issue similar certificates to purchase land and to construct thereon an aluminum manufacturing plant. A private corporation was to lease the project for 20 years, the rent monies paying for the certificates. The difference seems to be that use of public funds to develop, for private enterprise, an entire resort is for a "public purpose,"<sup>289</sup> while such usage to lure manufacturers to an area is not. Since the court read the words "public purpose" into the constitutional language this result was *not* necessary. The restrictive language of the decision was also far too broad to bear close scrutiny.<sup>290</sup> However, *this* decision is easier to justify than the 1952 *Daytona Beach* case<sup>291</sup> wherein the city, under proper legislative authority, undertook to redevelop a blighted area by acquiring the land by purchase or eminent domain with the ultimate purpose of re-zoning the area and making it available for sale or lease to private enterprise. The *North Miami* case was cited as controlling authority. The differences are startling. In the present case, particularly, the entrance of the *police power* of the city should be possible since the area to be redeveloped was "blighted." The only possible distinction, under the restrictive constitutional phrases, from *State v. Escambia County* was the fact that there the county already owned the land. A petty distinction? In both cases the *police power* could be referred to—blighted areas and undeveloped areas both need government planning on a long-range basis.<sup>292</sup> Since the constitutional language does not require the court's conclusion, that conclusion apparently mirrors the court's distaste for the particular governmental attempted project.<sup>293</sup> The original *constitutional* intent probably was limited to "counter debauching the state's credit and the reckless speculation" involved therein.<sup>294</sup>

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288. 59 So.2d 779 (Fla. 1952).

289. See note 287 *supra*, at page 129.

290. See note 288 *supra*, at page 786.

291. *Adam v. Housing Authority of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

292. A similar case was *State v. Miami*, 62 So.2d 404 (Fla. 1953), wherein the local government issued debt certificates to pay for the construction of a large building for the leased usage of National Airlines, the certificates to be paid for from the project's rental.

293. There were 2 other cases under Fla. Const. Art. IX, § 10. *Brautigan v. White*, 64 So.2d 781 (Fla. 1953), validated a county's attempt to purchase an incorporated country club by purchasing the member ownership certificates. *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952), validated a state subsidy to a non-profit educational institution such as the University of Miami.

294. *Brautigan v. White*, 64 So.2d 781, 784 (Fla. 1953).

## LEGISLATION AND THE CONSTITUTION

There are several provisions in the Florida Constitution which require a certain awareness on the part of the legislature in the mundane business of mechanics of the legislative process<sup>295</sup> or the equally mundane problems of constitutional drafting.<sup>296</sup> The recent cases interpreting these provisions are not particularly notable.<sup>297</sup>

## I. Article III, Section 16

This section states that "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only . . . ." There were several cases, in the last two years, interpreting these words.

*Miami v. Hadley*<sup>298</sup> dealt with the possibly deliberate deceptive practice problem. There, the title to one act indicated a repeal of several provisions of the city charter, while the title to another act purportedly added material to the charter. In fact the first act preserved practically everything the title stated repealed while the second failed to add anything. The whole attempt—a "fragmentary approach to . . . amendment which was deceptive"—was invalidated. A similar act was invalidated by the court,<sup>299</sup> which repealed an earlier act, which in the body of the repealing act contained a provision partially restricting the effect of the repeal. The title of the former act failed to mention this provision.

The case most generally involved with this constitutional restriction dealt with notice. Would "a trustee of the internal improvement fund who read the title not be advised that the property of the state under his charge was being conveyed by the legislature" was a typical issue here.<sup>300</sup> The test of the court was whether the title would "reasonably . . . give notice of what one may expect to find in the body of the act." The court's solution was that, "Tucked away in the body of the act is a grant of sovereign lands." The title indicated little more than abolishment and recreation of a city government.<sup>301</sup> *City of Ocoee v. Bowness*<sup>302</sup> was more descriptive of the meaning of the constitutional words. Only

295. E.g., FLA. CONST. Art. III, § 17 (1951) ("Every bill shall be read by its title . . .").

296. E.g., FLA. CONST. Art. III, § 16 (1951) ("Each law . . . shall embrace but one subject . . .").

297. See, generally, Manson, *The Drafting of Statute Titles*, 10 *IND. L.J.* 155 (1934) and Cloe and Marcus, *Special and Local Legislation*, 24 *KY. L.J.* 351 (1936).

298. 61 So.2d 321 (Fla. 1952).

299. *Soule v. Lewis*, 66 So.2d 665 (Fla. 1953).

300. *Bird Key Corp. v. Sarasota*, 54 So.2d 245, 247 (Fla. 1951).

301. *Thompson v. Intercounty Tel. & Tel. Co.*, 62 So.2d 16 (Fla. 1952) was handled the same way. The court insisted that those affected by the act have a reasonable notice from the title language. On the facts the decision is excellent.

302. 65 So.2d 7 (Fla. 1953).

the "subject" of the act need be expressed, not the "object"—"reasonable notice" of the "scope of the act" is necessary. The title need not be an "index to its contents." A strong presumption has to be overcome to invalidate; the title must be "deceptive" as well as "unartificial as an expression of the subject matter." It is possible that strong prayer may assist a drafter under these phrases.

The court also held that, "Where a statute is re-enacted in a general revision of the laws, an original imperfection in title is cured by such re-enactment."<sup>303</sup> This had to do with amending by reference to title only. A legislative curing of a title defect by amending was held not retroactive in effect.<sup>304</sup> "Plurality of subject" was not accomplished where the "subjects" were not "discordant."<sup>305</sup>

## II. Article III, Section 20

This section states that the "Legislature shall not pass special or local laws in any of the following enumerated cases: that is to say, regulating the jurisdiction and duties of any class of officers . . . regulating the practice of courts . . ." In the case of *In re Rouse*<sup>306</sup> a juvenile court was established by a population act applicable to counties having a population of over 350,000 persons. The court indicated that such acts are valid when the "purpose" of the act has a "fair relation" to the population requirement. This act was validated since Dade County, the only county presently affected, had such a large dependent child problem in connection with the numerous divorce cases tried there. Also the court stated that the general problem of children and courts is different in these larger urban areas.<sup>307</sup> A similar case<sup>308</sup> involved an act, applicable to counties of over 315,000 population, which increased membership in the grand jury to 23 jurors. The same test was used. Since large counties have more crime than small counties and the juries sit almost continuously therein the court stated large juries would function there more expeditiously since the quorum members can be rotated.

Under the court's test of reasonable classification of population acts several of such acts were rightfully invalidated. In one case Pinellas County was arbitrarily excluded from the operation of the general budget commission laws;<sup>309</sup> in another, Escambia County voters were given a choice

303. *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953).

304. See note 301 *supra*.

305. *Hanson v. State*, 56 So.2d 129 (Fla. 1952) (an act abolished one court and transferred the jurisdiction to another court).

306. 66 So.2d 42, 44 (Fla. 1953).

307. See VIRTUE, *SURVEY OF METROPOLITAN COURTS DETROIT AREA* (1950). Justice Mathew's dissent argued that the child's welfare was the same in all counties and anyway the act simply lessened the work of ten circuit judges and increased the work of one juvenile court judge. Therefore, the classification was not reasonable.

308. *Lightfoot v. State*, 64 So.2d 261 (Fla. 1953).

309. *Budget Commission of Pinellas County v. Blocker*, 60 So.2d 193 (Fla. 1952).

to retain a budget commission.<sup>310</sup> One questionable decision<sup>311</sup> permitted a city charter provision to the effect that no personal injury suit could be started against the city without notice within 60 days of the injury. Chief Justice Roberts, in dissent,<sup>312</sup> pointed out that one of the purposes of the constitutional statement was to obtain uniformity in court practice. In an earlier decision the court had invalidated a quite similar charter provision.<sup>313</sup>

### III. Article III, Section 21<sup>314</sup>

In *Lindsay v. Miami*<sup>315</sup> an act which applied to cities, within counties with over 315,000 population, prohibited women bartenders. The reasonable classification test was used. The court probably rightfully concluded that women's morals are common to all size counties. Also, a small city in a large county could impose the restriction. This made the act's population classification purely arbitrary.

### IV. Conclusion

The activity of the court under sections 20 and 21 of Article III is important to the drafter of legislation only as indicative of the attitude of the court toward those constitutional words. Simply put, if the court is emphasizing, for example, notice in titles, draftors must be more careful. It is difficult to cite one case in this constitutional area to mean much with reference to another case—what is a “reasonable classification” or single “subject” changes act by act.

### CONCLUSION

It is difficult, perhaps impossible, for this writer to resist the temptation of a few concluding remarks upon the health of Florida constitutional law during the survey years.

Bluntly, that legal scene is ailing and a diagnosis defies simplicity. Since this characterization of the situation would amply describe much of Florida law, in general, more must be attempted—and it is possible to localize several causation factors. An incredibly over-worked state supreme

310. *Soule v. Lewis*, 66 So.2d 665 (Fla. 1953).

311. *Oliver v. St. Petersburg*, 65 So.2d 71 (Fla. 1953).

312. *Id.* at 75-76.

313. *Skinner v. Eustis*, 147 Fla. 22, 2 So.2d 116 (1941) (suits can be commenced within 6 months).

314. “In all cases enumerated in the preceding Section, all laws shall be general . . . but in all cases, not enumerate . . . the Legislature may pass special or local laws . . . PROVIDED that no local . . . bill shall be passed, nor shall any local or special law establishing or abolishing municipalities, or providing for their government . . . be passed, unless notice of intention . . . shall have been published . . .”

315. 32 So.2d 111 (Fla. 1951).

court explains much of the inadequacy. Maintenance of enlarged judicial reviewing practices by the court, when elsewhere such judicial power properly dwindles, provides a partial explanation. Perhaps the entirety is reached by reflection on the antique, poorly drafted, and just as poorly amended state constitution. Only slight exploration of these is feasible here. The heavy time burden under which the court struggles undoubtedly parallels the analytical nightmare in Florida constitutional law—a nightmare which only thoughtful analysis can dissipate. The decisions, at times, have ignored Federal Constitutional issues,<sup>316</sup> or so failed to differentiate between such issues and the state constitutional law that the actual basis for decision is impossible to determine.<sup>317</sup> Statements, unnecessary to decision, impregnate the cases.<sup>318</sup> A Florida judiciary favorite is the shotgun approach to constitutional law—a number of constitutional grounds being urged by the court for invalidation purposes.<sup>319</sup> This approach is particularly deadly to the reach of legislative power in the state. Another untidy practice has been a comingling of statute and constitutional law to the extent that analysis is impossible.<sup>320</sup> Other decisions have not been *specifically* related to a *particular* clause in the constitution.<sup>321</sup> The meaning of such decisions always remains unclear. It might be suggested that the Florida Supreme Court simply write fewer decisions. This not a brilliant nor original suggestion, yet under it quantity, not quality, undoubtedly would suffer.<sup>322</sup> There are other, less obvious, suggestions.<sup>323</sup>

Judicial self-restraint is difficult to over-emphasize in constitutional law. Constitutional revolutions have recently taken place which have successfully breached an over-powering wall of judicial supremacy.<sup>324</sup> The hard won presumptions of legislative correctness are of *extreme* necessity, since so much of constitutional law is purely a subjective area directly reflecting

316. *E.g.*, *Lightfoot v. State*, 64 So.2d 261, 265 (Fla. 1953) (on re-hearing). The court presents the issue and ignores it.

317. *E.g.*, *Sneed v. Mayo*, 66 So.2d 865 (Fla. 1953).

318. *E.g.*, *Lee v. Delmar*, 66 So.2d 252 (Fla. 1953).

319. *E.g.*, *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952).

320. *E.g.*, *Owens v. State*, 61 So.2d 412, 416 (Fla. 1952). See also *Boynton v. State*, 64 So.2d 536 (Fla. 1953), wherein the court vaguely mixed due process and search and seizure.

321. *E.g.*, *Miami v. Benson*, 63 So.2d 916 (Fla. 1953).

322. Why make it easy for those who insist that the present appellate process is really adequate—no intermediate appellate court system or revision of our present system *seems* necessary.

323. The court has a reverence for the American Jurisprudence work (and like publications) which is unfortunate—these are not particularly brilliant sources for constitutional law. The court apparently relied heavily on such works in many cases. *E.g.*, *State v. Cootner*, 60 So.2d 734 (Fla. 1952); *Gray v. State*, 54 So.2d 436 (Fla. 1952); *Chase v. City of Sanford*, 54 So.2d 370 (Fla. 1951); *Mayo v. Lukers*, 53 So.2d 916 (Fla. 1951). The court cited these works many, many times. *E.g.*, *Miami v. Romer*, 58 So.2d 849 (Fla. 1952); *Hanson v. State*, 56 So.2d 129 (Fla. 1952); *Maiers v. Peters*, 52 So.2d 793 (Fla. 1951).

324. See, generally, CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941).

the judges' personality and background.<sup>325</sup> In a modern state the police power, restricted to health, safety and morals, is a poor thing. The administrative process limited by passé separation and delegation of power arguments crumbles before modern problems.<sup>326</sup> The possibility of yet other constitutional revolutions—filtering from the federal to the states—may soon be realized.<sup>327</sup> Contraction of Florida judicial power will facilitate entrance thereof on the Florida legal stage.

These concerns the Florida Supreme Court rapidly can correct. Fairness compels, however, the admission that an ultimate, other than partial, solution to Florida constitutional ills undoubtedly necessitates a modern constitution.<sup>328</sup>

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326. Unsympathetic judicial treatment wrecks the administrative process. Of course, the lack of a state administrative procedure act helps.

327. See the review on Crosskey's great book, DURHAM, CROSSKEY ON THE CONSTITUTION: An Essay-Review, 41 CALIF. L. REV. 209 (1953), CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) is "must" reading for those interested in American constitutional law; reviews thereon are numerous and conflicting.

328. Recent constitutional problems demonstrate this. See Miami Herald, Dec. 12, 1953, p. 1, col. 7, for a discouraging example.

325. Are citations necessary? Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 550 (1948).