Florida Constitutional Law

L. Harold Levinson
## FLORIDA CONSTITUTIONAL LAW*

L. Harold Levinson**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>553</td>
</tr>
<tr>
<td>II. METHODS OF CHANGING THE CONSTITUTION</td>
<td>555</td>
</tr>
<tr>
<td>III. TECHNIQUES OF CONSTITUTIONAL INTERPRETATION</td>
<td>556</td>
</tr>
<tr>
<td>A. Extrinsic Sources when Meaning Is Not Clear</td>
<td>556</td>
</tr>
<tr>
<td>B. Transition from Old to New Constitution</td>
<td>557</td>
</tr>
<tr>
<td>1. REPETITION OF IDENTICAL PROVISIONS IN NEW AND OLD CONSTITUTION</td>
<td>557</td>
</tr>
<tr>
<td>2. SIMILAR BUT NOT IDENTICAL PROVISIONS IN NEW AND OLD CONSTITUTION</td>
<td>557</td>
</tr>
<tr>
<td>3. OMISSION FROM NEW CONSTITUTION OF PROVISION APPEARING IN OLD CONSTITUTION</td>
<td>557</td>
</tr>
<tr>
<td>4. OVERLAP BETWEEN FLORIDA AND FEDERAL CONSTITUTION</td>
<td>559</td>
</tr>
<tr>
<td>IV. ORGANS OF STATE GOVERNMENT</td>
<td>559</td>
</tr>
<tr>
<td>A. Separation of Powers</td>
<td>559</td>
</tr>
<tr>
<td>1. PROHIBITION AGAINST ENCROACHMENT</td>
<td>560</td>
</tr>
<tr>
<td>2. PROHIBITION AGAINST DELEGATION</td>
<td>561</td>
</tr>
<tr>
<td>B. Courts</td>
<td>562</td>
</tr>
<tr>
<td>1. THE 1972 REVISION OF ARTICLE V</td>
<td>562</td>
</tr>
<tr>
<td>2. JURISDICTION OF SUPREME COURT</td>
<td>563</td>
</tr>
<tr>
<td>a. Appeals</td>
<td>563</td>
</tr>
<tr>
<td>b. Certiorari</td>
<td>564</td>
</tr>
<tr>
<td>(1) Class of constitutional or state officers</td>
<td>564</td>
</tr>
<tr>
<td>(2) Question certified by district court to be of great public interest</td>
<td>565</td>
</tr>
<tr>
<td>(3) Conflict</td>
<td>565</td>
</tr>
<tr>
<td>(4) Interlocutory order</td>
<td>568</td>
</tr>
<tr>
<td>(5) Commissions established by law</td>
<td>568</td>
</tr>
<tr>
<td>c. All writs</td>
<td>568</td>
</tr>
<tr>
<td>d. Habeas Corpus</td>
<td>569</td>
</tr>
<tr>
<td>e. Direct review of administrative action</td>
<td>569</td>
</tr>
<tr>
<td>f. Certified questions in pending cases</td>
<td>569</td>
</tr>
<tr>
<td>g. Advisory opinions to the Governor</td>
<td>570</td>
</tr>
<tr>
<td>h. Discipline of attorneys</td>
<td>571</td>
</tr>
<tr>
<td>i. Discipline of judges</td>
<td>572</td>
</tr>
<tr>
<td>j. Rules for practice and procedure</td>
<td>573</td>
</tr>
<tr>
<td>C. Legislature</td>
<td>573</td>
</tr>
<tr>
<td>1. SESSIONS</td>
<td>573</td>
</tr>
<tr>
<td>2. APPORTIONMENT</td>
<td>573</td>
</tr>
<tr>
<td>3. INVESTIGATIONS</td>
<td>574</td>
</tr>
<tr>
<td>4. TITLE AND SUBJECT OF LAWS</td>
<td>576</td>
</tr>
<tr>
<td>5. SPECIAL LAWS</td>
<td>577</td>
</tr>
<tr>
<td>6. CONFLICT BETWEEN SPECIAL AND GENERAL LAWS</td>
<td>579</td>
</tr>
<tr>
<td>7. GENERAL LAWS OF LOCAL APPLICATION—POPULATION ACTS</td>
<td>579</td>
</tr>
<tr>
<td>8. CONFLICT OF INTEREST</td>
<td>581</td>
</tr>
<tr>
<td>D. Executive</td>
<td>582</td>
</tr>
<tr>
<td>1. GOVERNOR—GENERAL POWERS AND FUNCTIONS</td>
<td>582</td>
</tr>
<tr>
<td>2. LIEUTENANT GOVERNOR</td>
<td>582</td>
</tr>
<tr>
<td>3. CABINET SYSTEM</td>
<td>583</td>
</tr>
<tr>
<td>4. ATTORNEY GENERAL</td>
<td>583</td>
</tr>
</tbody>
</table>

* Portions of this survey have been reproduced, with permission of D & S Publishers, Inc., from L. H. Levinson and C. C. Alloway, FLORIDA CONSTITUTIONAL LAW CASEBOOK (3d ed. 1973 and 1974 Supp.). Portions of the survey will be incorporated in the present author's forthcoming FLORIDA CONSTITUTIONAL LAW HANDBOOK, pending publication by the same publisher.

** Professor of Law, Vanderbilt University. The author gratefully acknowledges the assistance of Edward E. ("Zef") Fessenden, Jr., a third-year law student at Vanderbilt University.
VII. CONSTITUTIONAL RIGHTS AND LIMITATIONS

A. Declaration of Rights
1. Religious Freedom
2. Freedom of Speech, Press and Assembly
3. Right to Work
4. Impairment of Obligation of Contracts
5. Search and Seizure
6. Administrative Penalties
7. Access to Courts

B. Equal Protection

C. Substantive Due Process and the Police Power
1. Health
2. Safety
3. General Welfare
4. Businesses affected with a public interest

D. Zoning

E. Administrative Due Process

F. Due Process in "Quasi-Public" and "State Action" Contexts

G. Clarity of Statutes and other Due Process Requirements

I. Eminent Domain
1. Takings v. Regulations
2. Inverse Condemnation
3. Public Purpose
4. Amount of Compensation

J. Taxation
1. Allocation of Taxing Power between State and Local Governments
2. Allocation of Taxing Power within the County
   a. Power of county to impose taxes pursuant to general law authorizing municipalities to tax
   b. Limitation on taxing power of county
   c. County preemption of municipality's power to levy ad valorem taxes
3. Income and Inheritance Taxes
4. Immunities and Exemptions from Taxation
   a. Immunities
   b. Exemption of municipal property
   c. Property used for exempt purposes
   d. Personal property exemptions
   e. Homestead exemption

VI. ELECTIONS

A. Campaign Practices
B. Resign-to-Run Law
C. Filing Fees
D. Qualifications of Electors
E. Minority Political Parties
F. Presidential Primary Elections
G. Municipal Recall Elections

V. ORGANS OF LOCAL GOVERNMENT

A. Counties
B. Municipalities
1. Powers
2. Establishment of Municipalities
3. Annexation
C. Consolidation
D. Transfer of Powers

VI. REGULATIONS

A. Health
B. Safety
C. General Welfare
D. Access to Courts

UNIVERSITY OF MIAMI LAW REVIEW [Vol. XXVIII

552
I. INTRODUCTION

The first revision of the Florida Constitution since 1885 was approved by the November, 1968 general election and went into effect on January 7, 1969. All articles were changed in 1968 except article V, the Judiciary Article, which had been rewritten in 1956. A number of amendments were approved after 1968, including the taxation of corporation profits and the overhaul of the Judiciary Article. By November, 1972, the entire text of the 1885 constitution had been replaced. Many significant changes were brought about, as illustrated by the following highlights:

Article I, Declaration of Rights, now expressly prohibits deprivation of any right because of race or religion (section 2); prohibits strikes by
public employees (section 6); prohibits “the unreasonable interception of private communications by any means,” and adds that articles or information obtained by illegal search and seizure “shall not be admissible in evidence” (section 12); prohibits administrative agencies from imposing a sentence of imprisonment, or any other penalty except as provided by law (section 18).

Article II, General Provisions, declares, in broad language, a commitment to environmental protection, and provides a power source for appropriate legislation (section 7).

Article III, Legislature, requires the legislature to meet annually (section 3(b)), and provides automatic legislative reapportionment every ten years, with special provisions for review in the Supreme Court of Florida (section 16).

Article IV, Executive, permits interested persons to be heard when the Governor has requested the justices of the supreme court to render an advisory opinion (section 1(c)); creates the office of Lieutenant-Governor (section 2); requires candidates for Governor and Lieutenant-Governor to run for election on a single ticket (section 5(a)); permits the Governor to serve for a maximum of two terms of four years each (section 5(b)); and reduces the number of executive departments of state government to not more than 25 plus those specifically provided for in the constitution (section 6).

Article V, Judiciary (as revised in 1972) simplifies the trial court system by consolidating the 14 pre-existing types of trial court into two uniform levels—circuit courts and county courts—and abolishing all other courts, subject to a phase-out period for municipal courts ending in January, 1977 (sections 5, 6, 20); permits the legislature, by two-thirds majority, to veto rules promulgated by the supreme court for practice and procedure in all courts (section 2(a)); requires the Governor to fill vacancies in judicial office by appointing one person from a list of at least three nominated by the judicial nominating commission provided for that court (section 11); subjects all justices and judges to the disciplinary authority of the judicial qualifications commission (section 12); and provides for an elected public defender in each judicial circuit (section 18).

Article VII, Finance and Taxation, authorizes the legislature to impose a corporation income tax (section 5); extends the homestead exemption from taxation to include condominiums and cooperative apartments, and authorizes the legislature to increase the exemption from the base of $5,000 up to a maximum of $10,000 for owners disabled or over 65 years old (section 6); imposes a “millage cap” limiting the rate of ad valorem taxation to ten mills for county purposes, ten mills for municipal purposes and ten mills for school purposes, except that higher millages can be imposed for payment of bonds or if approved by referendum
CONSTITUTIONAL LAW

Article VIII, Local Government, permits counties to enjoy stronger self-government by means of charters and ordinances (section 1).

Article IX, Education, permits each school district to exercise local option whether the school superintendent should be elected or appointed (section 5).

Article XI, Amendments, establishes a constitution revision commission in 1979 and every 20 years thereafter (section 2), and permits the people to propose constitutional amendments by means of initiative petitions (section 3).

Article XII provides a unique procedure for transition from the old to the new constitution (section 10).

The significant changes in the constitutional text, illustrated above, were accompanied by an unusually rapid turnover of justices on the supreme court. Of the seven justices who were on the court in 1968, only two remained in 1973.3

This survey discusses the major developments in Florida constitutional law during the period starting with approval of the new constitution in November, 1968, and ending with cases decided in April, 1974, and contained in volume 294 Southern Reporter. No attempt is made to cover criminal law and procedure, since these topics are dealt with in another survey article.8

II. METHODS OF CHANGING THE CONSTITUTION

Adoption of any change in the constitution requires a vote of the people in a state-wide election. The 1968 constitution provides a number of alternative methods by which proposals for constitutional change may be submitted to the people.4 First, the legislature may, by three-fifths vote, propose changes in any part or in all of the constitution (section 1). Second, a 37-member constitution revision commission shall be appointed in 1979 and every 20 years thereafter to reexamine the constitution and to propose any changes (section 2). Third, an initiative petition signed by a designated number of citizens can propose certain types of constitutional change (section 3). As originally expressed in the 1968 constitution, the initiative was available “to propose amendments to any section of this constitution.”

In Adams v. Gunter,5 the supreme court held that this provision could not be invoked to initiate a proposal to change from a bicameral to

2. Justices Roberts and Erwin.
4. FLA. CONST. art. XI.
5. 238 So. 2d 824 (Fla. 1970).
a unicameral legislature, since this change would be of such magnitude as to amount to a revision, not merely an amendment. As a sequel to this decision, the scope of the initiative was increased by a November, 1972 amendment to the constitution, making the initiative available "to propose the revision or amendment of any portion or portions of this constitution . . . , provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith."8

Fourth, a petition signed by a designated number of citizens can request a referendum on whether a constitutional convention shall be called (section 4). If the referendum requests a convention, the next general election will include the election of members of the convention.

III. TECHNIQUES OF CONSTITUTIONAL INTERPRETATION

In interpreting constitutional provisions, courts generally apply traditional rules of statutory construction,7 such as the rule that when the text is clear, its plain meaning should be followed, without resort to extrinsic sources. However, constitutional interpretation sometimes requires special techniques.

A. Extrinsic Sources when Meaning Is Not Clear

When a statute is unclear on its face, resort may be had to its legislative history. When a constitutional provision is unclear on its face, the relevant history is a combination of the intent of the framers who drafted the provision, and the intent of the people when they adopted it, found in such sources as the minutes of the constitutional revision commission,8 pre-existing case law interpreting relevant language,9 and even newspaper accounts of public debate about the proposed provision.10

The minutes of the Constitutional Revision Commission of 1966-68 provide a valuable source of reference on the intent of the framers of the 1968 revision. Another significant source is the section-by-section commentary to the 1968 constitution by Talbot "Sandy" D'Alemberte in volumes 25A, 26 and 26A of Florida Statutes Annotated.

Interpretations of the constitution by the legislative and executive branches are persuasive indications of its meaning especially if made at or near the time of adoption.11

8. E.g., Hayek v. Lee County, 231 So. 2d 214 (Fla. 1970).
10. E.g., Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971).
B. Transition from Old to New Constitution

1. Repetition of Identical Provision in New and Old Constitutions

If the new constitution contains a provision identical to the corresponding provision in the old, judicial interpretations of the old constitution retain their validity as interpretations of the new, since the framers or the voters are presumed to have known the old interpretations and to have intended to preserve them by repeating the same constitutional language.\(^\text{12}\)

2. Similar but Not Identical Provision in New and Old Constitutions

If the new constitution contains a provision similar but not identical to the corresponding provision in the old, the question arises whether the framers or voters intended a mere change in literary style (in which event the cases decided under the old constitution continue to govern) or a change of meaning (in which event the old cases are superseded).

In *Hayek v. Lee County*,\(^\text{13}\) the issue was whether article III, section 11(a)(1) of the 1968 constitution, on laws “pertaining to . . . jurisdiction . . . of [court] officers,” should receive the same interpretation as had been given to the corresponding provision of the 1885 constitution about laws “regulating the jurisdiction . . . of officers.”\(^\text{14}\) The court examined the minutes of the Constitutional Revision Commission and determined, on rehearing, that the change was merely one of style and that the framers intended to preserve the meaning developed by the old cases.

3. Omission from New Constitution of Provision Appearing in Old Constitution

The 1968 revision was submitted to the people in the form of three resolutions. One revised article VI (Elections), another, article VIII (Local Government) and the third, all of the 1885 constitution except article V (Judiciary). Each of the three resolutions differed concerning transition from the old to the new constitution. Article VI makes no mention of transition. Article VIII, section 6(a) provides: “This article shall replace all of Article VIII of the Constitution of 1885, as amended, except those sections expressly retained and made a part of this article by reference.” Article XII, revised by the third resolution, provides, at section 10: “All provisions of Articles I through IV, VII, and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not incon-

---

13. 231 So. 2d 214 (Fla. 1970).
consistent with this revision shall become statutes subject to modification or repeal as are other statutes." A somewhat similar transitional provision appears as section 20(g) of the 1972 revision of article V.

Article XII, section 10 has no counterpart in pre-1968 Florida Constitutions. It drastically changes the transitional rule which was previously followed by the courts.

The old rule, still applicable except in situations covered by article XII, section 10 or article V, section 20(g), is that if a new constitution omits a provision which was included in the old, the omission is deemed equivalent to repeal. The old rule of omission equals repeal still applies, for example, to a provision which was stated in the constitutions of 1838, 1861, 1865 and 1868, but was omitted from the 1885 and 1968 constitutions. Such a provision was repealed by omission from the 1885 constitution and therefore was not available for carry forward to the 1968 constitution under article XII, section 10. A provision carried over from the 1885 to the 1968 constitution pursuant to article XII, section 10 becomes a statute and loses its character as a constitutional provision. The justices of the supreme court are not authorized to render an advisory opinion to the Governor regarding such an item, since their advisory jurisdiction is limited to "interpretation of any portion of the Constitution upon any question affecting the Governor's powers and duties."

Questions may arise whether a provision of the 1885 constitution is inconsistent with the 1968 constitution and thus cannot be carried forward as a statute. In State v. City of St. Augustine, the supreme court stated, in such a situation,

[W]e must consider whether the people of Florida intended to rewrite the constitutional limitations on the subject of local bonds and whether said section of the 1968 Constitution entirely preempts all provisions of the 1885 Constitution on the subject of local bond elections, the provisions of Section 10, Article XII, of the 1968 Constitution, notwithstanding.

An opinion rendered by the Attorney General in 1972 deals with a problem of transition from the 1885 to the 1968 constitution. The 1885 constitution included a provision which required a two-thirds vote of each house of the legislature in order to pass bills for payment of claims against the state. No such provision appears in the 1968 revision. However, the 1968 constitution states: "Passage of a bill shall require a ma-

15. E.g., Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959). Pursuant to art. V, § 20(g), the legislature enacted Laws of Florida, ch. 73-303, repealing all provisions of the pre-1972 art. V.
17. Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969).
18. State v. City of St. Augustine, 235 So. 2d 1, 3-4 (Fla. 1970) (emphasis added).
The Attorney General stated that the requirement of a two-thirds vote for claims bills in the 1885 constitution was inconsistent with the requirement of a simple majority for all bills in the 1968 constitution; therefore the two-thirds requirement could not be carried forward and claims can be approved in the same manner as any other legislation, that is, by simple majority.

4. OVERLAP BETWEEN FLORIDA AND FEDERAL CONSTITUTION

Many topics are dealt with in both the Florida and Federal Constitutions. If the federal provision is applicable to the states, such as by “incorporation” into the fourteenth amendment, and if the United States Supreme Court has rendered a clear decision directly on point, the Florida courts consider themselves bound by that decision. Florida courts may, of course, invalidate, on state constitutional grounds, state laws valid under the Federal Constitution.

The Florida courts regard lower federal court decisions as persuasive but not binding as precedents. Thus in Bradshaw v. State, the Supreme Court of Florida sustained a conviction under a statute which had previously been held unconstitutional by a federal district court. The Florida court stated: "It is axiomatic that a decision of a federal trial court, while persuasive if well reasoned, is not by any means binding on the courts of a state."

IV. ORGANS OF STATE GOVERNMENT

A. Separation of Powers

The separation of powers rule continues to serve a two-fold purpose. It prohibits any branch of government from encroaching upon the jurisdiction of another and from delegating its powers to another. The text of the separation of powers provision received only minor stylistic changes in the 1968 revision of the constitution and the courts have closely followed pre-1968 precedents.


26. 286 So. 2d at 6. See also State ex rel. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970), rev'd, 407 U.S. 25 (1972); Hall v. State, 282 So. 2d 190 (Fla. 2d Dist. 1973); Brown v. City of Jacksonville, 236 So. 2d 141 (Fla. 1st Dist. 1970), rev'd sub nom., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); CASEBOOK, supra note 7, at 150.

27. See Fla. Const. art. II, § 3 (1968); Fla. Const. art. II (1885).
1. PROHIBITION AGAINST ENCROACHMENT

In *Kirk v. Baker*, a judge of the criminal court of record issued an order requiring the Governor and his counsel to show cause why they should not be held in contempt for having attempted to influence the judge's decision in a pending case. The supreme court noted that judges of the criminal court of record were subject to suspension from office by the Governor, and the court assumed that the conferences between the Governor and the judge "were for the legitimate purpose of learning facts upon which to base such an exercise of [the Governor's] discretionary power." Upon this assumption, the court held that the Governor and his counsel were immune from the process of the criminal court of record. The court expressly disclaimed any opinion as to the immunity of the Governor if he were accused of a felony or if he were named in contempt proceedings by a judicial officer subject only to impeachment.

Another confrontation between the executive and judicial branches arose in *Robbin v. Brewer*. A statute provided that the Governor should appoint court reporters, in certain circumstances, upon recommendation of the circuit judges of the circuit. The Governor, however, rejected the judges' recommendation and appointed a different reporter on the theory that reporters are "officers" and that the Governor can fill vacancies in "office" pursuant to his constitutional powers. The district court of appeal held that reporters are employees, not officers. The Governor, therefore, has no constitutional authority to fill vacancies and he is bound by the statute which requires him to act on the recommendation of the circuit judges.

An advisory opinion rendered in 1973 determined that neither the legislature nor the Governor could encroach upon the authority of the judicial nominating commissions which were created by the 1972 revision of article V for the purpose of submitting nominations to the Governor for filling vacancies in judicial office. The advisory opinion stated that the nominating commissions are a part of the executive branch of government performing an executive function which cannot be limited by legislative act. The Governor has no power to establish rules governing the operation of the nominating commissions, as the exercise of such power might tend to curtail the constitutional independence of the commissions. The power and duty for promulgating rules for the commissions must rest with the members of the commis-

---

28. 229 So. 2d 250 (Fla. 1969). This is the second of the *Kirk v. Baker* cases. The first is discussed in this survey in text accompanying notes 198-99 *infra*.
29. 229 So. 2d at 252.
30. 236 So. 2d 448 (Fla. 4th Dist. 1970).
32. *Fla. Const.* art. IV, § 1(f).
33. Advisory Opinion to the Governor, 276 So. 2d 25 (Fla. 1973).
sions. These rules, for the various commissions, are not required to be uniform throughout the state. Statutes which have been held invalid as encroachments upon the jurisdiction of the supreme court to promulgate rules of practice and procedure are discussed below.

2. PROHIBITION AGAINST DELEGATION

In an advisory opinion in 1969, the justices of the supreme court quoted with approval from the 1930 decision in *Florida Motor Lines, Inc. v. Railroad Commissioners* that

> [a]ll governmental functions may not be among "the powers of government" which the Constitution separates into three departments. . . . [W]hen not in conflict with some provision or principle of organic law, statutes may authorize . . . functions to be performed by administrative or ministerial officers who do not exercise any of "the powers of government" that are divided into the three departments, legislative, executive, and judicial.

Delegation of authority must be accompanied by adequate standards. This principle was forcefully illustrated in *Dickinson v. State ex rel. Bryant*. A statute authorized the comptroller to issue licenses for the operation of cemeteries, with consideration to be given to the need for a cemetery in the community. An applicant had satisfied all other requirements but had not convinced the comptroller that a need existed and his application was denied. The supreme court invalidated the portion of the statute which required the comptroller to determine need, since no guidelines or standards were expressed. "The effect of the statute is to confer upon the defendant [comptroller] the authority to grant approval to one yet withhold it from another, at whim, and without guides of accountability." Since the applicant had satisfied all other requirements, the supreme court affirmed the circuit court's issuance of mandamus to compel the comptroller to grant the license.

In *State Department of Citrus v. Griffin*, the supreme court held that the Orange Stabilization Act did not constitute an improper delegation of authority. The Act authorized the Citrus Commission to achieve the statutory purpose by means of marketing orders, to be approved by referendum of the industry after public hearings, subject to suspension by the Commission upon a finding that the orders did not tend to effectuate

---

35. Advisory Opinion to the Governor, 276 So. 2d 25, 30-1 (Fla. 1973).
36. See notes 131-33 infra and accompanying text.
37. Advisory Opinion to the Governor, 223 So. 2d 35 (Fla. 1969).
38. 100 Fla. 538, 129 So. 876 (1930).
39. 227 So. 2d 36 (Fla. 1969).
41. 227 So. 2d at 38.
42. 239 So. 2d 577 (Fla. 1970).
43. FLA. STAT. § 601.154 (1973).
the purposes of the Act. The supreme court found sufficient guidelines for review of marketing orders in the context of the Act and its stated purposes to sustain the constitutionality of the statute. The court noted, for example, that the Commission was not authorized to pledge the credit of the state and therefore the provisions in the Act permitting it to "borrow" must be interpreted to permit borrowing only to the extent that the funds can be repaid in the same budgetary period.

Delegation by the Florida legislature to a federal agency was at issue in Freimuth v. State. A Florida statute defined "hallucinogenic drug" as "\(\text{lysergic acid} \ldots\) and any other drugs to which the drug abuse laws of the United States apply." The supreme court held that the Florida legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body, "that are in existence and in effect at the time the [Florida] legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any administrative body that Congress or such administrative body might see fit to adopt in the future."46

In Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co., the supreme court considered challenges, on delegation grounds, against the statute dealing with the computation of experience modification factors for determining premiums payable on workmen's compensation insurance policies. The statute listed the various relevant factors and permitted insurance companies either to file their own schedule of rates with the Insurance Commissioner or to delegate this responsibility to a privately owned rating organization. If such an organization were selected, it would compute and file the rates, subject to making "reasonable means" available whereby any person aggrieved "may be heard" by the rating organization and subject to further review by the Commissioner. The court held that the statute contained adequate guidelines in the form of the experience modification factors and provided for adequate procedures in the form of the hearings before the rating organization and then before the Commissioner.

B. Courts

1. THE 1972 REVISION OF ARTICLE V

Article V (Judiciary), was revised in March, 1972, the most significant change being made in the trial court system.49 The 1972 revision

---

44. 272 So. 2d 473 (Fla. 1972). The case was followed and applied in State v. Welch, 279 So. 2d 11 (Fla. 1973) and State v. Camil, 279 So. 2d 832 (1973).
45. Fla. Laws 1967, ch. 67-136 (now FLA. STAT. § 893.02 (1973)).
47. 285 So. 2d 386 (Fla. 1973).
49. See, Massey, Hoffmann & Linder, Civil Procedure, 1972-73 Survey of Florida Law,
abolished 12 of the 14 types of trial court leaving only the circuit and county courts.80

2. JURISDICTION OF SUPREME COURT

a. Appeals

The 1972 revision continues to distinguish between the supreme court's jurisdiction on appeal, which parties can invoke as of right, and the court's discretionary jurisdiction to review by certiorari or other writs.81 The supreme court's jurisdiction on appeal82 has been expanded to include final judgments and orders of trial courts imposing life imprisonment, if provided by general law. Trial court decisions in bond validation cases, which previously were reviewable on appeal, are now so reviewable only if provided by general law.83

Appeal to the supreme court is still available from district court of appeal decisions initially and directly passing upon the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.84 In addition, trial court "orders" meeting these same requirements can be directly appealed to the supreme court. In Burnsed v. Seaboard Coastline Railroad,85 the supreme court held that the term "orders" in the 1972 revision means the same as "final judgments or decrees" in the prior constitutional text,86 since the 1972 revision gives separate treatment elsewhere to trial court interlocutory orders, which the supreme court may review by certiorari under certain circumstances.87

The supreme court made a significant clarification of its jurisdiction on appeal in Ogle v. Pepin.88 The court distinguished between appeals from decisions passing on the validity of a statute and from decisions construing provisions of the constitution. In cases involving the validity of a statute, the supreme court will accept jurisdiction on appeal even if the lower court did not discuss, explain or even refer to any constitutional provision, so long as a decision as to the validity of the statute was inherent in the case. However, the court will not apply the inherency doctrine as a basis for its appellate jurisdiction in cases where the lower court construed a constitutional provision; in such cases, the lower court decided

51. See subsections (5), c and d infra for review by extraordinary writs.
52. FLA. CONST. art. V, § 3(b)(2).
54. FLA. CONST. art. V, § 3(b)(1).
55. 290 So. 2d 13 (Fla. 1974).
57. FLA. CONST. art. V, § 3(b)(3); see notes 91-2 infra and accompanying text.
58. 273 So. 2d 391 (Fla. 1973); accord, Dykman v. State, 294 So. 2d 663 (Fla. 1974); State v. Lyons, 293 So. 2d 391 (Fla. 3d Dist. 1974); Rojas v. State, 288 So. 2d 234 (Fla. 1974).
sion must expressly "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." 569

The supreme court's appellate jurisdiction has been further clarified in other recent cases. In Williston Highlands Development Corp. v. Hogue, 60 the court found that the circuit court had unnecessarily reached the constitutional question, but nevertheless retained jurisdiction on appeal from the circuit court's decision. Reams v. State 61 held that a judgment holding a state statute unconstitutional as applied to a specific set of facts is appealable directly to the supreme court. In Cuevas v. State, 62 a defendant entered a guilty plea, which he declared was subject to the correctness of the trial court's ruling on the constitutionality of the statute. The supreme court held that the defendant could directly appeal the trial court's judgment. In Delano Hotel v. Dade County, 63 the supreme court held that direct appeal cannot be based upon the trial court's passing upon the validity of a county ordinance, even in a home rule county, since the constitution refers only to decisions passing upon the validity of statutes.

b. Certiorari

The constitution continues to list a number of types of certiorari jurisdiction.

(1) Class of constitutional or state officers

The 1972 revision preserves the supreme court's certiorari jurisdiction to review district court of appeal decisions affecting a class of constitutional or state officers. 64 Richardson v. State 65 held this jurisdiction was properly invoked to test the propriety of the prosecuting attorney's refusal to exchange witness lists, since the outcome affected all prosecuting attorneys and trial judges in the state. The supreme court expressly receded from this holding in Spradley v. State, 66 and made the following clarification of certiorari jurisdiction over district court decisions affecting a class of constitutional or state officers:

To vest this Court with jurisdiction, a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of con-

---

59. 273 So. 2d at 392, quoting from Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958).
60. 277 So. 2d 260 (Fla. 1973); accord, Metropolitan Dade County Transit Auth. v. State Dept. of Highway Safety & Motor Vehicles, 283 So. 2d 99 (Fla. 1973).
61. 279 So. 2d 839 (Fla. 1973); accord, Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973).
62. 279 So. 2d 817 (Fla. 1973).
63. 287 So. 2d 288 (Fla. 1973).
64. FLA. CONST. art. V, § 3(b) (3); FLA. CONST. art. V, § 4(2) (1956).
65. 246 So. 2d 771 (Fla. 1971).
66. 293 So. 2d 697 (Fla. 1974).
stitutional or state officers. This may be a decision in a case in which the class, or some of its members, is directly involved as a party. It may also be in a case in which no member of the class is a party if the decision generally affects the entire class in some way unrelated to the specific facts of that case.  

Estes v. City of North Miami Beach held that a city official was not a "constitutional or state officer" within the meaning of this provision.

(2) Question certified by district court to be of great public interest

The 1972 revision preserves the supreme court's certiorari jurisdiction to review district court of appeal decisions which pass upon questions certified to be of great public interest. In Rupp v. Jackson, the district court of appeal certified its opinion without identifying any specific question. The supreme court held that the certification was sufficient to invoke the supreme court's certiorari jurisdiction. However, the supreme court expressed a preference for a form of certification articulating the specific question:

Presentation of a precise question enhances the probability that we will pass upon the specific question in mind below; furthermore, preciseness may contribute significantly to our decision whether to pass upon the merits of the case at all, a decision which remains solely within our prerogative under the constitution.

(3) Conflict

The 1972 revision makes a small but significant change in the conflict certiorari jurisdiction of the supreme court, which is now invoked by a district court of appeal decision "in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law." Before 1972, the conflict had to be with another district court of appeal or with the supreme court. Thus, as the supreme court observed in Wales v. Barnes, the 1972 revision introduces certiorari jurisdiction based upon a conflict between a district court of appeal decision and a prior decision of the same district court.

Conflict certiorari, more than any other jurisdictional concept, raises recurring questions about the respective roles of the supreme court and
the district courts of appeal. Until the creation of the district courts of appeal in 1957, pursuant to the 1956 revision of article V, the supreme court was the only court of general appellate jurisdiction in the state. Since their creation, the district courts have been the general appellate courts and the supreme court has been limited to enumerated types of jurisdiction. To the extent that the district courts of appeal are successors to the pre-1957 jurisdiction of the supreme court, it could be argued that the district courts can overrule pre-1957 supreme court precedents, subject of course to supreme court review on the basis of the conflict which would inevitably be created. Singleton v. Bussey lends some support to this argument. The district court of appeal decision conflicted with a 1936 supreme court precedent. On conflict certiorari, the supreme court noted that times had changed, receded from its own precedent, and affirmed the lower court decision recognizing a direct cause of action by a third party beneficiary against an insurer in a motor vehicle liability insurance case. Similarly in Hoffman v. Jones the lower court had overruled a supreme court precedent and certified the question as being one of great public interest. The supreme court flatly stated that district courts of appeal cannot overrule supreme court precedents. But, in response to the district court's certification, the supreme court receded from its own precedent. It thus reached the same result on the merits as had been reached by the district court, which had adopted the comparative negligence rule in place of contributory negligence.

The requirement of a conflict can be satisfied by a “misapplication of law” arising where the district court of appeal expressly adopts a prior decision as controlling precedent even though the factual situation under review is materially distinguishable from the case relied upon. Similar considerations prevailed in Sacks v. Sacks. The district court declined to order a man to pay child support for a child he had sired while the child’s mother was married to another husband, even though after the birth of the child the mother obtained a divorce from her first husband and married the natural father of the child. In reaching this decision, the district court relied upon the principle that a woman may not “have her child declared illegitimate and thus receive support for said child from its

76. FLA. CONST. art. V, § 5 (1956).
77. 233 So. 2d 713 (Fla. 1969).
79. The “dressing down” given the district court of appeal in Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), however, suggests that the merits of a case may not be given full consideration by the supreme court when a lower court overrules its precedent. In Gilliam the court reaffirmed the archaic “impact rule,” quashing the decision below which rejected it. For a discussion of the case, see 28 U. MIAWI L. REV. 705 (1974).
80. Wales v. Barnes, 278 So. 2d 601 (Fla. 1973); accord, Guerrero v. State, 289 So. 2d 396 (Fla. 1974).
81. 267 So. 2d 73 (Fla. 1972).
putative father if she was married to another person at the time of its conception. The supreme court held that the district court improperly applied this general rule to the "unique factual situation" in the present case, therefore giving rise to conflict certiorari jurisdiction. Similarly in Rinker Materials Corp. v. City of North Miami, the supreme court held that conflict certiorari can be based upon the misapplication of established decisional rules of statutory construction.

The conflict requirement may also be satisfied by consulting the record in a case. In Gibson v. Maloney, the supreme court observed that "[i]t is conflict of decisions, not conflict of opinions or reasons, that supplies jurisdiction for review by certiorari. . . . When comparing decisions it may be necessary to consult the record to some extent." In this case, the court consulted the record in order to ascertain that the trial court had refused to give certain jury instructions requested by defendant, a circumstance which helped to establish the conflict for jurisdictional purposes. This decision reaffirmed the four to three holding of Foley v. Weaver Drugs, Inc., that conflict certiorari jurisdiction could be established by examination of the "record proper," meaning the written record of the proceedings in the court under review except the report of the testimony. Additionally, even a per curiam affirmance without opinion by the district court can be subjected to certiorari review if conflict is established by the record proper.

In Short v. Grossman, the supreme court pointed out, however, that while it will examine the record of the case under review, the court will not examine the record of the other decision which allegedly conflicts with the case under review. The court noted an exception to this rule where there is an initial judicial review of rulings of administrative bodies. "In such a situation, this Court has reviewed a district court of appeal decision on certiorari from an administrative body on the ground of conflict with the decision of another district court of appeal even though the latter was rendered without an opinion."

In Taylor v. Knight, the district court held that the unsuccessful party in that court had no constitutional right to obtain an opinion for use in establishing the existence of a conflict. Allstate Insurance Co. v. Clendening held that conflict certiorari cannot be based upon an interlocutory order, where the final judgment of the lower court did not

82. 254 So. 2d 572, 573 (Fla. 3d Dist. 1971), quashed 267 So. 2d 73 (Fla. 1972), conformed 269 So. 2d 425 (Fla. 3d Dist. 1972).
83. 286 So. 2d 552 (Fla. 1973).
85. 177 So. 2d 221 (Fla. 1965).
86. Whitmore v. Dade County, 292 So. 2d 363 (Fla. 1974).
87. 245 So. 2d 217 (Fla. 1971).
88. Id. at 220.
89. 234 So. 2d 156 (Fla. 1st Dist. 1970).
90. 289 So. 2d 704 (Fla. 1974).
depend on that aspect of the interlocutory order which was in conflict with a prior supreme court decision.

(4) Interlocutory order

The 1972 revision authorizes the supreme court to review, by certiorari, "any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court."91 The pre-1972 provision was limited to chancery matters.92

(5) Commissions established by law

Before 1972, the supreme court could issue writs of certiorari to "commissions established by law."93 The 1972 revision restricts this jurisdiction to "commissions established by general law having statewide jurisdiction."94

c. All writs

Under the 1956 constitution the supreme court could issue "all writs necessary or proper to the complete exercise of its jurisdiction."95 The 1972 revision eliminates the words "or proper."96 If this change of wording has any effect at all, apparently it restricts the scope of the all writs jurisdiction. Expansive use of the provision was occasionally made before 1972; no cases have been found interpreting the 1972 revision.

The supreme court invoked its all writs jurisdiction in *Mize v. Seminole County*,97 a consolidation of two suits brought in the trial court concerning a proposal to build and finance by bond issue a courthouse and jail in the City of Sanford. One of the suits was a bond validation proceeding. The other requested a declaratory judgment that Sanford was not the county seat; the granting of such a judgment would remove the legal basis for the proposed construction and bond issue. By the time the bond validation suit reached the supreme court (on direct appeal from the trial court), the declaratory judgment suit had been appealed from the trial court to the district court of appeal, which had rendered a decision. The supreme court granted certiorari to review the district court decision, and consolidated both cases. The court noted that its jurisdiction in the bond validation suit would be "completely frustrated" unless it also reviewed the district court decision in the declaratory judgment suit; consequently the all writs provision authorized review by certiorari.

91. FLa. Const. art. V, § 3(b) (3).
94. FLa. Const. art. V, § 3(b) (3).
96. FLa. Const. art. V, § 3(b) (4).
97. 229 So. 2d 841 (Fla. 1969).
In *State ex rel. Pettigrew v. Kirk*, a petition for a writ of quo warranto was filed in the supreme court seeking to enjoin respondents from performing certain official acts. Noting the vital public interests involved, the court stated:

Although quo warranto is not the proper remedy, we are of the view that since all the parties have appeared before the Court and argued the questions involved we should exercise our jurisdiction under the all writ section.

d. Habeas corpus

The 1972 revision preserves the jurisdiction of the supreme court or any justice, to issue writs of habeas corpus returnable before the supreme court or any justice, any district court or district judge, or any circuit judge.

In *Lamberti v. Wainwright*, the supreme court declined to consider, on habeas corpus, those issues already considered and determined by another appellate court, since such issues are res judicata in collateral proceedings such as habeas corpus. In *State ex rel. Scaldeferri v. Sandstrom*, the district court of appeal had refused to issue habeas in order to review allegedly excessive bail imposed by the trial court. Petitioner then sought original habeas in the supreme court. The supreme court also declined to issue habeas, since a petitioner should not have repetitious habeas proceedings available at the various levels of the court system. The court, however, treated the habeas petition as if it were a petition for certiorari to review the district court's denial of habeas.

e. Direct review of administrative action

A new provision appears in the 1972 revision giving the supreme court "the power of direct review of administrative action prescribed by general law." Identical jurisdiction is also conferred upon the district and circuit courts, thereby giving the legislature full flexibility to allocate this type of jurisdiction among the supreme court and the lower courts.

f. Certified questions in pending cases

Neither the 1972 revision nor its predecessor authorizes the supreme court to respond to questions certified in pending cases. Nevertheless, the

---

98. 243 So. 2d 147 (Fla. 1970).
99. *Id.* at 149.
101. 284 So. 2d 202 (Fla. 1973).
102. 285 So. 2d 409 (Fla. 1973).
106. This topic is distinct from previous discussion of certiorari jurisdiction over ques-
court continues to respond to certain types of questions on the basis of statute and court rule, which permit certification to it by either a federal appellate court or a state court.

State court certification was clarified by two 1970 supreme court decisions. *Boyer v. City of Orlando* reaffirmed the rule that the supreme court will answer a question certified by a trial court only if the question is one which, if decided by the trial court, would be reviewable on direct appeal to the supreme court. Moreover, the supreme court will not decide the certified question if the trial court has already decided it, since the certified question procedure should not be used as a substitute for the appellate process.

In *State v. Hayles*, the trial court certified questions to the district court of appeal which in turn certified them to the supreme court. In response, the supreme court interpreted certain language in a criminal statute and determined that, as thus interpreted, the statute was not unconstitutionally vague. Justice Drew's dissenting opinion pointed out that the supreme court had no appellate jurisdiction over a trial court's decision interpreting a statute, and therefore he urged the supreme court to refrain from responding to the certified question on this point. The majority of the supreme court evidently regarded the interpretation of the statute as an essential ingredient of their ruling on the constitutionality of the statute as thus interpreted; since the constitutional question could be directly appealed from the trial court to the supreme court, the majority responded to the constitutional question, together with the related question of statutory interpretation.

g. Advisory opinions to the Governor

The constitution authorizes the Governor to request the opinion of the justices of the supreme court "as to the interpretation of any portion of this constitution affecting his executive powers and duties." The 1968 revision added a new sentence to this provision, as follows:

---

108. FLA. APP. R. 4.6, 4.61.
110. 232 So. 2d 169 (Fla. 1970). When the case returned to the Supreme Court of Florida on appeal, some five months after the court's refusal to answer the certified question, the court decided, by four votes to three, to affirm the circuit court's judgment. 238 So. 2d 84 (Fla. 1970). The United States Supreme Court reversed, 407 U.S. 25 (1972).
111. 240 So. 2d 1 (Fla. 1970).
112. Fla. Laws ch. 67-136 (now FLA. STAT. §§ 893.01 et seq. (1973)).
113. 240 So. 2d at 3 (Drew, dissenting).
114. FLA. CONST. art. IV, § 1(c). For a discussion of this provision, see Comment, Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation, 24 U. FLA. L. REV. 328 (1972).
The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.\textsuperscript{118}

In two important post-1968 advisory opinions, the justices agreed to answer questions of broader scope than had been generally answered in the past, and in both opinions the justices suggested that the broader scope was appropriate in view of the procedural changes introduced in 1968, whereby an adversary proceeding became available. In a 1970 advisory opinion\textsuperscript{118} as to the constitutionality of the 1970 General Appropriations Bill, the court observed that “[t]his court was not always in agreement under the Constitution of 1885 as to whether or not such a question could be answered.”\textsuperscript{117} A 1971 advisory opinion\textsuperscript{118} answered the governor’s inquiry as to whether a corporation income tax could be imposed by statute under the existing constitution.\textsuperscript{119} The justices stated:

It has long been the policy of this Court to decline to express any opinion on the constitutionality vel non of a proposed legislative enactment prior to its adoption by the Legislature, and our judicial action in this case is not to be construed as a change at this time of that long standing policy.\textsuperscript{120}

But the justices pointed out that the Governor’s request cited his various constitutional and statutory responsibilities to recommend budgetary and other measures, and to manage the fiscal affairs of the state. The justices also took notice of a substantial deficit between the originally requested budget and the currently available revenue, “which deficit, unless resolved in some appropriate manner, could result in fiscal chaos.”\textsuperscript{121} Finally, the justices referred to the introduction of adversary proceedings by the 1968 revision as a development that had “enlarged to some extent the power of this Court to be of assistance.”\textsuperscript{122} The cumulative weight of all circumstances persuaded the justices to answer the Governor’s question.

h. Discipline of attorneys

The 1972 revision of article V vests the supreme court with “exclusive jurisdiction to regulate the admission of persons to the practice of

\begin{thebibliography}{122}
\bibitem{115} FLA. CONST. art. IV, § 1(c) (1968), \textit{revising} FLA. CONST. art. IV, § 13 (1885).
\bibitem{116} Advisory Opinion to the Governor, 239 So. 2d 1 (Fla. 1970).
\bibitem{117} \textit{Id}. at 8.
\bibitem{118} Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971).
\bibitem{119} The justices replied that a corporation income tax could not be imposed. Subsequently, on November 2, 1971, art. VII was amended so as to authorize such a tax. FLA. CONST. art. VII, § 5(b).
\bibitem{120} 243 So. 2d at 576.
\bibitem{121} \textit{Id}.
\bibitem{122} \textit{Id}.
\end{thebibliography}
law and the discipline of persons admitted. The pre-1972 judiciary article included a provision, omitted in 1972, authorizing the supreme court to provide for an agency to handle admissions and to provide for the handling of disciplinary matters in the circuit and district courts of appeal or by commissions appointed by the supreme court, subject to its supervision and review.

A memorandum filed in 1970 by Justice Drew, as chairman of the Supreme Court Rules Committee, stated that the district courts of appeal and circuit courts have concurrent jurisdiction with the Florida Bar in disciplinary matters, pursuant to the integration rule, which rule provides also that the forum first asserting jurisdiction shall retain the same to the exclusion of the others. Justice Drew's memorandum noted that if the circuit court suspends a lawyer for a fixed period of time, the lawyer automatically returns to active status at the end of that period. However, if the circuit court disbars and its decision is not disturbed on appeal by the supreme court, the lawyer remains disbarred until such time as he shall apply for reinstatement to the Board of Governors. The circuit court has no jurisdiction to order reinstatement.

i. Discipline of judges

The 1972 revision preserves but restructures the Judicial Qualifications Commission which was originated by a 1966 amendment to article V. Further, a two-thirds vote of the Commission is now required in order to confer jurisdiction upon the supreme court to order that a justice or judge be reprimanded or removed from office for willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary, or be involuntarily retired for any permanent disability that seriously interferes with the performance of his duties.

By a vote of four to three in 1970, the supreme court modified the recommendations of the Commission and ordered a public reprimand of a circuit judge upon finding he had engaged in conduct unbecoming a member of the judiciary. The judge was further admonished to comply with his oath as a member of the judiciary and to abide by the Canons of Judicial Ethics as a member of the judiciary, particularly in cooperating with his fellow judges, following the normal method for seeking procedural changes as to the administration of justice . . . and refraining from seeking personal publicity or attempting to advance his personal ambitions through the public information media.

126. Integration Rule of the Florida Bar, art. 11, § 11.14.
130. 238 So. 2d at 574.
j. Rules for practice and procedure

The 1972 revision continues to authorize the supreme court to adopt rules for practice and procedure in all courts and adds a new proviso: "These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."\(^{131}\)

A number of recent decisions have invalidated statutes which conflict with rules of practice and procedure promulgated by the Supreme Court.\(^{132}\) A statute can be invalidated on this ground, even though a non-adversary proceeding is involved.\(^{133}\)

C. Legislature

1. Sessions

The 1968 revision\(^{134}\) of article III requires annual sessions of the legislature instead of the biennial sessions as provided previously.\(^{135}\) In odd-numbered years the annual session must start in April. In even-numbered years it starts in April unless another date is fixed by law.

2. Apportionment

Drastic changes in apportionment were accomplished by the 1968 revision.\(^{136}\) The 1885 constitution\(^{137}\) required reapportionment sessions to be held every ten years. However, this proved totally unsuccessful.\(^{138}\) Legislatures did not live up to their responsibility. The Florida courts declined to enforce apportionment and the federal courts ordered reapportionment, which had the effect, in part, of increasing the number of members of each house beyond the constitutional maximum. The framers of the 1968 revision intended to establish a "fail-safe system."

In the second year following each decennial census, the legislature is now required to apportion the state into between 30 and 40 senatorial districts and between 80 and 120 representative districts.\(^{139}\) All districts may be either contiguous, overlapping, or identical in territory. If the legislature fails to apportion during the regular session, the Governor is required to call a special 30-day session which has a duty to reapportion. If the legislature adopts a reapportionment resolution, the Attorney

---

134. Fla. Const. art. III, § 3(b).
139. Fla. Const. art. III, § 16(a)
General shall petition the supreme court for a declaratory judgment on the validity of the apportionment, and the supreme court shall conduct an adversary proceeding and render a decision within thirty days. If the court finds the apportionment invalid, the Governor shall reconvene the legislature for a 15-day extraordinary apportionment session, the results of which shall again be submitted to the court by the Attorney General. If the supreme court twice disapproves the legislative apportionment, or if the legislature fails to pass any apportionment resolution, the Attorney General shall petition the supreme court, and the court shall itself, within sixty days, render an apportionment order.

In a 1972 decision, the supreme court ruled, by a vote of four to three, that the 1970 apportionment law was valid under the federal and state constitutions. The court held that

the variable multi-member districts prescribed in the apportionment plan are not per se invalid.... We recognize that variable multi-member districts may be subject to challenge where the circumstances of a particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population.

The court retained jurisdiction over any future proceedings which might challenge the validity of the apportionment plan on the basis of its practical effect as shown by the election results. In supplemental proceedings, the court found the apportionment plan valid as applied as well as on its face. One of the cases noted the enactment of a law giving broad home rule powers to municipalities and thereby removing

from the legislative arena the vast bulk of the local bills which have previously created a need for all citizens in a municipality to have an effective voice in selecting the senators and representatives to present such local legislation. While the problems presented by petitioners might have raised sufficient questions to require the appointment of a Commissioner in this cause prior to the adoption of the [Municipal Home Rule Act], such questions no longer exist.

3. INVESTIGATIONS

Legislative power to investigate is broadened by the 1968 revision. Each house, when in session, can compel the attendance of witnesses, as before, and can now also compel production of documents and other evi-

140. Fla. Const. art. III, § 16(c).
141. Fla. Const. art. III, § 16(c).
142. Fla. Const. art. III, § 16(f).
143. In re Apportionment Law, 263 So. 2d 797 (Fla. 1972).
144. Id. at 809.
145. In re Apportionment Law, 279 So. 2d 14; 281 So. 2d 484 (Fla. 1973).
146. In re Apportionment Law, 281 So. 2d 484 (Fla. 1973).
147. Id. at 486.
The punishment for contempt is limited to a fine of $1,000, or imprisonment for 90 days, or both; previously the punishment was unlimited, except that imprisonment could not extend beyond the final adjournment of the legislative session. The investigative power, but not the power to punish, may be conferred by law upon committees when the legislature is not in session; the 1885 constitution allowed each house to delegate investigative power to its own committees, subject to guidelines established by law.

Delegation of investigative power was at issue in *Johnston v. Gal- len*, decided in 1969 but governed by the 1885 constitution which was in effect when the case arose. The speaker appointed a select committee when the House was not in session, and the committee issued a subpoena requiring a witness to testify. The witness filed suit challenging the validity of the subpoena. The speaker claimed that he had appointed the committee under authority of a House resolution to the effect that “[t]he Speaker shall appoint such select committees as may be necessary or authorized by the House of Representatives.” The supreme court held that, even if the House had intended to authorize the speaker to appoint the committee, the House lacked constitutional authority to do so. The House could confer its investigative power upon committees, but could not delegate to the speaker the authority to confer such power upon committees. The court stated: “The constitutional inhibition against delegation of legislative power applies not only to the enactment of laws but also to other legislative functions.”

The 1970 decision in *Hagaman v. Andrews* arose under the 1968 revision. A standing committee of the House of Representatives conducted an investigation into the Governor’s Club, a private organization which collected membership dues in minimum denominations of $500 and which disbursed these funds under the supervision of Governor Kirk in the payment of his official, quasi-official and political expenses. In the course of its investigation the committee issued a subpoena duces tecum to a bank in which the club allegedly maintained an account, for the production of the bank’s records of deposits and disbursements of the club. The bank filed suit to determine whether its duty to protect the confidentiality of its depositors’ records had to yield to the committee’s subpoena. The supreme court held the subpoena proper and ordered the bank to comply. The court found a substantial connection between the Governor’s Club and the activities of the government of the state, constituting

---

149. 217 So. 2d 319 (Fla. 1969).
151. 217 So. 2d at 321.
152. 232 So. 2d 1 (Fla. 1970).
“the substantial State interest necessary to sustain the right of the committee to inquire into the membership list of the association.”

Part of the court’s opinion was based upon the traditional right of the legislature, through its committees, to conduct investigations on matters which are potential subjects of legislation. Other parts of the opinion go further and suggest that the legislative investigation may be justified as a means of informing the public even if no future legislation is contemplated. Thus the concluding paragraph of the opinion states: “The sum and substance of the whole matter is the right of the citizen to know about The Governor’s Club, or similar organizations, for this right instills confidence in government, just as the right to speak and be heard improves government.” This rationale is troublesome, especially in view of the unfortunate experience, in Florida as well as other jurisdictions, of legislative investigations undertaken for the stated purpose of informing the public; too often the underlying purpose has been harassment of the persons under investigation and interference with their associational rights.

Johnson v. McDonald held that the constitutional grant of investigatory power to legislative committees extends also to the subcommittees thereof.

4. TITLE AND SUBJECT OF LAWS

The 1968 constitution restates prior requirements that “every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” In Board of Public Instruction v. Doran, the supreme court sustained the validity of the Sunshine Law against a number of challenges, including a challenge that it violated the one-subject requirement. The court stated:

The term “subject of an act” within this provision means the matter which forms the groundwork of the act and it may be as broad as the Legislature chooses so long as the matters included in the act have a natural or logical connection. . . . The fact that a certain statute embracing the matter of open meetings for certain boards and commissions also contains provisions for criminal penalties and an injunction by application of citizens does not make the act unconstitutional.
In *State ex rel. Shevin v. Metz Construction Co.*, the supreme court ruled that to be valid, an act which prohibited discriminatory local ordinances against the factory built housing industry must be interpreted to prohibit only *future* enactments, since a prospective intent could be reasonably inferred from the title, while an intent to invalidate pre-existing discriminatory ordinances could not.

5. SPECIAL LAWS

The 1968 revision eliminated the prior distinction between special and local laws by defining "special law" to mean "a special or local law." The procedure to enact special laws and the types of subject matter prohibited in special laws are substantially retained in the 1968 revision, with minor changes. In *Hayek v. Lee County*, the supreme court held that the 1968 revision made a change in style only, and not in meaning, by prohibiting special laws "pertaining to" certain topics, where the 1885 constitution had prohibited special laws "regulating" certain topics.

The 1969 decision in *Veterinary Medical Society, Inc. v. Chapman* affirmed the traditional rule that special legislation, by definition, need not apply uniformly throughout the state. The court sustained the validity of a special law requiring the licensing and vaccination of dogs and the establishing of impounding agencies in Pinellas County. The requirements of equal protection are satisfied so long as the special law applies equally to all within the locality affected; statewide equality is not constitutionally required.

*Housing Authority v. City of St. Petersburg* involved a statute which created housing authorities in Pinellas County with powers different from those of housing authorities in every other part of the state. The supreme court held that this was a special law, which was void unless enacted with the constitutionally required notice.

In *Wednesday Night, Inc. v. City of Fort Lauderdale*, the supreme court sustained the validity of a statute which set the hours for the sale of alcoholic beverages statewide, but which permitted these hours to be changed by ordinance of any municipality or, as to unincorporated areas, by any county. The court held this was a general, not a special,

162. 285 So. 2d 598 (Fla. 1973).
163. FLA. CONST. art. X, § 12(g). The theoretical difference between special and local laws was discussed in *State ex rel. Buford v. Daniel*, 87 Fla. 287, 99 So. 804 (1924).
165. 231 So. 2d 214 (Fla. 1970).
166. 224 So. 2d 307 (Fla. 1969).
167. 287 So. 2d 307 (Fla. 1974).
169. 272 So. 2d 502 (Fla. 1972).
law even though the law was likely to result in different hours of sale in different parts of the state. The court held that the legislature could properly establish, by general law, that this was a matter for local determination.

Adequacy of notice of a special act was at issue in City of Naples v. Moon,171 where the supreme court held that the notice given by the city concerning its proposed charter amendment was adequate as notice of the special act which the legislature enacted as a substitute, since the same subject matter was covered by both.

One of the topics which cannot be reached by special law is "punishment for crime."172 An Attorney General's Opinion in 1972173 ruled that this provision was not violated by a pollution control act174 of local application which defines certain conduct as a misdemeanor, without specifying the punishment, since the punishment is provided by the general statute setting the punishment for misdemeanors, not by the special statute defining the offense.

A similar result was reached in Stephens v. Board of County Commissioners.175 A special act authorized the county commissioners to grant franchises for garbage service and to set rates and otherwise regulate the collection and disposal of garbage. Relying on this special act, the commissioners passed a resolution providing, inter alia, that any violation of the resolution or of the special act would be a misdemeanor punishable by a $100 fine and/or imprisonment for thirty days. The supreme court held that the penalty provision was invalid because it attempted to do, under authority of a special law, that which the legislature itself cannot do by special law; namely, determine the punishment for an offense. The court's opinion necessarily implies that the commission was authorized to define certain conduct as a misdemeanor, provided the commission did not specify the punishment.

In Board of County Commissioners v. Hibbard,176 a statute transferred the power to issue gun permits in the named county from the county commissioners to the sheriff. The supreme court held that the transfer of power was a primary purpose of the statute, which, thus, violated the prohibition against special laws pertaining to the duties of officers.

By a vote of four to three, the supreme court sustained the validity of a special act in City of Cape Coral v. GAC Utilities, Inc.177 The statute

---

171. 269 So. 2d 355 (Fla. 1972).
175. 278 So. 2d 269 (Fla. 1973).
176. 292 So. 2d 1 (Fla. 1974).
177. 281 So. 2d 493 (Fla. 1973).
divested the Public Service Commission of jurisdiction to regulate public utilities furnishing water and sewers within the named city and conferred such jurisdiction upon the city commission. The court held this act did not violate the constitutional prohibition against special laws pertaining to “regulation of occupations which are regulated by a state agency,” since the statute divested the Public Service Commission of jurisdiction at the same time it conferred jurisdiction upon the city commission, and consequently the utilities within the city were no longer “regulated by a state agency.”

6. CONFLICT BETWEEN SPECIAL AND GENERAL LAWS

Hillsborough Island House Condominium Apartments, Inc. v. Town of Hillsborough Beach178 reaffirmed the case law to the effect that a special statute usually takes precedence over a general statute on the same subject. The town charter of Hillsborough Beach (a special law) provided the specific projects suitable for bond financing. Chapter 169 of Florida Statutes (a general law) provided that money may be borrowed for the advancement of municipal powers and purposes, a much broader grant than the town charter. The supreme court ruled that the town “can borrow money under chapter 169 but not by means of bonded indebtedness unless such bonds come within the limitations of [the town charter].”179

7. GENERAL LAWS OF LOCAL APPLICATION—POPULATION ACTS

The 1968 revision for the first time expresses constitutional guidelines concerning general laws of local application.180 These laws typically are drafted as “population acts,” to be effective only in counties whose population falls within a stated range. This device was often used before 1968181 and the supreme court developed a series of precedents to prevent certain abuses. These pre-1968 precedents are, to some extent, reflected in the revised text of the 1968 constitution.

The first rule expressed in the 1968 constitution is that population acts are prohibited on any subject concerning which a special law would be prohibited.182 This is a significant change from prior case law183 and evidently reduces the motivation for legislators to introduce measures in the format of population acts. The second rule in the 1968 constitution is

---

178. 263 So. 2d 209 (Fla. 1972).
179. Id. at 212.
181. Sparkman, supra note 180, at 280-3, 298-9; see notes 183-90 infra and accompanying text.
183. Sparkman, supra note 180, at 280; Casebook, supra note 7, at 401.
that in the enactment of population acts on permissible subject-matter, "political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law."

This rule restates pre-1968 case law. A third requirement of the pre-1968 cases was that the population bracket must be left open-ended so that subdivisions may move into or out of the designated population range from time to time as their populations change. This requirement was not written into the text of the 1968 constitution, but apparently survives in the case law.

The social utility of population acts underwent a change with the adoption of the 1968 constitution. Before 1968, the state legislature was obliged to legislate on many matters of concern only to single counties since the counties themselves were without general legislative power to govern their own affairs. The large volume of special acts adopted at each legislative session was supplemented by population acts. This may have provided a certain amount of convenience by dispensing with some of the procedural requirements which would have been applicable to special laws, such as local referendum or notice. Moreover, population acts could be enacted before 1968 even on subjects concerning which special laws were prohibited. However, the 1968 constitution increased the availability of county home rule (in all matters other than taxation) and correspondingly reduced the counties' need for action by the state legislature.

Recognizing this change, the 1971 legislature enacted chapter 71-29, repealing literally thousands of population acts and reenacting all of them as follows: all relating to courts became general laws; all affecting a county became ordinances of the affected county; all affecting a municipality became ordinances of the affected municipality; and all affecting a school district became regulations of the affected school district. Obviously the 1971 legislature did not and could not prevent future legislatures from enacting population acts; the 1968 constitution expressly authorizes population acts within the stated guidelines.

---

185. Sparkman, supra note 180, at 281-2; Casebook, supra note 7, at 402. See, e.g., Morris v. Bryan, 198 So. 2d 18 (Fla. 1967); Yoo Kun Wha v. Kelly, 154 So. 2d 161 (Fla. 1961); Cotterill v. Bessenger, 133 So. 2d 409 (Fla. 1961).
186. E.g., State v. City of Miami Beach, 234 So. 2d 103 (Fla. 1970) (decided under the 1885 constitution); Advisory Opinion to the Governor, 132 So. 2d 163 (Fla. 1961).
187. Arguably the requirement of open-ended population brackets is inherent in the requirement that the population bracket be reasonably related to the subject-matter of the act.
188. Sparkman, on the basis of "a glance through the population acts in effect through 1970," found that population acts had been "occasionally" enacted on subjects concerning which special laws were prohibited, "although more than ninety percent of the acts did not involve such prohibited subjects." Sparkman, supra note 180, at 280-1.
189. Fla. Const. art. 8, § 1 (g)-(h).
191. See notes 180-85 supra and accompanying text.
theless, chapter 71-29 suggests that population acts will not be used as widely in the future as they were in the past.102

A remarkable decision by the supreme court in 1970103 sustained the validity, under the 1885 constitution, of a population act enacted in 1967. The act authorized the imposition of a municipal resort tax by any city or town within any county having a population between 330,000 and 340,000, or a population over 900,000, according to the latest decennial census, provided that the act is applicable only to those cities and towns whose charters specifically provide for such a tax by charter provision adopted before January 1, 1968. The court noticed that only cities and towns in Broward and Dade Counties were covered by the act. This classification was found to be reasonable in view of "this state's interest in the promotion and further development of the tourist industry."104 Further, the court held that the population bracket was open-ended since other counties could move into or out of the coverage of the act as determined by their census every ten years. The requirement that cities must make charter provision for such a tax before January 1, 1968, was not deemed to close the bracket, presumably because any city in any county could have adopted an appropriate charter provision before January 1, 1968, to be triggered in the event the county's population ever entered the population bracket of the act.

8. CONFLICT OF INTEREST

The 1968 revision includes a new provision requiring the legislature to prescribe a code of ethics for all state employees and non-judicial officers "prohibiting conflict between public duty and private interests."105 The legislature implemented this section by enactments codified in Florida Statutes, chapter 112. An Attorney General's Opinion rendered in 1971106 ruled that a member of the legislature may, without violating the conflict of interests standards, accept employment, either as a consultant to the Okaloosa Island Authority, or as a supervisor in a county school system.

192. Sparkman, supra note 180, at 305, reports a combined total of special acts and population acts of 292 in 1972, a sharp reduction from prior years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>292</td>
</tr>
<tr>
<td>1971</td>
<td>592</td>
</tr>
<tr>
<td>1970</td>
<td>534</td>
</tr>
<tr>
<td>1969</td>
<td>1,211</td>
</tr>
<tr>
<td>1967</td>
<td>1,584</td>
</tr>
<tr>
<td>1965</td>
<td>1,832</td>
</tr>
<tr>
<td>1963</td>
<td>1,473</td>
</tr>
</tbody>
</table>

Obviously the enactment of ch. 71-29 is not the only factor causing this reduction.

193. State v. City of Miami Beach, 234 So. 2d 103 (Fla. 1970).

194. Id. at 106.

195. FLA. CONST. art. III, § 18.

D. Executive

1. GOVERNOR—GENERAL POWERS AND FUNCTIONS

The 1968 revision restates, with minor changes, the supreme executive power of the Governor and his responsibility to take care that the laws be faithfully executed. The scope and limits of the Governor's power to execute the laws are illustrated by the first of the *Kirk v. Baker* cases. Governor Kirk ordered the state attorneys of the Fifth and the Eleventh Circuits to take each others' places for an indefinite period of time; the supreme court found that the Governor was acting pursuant to a statute which implemented his constitutional powers, and therefore the court sustained this action. The Governor further ordered the visiting state attorney, upon being transferred to the Eleventh Circuit, to prosecute a specific case named by the Governor. However, the judge before whom that case was pending appointed another lawyer to serve as acting prosecutor in the case. The supreme court ruled that the Governor had no statutory authority to designate a prosecutor for a specific case, and apparently his “raw” constitutional power was not sufficient to support this action, which the court declared void. The supreme court found that the trial judge had no statutory authority either, but that the appointment of an acting prosecutor was within the inherent power of a court possessing criminal jurisdiction and was therefore proper even without a statutory foundation. This case places heavy reliance upon statutes as a source of the Governor's power, perhaps because the subject-matter of the case involves the functions of state attorneys, who are required by the judiciary article “to fulfill duties prescribed by law.”

The one-term limitation on the Governor, which existed in the 1885 constitution and its predecessors, was changed in 1968 so as to allow the Governor to serve for two successive four-year terms.

2. LIEUTENANT GOVERNOR

The office of Lieutenant Governor existed under the constitutions of 1865 and 1868, was abolished by the 1885 constitution, and was reinstated by the 1968 constitution. The Governor and Lieutenant Governor run in the primaries and in the general election on a joint ticket. The Lieutenant Governor succeeds to the office of Governor upon the death, incapacity or impeachment of the Governor.

---

197. *Fla. Const.* art. IV, § 1(a); *Fla. Const.* art. IV, §§ 1, 5, 6 (1885).
198. 224 So. 2d 311 (Fla. 1969). The second of the *Kirk v. Baker* cases is discussed in text accompanying note 28 supra.
3. CABINET SYSTEM

The 1968 constitution preserves the elected cabinet, composed of the Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Agriculture and Commissioner of Education. The constitution gives a one-sentence description of the basic duties of each cabinet member and provides further that "they shall exercise such powers and perform such duties as may be prescribed by law." This language, although slightly changed from the 1885 constitution, has permitted continuation of the previous pattern of numerous boards, created by statute, the members consisting of the Governor and some or all cabinet members.

4. ATTORNEY GENERAL

The 1968 revision provides that the Attorney General shall be the chief state legal officer, a somewhat stronger statement than the previous constitution which described him as "the legal advisor of the Governor, and of each of the officers of the Executive Department..."

In State ex rel. Shevin v. Yarborough, the Attorney General filed an original mandamus action in the supreme court seeking authority to intervene in proceedings before the Public Service Commission "on behalf of all citizens of the State of Florida who are consumers of the electrical services provided by Florida Power Corp. in a pending application for rate increase before the PSC." The court held that the Attorney General can represent the state as a consumer and will, in that posture, be able to render as much service to the general public as if he appeared as their representative.

State ex rel. Shevin v. Kerwin held that the state, through the Attorney General, is a proper party to any action in which the constitutionality of a statute is raised. When the trial court finds a statute unconstitutional, it is proper that the Attorney General appear on appeal to defend the statute even if he was not a party in the trial court. And, in some cases of great magnitude or importance, it may be necessary for the Attorney General to intervene in the cause at the trial level.

State ex rel. Shevin v. Morgan held that the Attorney General has standing to bring an action to abate, as a public nuisance, an "automatic


205. Fla. Const. art. IV, §§ 20-26 (1885).


207. Fla. Const. art. IV, § 4(c).

208. Fla. Const. art. IV, § 22 (1885).

209. 257 So. 2d 891 (Fla. 1972).

210. 279 So. 2d 836 (Fla. 1973).

211. 289 So. 2d 782 (Fla. 2d Dist. 1974).
scarecrow” in a strawberry field adjacent to a residential subdivision which emits “loud and raucous shotgun-like sounds at 55-second intervals from dawn to dark, seven days per week.”

5. LIMITATION ON NUMBER OF EXECUTIVE DEPARTMENTS

A completely new provision in the 1968 constitution declares:

All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

(b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

The schedule to the 1968 constitution delayed the effective date of this section until July 1, 1969, and the legislature enacted the Reorganization Act of 1969 by that date, accomplishing the task of reducing over 150 departments to less than 25. In connection with this process, the justices of the supreme court issued an advisory opinion to the effect that the Public Service Commission was not an executive department, but was, instead, “a part of the legislative or the judicial branch of government.”

6. SUSPENSIONS

The 1968 constitution substantially restates the Governor’s power to suspend state officers not subject to impeachment and county officers, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform the duties of the office, or commission of a felony. The Governor may fill the office by appointment for the period of the suspension. The Senate may remove or reinstate the sus-

213. Fla. Const. art. XII, § 16.
216. Id. at 40.
pended officer, and the Governor may reinstate him before the Senate acts on removal.

Until 1968 municipal officers were subject to suspension in the same manner as state and county officers. The 1968 constitution reduces the Governor's power over municipal officers. His only power now is to suspend elected municipal officers indicted for crime until acquitted and to fill the office for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter.

In *Fair v. Kirk*, a federal district court, affirmed by the United States Supreme Court, held that an officer has no constitutional right to a hearing before suspension. The court assumed that he would be entitled to a hearing before removal and Florida Statutes so provide. State ex rel. *Meyerson v. Askew* held that the Senate improperly removed an officer where the Senate's findings involved different grounds than those mentioned in the Governor's order of suspension. *Crowder v. State ex rel. Baker* held that an executive order suspending an officer must allege facts with some degree of specificity, although the standard is not as stringent as is required for an indictment or information. In this case the executive order was declared invalid for failure to meet the applicable standard of specificity.

7. CLEMENCY

Before 1968, the constitution provided a Pardon Board, consisting of the Governor, Secretary of State, Comptroller, Attorney General and Commissioner of Agriculture. The Governor's presence was required for a meeting, but the Board made decisions as a unit, with or without the concurrence of the Governor. The 1968 constitution makes no mention of the Pardon Board, but provides that similar functions shall be carried out by the Governor "with the approval of three members of the cabinet." Thus the Governor's vote and initiative are now essential and the approval can come from any three members of the Cabinet. As a matter of practice, the cabinet meets on pardon matters, although opinions vary as to whether this is necessary under the 1968 constitution.

The Parole and Probation Commission remains substantially unchanged, except that a six-year term of office is now provided for its members.

---

218. FLA. CONST. art. IV, § 15 (1885).
219. FLA. CONST. art. IV, § 7(c).
221. FLA. STAT. § 112.47 (1973).
222. 269 So. 2d 671 (Fla. 1972).
223. 285 So. 2d 33 (Fla. 4th Dist. 1973).
224. FLA. CONST. art. IV, § 12 (1885).
225. FLA. CONST. art. IV, § 8(a).
227. FLA. CONST. art. IV, § 8(c); FLA. CONST. art. XVI, § 32 (1885).
8. GAME AND FRESH WATER FISH COMMISSION

The Game and Fresh Water Fish Commission continues its constitutional existence. Fewer details are contained in the 1968 constitution than its predecessor and more aspects of the Commission's functions are subject to statutory control.

Whitehead v. Rogers, decided in 1969, illustrates the autonomy enjoyed by the Commission under the 1885 constitution, which controlled this case. A huntsman was arrested for discharging firearms on Sunday, a crime under state statute. However, the Game and Fresh Water Fish Commission had promulgated an order providing an open season for the hunting of mourning doves and the defendant asserted he had indeed been hunting mourning doves during the Commission's open season at the time of his arrest. Faced with a conflict between the state statute and the Commission's order, the supreme court held that the Commission's order must prevail, since the 1885 constitution expressly conferred authority upon the Commission to fix hunting seasons.

The 1968 constitution omits mention of hunting seasons, but provides that the Commission "shall exercise the non-judicial powers of the state with respect to wild animal life and fresh water aquatic life, except that . . . penalties for violating regulations of the commission shall be prescribed by specific statute." This language appears to preserve the supremacy of the Commission in such matters as hunting seasons.

9. OFFICERS

In State Department of Citrus v. Huff, the district court of appeal held that the Department of Citrus exercises corporate powers necessary to promote the general welfare, but is not a corporation with the full powers and duties of private corporations. It is, therefore, not subject to the statutory requirement that corporate officers and directors be indemnified for attorney fees incurred in the successful defense of a criminal action.

V. ORGANS OF LOCAL GOVERNMENT

Article VIII, Local Government, was significantly revised in 1968. The general thrust of the revision is to increase local autonomy, but the legislature retains substantial control over the framework of local government.

228. Fla. Const. art. IV, § 9; Fla. Const. art. IV, § 30 (1885).
230. 223 So. 2d 330 (Fla. 1969).
233. 290 So. 2d 130 (Fla. 2d Dist. 1974).
CONSTITUTIONAL LAW

A. Counties

Before 1968, a county could achieve home rule status only through an amendment to the constitution.235 Dade was the only county granted home rule before 1968 and the Dade County Home Rule Amendment is preserved in the schedule of the new article VIII.236

The 1968 revision, for the first time, authorizes any county, pursuant to general or special law, to adopt a charter which can be adopted, amended or repealed only by referendum.287 Every county has ordinance making powers. The basic constitutional difference between charter and non-charter counties is three-fold. First, the charter itself contains provisions which are part of the law of the county. Second, special laws require a referendum in a charter county, in order to override inconsistent county ordinances. Third, in the event of a conflict between a county ordinance and a municipal ordinance, in a charter county the charter shall provide whether the county or municipal ordinance shall prevail, while in a non-charter county the municipal ordinance must prevail.

Implementing legislation288 has granted broad powers, both to charter and to non-charter counties, leading a commentator to observe: "The range and scope of the powers enumerated by the [county home rule] law are so broad and comprehensive as to encompass all readily imaginable local government concerns."289 The same author notes that the legislature has significantly reduced the number of special laws and population acts enacted annually apparently in deference to the autonomy of county commissions.

Davis v. Gronemeyer240 involved an attempt by Escambia County, under the 1968 revision, to repeal statutes241 which created a civil service system for county personnel and established a Civil Service Board to administer the law. In 1970 the Escambia County Commission enacted ordinances repealing the statutes and creating a new civil service system. The supreme court first ruled that the old Board had standing to bring suit to test the constitutionality of the new county ordinances, since the ordinances could be characterized as "the ultimate violation" of the statutes. On the merits, the court noted that Escambia County was a non-charter county and thus could enact ordinances only to the extent not inconsistent with general or special law. The county derived a certain amount of additional authority from the schedule to article VIII, which provides: "Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county

236. Fla. Const. art. VIII, § 6(e).
237. Fla. Const. art. VIII, § 1(c).
239. Sparkman, supra note 180, at 298.
240. 251 So. 2d 1 (Fla. 1971).
ordinance. However, this authority did not avail in the present case, since the statutes applied to the incorporated as well as the unincorporated areas of the county. The court therefore held that the county was without authority to enact an ordinance inconsistent with the statutes.

In *Dade County v. Acme Specialty Corp.*, a district court of appeal held unconstitutional a county ordinance banning the sale of sparklers, since a state statute authorized such sales.

Other cases on counties will be discussed under later headings of this survey, especially those dealing with taxation and borrowing.

**B. Municipalities**

1. **Powers**

The 1968 constitution includes the statement:

Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

The dominant case regarding municipal powers during the period under survey was decided by a four-to-three vote of the supreme court in 1972. In *City of Miami Beach v. Fleetwood Hotel, Inc.*, the court invalidated a municipal rent control ordinance on three grounds: that the city did not have power to enact an ordinance on rent control; that the ordinance was an unlawful delegation of legislative authority, without guidelines, to the rent agency; and that the ordinance conflicted with state law. On the first issue, regarding the power of the city to enact rent control ordinances, the court noted that the 1968 revision of article VIII had expanded municipal powers, but continued:

The powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt will be resolved against the City.

This statement is, basically, a repetition of the doctrine known as "Dil-
Ion’s Rule,” which the Supreme Court of Florida embraced as long ago as 1913, to the effect that municipalities can exercise “only such authority as is conferred by express or implied provisions of law. . . . If reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city.\footnote{250}

A more expansive view of municipal powers than that expressed in the Fleetwood Hotel case was taken by the Attorney General in a 1972 opinion, which ruled that

\begin{quote}
[m]unicipal corporations may enact and enforce legislation to protect those civil rights guaranteed by the state and federal constitutions, where the subject of such legislation has not been displaced or preempted by state or federal action and where such legislation is not prohibited by general or special law.\footnote{251}
\end{quote}

The matter has been clarified by the Municipal Home Rules Powers Act,\footnote{252} which became effective on October 1, 1973. The Act, in an apparent attempt to expand municipal power beyond the scope of the Fleetwood Hotel decision, defines the constitutional term “municipal purpose” to mean “any activity or power which may be exercised by the state or its political subdivisions.”\footnote{253} The Act then gives municipalities the power to enact any legislation concerning any subject matter upon which the state legislature may act, except:

\begin{itemize}
  \item[(a)] The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to § 2(c), Art. VIII of the state constitution;
  \item[(b)] Any subject expressly prohibited by the constitution;
  \item[(c)] Any subject expressly preempted to state or county government by the constitution or by general law; and
  \item[(d)] Any subject preempted to a county pursuant to a county charter adopted under the authority of §§ 1(g), 3, and 6(e), Art. VIII of the state constitution.\footnote{254}
\end{itemize}

As previously mentioned, one of the grounds of the Fleetwood Hotel decision was that the rent control ordinance was an unconstitutional delegation of power. On this point the court noted that

\begin{quote}
[t]he same restrictions which apply to the Legislature’s delega-
\end{quote}

\footnotetext{250}{Malone v. City of Quincy, 66 Fla. 52, 56-57, 62 So. 922, 924 (1913); J. Dillon, 1 Municipal Corporations 237 (5th ed. 1911).}
\footnotetext{251}{Op. Att’y Gen. Fla. 072-216 (July 10, 1972).}
\footnotetext{252}{Fla. Stat. ch. 166 (1973).}
\footnotetext{253}{Fla. Stat. § 166.021(2) (1973).}
\footnotetext{254}{Fla. Stat. § 166.021(3) (1973).}
tion of legislative authority also apply to the enactment of municipal ordinances under the general police power by municipalities in that city ordinances must not constitute an improper delegation of legislative, executive or administrative power.\textsuperscript{265}

The court thus reaffirmed its 1971 decision in \textit{Municipal Court, City of Fort Lauderdale v. Patrick},\textsuperscript{266} which invalidated a provision of the city charter authorizing the mayor, by proclamation, to establish a curfew and a penalty for its violation, enforceable by the municipal court. The court held in \textit{Patrick} that these matters were legislative and therefore must be decided by the city commission.

\textit{Pinellas Apartment Association, Inc. v. City of St. Petersburg}\textsuperscript{257} dealt with the rates charged by the city for its garbage collection and disposal service. Some consumers sued when the city increased its rates. The evidence tended to show that users of bulk containers (dumpsters) were being charged slightly more than the city’s cost to handle this type of container, while users of garbage cans were being charged slightly less than the city’s cost. However, the evidence did not indicate that the rates were arbitrary, discriminatory or unreasonable, and the court, therefore, sustained the rates. The court noted that mathematical exactitude is not required, and that “[t]here is nothing inherently wrong with the city making a modest return on its utility operation or certain portions thereof, providing the rate is not unreasonable in light of the service provided.”\textsuperscript{258}

This last proviso raises serious questions as to the propriety of the rate structure of certain city owned utilities which deliberately and consistently charge rates high enough to yield a substantial profit to be turned over to the general fund of the city as a significant portion of the city’s budgeted revenues and thereby reduce the burden on ad valorem taxpayers at the expense of utility consumers.

In \textit{City of Riviera Beach v. Witt},\textsuperscript{260} the court held that the employment of a city prosecutor is a governmental, not a proprietary function. Therefore, an employment contract which purported to extend beyond the terms of office of the contracting officers could not effectively bind their successors.

2. \textbf{ESTABLISHMENT OF MUNICIPALITIES}

The 1968 revision restates prior provisions for the establishment or abolition of municipalities and the amendment of their charters by special or general law.\textsuperscript{260}

\textit{State ex rel. Lee v. City of Cape Coral}\textsuperscript{261} held that a special act estab-

\begin{itemize}
  \item 255. 261 So. 2d at 805.
  \item 256. 254 So. 2d 193 (Fla. 1971) [hereinafter referred to as \textit{Patrick}].
  \item 257. 294 So. 2d 676 (Fla. 2d Dist. 1974).
  \item 258. Id. at 678.
  \item 259. 286 So. 2d 574 (Fla. 4th Dist. 1973).
  \item 260. \textit{Fla. Const.} art. VIII, § 2(a); \textit{Fla. Const.} art. VIII, § 8 (1885).
  \item 261. 272 So. 2d 481 (Fla. 1973).
\end{itemize}
lishing a city was constitutional, but that lands too remote from the populated area and from city benefits must be excluded from the city limits. The court's opinion was a per curiam affirmance and consequently the rationale was not expressed.

3. ANNEXATION

The 1968 revision states: "Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law." This substantially restates prior provisions.

In *City of Long Beach Resort v. Collins*, the supreme court sustained the validity of a special statute which provided for the merger of several cities and the surrounding unincorporated areas. The statute provided for an election only in the unincorporated areas and the outcome of this election was in favor of merger. Residents of the cities had no opportunity to vote on the question. The court found no denial of equal protection, and concluded that the legislature has complete power to create or abolish municipalities, and may do so on its own terms.

C. Consolidation

Before 1968, a separate constitutional amendment was required for each proposal to consolidate a county government with the government of one or more municipalities within its borders. Three such amendments were adopted dealing, respectively, with Duval-Jacksonville, Monroe-Key West and Hillsborough-Tampa. The only consolidation implemented by referendum before 1968 was the Duval-Jacksonville consolidation.

The 1968 revision of article VIII authorizes the legislature, by special law, to propose consolidation plans without need of further constitutional amendment. The legislative proposal must provide for a referen-

262. FLA. CONST. art. VIII, § 2(c).
263. See FLA. CONST. art. VIII, 8 (1885). The analysis of the proposed 1968 revision, published on July 20, 1968 by the Legislative Reference Bureau, comments that the provision in the 1968 revision "clarifies the power of the Legislature that is implicit in the 1885 Constitution. No substantive change."
264. D'Alemberte, Commentary on art. 8, § 3, 26A FLA. STAT. ANN. (1970). Legislative Reference Bureau, n. 263, comments that, "the type of consolidation permitted by [art. VIII, § 3, 1968 revision] requires separate constitutional authorization in each county under the 1885 constitution."
265. FLA. CONST. art. VIII, § 9 (1885).
266. FLA. CONST. art. VIII, § 10 (1885).
267. FLA. CONST. art. VIII, § 24 (1885), which included partial home rule powers as well as consolidation.
268. FLA. CONST. art. VIII, § 24 (1885).
269. Jackson v. Consolidated Government, 225 So. 2d 497 (Fla. 1969) sustained the validity of the Jacksonville Consolidation Charter against attack on various constitutional grounds.
270. FLA. CONST. art. VIII, § 3.
dum either of the county alone, or of the county and each affected munici-
pality, as may be provided in the plan. Consolidation "shall not extend
the territorial scope of taxation for the payment of pre-existing debt ex-
cept to areas whose residents receive a benefit from the facility or service
for which the indebtedness was incurred."

City of Jacksonville Beach v. Albury held that even after the con-
solidation, certain unconsolidated “quasi-municipal corporations” con-
tinued to exist and could exercise certain ordinance-making and adminis-
trative powers.

D. Transfer of Powers

A new provision in the 1968 revision authorizes the transfer or
contracting of any function or power of a county, municipality or special
district to another such entity, by law or by resolution of the governing
bodies of each of the affected governments, after approval by referendum
of the electors of the transferor and of the transferee, "or as otherwise
provided by law."

VI. Elections

Article VI, Suffrage and Elections, as revised in 1968, substantially
restates the 1885 constitution. In addition, it grants power to the legis-
lature to regulate political party functions and to provide for registration
and elections in municipalities and other governmental entities created
by statute. The twenty-one year minimum age for voting, included in the
1968 revision, has been superseded by the 26th amendment to the
United States Constitution, establishing a nationwide voting age of eight-
een years.

Extensive case law developed during the period under survey.

A. Campaign Practices

Adams v. Sutton sustained the validity, under the 1885 constitu-
tion, of a statute prohibiting liquor licensees from making political
campaign contributions. A subsequent suit in federal court by the same
parties on the same issue was dismissed upon the finding by the Fifth
Circuit Court of Appeals that the federal issues had been litigated and
decided previously by the Florida courts in Adams.

271. Id.
272. 291 So. 2d 82 (Fla. 1st Dist. 1973).
273. FLA. CONST. art. VIII, § 4.
274. FLA. CONST. art. VI; FLA. CONST. art VI (1885).
275. FLA. CONST. art. VI, § 2.
276. 212 So. 2d 1 (Fla. 1968), appeal dismissed, 393 U.S. 404 (1969).
278. Rankin v. Florida, 418 F.2d 482 (5th Cir. 1969).
Maloney v. Kirk\textsuperscript{279} held that the 1885 constitution was violated by a statute\textsuperscript{280} which provided, in part:

The nomination or election to office of any person who willfully violates the provisions of [another statute dealing with the receipt, handling and disbursement of campaign funds] may be declared void by the court of competent jurisdiction. . . .

The statute was declared unconstitutional since it attempted to add to the constitutional qualifications of candidates for office.

B. Resign-to-Run Law

The resign-to-run law, enacted in 1970, provides, in part:

No individual may qualify as a candidate for public office who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than ten days prior to the first day of qualifying for the office he intends to seek. Said resignation shall be effective not later than the date upon which he would assume office, if elected to the office to which he seeks to qualify, the expiration date of the term of the office which he presently holds, or the general election day at which his successor is elected, whichever occurs earliest.\textsuperscript{281}

Holley v. Adams\textsuperscript{282} held this statute valid as regards a state officer seeking another state office. Distinguishing Maloney v. Kirk,\textsuperscript{283} the supreme court stated that the statute "does not relate to the qualifications one must possess in order to hold office, but merely conditions under which he may become eligible to be a candidate."\textsuperscript{284} Similarly, in Deeb v. Adams\textsuperscript{285} a three-judge federal district court held that the resign-to-run law did not violate federally protected rights by requiring candidates for state office to resign in order to qualify. The companion case of Stack v. Adams\textsuperscript{286} held, however, that the resign-to-run law did violate the United States Constitution as regards candidates for federal office. By requiring such candidates to resign from state office as a precondition of running for federal office, the statute imposed an additional qualification for federal office beyond the qualifications contained in article I, section 2, clause 1 of the Federal Constitution.

Evers v. Lacy\textsuperscript{287} held that a candidate who did not resign although

\textsuperscript{279} 212 So. 2d 609 (Fla. 1968), noted in 21 U. FLA. L. REV. 408 (1969).
\textsuperscript{280} F.LA. STAT. § 104.27 (1973).
\textsuperscript{281} F.LA. STAT. § 99.012(2) (1973).
\textsuperscript{282} 238 So. 2d 401 (Fla. 1970), noted in 25 U. MIAMI L. REV. 339 (1971).
\textsuperscript{283} 212 So. 2d 609 (Fla. 1968).
\textsuperscript{284} 238 So. 2d at 408.
\textsuperscript{286} 315 F. Supp. 1295 (N.D. Fla. 1970).
\textsuperscript{287} 257 So. 2d 70, 71 (Fla. 2d Dist. 1972).
required to do so by the resign-to-run law was without standing to bring suit to challenge absentee ballots "but for which, undisputedly, he would have won." The court held that since he was not eligible to be a candidate, he was not an "unsuccessful candidate" with standing to attack the results.

In an advisory opinion rendered in 1970,288 the justices interpreted the resign-to-run law to mean that surrender of the resigned office takes effect simultaneously with the election of the successor in the general election; therefore no vacancy occurs in the office and the Governor does not have occasion to use his appointive power to fill a vacancy.289 Since the constitution lists resignation as one of the occurrences creating a vacancy,290 this advisory opinion implies that resignation takes place on the effective date when the incumbent leaves his office, not on the date he announces his decision.

In State ex rel. Cherry v. Stone,291 a district court of appeal held that the Secretary of State had no duty to conduct an independent inquiry into the qualifications of candidates. The court therefore declined to issue mandamus to require the Secretary to ascertain whether a candidate had complied with the resign-to-run law. The same court, in Eastmore v. Stone,292 pointed out that the Cherry rule applied only to latent defects in the candidate's qualifications. If, instead, patent defects appeared on the face of the papers, the Secretary was bound to disqualify the candidate.

C. Filing Fees

In Fair v. Taylor,293 a three-judge federal district court found unconstitutional Florida statutes294 imposing a filing fee, amounting to five percent of the annual salary of the office sought. The filing fee provisions were deemed to be reasonable in amount if applied uniformly as a means of regulating the ballot; however, the court ruled that the state must provide an alternative method of obtaining a place on the ballot that does not involve the payment of a substantial sum of money to the state, so that the filing fee does not exclude candidates who are unable to pay it.

The court formulated a method which would satisfy constitutional standards, to be invoked by candidates until the Florida legislature determined another method. The court's formula requires a candidate either to pay the filing fee or to file an affidavit that he cannot pay it without imposing an undue burden on his personal resources. After filing the affidavit, petitions may be circulated on behalf of the candidate, and

288. Advisory Opinion to Governor, 239 So. 2d 247 (Fla. 1970).
289. Fla. Const. art. IV, § 1(f).
290. Fla. Const. art. X, § 3.
291. 265 So. 2d 56 (Fla. 1st Dist. 1972).
292. 265 So. 2d 517 (Fla. 1st Dist. 1972).
his name shall be placed upon the ballot if petitions are filed with the requisite number of signatures, as follows: candidates for statewide office require 10,000 signatures; candidates for any federal, state or county office elected on less than a statewide basis require petitions signed by one percent of the population of the elective district, but not less than 100 nor more than 3,000 signatures.

D. Qualifications of Electors

Article VI, section 3 requires each person making application for registration as an elector to take the following oath: "I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and that I am qualified to register as an elector under the Constitution and laws of the State of Florida." A statute repeats the oath verbatim in context of laws regulating voter registration. In Fields v. Askew, the supreme court sustained the validity of the oath, noting that the United States Supreme Court had sustained similar oaths for public employees in recent cases which were "sufficiently analogous to control."

Beacham v. Braterman, a federal district court decision, sustained the validity of article VI, section 4, which disqualifies any person convicted of a felony from voting or holding office until restoration of civil rights.

In Hinnant v. Sebesta, a federal court invalidated the Florida statute imposing a sixty-day residency requirement on electors. An opinion of the Attorney General ruled, subsequently, that regardless of the fate of voter residency statutes, Florida could continue, by statute, to require candidates for judicial office to have been registered to vote in the state in the last preceding general election. There is no absolute connection, in the Attorney General's view, between qualification of voters and qualification for elective office. Andrews v. Linden held that a city charter may permit nonresident property owners to participate in city elections.

E. Minority Political Parties

Beller v. Adams involved a Florida statute which provided that only "recognized" political parties, with more than five percent of the

296. 279 So. 2d 822 (Fla. 1973).
302. 284 So. 2d 398 (Fla. 3d Dist. 1973).
303. 235 So. 2d 502 (Fla. 1970).
registered electors of the state, could place a party candidate on the ballot. The supreme court upheld the five percent provision, but permitted plaintiff to satisfy it by filing a petition signed by five percent of the registered electors of the state. Following the decision, statutes were enacted, requiring signatures of three percent of the registered electors to place minority party candidates on ballots for statewide offices and five percent on ballots for less than statewide offices. The new statute was upheld in a three-judge federal court, which was affirmed by the United States Supreme Court.

F. Presidential Primary Elections

The Florida Presidential Preference Primary Law provides for selection of candidates for ballot inclusion by a Presidential Candidate Selection Committee composed of the Secretary of State, Speaker of the House, President of the Senate, minority leaders of both House and Senate, and chairmen of the two major political parties. In Quinn v. Stone, the supreme court held this system did not violate equal protection or free speech because there must be some type of control of the ballot and these were reasonable procedures.

Yorty v. Stone involved withdrawal of a name selected for the ballot by the committee. Mayor Yorty was an announced "national" presidential candidate, but he did not want his name to appear on the Florida preference primary ballot. The supreme court sustained the validity of the statutory requirement that he must either leave his name on the ballot or declare himself not to be a presidential candidate. The court held this statute was a reasonable exercise of the police power and not a denial of equal protection, due process, or the candidate's right of privacy.

G. Municipal Recall Elections

The 1885 constitution, in the Dade County Home Rule Amendment, recited that the charter "[s]hall provide a method of recall of any commissioner . . . ." The charter implemented this requirement by providing that, after one year in office, "[a]ny member of the Board of Commissioners . . . may be removed in a recall election on the petition" of a percentage of the voters. The schedule to the 1968 revision of ar-

---

308. 259 So. 2d 492 (Fla. 1972).
309. 259 So. 2d 146 (Fla. 1972).
311. FLA. CONST. art. VIII, § 11(1)(i) (1885).
312. METROPOLITAN DADE COUNTY HOME RULE CHARTER, § 7.02 (1957).
article VIII states that all provisions of the Dade County charter adopted under the old constitution continue as valid.813

In Gordon v. Leatherman,814 the Fifth Circuit Court of Appeals held that a county commissioner had a property right in his office which could not be taken away except by due process of law. But, continued the court, a recall petition executed pursuant to the home rule charter satisfied the requirements of due process even though no notice of the reasons was given, since no such notice was required by the charter.

In Lalor v. Dade County,815 a district court of appeal refused to enjoin a recall election. The plaintiffs alleged that the compilation of petitions was erroneous and that enough signatures were not collected. The court refused to interfere with the political process unless it were shown to be clearly without basis in law.

VII. Constitutional Rights and Limitations

A. Declaration of Rights816

1. Religious Freedom817

Johnson v. Presbyterian Homes of the Synod,818 challenged the exemption from property taxes which had been granted to homes for the aged owned by religious organizations and operated primarily for religious purposes. The supreme court sustained the tax exemption and observed: “A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited.”819

2. Freedom of Speech, Press and Assembly820

Lieberman v. Marshall821 arose out of an attempt to conduct a rally of Students for a Democratic Society on the campus of Florida State University. Upon petition of the University president, the circuit court issued an injunction ex parte, forbidding members of SDS from holding a rally or sponsoring a speaker in any building on campus; the injunction did not forbid the use of campus grounds. Later the same day, the order was served on members of SDS as they were starting to occupy a campus building where they had scheduled a rally. Students who did not leave

313. FLA. CONST. art. VIII, § 6(e).
314. 450 F.2d 562 (5th Cir. 1971).
315. 258 So. 2d 843 (Fla. 3d Dist. 1972).
316. Due process and equal protection are discussed in subsections C and D infra.
317. FLA. CONST. art. I, § 3.
318. 239 So. 2d 256 (Fla. 1970).
319. 239 So. 2d at 261. This holding derived from the decision in Walz v. Commissioner, 397 U.S. 664 (1970).
320. FLA. CONST. art. I, §§ 4, 5.
immediately upon the reading of the court order were arrested and cited for contempt. The supreme court held that the injunction was properly issued

to prevent the occupation of a portion of a campus building, by a student organization whose denial of recognition has not been shown to be invalid, to hear a speaker whom the university neither approved nor disapproved, in circumstances which reveal calculated and deliberate efforts to publicly confront, embarrass, defy and challenge the university in the enforcement of its regulations.\textsuperscript{222}

Although the court relied heavily upon the fact that SDS had been denied recognition as a campus organization, it did not discuss the circumstances surrounding the denial or the standards, if any, which would apply if the denial were subjected to judicial review.\textsuperscript{228}

Another free speech case\textsuperscript{224} arose out of a political rally in Tallahassee in support of the presidential candidacy of Alabama Governor George Wallace. An area outside the rented stadium was reserved for protesters. However, petitioner entered the stadium itself and then unrolled a sign he had been carrying, which bore the legend, “Racism is Destroying my Country.” He was ushered out, attempted to return, and was eventually arrested, charged and convicted of “disturbing the peace.” The district court of appeal affirmed the conviction, holding that while petitioner had every right to display his sign in the area outside the stadium reserved for demonstrators, he had no right to interfere with the exercise of first amendment rights by the persons who reserved the stadium for their meeting. “Petitioner’s contention that he can speak while another citizen already has the floor can only serve to diminish the right of both to the unfettered exercise of constitutional freedoms.”\textsuperscript{228}

Of course obscene speech is not constitutionally protected. Decisional conflict persisted for a number of years between the Florida courts and the lower federal courts in Florida as to the definition of obscenity.\textsuperscript{226} This conflict may have been resolved by the 1973 United States Supreme Court decisions in \textit{Miller v. California}\textsuperscript{227} and companion cases.

In \textit{Rhodes v. State}\textsuperscript{228} decided after \textit{Miller} on the basis of facts occurring before \textit{Miller}, the Supreme Court of Florida ruled that the

\textsuperscript{222} 236 So. 2d at 130.
\textsuperscript{223} In Healy v. James, 408 U.S. 169 (1972) the Supreme Court held that the burden rests upon a university or college to show that recognition of the organization would pose a substantial threat to the educational process; mere disagreement with the philosophy of the organization is not sufficient.
\textsuperscript{224} Carlson v. City of Tallahassee, 240 So. 2d 866 (Fla. 1st Dist. 1970), \textit{cert. denied}, 244 So. 2d 431 (Fla. 1971).
\textsuperscript{225} 240 So. 2d at 868.
\textsuperscript{227} 413 U.S. 15 (1973).
\textsuperscript{228} 283 So. 2d 351 (Fla. 1973).
pre-Miller tests must apply to the case at bar, and that the Miller test would be adopted prospectively. Applying the pre-Miller test, the Florida court sustained the validity of the applicable Florida obscenity statute, and held that authoritative judicial interpretations of that statute had been published before the offense in the case at bar, giving the defendants adequate notice of the meaning of the statute. Rhodes also sustained the validity of the seizure of the film on the basis of a warrant issued ex parte by a circuit judge following his consideration of affidavits submitted by grand jurors upon their collective viewing of the film.

In Davison v. State, on remand from the United States Supreme Court for reconsideration in light of Miller, the supreme court found the Florida obscenity standard valid under the Miller test. Further, the Florida court ruled that "contemporary community standards" could be applied by reference either to an entire state, as in Miller itself, or to a smaller community; Alachua County was an appropriate community from which to determine contemporary standards. Finally, the court sustained the validity of the seizure of the film at the time of the arrest of the theatre operator pursuant to a warrant.

The use of broad injunctions against the sale of obscene materials was prohibited by the supreme court in Mitchem v. State ex rel. Schaub. The circuit court had permanently enjoined the owners and operators of a bookstore from selling obscene or pornographic materials and from further operation of their business in such a manner as to annoy the community. The supreme court held that such a blanket injunction is constitutionally invalid because it does not put the respondent on notice as to what is prohibited, and thereby creates an unacceptable restraint on his freedom to vend publications. A valid injunction would have to name each publication involved and the evidence submitted to the trial court in support of the injunction would have to include one copy of each item sought to be suppressed, unless the defendant stipulated that the exhibits were representative of the entire stock. The court reserved judgment on the issue whether a nuisance theory might, in appropriate circumstances, be applicable to obscenity proceedings.

In Hoffman v. Carson, a go-go dancer was unsuccessful in her attempt to obtain an injunction to restrain the sheriff from prosecuting her for indecent exposure. She argued that her performance was protected by the constitutional guarantee of free speech. The supreme court held that her performance was conduct, not speech, nor even symbolic speech, and therefore not protected by the constitution. But an Attorney General's opinion rendered in 1971 ruled that a stage performance that includes a scene where members of the cast appear in the nude is not "obscene"

329. FLA. STAT. § 847.01 (1973).
330. 288 So. 2d 483 (Fla. 1973).
331. 250 So. 2d 883 (Fla. 1971).
332. 250 So. 2d 891 (Fla. 1971), appeal dismissed, 404 U.S. 981 (1971).
unless, in addition to being nude, they engaged in "some lascivious, vulgar or indecent exhibition of their bodies."

In the June, 1974 decision in Miami Herald Publishing Co. v. Tornillo, the United States Supreme Court reversed the Supreme Court of Florida and invalidated Florida's "right to reply" statute. The Court held that the statute violated the first amendment by imposing a requirement upon newspapers that they publish a reply by any candidate against certain types of criticism previously published in the newspaper. A somewhat similar result had been reached by the district court of appeal in Town of Lantana v. Pelczynski. An ordinance prohibited publication or circulation of any charge or attack against any candidate for election during the seven days before the election, unless the charge or attack had been personally served upon the candidate at least seven days before the election. The court held the ordinance unconstitutional as a violation of free speech under United States Supreme Court decisions, even if not under Supreme Court of Florida decisions.

In Menendez v. Key West Newspaper Corp., a district court of appeal held that a candidate for the city commission could not recover in an action for libel against a newspaper which had published paid advertisements shortly before the primary and run-off elections, charging he was an un-American with pro-Castro Communist allegiance.

3. RIGHT TO WORK

The 1968 constitution repeats the right to work provision and adds that public employees shall not have the right to strike. Dade County Classroom Teachers' Ass'n v. Ryan held that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted to private employees. The collective bargaining rights of public employees were emphasized in Bassett v. Braddock, in which the court held that the Sunshine Law was not violated where preliminary contact with a teacher representative was in private; to require such contacts to be public, said the court, would destroy meaningful collective bargaining which is guaranteed to public employees by the constitution.

In Classroom Teachers' Ass'n v. Legislature, plaintiffs brought a class action to compel the legislature to enact standards on collective bargaining by public employees in order to implement guarantees con-

335. FLA. STAT. § 104.38 (1973).
336. 290 So. 2d 566 (Fla. 4th Dist. 1974).
337. 293 So. 2d 751 (Fla. 3d Dist. 1974).
339. 225 So. 2d 903 (Fla. 1969).
340. 262 So. 2d 425 (Fla. 1972).
342. 269 So. 2d 684 (Fla. 1972).
tained in the right to work provision. The petition was denied as premature. However, the supreme court declared itself ready to establish guidelines by judicial decree unless the legislature acts on the matter within a reasonable time.

4. IMPAIRMENT OF OBLIGATION OF CONTRACTS

In *Ryan v. Ryan*, the supreme court sustained the validity of Florida's new no-fault divorce law against a number of challenges. One challenge asserted that the law amounted to an impairment of the obligation of contracts, since the law applied to preexisting marriage "contracts" and had the effect of reducing the opportunities for alimony available to parties who had entered into marriage before enactment of the law, and who might obtain divorces subsequent to its enactment. The court held that potential alimony is not a property right and is therefore not protected by the prohibition against impairment of the obligation of contracts which was repeated in the 1885 and 1968 constitutions.

*Goodfriend v. Druck* interpreted Florida's usury statutes in context of the rule against impairment of the obligation of contracts. A promissory note was issued in 1962, guaranteed by Goodfriend individually, bearing interest at ten percent until maturity in 1966, and "deferred interest" at fifteen percent from maturity until date of payment. These interest rates were allowable as charges against an individual guarantor under the usury statute in effect when the note was issued in 1962. By statutory amendment in 1965, however, the maximum interest rate chargeable against individual guarantors was reduced to ten percent. Subsequently the promissor defaulted and the lower courts ruled that the guarantor must pay deferred interest at the rate of fifteen percent, on the theory that the non-impairment of contracts rule prevented the 1965 statute from affecting the terms of the 1962 note. The supreme court reversed and ordered deferred interest to be paid at ten percent, the maximum rate allowable by the 1965 statute, which remained in effect throughout the litigation. The court held that the pre-1965 usury statute had created no vested right to interest and, therefore, the 1965 statute controlled the courts as the latest expression of the legislative will. The court placed substantial reliance upon its 1972 decision in *Wilensky v. Fields*, which had reached a similar result. Neither *Goodfriend* nor *Wilensky* reached the question whether a supervening amendment to the usury statute could effect a forfeiture of the principal as well as the interest of a usurious loan, but both cases imply that a forfeiture of the principal would violate the non-impairment of contracts rule.

---

344. 277 So. 2d 266 (Fla. 1973).
346. 289 So. 2d 710 (Fla. 1974).
348. 267 So. 2d 1 (Fla. 1972).
In *Castellano v. Cosgrove*, a statute enacted after the creation of a trust account required that trusts as to which the settlor is sole trustee be executed in accordance with the formalities required for the execution of wills. The supreme court held that this statute could only apply prospectively, because an attempt at retroactive application would be unconstitutional as an impairment of the obligation of contracts.

In *Morton v. Zuckerman-Vernon Corp.*, a district court of appeal applied the non-impairment of contracts rule as a test for reviewing a circuit court order on appeal. The circuit court had relieved the plaintiff of his obligation to pay interest as provided under a note and mortgage and had enjoined the holders thereof from enforcing their rights. The district court reversed this order as a judicial impairment of the obligation of contracts and a taking of property without due process of law, in violation of the Florida and Federal Constitutions.

In *Schine Enterprises, Inc. v. Askew*, a business corporation had, in 1952, entered into a contract with Florida Inland Navigation District, a state agency created by statute. The contract provided that when the District received a bona fide offer to purchase a certain parcel of property "at a price and upon terms satisfactory to it," the District would notify the corporation, which would have "the first and exclusive option for 30 days to purchase the property from the [District] at the same price and on the same terms offered to the [District]." In 1964 the District solicited bids for the property but none were deemed satisfactory. In 1965 the legislature enacted a statute requiring the District to convey the property, without consideration, to the Trustees of the Internal Improvement Fund for outdoor recreation and conservation purposes. In 1966 the District entered into a 99-year "dedication agreement" with the Trustees for one dollar, reciting the requirements of the 1965 statute and also declaring the dedication to be subject to the "option agreement" with the business corporation. The district court of appeal held that the corporation had not suffered an impairment of the obligation of contracts, nor had its property been taken without due process of law. The court held that the corporation's interest was properly characterized as a "right to first refusal," which could only be triggered if the District received a satisfactory bona fide offer. Since this event had not taken place, the corporation could not complain. Further, the court held that the "dedication agreement" between the District and the Trustees was not a conveyance but was rather an "intra-entity transfer" of the use of the property. The property was not conveyed out of governmental ownership into private ownership. "We know of no prohibition against the transfer of property from one governmental agency to another so that the latter may put it to uses which it is better able to administer."
5. SEARCH AND SEIZURE

The 1968 revision adds two significant provisions to the guarantee against unreasonable search and seizure. The right is extended so as to protect against "the unreasonable interception of private communications by any means," an obvious reference to wiretapping and bugging. And the final sentence, newly added in 1968, declares: "Articles or information obtained in violation of this right shall not be admissible into evidence."

This exclusionary rule is not, on its face, limited to criminal proceedings. It apparently applies to any kind of proceeding. In Markham v. Markham, the supreme court held that tape recordings must be excluded from divorce proceedings, when the husband had obtained the recordings by tapping the telephone line of his house so as to record conversations between his wife and a third party.

In Renbur Drugs, Inc. v. Board of Pharmacy, a pharmacist sought judicial review of the Board’s revocation of his license. He asserted that the Board’s action was based upon evidence obtained by an illegal search and seizure. The court found that the evidence had been obtained legally. By looking into the legality of the search, the court implied that the outcome of this inquiry could affect the outcome of the case. Thus this case, like Markham v. Markham, supports the implication that the exclusionary rule applies in non-criminal as well as criminal proceedings.

6. ADMINISTRATIVE PENALTIES

Article I, section 18, added to the constitution as part of the 1968 revision, states: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law."

In 1968 large numbers of teachers “resigned” during a crisis in school administration and funding. Eventually the school board agreed to reinstate any teacher, provided he paid a $100 fine. A federal district court, exercising pendent jurisdiction to decide a matter of state law, ruled that the $100 fine was a “penalty” in violation of Article I, section 18 and that Article I, section 18 restated prior Florida constitutional case law. The case was appealed to the Fifth Circuit Court of Appeals, which certified the question to the Supreme Court of Florida. The supreme court ruled that the fine was legally proper as liquidated damages and was not a “penalty” within the meaning of Article I, section 18.

355. 249 So. 2d 698 (Fla. 3d Dist. 1971).
357. 448 F.2d 451 (5th Cir. 1971).
The Fifth Circuit accepted this statement of Florida law and reversed the district court, finding no violation of federally guaranteed rights.\(^8\)

7. ACCESS TO COURTS

The 1968 Constitution preserves the guarantee, traceable to the Magna Carta,\(^8\) that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."\(^9\)

Pre-1968 interpretations of this section were remarkable,\(^6\) but no more so than the four-to-three decision rendered by the supreme court in 1973 in the case testing the no-fault insurance law.\(^8\) The statute\(^6\) provided, in part, that the traditional right of action in tort for property damage arising from an automobile accident was abolished, and that a victim must look to property damage coverage with his own insurance company, unless the victim had chosen not to purchase property damage insurance and had suffered more than $550 property damage. The Court ruled this portion of the statute unconstitutional as a denial of access to the courts. The court declared:

We hold, therefore, that where a right of access to the courts for redress of a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.\(^8\)

B. Environmental Protection

Article II, section 7, a completely new provision in the 1968 constitution, states: “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.” This policy statement could be used in various ways:

\(^359\). 467 F.2d 447 (5th Cir. 1972).
\(^360\). "To none will we sell, to none will we deny, or delay, right or justice." MAGNA CARTA, § 40, found in 25 FLA. STAT. ANN. 6 (1970).
\(^361\). FLA. CONST. art. I, § 21.
\(^362\). E.g., Slavin v. Kay, 108 So. 2d 462 (Fla. 1958); Smith v. Jackson County, 129 Fla. 787, 176 So. 858 (1937); Wilson v. O'Neal, 118 So. 2d 101 (Fla. 1st Dist. 1960).
\(^363\). Kluger v. White, 281 So. 2d 1 (Fla. 1973).
\(^365\). 281 So. 2d at 4.
as a means of protecting legislation against assertions that the legislature has exceeded the proper scope of the police power; as a means of persuading legislators and other officials to exercise their discretion in favor of the stated policy; and even as a means of compelling official action to implement the policy. So far, however, the dramatic use of Article II, section 7 has been made in eminent domain cases, and discussion of this section will be postponed until a later heading of this survey dealing with eminent domain.\(^{306}\)

C. **Substantive Due Process and the Police Power**

Case law on substantive due process and the police power has not been noticeably changed by the transition from the 1885 to the 1968 constitution. This continuity has resulted because the same due process clause is repeated in both constitutions,\(^ {367}\) and because the notion of the police power is rooted in unwritten constitutional doctrine developed through judicial interpretation of the inherent powers of sovereign governments.\(^ {368}\) The courts often neglect to cite the due process clause of the constitution, implying that their decisions do not depend upon any specific constitutional language.

The familiar rule\(^ {369}\) is that the state may legitimately exercise its police power, provided the two requirements of substantive due process are satisfied. First, the police power must be exercised for a permissible purpose: promotion or protection of the public health, safety, morals or general welfare. Second, the police power must be exercised reasonably. The vagueness of these standards permits considerable leeway.

When the validity of a local government's exercise of police power is under consideration, a threefold test can be applied: First, whether this type of police power could be exercised by the state, under the doctrine of substantive due process; second, whether the state has conferred sufficient authority upon the local government to enable it to exercise this power; and third, whether the subject-matter has been preempted by a higher government, either federal, state, or county. Some examples of the exercise of the police power, such as the *Fleetwood Hotel* case, have been given under the Local Government heading of this survey.\(^ {370}\) Additional examples are included under the present heading, together with cases involving the police power of the state itself.

---

366. See notes 485-93 infra and accompanying text.
367. FLA. CONST. art. I, § 9; FLA. CONST., Declaration of Rights, § 12 (1885).
368. See *State ex rel. Lanz v. Dowling*, 92 Fla. 848, 110 So. 522 (1926); CASEBOOK, supra note 7, at 755.
370. See notes 247-59 supra and accompanying text.
1. HEALTH

A statute\(^{371}\) enacted in 1941 prohibited the sale of "filled milk" products, consisting of milk blended with non-milk fat. A 1967 statute\(^{372}\) continued the ban against "filled milk," but expressly permitted the sale of "imitation milk," made entirely of synthetic products, so long as the word "imitation" appeared on the label. A food distributor brought an action to declare the 1941 statute unconstitutional.\(^{373}\) Witnesses testified that filled milk was more nutritious and digestible than any imitation milk. The supreme court concluded that the public health could not possibly be served by banning filled milk while permitting the less desirable imitation milk. The Court held the 1941 statute invalid, noting that the 1967 revision of the statute permitting the sale of imitation milk "removed the constitutional props out from under the filled milk provision.\(^{374}\)

*Borras v. State*\(^{375}\) sustained the validity of a statute\(^{376}\) which imposed criminal penalties for the possession of marijuana. The supreme court, finding marijuana was a "harmful, mind-altering drug," held that the police power of the state to protect public health could reasonably be exercised as provided by the statute.

In *State ex rel. Furman v. Searcy,*\(^{377}\) the Brevard County Commission adopted a regulation, pursuant to general law, requiring applicants for temporary septic tank permits to sign a standard agreement as a precondition for the issuance of a permit. The agreement included an undertaking by the applicant to pay his pro-rata share of the cost of any future installation of a sewer system, as well as the regular charges for service after connection to the system. In addition, the agreement included an acknowledgment by the applicant that any future sewer installation would constitute an improvement to each lot in the subdivision. The district court of appeal observed that similar acknowledgments have been held as a waiver or estoppel, preventing the signer from challenging the legality of future assessments. The court noted that the county may impose reasonable regulations in the interests of public health, but ruled that the terms of the agreement were unreasonable, and consequently violated substantive due process.

2. SAFETY

*State v. Eitel*\(^{378}\) sustained the validity of a statute\(^{379}\) which required motorcyclists to wear protective helmets while riding public highways;

\(^{371}\) Fla. Laws 1941, ch. 20496, § 3 (repealed 1971).
\(^{373}\) Conner v. Cone, 235 So. 2d 492 (Fla. 1970).
\(^{374}\) Id. at 498.
\(^{375}\) 229 So. 2d 244 (Fla. 1969), appeal dismissed, 400 U.S. 808 (1970).
\(^{377}\) 225 So. 2d 420 (Fla. 4th Dist. 1969).
\(^{378}\) 227 So. 2d 489 (Fla. 1969); accord, Cesin v. State, 288 So. 2d 473 (Fla. 1974).
the supreme court found that the statute was a reasonable safety measure.

In *Carter v. Town of Palm Beach*, 8 the supreme court invalidated a municipal ordinance which prohibited the operation of a surfboard or skimmer upon any beach or in the surf adjacent to any beach within the town limits. The court acknowledged the power of the municipality to regulate and control these activities throughout the town and to prohibit them at certain places along the beach. However, the court held that the outright prohibition of these activities throughout the town was arbitrary and unreasonable, since these activities do not constitute a nuisance per se.

In *Burnsed v. Seaboard Coastline Railroad*, 8 the supreme court sustained the validity of a statute 8 which required the display of a lighted fusee or other visual warning whenever a train is engaged in a switching operation or otherwise blocks a street any time from one-half hour after sunset to one-half hour before sunrise. The court interpreted the statute as impliedly allowing a reasonable time to provide the lighting after the train blocks the street and held the statute, as thus interpreted, to be a reasonable exercise of the police power in the interests of public safety.

3. GENERAL WELFARE

*World Fair Freaks & Attractions, Inc. v. Hodges*, 8 involved a criminal statute which prohibited the exhibition for pay or compensation of any crippled or physically distorted, malformed or disfigured person in any circus, side show or other place where an admission fee is charged. The supreme court held the statute unconstitutional because of a lack of any reasonable standards or definitions which could be followed in enforcement. The court added an observation on the police power:

> The validity of the statute as a regulation for the protection of the public health, morals and welfare seems questionable in light of the fact that the statute is hinged upon the charging of admission. Apparently, there is no prohibition against exhibitions without charge. 8

*Newman v. Carson* 8 sustained the validity of a statute 8 which required the keeping of certain records by persons or firms regularly buying and selling junk or secondhand goods. The supreme court found that the statute was a reasonable means of preventing the sale of stolen

---

380. 237 So. 2d 130 (Fla. 1970).
381. 290 So. 2d 13 (Fla. 1974).
382. FLA. STAT. § 357.08 (1973).
383. 267 So. 2d 817 (Fla. 1972).
384. FLA. STAT. § 867.01 (1973).
385. 267 So. 2d at 819.
386. 280 So. 2d 426 (Fla. 1973).
merchandise and of increasing the possibility of returning such goods to the rightful owners "in the interest of public welfare."

*Florida Citrus Commission v. Hi-Acres Concentrates, Inc.*[^888] invalidated regulations of the Citrus Commission which required containers of frozen citrus concentrate to have an "easy open" feature. The purpose of the regulations was to improve the quality of containers used in the citrus industry, thereby leading to increased sales and the promotion of the general welfare of the citrus industry and of the state. The district court of appeals acknowledged that the state's police power can properly be exercised in a reasonable manner in the interests of the citrus industry, but held that the "easy open" regulations were an unreasonable interference with matters which should be resolved in the free enterprise marketplace.

In *Hill v. State*,[^889] the supreme court upheld a statutory requirement[^890] included on the application form for a shrimping permit whereby the applicant agrees to permit any agent of the State Board of Conservation to board the vessel at any time. The court interpreted the consent as authorizing an agent to board the vessel for the limited purpose of determining whether the vessel carried the shrimping permit as required by law, and as not authorizing any search or seizure of the contents of the vessel. Other statutes, not at issue in this case, permit agents to board, search and seize on the basis of warrants or probable cause. The court held that the requirement on the application form, under the court's limiting interpretation, constituted a reasonable exercise of the police power.

*Florida Real Estate Commission v. Windsor*[^891] invalidated a statute[^892] which required attendance at a college or university located in Florida as a prerequisite to registration as a real estate salesman. The district court of appeal held that this requirement bore no reasonable relationship to public safety, health, morals or general welfare.

4. BUSINESSES AFFECTED WITH A PUBLIC INTEREST

The courts have traditionally recognized that certain types of business are "affected with a public interest." Examples include common carriers, innkeepers, insurance, gambling, intoxicating beverages and banking. Regulation of a business affected with a public interest is strongly presumed to be a reasonable exercise of the police power.[^893]

*Williams v. Hartford Accident & Indemnity Co.*[^894] sustained the

[^888]: 227 So. 2d 707 (Fla. 4th Dist. 1969), cert. denied, 241 So. 2d 859 (Fla. 1970).
[^889]: 238 So. 2d 608 (Fla. 1970).
[^891]: 284 So. 2d 17 (Fla. 3d Dist. 1973).
[^893]: [CASEBOOK, supra note 7, at 804.](https://www.researchgate.net/publication/224112012)
[^894]: 245 So. 2d 64 (Fla. 1970).
validity of a statute which imposed a 120-day moratorium on increases in automobile insurance rates, so as to prevent increases until a special session of the legislature could study the matter and establish statutory guidelines to regulate the rates charged for such insurance. The supreme court found that insurance is a business clearly affecting the public welfare; that the fixing of reasonable rates at which insurance can be sold is a proper exercise of the police power; and that the moratorium pending legislative study was a reasonable exercise of the police power.

In *Gulf Power Co. v. Bevis*, the supreme court observed that the Public Service Commission must set rates to be charged by public utilities for their services at such a level as to assure a fair return, as a requirement of Florida and federal due process. The court held that the new state income tax must be considered as an expense of doing business and consequently as one of the factors in arriving at the rate needed to provide a fair return, although the tax should not necessarily be passed through, dollar for dollar, to the consumer.

D. Equal Protection

The 1968 revision of the constitution added a new provision to the equal rights section: "No person shall be deprived of any right because of race or religion." In other respects, the constitutional language remains unchanged, and the case law follows traditional lines.

*Florida Cities Water Co. v. Board of County Commissioners*, held that equal protection is not violated by laws which subject most utility companies in the state to regulation by the Public Service Commission, but which authorize Hillsborough County Commissioners to regulate the rates of utilities within that county. Nor, held the court, is equal protection violated by the fact that, in exercising their respective jurisdictions, the Public Service Commission and the Hillsborough County Commission use different methods for computing the rate which may be charged by a utility. The court observed: "A reasonable rate under both acts can only be one which allows a fair net return on the investment. That different methods are used in arriving at what is a reasonable rate does not constitute a denial of equal protection of the law."

A marketing order under the Florida Celery and Sweet Corn Marketing Law was at issue in *Joe Hatton, Inc. v. Conner*. The order applied only to producers in the sixteen southern counties of the state. One producer in that area, covered by the order and therefore obliged to pay

---

396. 289 So. 2d 401 (Fla. 1974).
399. 244 So. 2d 737 (Fla. 1971).
400. Id. at 739.
an assessment and submit to regulation, complained that producers in the Zellwood area were not covered by the order, and therefore were exempt from payments and regulation, although they were benefited from the advertising and other activities resulting from the order. The producer claimed that the law, as applied in this instance, deprived him of due process and equal protection. The court rejected this contention, finding that the Zellwood area had its own conditions and growing seasons which justified its exclusion from the marketing order, even though certain incidental benefits resulting from the marketing order, such as advertising, might "spillover" and benefit the Zellwood producers.

In *Hall v. King*, the supreme court held unconstitutional a statute which provided for the revocation of the license of a real estate broker if he became a nonresident of the state. Citing federal decisions, the court held: "Unless there is a reasonable, compelling, state interest justifying the residency requirement, it cannot be upheld for it clearly has a chilling effect on Florida real estate brokers who might wish to reside in another state." In rejecting the Real Estate Commission's argument that the residency requirement was justified in order to facilitate the disciplining and policing of brokers, the court stated: "The Florida Bar has numerous nonresident members and it has not suffered disciplinary hardships."

But in *Caiazza v. Caiazza*, the supreme court sustained the statute which imposes a six-month residency requirement upon parties seeking a divorce in Florida. The court found the requirement justified by the compelling state interest in requiring a provable durational residency so that Florida may avoid intrusion upon the rights and interest of a sister state that might otherwise be paramount while still insuring the integrity of its judicial decrees as against future collateral attack in distant courts.

In *Selby v. Bullock*, a motorist was injured when his car collided with cattle on a highway at night. The statute required the victim to prove, in order to recover in such cases, that the owner of the cattle had intentionally or negligently permitted his cattle to stray on the highway. The victim argued that this statute denied him equal protection since victims of injuries caused by dogs can hold the owners strictly liable without the need to prove intent or negligence. The supreme court noted that the same statute which required the victim to prove the intent or negligence of the cattle owner also required the cattle owner to fence his cattle off the highway. These two requirements, in combination, were held to con-

---

403. 266 So. 2d 33 (Fla. 1972).
404. Id. at 34.
405. Id.
406. 291 So. 2d 569 (Fla. 1974).
408. 291 So. 2d at 571.
409. 287 So. 2d 18 (Fla. 1974).
stitute a reasonable classification, consistent with the requirements of equal protection. In an instructive passage, the court stated:

To require fencing by the livestock owner and, in addition thereto, hold him strictly liable would place an impossible burden on the livestock industry. Those in the livestock industry would become virtual insurers, and this would retard and diminish stock raising as an important part of Florida agri-business. A key question is whether a fencing requirement or strict liability will have the greatest effect on protecting the motoring public by keeping cows off the highway. The answer appears clear. Cows know little of strict liability but do respect barbed wire. . . . To keep livestock off the highway requires fencing. To require fencing, there must be incentive to the livestock owner. The incentive is civil responsibility only for damage caused by his negligence or his intent. 410

The court did not demonstrate the source of its finding that cattle owners could be persuaded to fence their cattle only by an incentive which reduced the victim’s chances of recovery in a tort action. This finding is especially troublesome since the fencing statute contains criminal penalties which the court by implication found ineffective as a means of procuring compliance. If these matters are henceforth to become factors in resolving equal protection problems, the court would render an invaluable service by indicating how it determined, for example, that the criminal statute was ineffective, and that the public interest justified an incentive via the law of torts.

In Castlewood International Corp. v. Wynne411 the supreme court invalidated, on equal protection grounds, a statute which required all sales of beer and wine to retail licensees to be for cash, while hard liquor sales could be on 10 days’ credit. The court noted the tendency, in recent federal and state decisions, to hold the government to constitutional standards of due process and equal protection, even when regulating types of activity which were traditionally regarded as possessing marginal social utility, and which were consequently permitted, if at all, as privileges granted by the state on whatever terms the legislature might impose. Thus the court held that the beer industry, like any other, was entitled to equal protection, and could not be subjected to unreasonable classifications.

E. Zoning

Zoning is a special type of exercise of the police power.412 It is subject to the general doctrines of substantive due process and equal protection and the decisions of zoning authorities are presumed correct, as are

410. 287 So. 2d at 21-22.
411. 294 So. 2d 321 (Fla. 1974).
412. CASEBOOK, supra note 7, at 814.
the decisions of other official agencies. However, the presumption in favor of the validity of zoning decisions is expressed by a special formula, suggesting that non-zoning cases should be used as precedent only with extreme caution. The traditional formula, reaffirmed in 1972 in Renard v. Dade County, is that the reviewing court must sustain a zoning ordinance which is "fairly debatable." This formula, uninformative on its face, is a useful means of evoking the case law applicable to zoning and of separating this case law from police power cases in non-zoning matters.

The Renard case made important clarifications regarding standing to sue in zoning cases. The court dealt separately with standing in three types of situations. First, in order to have standing to enforce a valid zoning ordinance, a plaintiff must allege special damages, peculiar to himself, different from those suffered by the community as a whole. However the court noted that changed conditions, including increased population growth and density, require this rule to be applied more leniently than it had been applied in the leading case of Boucher v. Novotny in 1958. Second, a plaintiff challenging a validly enacted zoning ordinance as being an unreasonable exercise of the legislative power, under the "fairly debatable" test, must show a "legally recognizable interest, which is adversely affected by the proposed zoning action..." Third, "[a]ny affected resident, citizen or property owner of the government unit in question" has standing to challenge a zoning ordinance which is allegedly void because not properly enacted.

Even if a plaintiff has standing under Renard, judicial relief may still be denied for failure to exhaust administrative remedies. The district court of appeal in Medical Arts, Inc. v. Rohrbaugh restated the rule: a plaintiff must exhaust administrative remedies before bringing suit to challenge a specific provision of a zoning ordinance as it affects his particular property, but not to challenge the constitutionality of the zoning ordinance in its entirety. The court also held that the estoppel doctrine, which has been invoked against local governments in a number of recent cases, can also be invoked against other parties. In this case, adjacent property owners brought suit to challenge a zoning ordinance, but only after the owner had invested substantial sums in construction. The court held that the plaintiffs should be estopped from bringing suit since they had sat back and failed to object while the owner was proceeding with construction.

In City of Hollywood v. Hollywood Beach Hotel, Inc., the district
court of appeal expressed the rule regarding estoppel in zoning cases as follows:

The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations that it would be highly inequitable and unjust to destroy the right he acquired.\(^\text{421}\)

The court further held that the mere possession of a building permit does not create a vested property right; such a right arises where the owner possesses a permit and where the circumstances giving rise to equitable estoppel exist. In this case, however, the owner had acquired a vested property right in the existing zoning, but had relinquished that right by voluntarily surrendering the building permit.

In *City of North Miami v. Margulies*,\(^\text{422}\) the owner of property was issued a conditional use permit pursuant to the zoning ordinance which provided that when the conditions of such a permit were fulfilled, a building permit would issue. However, upon fulfilling all the conditions of the conditional permit, at considerable expense, the owner was denied a building permit, apparently because the policy of the city council had changed as the result of an election occurring in the interim. The court held that the doctrine of equitable estoppel should be invoked and ordered the city to issue the building permit.

*Metropolitan Dade County v. McGear\(^\text{y}\)\(^\text{423}\) restates the familiar rule that a court has jurisdiction to set aside a zoning ordinance, but not to write a new one, since the latter is a legislative matter.

Two recent decisions involve the distinction between governmental and non-governmental parties to zoning. *Jefferson National Bank v. City of Miami Beach*\(^\text{424}\) held that a zoning ordinance which permits a city but not a private citizen to operate a parking lot on a parcel within a district zoned residential is valid and does not deny equal protection. *Metropolitan Dade County v. Parkway Towers Condominium Ass’n*\(^\text{425}\) held that a county may build a governmental facility (in this case, a jail) without regard to the county’s own zoning.

F. Administrative Due Process

The Florida Administrative Procedure Act (APA)\(^\text{426}\) provides significant procedural safeguards for parties in some types of relationship
with state administrative agencies. Bay National Bank and Trust Co. v. Dickinson\textsuperscript{427} warns that not all relationships were covered by the APA. The case involved the function of the state’s Comptroller, as State Commissioner of Banking, in deciding whether or not to issue certificates of authority to transact the business of banking. The Comptroller issued a certificate to an applicant, after investigation, but without first conducting a public hearing. An objector, who operated an existing bank near the site of the newly authorized bank, sought a declaratory judgment that the Comptroller should have conducted a public hearing in order that interested parties could appear, offer evidence, cross-examine witnesses, and otherwise engage in adversary proceedings on the merits of the application. The district court of appeal denied relief, holding that the function at issue was “quasi-executive or quasi-legislative in which legal rights, duties, privileges, or immunities are not the subject of adjudication.”\textsuperscript{428} The agency action, therefore, did not necessitate a public hearing under Florida Statutes section 120.22 (APA).\textsuperscript{429} The court held, further, that no constitutional right of the objector was violated by the Comptroller’s failure to provide a prior public hearing.

The Bay National Bank case, recently cited with approval by the supreme court,\textsuperscript{430} permits the Comptroller to issue “certificates” which, for all practical purposes, are licenses to engage in the banking business, without providing an opportunity for a public hearing. Few functions of state government are more readily subject to favoritism, arbitrariness and even corruption. If this sensitive function can be carried out without a public hearing, other agencies may understandably seek to characterize their own functions as “quasi-executive” or “quasi-legislative.” The 1974 revision of the APA significantly expands coverage, and supersedes the holding of Bay National Bank.\textsuperscript{431}

Even in cases admittedly governed by the APA, the Florida courts have compiled an uneven record. In Mack v. State Board of Dentistry,\textsuperscript{432} While a full discussion of the Act is beyond the scope of this survey it is appropriate to note here that the new Act may significantly extend the right to a public hearing before a state agency. Section 1 of the Act (Fla. Stat. § 120.57) provides for a formal hearing “in all proceedings in which substantial interests of a party are determined by an agency” (emphasis added). This language appears broader than the provision in Fla. Stat. § 120.22 (1973) that “[a]ny party’s legal rights, duties, privileges or immunities shall be determined only upon public hearings by an agency ...” (emphasis added). It is suggested that the new requirement of a formal hearing wherever agency action affects “substantial interests” of a party was intended to overrule the decision in Bay Nat’l Bank & Trust Co., 229 So. 2d 302 (Fla. 1st Dist. 1969) (discussed in text accompanying notes 427-31 infra).

\textsuperscript{427} 229 So. 2d 302 (Fla. 1st Dist. 1969).
\textsuperscript{428} Id. at 306.
\textsuperscript{429} See note 426 supra.
\textsuperscript{430} Washington Fed. Sav. & Loan Ass’n v. Dickinson, 282 So. 2d 167 (Fla. 1973). See also, Yonge v. Askew, 293 So. 2d 395 (Fla. 1st Dist. 1974).
\textsuperscript{431} The accompanying text is based upon statements made by various officials at public meetings of the Florida Law Revision Council during the drafting of the revision of the Administrative Procedure Act, during 1973 and 1974. This subject will be further explored in another article by the present author, to appear in a future issue of this Review.
\textsuperscript{432} 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971).
the Fifth Circuit Court of Appeals remanded the case for further proceedings by the Board, although a Florida district court of appeal had denied relief on the same record.\textsuperscript{433} The Fifth Circuit declared:

\begin{quote}
[T]his was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.\textsuperscript{434}
\end{quote}

Concern for the client of the administrative agency was demonstrated by the District Court of Appeal, First District, in \textit{Dubin v. Department of Business Regulation}.\textsuperscript{435} The Board had refused to issue the annual renewal of a horse trainer’s license. At the administrative hearing, the Board took the position that the licensee had the burden of making a new demonstration of his qualifications in order to qualify for each annual renewal of the license. The court rejected this view and reaffirmed the case law holding that, once a license has been issued, the annual renewal must follow as a ministerial duty; if the Board proposes to discontinue the license, the Board must initiate revocation proceedings, in which the Board bears the burden of proving grounds for revocation.

In \textit{State ex rel. Vining v. Real Estate Commission},\textsuperscript{436} the supreme court held that the constitutional right to remain silent extends to license revocation proceedings. Along similar lines, in \textit{Lurie v. State Board of Dentistry},\textsuperscript{437} the supreme court held that a statute\textsuperscript{438} which grants immunity from prosecution or from “any penalty or forfeiture” is not limited to criminal matters, but also protects against administrative proceedings for revocation of a professional license. This decision expressly overrules the contrary holding in \textit{Headley v. Baron}.

\textit{Gentry v. Department of Professional and Occupational Regulations}\textsuperscript{439} reversed a disciplinary order which the Board had issued against a physician. The court held the order invalid because it did not recite specific findings of fact as required by due process and equal protection. Upon remand,\textsuperscript{440} the Board made findings that the physician had diagnosed seven patients as suffering from gonorrhea and had treated them for that condition, and that subsequent diagnoses by other physicians revealed that the patients did not have the disease. On the basis of these findings, the Board placed the physician’s license in probationary status

\begin{itemize}
\item \textsuperscript{433} Mack v. Pepper, 192 So. 2d 66 (Fla. 3d Dist. 1966), cert. denied, 201 So. 2d 551 (Fla. 1972).
\item \textsuperscript{434} 430 F.2d at 864.
\item \textsuperscript{435} 262 So. 2d 273 (Fla. 1st Dist. 1972).
\item \textsuperscript{436} 281 So. 2d 487 (Fla. 1973); accord Kozerowitz v. Florida Real Estate Comm., 298 So. 2d 391 (Fla. 1974).
\item \textsuperscript{437} 288 So. 2d 223 (Fla. 1974).
\item \textsuperscript{438} FLA. STAT. § 914.04 (1973).
\item \textsuperscript{439} 228 So. 2d 281 (Fla. 1969).
\item \textsuperscript{440} 283 So. 2d 386 (Fla. 1st Dist. 1973).
\item \textsuperscript{441} 293 So. 2d 95 (Fla. 1st Dist. 1974).
\end{itemize}
for two years, with the requirement that she personally report to each semi-annual meeting of the board to give a progress report. The court interpreted the Medical Practices Act as precluding the imposition of any disciplinary sanctions against a physician who makes an honest but incorrect diagnosis, although a patient might hold the physician civilly liable in such a case. The court therefore quashed the Board’s order. It is submitted that this decision pays altogether too much deference to the interests of the dangerously negligent physician and altogether too little deference to the expertise of the Board in fashioning a remedy designed to protect the public interest.

In *Pauline v. Borer*, the supreme court held that in the circumstances of the case, agency action in suspending a real estate broker’s license was too “harsh and unusual.” A public reprimand was the appropriate penalty, and the court remanded to the agency for modification of the penalty. The constitutional basis for the court’s decision was apparently article I, section 17, which prohibits “[e]xcessive fines, cruel or unusual punishment . . .”

In *Southern Bell Telephone & Telegraph Co. v. Mobile America Corp.*, the supreme court ruled that the circuit court rather than the Public Service Commission has jurisdiction over a claim for money damages filed by a consumer against a utility company. The circuit court may, in its discretion, refer questions to the Public Service Commission for a non-binding determination as to whether the defendant utility company has complied with statutory standards for the rendition of service to its consumers.

Procedural due process rights of prisoners have become a matter of increasing concern. The lower federal courts have assumed leadership in this area which could have been, and arguably should have been, brought within the reach of constitutional due process by the Florida courts. The 1974 revision of the Florida Administrative Procedure Act is worded with sufficient breadth to include the disciplining of prisoners and the administration of the parole and probation systems and the Act should therefore effectuate significant reforms in these areas.

G. Due Process in “Quasi-Public” and “State Action” Contexts

Some recent cases demonstrate that the due process guarantee can apply not only to governmental actions, but also to certain types of “quasi-public” or “state action” situations. In *McCune v. Wilson*, the supreme court reviewed disciplinary proceedings instituted by a voluntary

---

443. 274 So. 2d 1 (Fla. 1973).
444. 291 So. 2d 199 (Fla. 1974).
446. FLA. STAT. §§ 120.52(1)(b), (2), (8); 120.57, included in Fla. Laws 1974, ch. 74-310, § 1 (1974 revision of Florida Administrative Procedure Act).
447. 237 So. 2d 169 (Fla. 1970) [hereinafter referred to as *McCune*].
association of real estate appraisers against one of its members, without adequate notice or opportunity for a fair hearing. The court noted:

Professional organizations, although voluntary in nature, often attain a quasi-public significance. In public view, membership in such organizations may appear to be a tangible demonstration of professional competence and skill, professional responsibility, and acceptance by one's professional peers. The fact that an individual member expelled from membership may not be prohibited from practicing his chosen occupation or profession is not a sufficient test to determine whether he needs and is entitled to judicial protection from unfair proceedings or arbitrary actions. When a voluntary association achieves this quasi-public status, due process considerations come into play.

The court found that the association of real estate appraisers was indeed a quasi-public organization and therefore had to conduct fair proceedings before a member could be expelled or disciplined.

In *Lee v. High School Activities Association, Inc.*, a high school student complained about his exclusion from interscholastic athletic activities by the association, a non-profit entity, the members of which were the principals of almost every public and private high school in the state. The court found that the association had the exclusive authority and responsibility for supervising and controlling all phases of interscholastic athletics in both the public and private high schools in the State of Florida. Hence, the conduct of the affairs of FHSAA undoubtedly is state action in the constitutional sense.

The court held that the association must provide procedural due process and must exercise its functions in a reasonable manner. This decision cites *McCune* and numerous United States Supreme Court decisions in support of its result, but the *Lee* court uses the term "state action," found in the fourteenth amendment, United States Constitution, rather than the term "quasi-public" which was used in *McCune*. The choice between these two terms may be significant, since their meaning is not identical. "State action" is apparently that which triggers fourteenth amendment due process, whereas "quasi-public" entities may be required to respect the due process clause of the Florida Constitution even if the federal restraints do not apply to them.

In *Northside Motors, Inc. v. Brinkley*, the supreme court held that self-help repossession by a creditor does not constitute state action under the fourteenth amendment to the United States Constitution and is therefore not controlled by *Fuentes v. Shevin*. The court did not discuss the

---

448. Id. at 172.
449. 291 So. 2d 636 (Fla. 3d Dist. 1974).
450. Id. at 638.
451. 282 So. 2d 617 (Fla. 1973).
possible applicability of Florida constitutional due process which, as indicated by McCune, can be required even where no state action is involved. In Monyek v. Parkway General Hospital, Inc., the District Court of Appeal, Third District, permitted a private hospital to deny a physician the privilege of practicing at the hospital without a hearing or statement of reasons, in apparent conflict with McCune insofar as a hospital, by denying the privilege of practicing, gives a clear indication to the public that the physician has failed to retain the acceptance of his professional peers.

H. Clarity of Statutes and other Due Process Requirements

The familiar rule of criminal law that a statute is void if excessively vague has some analogies in non-criminal contexts.

A Florida statute authorized the forfeiture of the charter of a corporation, as well as other sanctions, if any officer or controlling person engaged in certain designated activities, or was connected directly or indirectly with organizations, syndicates or criminal societies engaged in such activities. In Aztec Motel, Inc. v. State ex rel. Faircloth, the supreme court held the statute unconstitutional, as being “too vague, indefinite and uncertain to constitute notice of the acts which may result in the forfeiture of the charter of a corporation. . . .”

Another statute, however, was sustained against a vagueness challenge in Orlando Sports Stadium, Inc. v. State ex rel. Powell. The statute provided:

Whoever shall erect, establish, continue, or maintain, own or lease . . . any place where any law of the state is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared to be a nuisance. All such places or persons shall be abated or enjoined . . .

This statute was invoked by the state attorney, who filed a complaint seeking to abate a nuisance. The court implied that proceedings for an injunction to abate a nuisance could be supported by a less precisely worded statute than would be needed for the imposition of criminal penalties. The court found that the wording of the complaint was sufficiently clear to give defendants reasonable notice, and that

[t]he statutes under attack are not so vague and indefinite as to invade the constitutional rights of the defendants in the case sub

453. 273 So. 2d 430 (Fla. 3d Dist. 1973).
455. FLA. STAT. § 932.58 (1973).
456. 251 So. 2d 849, 854 (Fla. 1971).
457. 262 So. 2d 881 (Fla. 1972).
458. FLA. STAT. § 823.05 (1973).
judice, where the plaintiffs seek an injunction. If the injunction does issue, it must be definite and certain. 459

The ultimate question, not discussed in the opinion, is whether the statute gives sufficient guidelines to the courts to enable them to dispose properly of requests for injunction. If the guidelines are insufficient, the statute violates the separation of powers under the doctrine laid down in City of Auburndale v. Adams Packing Ass’n, 460 that a statute may permit a court to determine whether conditions or circumstances prescribed by the legislature have been met to bring the statute into play, but may not define what these conditions or circumstances are.

In Billings v. City of Orlando, 461 the supreme court sustained the validity of a special act which required a mandatory contribution of five percent of each police officer’s salary, by payroll deduction each payday, for deposit to a pension fund. If the officer is discharged or resigns prior to becoming entitled to a pension, he shall forfeit one-half of his contribution and shall receive a refund of the other half. Citing case law from other states, the court held that mandatory salary deductions for a public employee pension fund do not give rise to private property right in the fund monies until such time as the employee becomes eligible for the pension. Further, held the court,

even if the sums in question were considered private property, we are satisfied as to the necessity and reasonableness of the procedure involved here, by which the 50% of contributions forfeited, in effect “paid for” the various benefits which petitioners received under the city’s pension plan. No denial of due process has been shown. 462

Mackenzie v. Hillsborough County 463 sustained the statute 464 which provides a maximum fee of $750 payable to court-appointed counsel in criminal cases. The supreme court noted that a request to increase the maximum fee should be addressed to the legislature rather than to the judiciary.

I. Eminent Domain

The eminent domain section of the 1968 revision states: “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.” 465 This provision replaces two which appeared at separate places in the 1885 constitution. 466 The single

459. 262 So. 2d at 884.
460. 171 So. 2d 161 (Fla. 1965).
461. 287 So. 2d 316 (Fla. 1973).
462. Id. at 320.
463. 288 So. 2d 200 (Fla. 1974).
466. Fla. Const. Declaration of Rights, § 12; art. XVI, § 29 (1885).
section on eminent domain in the 1968 constitution combines and restates the two provisions which appeared in the 1885 constitution. Post-1968 case law appears to proceed on this assumption, and the 1968 eminent domain section must therefore be interpreted in light of the prior cases dealing with both of its predecessor provisions in the 1885 constitution. Four topics continue to arise in litigation: (1) takings vs. regulations; (2) inverse condemnation; (3) public purpose; and (4) amount of compensation.

1. TAKINGS V. REGULATIONS

Cases continue to distinguish between takings and regulations. The distinction makes sense only with the realization that the terms are not given their usual meaning in this context, but instead are used for conclusory purposes: a “taking” is that which triggers the constitutional right to compensation, and a “regulation” is a non-compensable interference by the government with the use of private property. The obvious example of a taking is the acquisition of property through condemnation proceedings by the state or a utility company. Another example of a taking, to be discussed under the next heading, arises from a continuing trespass when the doctrine of inverse condemnation recognizes a “taking in fact.” Other situations clearly involve non-compensable regulations. In Mailman Development Corp. v. City of Hollywood, the court held that a zoning ordinance cannot be regarded as a taking. If the ordinance is unreasonable or arbitrary, the affected property owner may obtain a judicial determination that the ordinance is invalid or unenforceable against him, but the owner is not entitled to compensation on that account.

Some cases have implied that an exercise of the police power may be regarded as a regulation if it goes into effect at a reasonable time and remains in effect for a reasonable period of time, but will otherwise be regarded as a taking. In E. B. Elliott Advertising Co. v. Metropolitan Dade County, the Fifth Circuit Court of Appeals reached a conclusion on fourteenth amendment due process grounds, in harmony with the prior rulings of the Florida courts on state constitutional grounds, regarding an ordinance which prohibited certain types of outdoor advertising within a designated distance from expressways. The ordinance provided a five-year phase-out period, during which pre-existing signs could remain on display. The Fifth Circuit held that because of the reasonable phase-out period, the owner was not entitled to compensation. The case implies

467. Legislative Reference Bureau, Analysis of Proposed 1968 Revision at 17 (1968); D'Alemberte, Commentary on art. X, § 6(a), 26A FLA. STAT. ANN.
468. This example invokes the literal text of FLA. CONST. art. X § 6(a).
469. 286 So. 2d 614 (Fla. 4th Dist. 1973).
470. 425 F.2d 1141 (5th Cir. 1970).
471. E.g., State ex rel. Boozer v. City of Miami, 193 So. 2d 449 (Fla. 3d Dist.), cert. denied, 201 So. 2d 533 (Fla. 1967).
that if advertising had been abruptly terminated without a reasonable phase-out period, compensation would have been required.

A similar implication can be read into an opinion rendered in 1972 by the Attorney General,\(^{472}\) advising that the legislature may validly authorize the cities and counties to adopt "interim" or "stopgap" ordinances which place a moratorium on the development of certain areas for a reasonable period of time, and that property owners affected by such ordinances would not be entitled to compensation for the limitation on the use of their property. The opinion implies that a moratorium for an unreasonably long period of time would be regarded as a taking.

If property is intentionally destroyed as a nuisance, pursuant to a regulatory program, the owner has no constitutional right to compensation, although the legislature may bestow such amounts of compensation as it sees fit. In *Conner v. Carlton*,\(^ {473}\) decided in 1969 under the 1885 constitution, the supreme court applied this principle to sustain the validity of the program to control and prevent the spread of brucellosis, a cattle disease. The statute and regulations required cattle owners to present their cattle for tests conducted by the Commissioner of Agriculture to determine if the cattle were infected. Any cattle found to be infected were required to be immediately branded with a distinctive mark, removed from the herd, sold at public auction and slaughtered within fifteen days after identification. The state was required to pay compensation on the basis of an impartial appraisal, but in no event more than $12.50 per animal slaughtered.

The *Conner* court distinguished the facts before it from the burrowing nematode cases,\(^ {474}\) which involved the state's "pull-and-treat" program to eradicate the spreading decline of citrus trees caused by the burrowing nematode. In those cases the court noted that the nematode traveled underground at an average rate of 36 feet per year and that fruit borne by trees during the early stages of infestation was no different from fruit on uninfested trees. In these circumstances the court held, in effect, that infested trees should not be treated as nuisances. Consequently, an owner was entitled to a hearing before the destruction of allegedly infested trees and was entitled to just compensation, computed of course in light of the infestation. Similar principles applied, a fortiori, to healthy trees which were ordered pulled in order to establish a cleared zone to prevent further spread of the citrus decline. The court emphasized that "the prohibition against the taking of private property 'without just compensation' . . . is not limited to the taking of property under the right of eminent domain."\(^ {475}\)

\(^{473}\) 223 So. 2d 324 (Fla. 1969), *appeal dismissed*, 396 U.S. 272 (1969) [hereinafter referred to as *Connor*].
\(^{474}\) State Plant Board v. Smith, 110 So. 2d 401 (Fla. 1959); Corneal v. State Plant Board, 95 So. 2d 1 (Fla. 1957).
\(^{475}\) State Plant Board v. Smith, 110 So. 2d 401, 405 (Fla. 1959).
In Conner, however, the court held that diseased animals posed a more serious and immediate danger which entitled the legislature to invoke the nuisance doctrine. Thus summary action was authorized, and the owner had no constitutional right to compensation. He could therefore not complain about the amount, if any, provided by statute.

Distinctive lines of cases have developed in connection with torts committed against private property by governmental agencies or officers. If the tort is likely to recur continually, under circumstances amounting to a taking in fact, the doctrine of inverse condemnation can be invoked, and the owner is entitled to compensation for the taking of his property. If, on the other hand, an isolated tort occurs, the owner is not entitled to recover for a taking but he may be entitled to tort damages, unless suit is barred by the sovereign immunity of the defendant.

In Elliott v. Hernando County, the court held that the complaint stated a cause of action in alleging that the defendant county had constructed an elevated road adjacent to plaintiffs' property, had failed to provide for proper drainage of the natural flow of rain, and had thereby subjected plaintiffs' property to flooding from rain, resulting in unsanitary and uninhabitable conditions. The court noted that the injury was likely to recur whenever rain fell and therefore amounted to a taking within the meaning of the eminent domain provision. Further, the court observed that the cause of action arose and was filed during a period when the state had waived its sovereign immunity from suits in tort. Evidently the complaint sought alternative relief in tort and inverse condemnation, and the court ruled, on motion to dismiss, that both types of relief could properly be pursued.

2. INVERSE CONDEMNATION

The doctrine of inverse condemnation, adopted by the District Court of Appeal, First District, in 1964 in City of Jacksonville v. Schumann, entitles the owner to recover the value of property which has been "taken in fact," although there has been no formal exercise of the power of eminent domain. Schumann allowed recovery by the owner of a residential property which had been rendered uninhabitable by low overflights of jet aircraft using a recently extended runway at an adjacent airport. In Northcutt v. State Road Department, decided in 1968, the district court held that inverse condemnation could not be the basis for recovery by owners of residences when an interstate highway was constructed in the vicinity. The court, distinguishing the case from Schumann, analogized the plaintiffs in Northcutt to the owners of property adjacent to

476. See notes 453-458 infra and accompanying text.
477. See heading M infra for a discussion of sovereign immunity.
478. 281 So. 2d 395 (Fla. 2d Dist. 1973).
479. 167 So. 2d 95 (Fla. 1st Dist. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965).
480. 209 So. 2d 710 (Fla. 3d Dist. 1968), petition for cert. dismissed, 219 So. 2d 687 (Fla. 1969).
railroad tracks, who have traditionally been denied relief under inverse condemnation. Additionally, as a policy matter, the court observed that if recovery were allowed, it would "bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida." 481

In *Hardwick v. Metropolitan Dade County*, 482 the owner of a residence alleged that the county was operating the adjacent Suniland Park in such a manner as to create a "nuisance and/or trespass." He sought injunctive relief and damages or, in the alternative, relief under the theory of inverse condemnation. The district court affirmed the circuit court's finding that the park was not a nuisance and that while plaintiff was subject to discomfort through the use of the park by thousands of children each year, his property had not been "taken in fact." The district court also affirmed the circuit court's decision to "balance the equities" between the parties by a six-point order which provided, for example, that "no inning of baseball, no quarter of football and no quarter of basketball shall begin after 10:00 P.M. . . . No play by play description of any athletic event shall be given by bullhorn, loud speaker or any electronic device." 483

In *Sarasota-Manatee Airport Authority v. Alderman*, 484 the court held that the owner is not entitled to a jury determination of the question whether there has been a "taking in fact" of his property, since this is a matter of law for determination by the judge alone.

3. PUBLIC PURPOSE

The leading case in this area is *Seadade Industries, Inc. v. Florida Power & Light Co.*, 485 arising out of FP&L's proposal to construct a nuclear-powered generating plant. The District Court of Appeal, Third District, had applied familiar principles in determining that the "public purpose" test could be satisfied by the taking of land in order to construct a canal for circulating and cooling water for the plant, but the test could not be satisfied by the taking of land for use as permanent storage of muck and rock excavated from the canal; the specific land was needed for the former but not for the latter purpose. 486 The supreme court affirmed on this point 487 and proceeded to make new law on other aspects of the case. Seadade had objected to the proposed taking on the grounds that: (1) the entire project would harm the environment by causing the discharge of heated water into Biscayne Bay, and (2) the entire project

---

481. 209 So. 2d at 711.
482. 256 So. 2d 387 (Fla. 3d Dist. 1972).
483. Id. at 389.
484. 238 So. 2d 678 (Fla. 2d Dist. 1970).
485. 245 So. 2d 209, (Fla. 1971) [hereinafter referred to as *Seadade*]; noted in 24 U. FLA. L. REV. 392 (1972).
486. 232 So. 2d 46 (Fla. 3d Dist. 1970).
487. 245 So. 2d at 210-12.
needed the prior approval of numerous federal, state and local regulatory agencies, and the public purpose test could not be satisfied until all necessary approval had first been obtained. In reply the supreme court formulated the following guidelines:

Article II, Section 7, Florida Constitution, F.S.A., contains a declaration that the protection of our natural resources shall be the policy of the State. The protection of resources, being a policy of the State, is an appropriate matter for consideration in condemnation cases. We think it logically follows that if taking and condemnation is sought in furtherance of a condemning authority's project affecting natural resources, and independent authorities guarding the public interest must approve the project before it can be put into operation, it is within the discretionary power of the judiciary to require that safeguarding of the public interest be demonstrated by the condemning authority . . . .

In a proper case, the judiciary may require, first, that the condemning authority reasonably demonstrate that the regulations and requirements of the independent authorities can and will be met; second, that condemnation and taking in advance of project approval will not result in irreparable damage to natural resources and environment, should the independent authorities decline to approve the proposed project.488

The court found from the record that FP&L had satisfied both requirements and therefore it approved the taking as qualifying under the public purpose test. Without extensive discussion, the court determined that FP&L should not be required to postpone acquisition of the property until after all approvals had been obtained. It observed:

It would be unreasonable to allow canal construction to begin only after all permissions have been granted since this would needlessly postpone the benefits of the completed facilities, which would stand idle and untested until completion of the canal. A rational balance must be struck between protection of the public interest in our natural resources under Article II, section 7, Florida Constitution, and the completion of public works which are also in the public interest.489

In a special concurring opinion,490 Justice Ervin suggested that in this type of case, the condemnor should acquire a defeasible fee unless and until the necessary approvals are obtained from the independent agencies. If the approvals are denied, the condemnee should be required to refund all condemnation proceeds within a short time, otherwise absolute title should vest in the condemnor.

The main innovation in Seadade is the court's use of the environ-

---

488. Id. at 214 (emphasis added).
489. Id.
490. Id. at 216 (Ervin, J., concurring).
mental protection policy statement of article II, section 7 as an ingredient of the public purpose test in a condemnation proceeding. This raises the question whether article II, section 7 may in future situations be applied in other contexts where a public purpose test is imposed, such as borrowing, spending, and the tax exemption of property owned by a municipality and used exclusively by it for municipal or public purposes. A more remote question is whether the court may merge other constitutional provisions; for example, if the equal protection clause were coupled with the tax exemption provision, the result could be the denial of tax exemption to a hospital which practices racial discrimination, a result which would overrule Maxwell v. Good Samaritan Hospital.

Another essential aspect of Seadade is the role of the various independent agencies which had authority to grant or deny permits for the project. The court deferred to the expertise of these agencies and did not undertake a separate judicial determination of the environmental issue; the court's only determination was whether these independent agencies were likely to grant approval and whether irreparable damage would be caused if they denied approval after the condemnation had taken place.

In situations where no independent agency has jurisdiction to protect the environment, the supreme court continues to pay great deference to the discretion of the condemning authority, as illustrated by the post-Seadade decision in Hillsborough County v. Sapp. The county sought to condemn two parcels of property for the purpose of constructing a highway needed to provide access to a new high school then under construction. The proposed right-of-way ran up to the front door of the home of one condemnee and completely through the home of another. The condemnees argued that an alternative route could be located in a large unoccupied wooded area nearby. The district court vacated the order of taking, finding it was a gross abuse of discretion since an alternative route could be used which would cause less interference with private interests. The supreme court reversed, holding that the lower court had erred in focusing solely on the question whether an alternative route was available. Other factors should have been considered, including "cost, environmental factors, long-range area planning, and—in this case—the safety considerations necessary when designing a highway next to a school." The court went on to describe the judicial role in such cases:

491. See notes 592-94 infra and accompanying text.
492. See notes 519-31 infra and accompanying text.
493. See notes 541-52 infra and accompanying text.
494. 204 So. 2d 519 (Fla. 1967), appeal dismissed, 392 U.S. 656 (1968).
495. 280 So. 2d 443 (Fla. 1973).
496. 262 So. 2d 256 (Fla. 2d Dist. 1972).
497. 280 So. 2d at 445.
498. Id. It is noteworthy that here the court did not attach any greater dignity to environmental factors than others. Compare with Seadade.
Once a condemning authority decides that a taking is necessary, selects one of the alternatives open to it, and applies to a court for approval of the taking, the role of the court is limited to assuring that the condemnor acted in good faith, did not exceed its authority, and did not abuse its discretion. ... When the trial court approves the determination of a reasonable necessity and finds no abuse of discretion, a reviewing court is then limited to deciding whether or not there was competent substantial evidence to support the decision of the trial court.499

Along similar lines, in a series of cases involving the condemnation of land for the proposed Cross Florida Barge Canal,500 the supreme court held that the condemning authority need not show absolute necessity, but could prevail upon showing reasonable necessity. After reasonable necessity was established, the only ground upon which the condemnee could object was bad faith or abuse of discretion.

These cases were reaffirmed in Ball v. City of Tallahassee,501 where the supreme court discussed the condemnor’s burden of going forward with evidence in condemnation cases. The court held that the condemnor must present evidence that the property is needed, otherwise the petition fails. Of course the condemnee can challenge the allegation of need. In addition, the condemnee can present evidence of either abuse of discretion or bad faith, and either one of these grounds, if proven, can constitute an independent basis for rejecting the petition even if the condemnor has already successfully demonstrated need.

Public necessity and good faith were involved in Dade County v. General Waterworks Corp.502 The county commission resolved to acquire all privately-owned water and sewer systems operating in the county, “subject to approval and determination of the fiscal feasibility by the [county commissioners] of the purchase price established either through negotiation or through eminent domain proceedings.”503 The condemnee argued that the county’s affirmation of necessity and good faith was discredited by the resolution which made the condemnation subject to a subsequent determination on fiscal feasibility. The supreme court noted that necessity and good faith are required by the statutes on condemnation,504 which also permit a condemnor to abandon an acquisition by refraining from paying the amount of the condemnation judgment into the registry of the court. Thus, reasoned the court, necessity and good

499. Id.
501. 281 So. 2d 333 (Fla. 1973).
502. 267 So. 2d 633 (Fla. 1972).
503. Id. at 635.
504. FLA. STAT. §§ 73.021, .111 (1973).
faith can coexist with the concept that the condemnor may abandon the project, even after judgment. The court concluded:

[T]he Constitution only requires that the property be acquired for a public purpose, not for an absolute public necessity. In our view, a purpose may be public without being of such compelling necessity that condemnation is required whatever the price. . . . [T]t was not improper for Dade County to recognize the possibility of later abandonment in its authorizing resolution. Such a result is especially appropriate where, as here, the proper method of valuation of the properties is vigorously contested, and the amount of the final judgment will probably fluctuate considerably depending on the valuation method ultimately arrived at.\textsuperscript{506}

In \textit{City of Miami v. Florida East Coast Railway Co.},\textsuperscript{508} the city petitioned to condemn, for park purposes, property owned by the railroad, including some which was used as port facilities. The district court held, first, that as between these two parties, each of which had a general power of eminent domain, neither had an inherently higher right of eminent domain than the other. Second, the court noted the “prior use doctrine,” to the effect that, as between two public bodies, property already devoted to a public use may not be taken for another public use without express legislative authority. Third, the court ruled that, for purposes of the “prior use doctrine,” the railroad was not a “public body,” but was a “franchised public use company.” Accordingly, in order to resist condemnation, the railroad had to prove not only prior public use, but also a use necessary for the successful operation of the railroad. The court found the test satisfied as to part of the property in question, and excluded this portion from condemnation.

In \textit{City of Jacksonville v. Moman},\textsuperscript{507} the city petitioned to condemn a large area for slum clearance purposes, apparently with the intent of selling the property to the privately owned Methodist Hospital for use by the hospital in constructing its own private professional building. The court restated the rule of \textit{Grubstein v. Urban Renewal Agency},\textsuperscript{508} to the effect that slum clearance can satisfy the public purpose test and that if the area in general can be characterized as a slum, the entire area can be condemned, including properties located within the area which could not, individually, be regarded as slums. In denying condemnation, however, the court stated:

\begin{quote}
[T]he record in this case reflects that the city bypassed numerous slum parcels in order to reach this block which, by its own admission, is not a slum. The city planners and sociologists
\end{quote}

\begin{footnotes}
\item[505.] 267 So. 2d at 636-37.
\item[506.] 286 So. 2d 247 (Fla. 3d Dist. 1973).
\item[507.] 290 So. 2d 105 (Fla. 1st Dist. 1974).
\item[508.] 115 So. 2d 745 (Fla. 1959).
\end{footnotes}
decided that this neighborhood needed to be wiped out in order to provide a "cohesive" area compatible with the existing installations. Such a conclusion is not in this jurisdiction a basis for seizing property owned by a citizen.  

4. AMOUNT OF COMPENSATION

Dade County v. General Waterworks Corp., discussed above in connection with the public purpose test, also involved a dispute regarding computation of the "full compensation" payable to the owner upon the taking of property. The condemnees were privately-owned water and sewer systems. Part of their properties had been acquired as in-kind contributions from customers, in aid of construction of the utility systems. Dade County, in the exercise of its regulatory powers in determining the rates charged by these utilities for their services, had required that the contributed property be given a book value of zero. The supreme court held that the book value of zero, while resulting from an appropriate exercise of Dade County's regulatory power over rates, should not govern the computation of the "full compensation" in the eminent domain proceedings. Nor, continued the court, could "full compensation" be computed by means of capitalizing the earnings of the utility systems, since the amount of these earnings had been affected by their rate structure, which in turn had been affected by the zero book value at which the contributed property had been recorded. The court ruled that whatever valuation method was adopted by the trial court on remand, the method must "take into consideration the value of the contributed property."

Full compensation is required with regard not only to the property taken, but also as to certain types of interest in the property retained. The courts continue to use the term "severance" damages to mean those types of interest in retained property which are compensable as a matter of constitutional right, and the term "consequential damages" to mean those types of interest which are not compensable as a matter of constitutional right and which consequently depend upon legislative grace for the amount of compensation, if any.

In Young v. Hillsborough County, the supreme court held that when a portion of a parcel of land is taken by eminent domain, the owner is entitled to severance damages as a matter of constitutional right in addition to full compensation for the portion taken if the taking dimin-

509. 290 So. 2d at 107.
510. 267 So. 2d 633 (Fla. 1972); see notes 502-05 supra and accompanying text.
511. 267 So. 2d at 639.
513. 215 So. 2d 300 (Fla. 1968).
ishes the value of the portion of the land retained by the owner. *Hill v. Marion County*,\(^{514}\) held that the owner is entitled to present evidence to the jury not only of the decrease in market value, but also of the "cost to cure," that is, the amount he would have to expend in relocating improvements in order to enjoy his remaining land to the same extent as before the taking, even if the cost to cure is more than the decrease in market value.

### J. Taxation

#### 1. Allocation of Taxing Power Between State and Local Governments

The 1968 revision clarifies the respective taxing powers of the state and of local governments (including school districts).\(^{515}\) Ad valorem taxes on real estate and *tangible* personal property are available only to local governments, and the state may not levy any such tax. Ad valorem taxes on *intangible* personal property are available only to the state and may not be levied by local governments. All other forms of taxation are preempted to the state except as provided by general law.

In *City of Tampa v. Birdsong Motors, Inc.*,\(^{516}\) the supreme court pointed out that the 1968 revision changed the manner in which the state could confer its residual taxing power upon local governments. Before 1968, a special or local act sufficed to authorize a local government to impose any form of taxation other than ad valorem taxes; under the 1968 revision, a general law is required. *Birdsong Motors* involved a so-called license tax levied by the city, measured by the amount of gross sales of the merchant during the preceding fiscal year; the tax was $10 for the first $3,000 of annual sales, and an additional $1.00 for every $1,000 in annual sales above 3,000. The only relevant general law authorized cities to impose license taxes. The court held that the Tampa tax did not qualify as a license tax within the meaning of the general law, but was in fact a sales tax unauthorized by general law. Further, the court ruled that the tax had not been authorized by "grandfathering," either by statute or by the schedules to the 1968 revision of the constitution.

*Belcher Oil Co. v. Dade County*\(^{517}\) involved an excise tax levied by Dade County, in reliance upon a general law which authorized municipalities to levy an excise tax of not more than ten percent on purchases of electricity, metered or bottled gas, water service, telephone service and telegraph service. The statute provided that in the event a municipality imposed the tax on the purchase of one of the utility services listed in the statute, "and a competitive utility service or services are purchased in the city or town, then such ordinance shall impose a tax in like amount..."

---

514. 238 So. 2d 163 (Fla 1st Dist. 1970).
516. 261 So. 2d 1 (Fla. 1972).
517. 271 So. 2d 118 (Fla. 1972).
on the purchase of the competitive utility service or services. . . " Dade county imposed the tax upon purchases of the utility services listed in the statute, and also upon fuel oil, on the grounds it was a "competitive utility." The supreme court held that the language of the statute, to the effect that "such ordinance shall impose a tax in like amount on the purchase of the competitive utility service," should be construed as permissive rather than mandatory. This construction was required, said the court, in view of the language of the 1968 constitution, which provides that local governments "may be authorized by general law to levy other taxes." Accordingly, the court continued:

Cities can refuse to impose a fuel tax because under the 1968 constitution, a city can only be authorized, not required "by general law" to impose "other taxes." . . . Although the municipality must receive the authority to levy this tax on public utilities, and services competitive thereto, from the Legislature, it has legislative discretion to determine what is competitive and whether, in fact, to impose such a tax.519

The supreme court remanded the case for further consideration by the trial court, "to determine whether or not the taxing authority in its free discretion intended the imposition of the tax or whether it adopted the tax under the belief that it was mandated by the state to do so."520

State v. City of Miami Beach521 demonstrated that a population act could effectively confer the power to collect an excise tax upon cities and towns located in counties falling within certain population brackets.

Case law has preserved the traditional distinction between taxes and assessments. In Lake Howell Water & Reclamation District v. State,522 the supreme court held that a special assessment levied by a drainage district against owners of property within the district is not a tax. The court noted that neither the 1885 nor the 1968 constitution makes express provisions regarding special assessments; therefore, presumably, these assessments may be authorized pursuant to the inherent power of the legislature, without regard to the restrictions imposed upon the taxing power.

2. ALLOCATION OF TAXING POWER WITHIN THE COUNTY

The 1968 revision contains significant provisions regarding the allocation of taxing powers within the county.

518. 271 So. 2d at 120 (emphasis in original).
519. Id. at 122-23 (emphasis in original).
520. Id. at 123.
521. 234 So. 2d 103 (Fla. 1970).
522. 268 So. 2d 897 (Fla. 1972).
a. Power of county to impose taxes pursuant to general law authorizing municipalities to tax

In State ex rel. Volusia County v. Dickinson, the supreme court sustained the validity of an excise tax levied by the county on sales of cigarettes in the unincorporated area. Volusia had become a home rule county by the time the tax was imposed, and the home rule charter expressly provided that the county would have such municipal powers as may be required to fulfill the intent of the charter. The tax was levied in reliance upon a general law which authorized municipalities to levy such a tax. The court held that the taxing power of counties must be considered in the light of the Local Government article of the constitution. Article VIII, section 1(g) provides that a charter county “shall have all powers of local self-government not inconsistent with general law.” This provision, when read together with the constitutional provisions regarding the taxing powers of counties and municipalities, led the court to conclude that, “unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose.”

b. Limitation on taxing power of county

Article VIII, section 1(h) states: “Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.” The supreme court interpreted this new provision in City of St. Petersburg v. Briley, Wild & Associates, Inc. Pinellas County entered into a contract with Briley, Wild, a firm of consulting engineers, for the construction and expansion of sanitary sewage facilities. The beginning phase involved construction of a master sewage treatment plant in the unincorporated area of the county, together with transmission lines and lift stations. The county auditor sought a declaratory judgment on the propriety, under article VIII, section 1(h), of expending monies raised by county-wide ad valorem taxes to pay for sewage facilities to be constructed in the unincorporated area. The City of St. Petersburg and some taxpayers intervened in the suit and objected to the expenditure.

The court assumed, without discussion, that the constitutional provision, by prohibiting counties from levying taxes for certain purposes, also prohibits the counties from expending general tax revenues for these purposes. The court then held that article VIII, section 1(h),

prohibits the taxation of municipally situated property by the County for any services rendered by the County where no

523. 269 So. 2d 9 (Fla. 1972).
524. Id. at 11.
525. 239 So. 2d 817 (Fla. 1970).
real or substantial benefit accrues to city property from such services. Conversely, this provision permits such taxation where such service is found to be of real and substantial benefit to such property.\footnote{526}

The court found that the sewage project would confer a substantial benefit upon the entire county, “healthwise and recreationwise,” even though “the benefits may not be direct in the sense that owners of city-located property will physically use the expanded treatment plant, lines and lift stations.”\footnote{527} The expenditure of general tax revenues for this purpose was therefore found proper. In dictum, the court speculated about the type of project which might run afoul of article VIII, section 1(h). Examples included:

- a library set up in an unincorporated area for the use and benefit of the area residents or, perhaps, a park or recreation facility for the residents of such area. Even the establishment of fire fighting facilities in a particular unincorporated area may not reasonably be said to be of consequential benefit to the incorporated areas.\footnote{528}

*Burke v. Charlotte County*,\footnote{529} sustained the validity of a county tax which was levied to provide for the construction of roads. The supreme court held that the roads, although not within municipal limits, would sufficiently benefit municipal residents to justify imposition of the tax in the incorporated as well as the unincorporated areas of the county.

c. County preemption of municipality’s power to levy ad valorem taxes

Article VII, section 9(b) provides that ad valorem taxes shall not be levied in excess of ten mills each for all county purposes, for all municipal purposes and for all school purposes, except that higher rates may be levied for any of these purposes when authorized by referendum or when required for the payment of bonds. A later heading will discuss various aspects of this so-called “millage cap.”\footnote{530} Germane to the present discussion is the last sentence of Article VII, section 9(b), which states: “A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.”\footnote{531}

This new provision was at issue in *State ex rel. Dade County v. Dickinson*.\footnote{532} The Dade County Home Rule Charter authorizes the county government to render certain municipal-type services throughout

\footnote{526. Id at 822-23.} 
\footnote{527. Id at 823.} 
\footnote{528. Id at 824.} 
\footnote{529. 286 So. 2d 199 (Fla. 1973).} 
\footnote{530. See notes 582-86 infra and accompanying text.} 
\footnote{531. 230 So. 2d 130 (Fla. 1970).}
the county, even in areas where municipal governments still exist. The court held that, without a referendum, Dade County may levy up to ten mills for county purposes and up to an additional ten mills if justified by municipal-type services rendered by the county. The millage imposed by the county for municipal-type services preempts the power of municipalities to impose taxes without referendum; thus if the county imposed ten mills for county purposes and another ten mills for municipal purposes, the county would thereby entirely preempt the power of municipalities to impose taxes without referendum, and the municipalities would have to seek a referendum in order to impose any tax at all. The court noted that “the demarcation between county purposes and municipal purposes is uncertain” and urged the legislature to clarify the distinction.532

3. INCOME AND INHERITANCE TAXES

The 1885 constitution, as revised in 1924,533 prohibited taxes upon inheritances or upon income, except that the state could impose an inheritance tax to the extent it could be credited or deducted from any similar federal tax. The 1968 revision534 allowed an income tax subject to the same limitation that applied to inheritance taxes, and the limitation applicable to both income and inheritance taxes was changed so that Florida could impose either type of tax to the extent it could be credited or deducted from any similar state or federal tax.

In an advisory opinion rendered in 1971,535 the justices of the supreme court ruled that corporations as well as natural persons enjoyed the protection against income taxes unless such taxes could be credited or deducted against state or federal taxes. Subsequently, in November 1971, the people approved an amendment to Article VII, section 5, which now reads as follows:

Section 5. Estate, inheritance and income taxes.
(a) NATURAL PERSONS. No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

(b) OTHERS. No tax upon the income of residents and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths (3/5) vote of the membership of each house of the legislature or as will provide for the state the maximum which may be allowed

532. Id. at 137.
535. Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971).
to be credited against income taxes levied by the United States and other states. There shall be exempt from taxation not less than five thousand dollars ($5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states.

(c) EFFECTIVE DATE. This section shall become effective immediately upon approval by the electors of Florida.

The intent of the framers of the constitutional amendment was expressed in a preamble adopted by the legislature as part of House Joint Resolution 7-B (1971), which also adopted the constitutional amendment itself for submission to the people. While the preamble was not voted upon by the people, it evidently represents a primary source for future determinations of the intent of the framers. It states:

[I]t is intended by this amendment to limit death and income tax immunity to natural persons, as opposed to artificial persons or entities created by or pursuant to law such as business corporations, professional corporations, banking associations, savings and loan associations and other entities brought into being by compliance with state or federal statutes; and

this amendment will, however, continue to prohibit imposition of these taxes upon trusts created by private contract between settlors and trustees, but the legislature will not be barred from imposing a tax on those forms of business trusts which obtain special statutory attributes from the state or federal government, such as so-called "Massachusetts business trusts."

In December, 1971, a special session of the legislature enacted a tax statute, implementing the constitutional amendment which had been adopted the previous month.

4. IMMUNITIES AND EXEMPTIONS FROM TAXATION
   a. Immunities

Neither the 1885 nor the 1968 constitution mentions immunity from taxation. Case law has held, however, that property owned by the state or a county is immune from taxation, regardless of the use to which the property is put.

The leasehold interests of parties who lease land from a county are not immune from taxation. Case law has developed the rule that the legislature may confer tax exemption upon such interests if it finds that they serve a public purpose. The 1968 decision in Hillsborough County

536. The italicized words were added by the November, 1971 amendment.
538. See, e.g., Hillsborough County Aviation Auth. v. Walden, 210 So. 2d 193 (Fla. 1968); Orlando Util. Comm. v. Milligan, 229 So. 2d 262 (Fla. 4th Dist.), cert. denied, 237 So. 2d 539 (Fla 1970).
Aviation Authority v. Walden\(^{539}\) dealt with a statute enacted in 1961 which authorized local governments to impose ad valorem taxes on leasehold interests of private, profit-making businesses located on publicly owned property, except that leaseholds were exempt if the property was used for a “public function or public purpose authorized by law.” The supreme court held that the leasehold interest of Bartke's Restaurant on land owned by the county at Tampa airport was tax exempt because the operation of an airport restaurant was a “predominantly public purpose;” the same case denied tax exemption to the predominantly private purposes of such businesses as car rental companies, service stations, motels, a construction company which rents a hangar for the storage of its private executive aircraft, an aircraft repair and salvage company, and a company engaged in repair of radio or communications equipment.

Straughn v. Camp\(^{540}\) further elaborated upon the ability of the legislature to confer tax exemptions upon the interests of lessees of county property if they serve a public purpose. The property in question was owned by Santa Rosa Island Authority, an entity created by statute to exercise some of the powers of Escambia County with regard to a portion of Santa Rosa Island. A special law enacted in 1949 conferred tax exemption upon all properties owned or used by the Authority, including property which was leased to private parties, on the basis of a legislative determination that the public purpose carried out by the Authority should be attributed to all activities carried on by the lessees. Portions of the Authority’s property were leased to private parties. Some of the leases declared that the lessee would be liable for any taxes which might lawfully be imposed, while other leases were completely silent on the question of taxation. In fact, all lessees were granted tax exemption until the enactment of a statute in 1971, which repealed a 1949 statute conferring the tax exemption. The Escambia tax assessor then assessed ad valorem taxes upon the leasehold interests of the lessees, who sought judicial relief.

The supreme court held that the legislature is fully authorized to repeal prior tax exemption laws, and that the 1971 legislature was justified in determining that the lessees were not serving a public purpose. The court implied that even if the legislature had found a public purpose, this finding could be judicially reviewed, since the constitution requires the leasehold to be taxed where the predominant use is for private purposes. The court also ruled that the statute repealing the exemption, which became effective December 31, 1971, should be applied to all leasehold interests, including those created prior to that date, and that such a result did not impair the obligation of contracts, since the Authority had never contracted to confer permanent tax exemption, nor could it have constitutionally entered into such a commitment. The court further held that the leaseholds would be taxable for the year 1972 and

\(^{539}\) 210 So. 2d 193 (Fla. 1968) [hereinafter referred to as Walden].

\(^{540}\) 293 So. 2d 689 (Fla. 1974).
thereafter, in conformity with legislative intent, and in order to avoid a discriminatory and unconstitutional interpretation.

b. Exemption of municipal property

The 1885 constitution provided that property held and used exclusively for municipal purposes was exempt. The 1968 revision tightened this exemption by making it available only to "property owned by a municipality and used exclusively by it for municipal or public purposes," unless the property is located outside the municipality, in which event general law may require the municipality "to make payment to the taxing unit in which the property is located." The 1968 revision declares that qualifying municipal property shall be exempt from taxation, and the exemption is consequently self-executing, without the need for implementing legislation.

In *Orlando Utilities Commission v. Milligan*, decided in 1970 under the 1885 constitution, the county tax assessor assessed real property owned by the city-owned utility and used exclusively as a recreation area for employees of the utility and their families. The city claimed the property was exempt from taxation since it was used for municipal purposes. The district court denied the claim for exemption. While the operation of the utility facilities was a public purpose, the recreation area was not essential to the operation of the facility, but was primarily for the private benefit of the utility's employees and their families.

*Dade County v. Pan American World Airways, Inc.*, decided in 1973 by the supreme court, considered constitutional provisions regarding the tax exemption of property used for municipal purposes. Dade County attempted to impose ad valorem taxes upon leasehold interests valued at approximately $15 million which were owned by Pan American and located on land owned by the county at Miami International Airport. The leases, executed in 1962, included a provision that the county would "if not prohibited by law, assume and pay any and all taxes or improvement charges of any nature which may be levied or assessed against..." the leasehold interest of Pan American therein. Dade County did not attempt to impose a tax so long as the 1885 constitution was in effect. However, beginning in 1970, on the theory that the 1968 constitution had changed the tax status of this type of property, the county imposed the tax. The county relied, primarily, on a sentence at the end of article VII, section 10(c) in the 1968 constitution regarding revenue bonds, to the effect that if any private corporation or person occupies a project financed

---

541. FLA. CONST. art. IX, § 1; art. XVI, § 16 (1885).
543. 229 So. 2d 262 (Fla. 4th Dist. 1970), cert. denied, 237 So. 2d 539 (Fla. 1970).
544. 275 So. 2d 505 (Fla. 1973) [hereinafter referred to as *Pan American*]; noted in 26 U. FLA. L. REV. 149 (1973).
545. 275 So. 2d at 507 (emphasis in original).
by such bonds pursuant to contract or lease with the governmental body which issued the bonds, "the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property." The supreme court rejected the county's contention, upon determining that the above constitutional language compelled taxation of property only if it was financed by bonds issued after the effective date of the 1968 constitutional revision, and even then only if the bonds were revenue bonds of the type described in article VII, section 10(c). The Pan American bonds had been issued before 1968, and were not of the type described in section 10(c); therefore, this section did not compel taxation.

Next the court considered whether Pan American's activities were for a public purpose. The court discussed this question within the framework of article VII, section 3(a), which confers tax exemption upon property owned by a municipality and used exclusively by it for a public purpose. In the present writer's view, this approach was completely inappropriate. First, the property subjected to taxation was the leasehold interest owned by Pan American, not the lessor's ownership interest; second, the lessor was a county, not a municipality. A sounder approach would have treated the case as one regarding an attempt to impose a tax upon a lessee's interest in county-owned land. This does not involve any provision in the text of the constitution, but rather, as discussed under the preceding heading, has been developed by statutes and case law. The approach which the court took in the post-Pan American decision of Straughn v. Camp, discussed above, would have been appropriate to the facts of the Pan American case itself. Viewed in this light, Pan American would have required the court to decide, first, whether the legislature had authorized the tax exemption; second, if not, whether Dade County had the jurisdiction to authorize the exemption without an enabling statute; third, if the exemption were found to be authorized either by statute or by Dade County's own action, whether the use by Pan American satisfied the public purpose test, without which the grant of exemption by statute or by Dade County would be constitutionally defective. The relevant public purpose test would be the test developed by case law on the exemption of the interests of lessees in county-owned property, culminating in Straughn v. Camp.

Instead, the court discussed public purpose in terms of article VII, section 3(a), which arguably requires a different public purpose test in order to determine the exemption of property owned by a municipality—the test under section 3(a) is whether the property is used exclusively by the municipality for a public purpose. The court's interpretation of this section in the Pan American decision should perhaps be regarded

546. See text accompanying notes 538-40 supra.
547. See note 540 supra and accompanying text.
548. See text accompanying notes 538-40 supra.
as dictum, since it was clearly inapplicable to the facts of the case; nevertheless, this interpretation represents a significant judicial attempt to clarify the meaning of this section.

In brief, the court held that two questions must be answered in determining whether property is used exclusively for public purposes under article VII, section 3(a): First, whether the facility is a public one; second, whether the property is used exclusively for that purpose. Applying this two-fold test to the present case, the supreme court concluded:

[T]he property leased to the airline is used exclusively for public purposes. The parties have stipulated that the airport facility is used for a public purpose; the incidental private purpose of a profitmaking venture by the airline has merged into the meaning of the stipulated “public purpose”; and there is no evidence in the record whatever to indicate that the property is not being used exclusively for the stated “public purpose.”

In City of Bartow v. Roden, property owned by the city at the municipal airport was leased to private parties, starting in 1961. No attempt was made to impose county ad valorem taxes until 1970, when the assessor assessed those portions of the property which, in his determination, were being used for private purposes, including land for which the city had not yet found a tenant, but which was being held out as available for lease to any private party. The court upheld the assessor, finding that the property leased or held out for lease for private purposes could not qualify under the public purpose test. The court cited and distinguished Walden and Pan American on the question whether the public purpose test was satisfied. The opinion would have been more useful by pointing out that Walden and Pan American involved attempts to tax the leasehold interests of the lessees of county-owned land, while the present case involved the taxation of the freehold interest of the city itself under the “exclusive public purpose” provision of article VII, section 3(a).

c. Property used for exempt purposes

The 1968 revision states: “Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.” This provision omits “municipal” from the list of purposes exempted by this section, municipal property is dealt with separately, in the provision

549. 275 So. 2d at 512.
550. 286 So. 2d 228 (Fla. 2d Dist. 1973).
551. See note 539 supra and accompanying text.
552. See notes 544-49 supra and accompanying text.
553. Fla. Const. art. VII, § 3(a).
554. The 1885 constitution listed municipal exemptions in the same sentences as other exemptions, such as literary, charitable, etc. Fla. Const. art. IX, § 1; art. XVI, § 16 (1885).
discussed previously in connection with the *Pan American* case. The 1968 revision introduces a new concept by limiting the exemption to "such portions of property" as are used "predominantly" for the designated purposes. Further, the 1968 revision can be implemented only by general law, in contrast to the 1885 provision which merely required a law.

In *Christian & Missionary Alliance Foundation, Inc. v. Schooley,* the owner filed a timely but incomplete application for tax exemption for the portion of its property used as a nonprofit old-folks' home. The court held that tax exemption was not necessarily lost for the year. All facts and circumstances should be considered to determine whether the applicant was guilty of laches or in some other way estopped from denying it had waived the exemption.

d. Personal property exemptions

The 1968 revision increases the exemption of household goods of the head of a family from $500 to $1,000, continues the additional exemption of $500 to widows and the disabled, and extends the $500 exemption to the blind. All of these exemptions are minimum figures guaranteed by the constitution, and the 1968 revision for the first time authorizes the legislature, by general law, to increase any or all of these exemptions without limit. The United States Supreme Court, in *Kahn v. Shevin,* sustained the validity of the $500 widow's tax exemption against a challenge on equal protection grounds because of its availability to women but not to similarly situated men. The Supreme Court held that to distinguish between women and men was reasonable.

e. Homestead exemption

The 1968 revision continues the basic concept of homestead exemption from taxation, but with significant changes. The constitution guarantees a minimum exemption of $5,000, but now authorizes the legislature, by general law and subject to conditions specified therein, to increase the exemption up to $10,000 if the owner is 65 years old or totally and permanently disabled. A 1971 statute partially implements this provision, by increasing the homestead exemption “for taxes levied by district school boards for current school operating expenses” to $10,000 for persons at least 65 years old who have been permanent residents of Florida for the five consecutive years prior to claiming such exemption. Another

---

555. See notes 544-51 supra and accompanying text.
556. F.L.A. Const. art. IX, § 1, revising F.L.A. Const. art. XVI, § 16 (1885).
557. 289 So. 2d 778 (Fla. 2d Dist. 1974).
558. F.L.A. Const. art. VII, § 3(b); F.L.A. Const. art. IX, §§ 9, 11 (1885).
560. This heading deals with homestead exemption from taxation, as distinguished from the exemption of homestead from alienation, discussed under O. infra.
562. F.L.A. Const. art. VII, § 6(c).
In 1967, while the draft of the proposed 1968 revision was being considered, the legislature enacted a statute extending homestead exemption to condominiums and cooperative apartments, effective on the first January 1st after adoption by the people of a constitutional revision including a similar provision. The 1968 revision was adopted at the November, 1968 election and became effective on January 7, 1969, too late to affect the homestead tax status of property for calendar year 1969. The question arose whether the 1967 statute, which purported to extend the homestead exemption to condominiums and cooperative apartments effective January 1, 1969, could be sustained on the basis of the 1885 constitution. In *Ammerman v. Markham*, the supreme court held that the statute was valid, as a legislative interpretation of the term “real property” eligible for the exemption under the 1885 constitution.

In *Horne v. Markham*, the supreme court held that a homeowner who had failed to make a timely application for homestead tax exemption could not complain of being denied the exemption; the constitutional provision is non-self-executing and the legislature has established reasonable procedures by which an applicant can establish his right.

5. **ASSESSMENTS AND RATES**

a. Rates

The 1968 revision preserves the general requirement that all ad valorem taxation shall be at a uniform rate within each taxing unit. An exception is preserved in the case of intangible personal property taxes, which may be at different rates, not to exceed two mills. The single intangible tax in lieu of other assessments is also retained with regard to obligations secured by mortgage, deed of trust or other lien on real estate, but the 1968 revision omits the prior requirement that this single tax must be paid at the time of recordation.

b. Assessment

Subject to the exceptions to be discussed below, the 1968 revision preserves the prior requirement of assessment on the basis of “just valuation.”

In *Southern Bell Telephone & Telegraph Co. v. Dade County*,

568. 222 So. 2d 423 (Fla. 1969).
569. 288 So. 2d 196 (Fla. 1974).
571. Id.
572. See note 578 *infra* and accompanying text.
574. 275 So. 2d 4 (Fla. 1973).
the supreme court in 1973 reiterated prior case law, to the effect that "just valuation" requires assessment at fair market value, and that a taxpayer is entitled to relief if his property is assessed at a percentage of its market value substantially higher than the percentage at which other property in the taxing unit is generally assessed, even though his property is not assessed above its fair market value. The court then held that the general level of assessment of other properties could be demonstrated to the courts by means of sales ratio studies, if reliably prepared according to generally accepted principles for the conduct of such studies.

Another 1973 decision, District School Board v. Askew, involved disparities in assessment levels from county to county. The Minimum Foundation Program allocates state funds to the public schools, under a formula which takes into account the total assessed value of taxable property in each school district. If a county systematically underasseses property, the result is to relieve the county taxpayers of paying their fair share of school taxes and to burden the state with the need to contribute an excessive subsidy. In order to remedy this problem, the legislature authorized the Auditor-General, for purposes of computing the allocation of state funds to school districts, to adjust the total assessed value reported by county tax assessors; if the Auditor-General determined that a county had underassessed, he could limit their allocation of state funds to the level which would have resulted from a proper level of county assessment. The supreme court held this statute unconstitutional, since it impinged upon the constitutional authority of county tax assessors. The court noted that other remedies were available to challenge improper assessments, notably through suit filed in the circuit court.

The 1968 revision continues to exempt stock in trade and livestock from the just valuation requirement. A new provision states that "agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use." This provision essentially restates pre-1968 case law interpreting statutes which achieved similar results through the exercise of the legislature's constitutional authority to prescribe the regulations for securing the just valuation of property.

c. Millage cap

The 1885 constitution placed a maximum limit on school tax millages. Article VII, section 9(b) of the 1968 constitution imposes, for the first time, a general "millage cap," limiting the rate of taxation which

575. 278 So. 2d (Fla. 1973).
577. FLA. CONST. art. VIII, § 1(d).
578. FLA. CONST. art. VII, § 4(b); FLA. CONST. art. IX, § 14-A (1885).
580. See, e.g., Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965); Matheson v. Elcock, 173 So. 2d 164 (Fla. 3d Dist. 1965), cert. dismissed, 184 So. 2d 889 (Fla. 1966).
581. FLA. CONST. art. XII, § 8 (1885).
may be levied by local governmental units on real estate and tangible personal property, subject to enumerated exceptions.

The general rule is that ad valorem taxes shall not be levied in excess of the following millages: "for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; and for special districts a millage authorized by law approved by a vote of the electors . . ."582 The exceptions provide that higher millages may be imposed on any of the following justifications:583 (1) for the payment of bonds (apparently on the assumption that the bond issue was previously approved by a referendum); (2) when authorized, for periods not longer than two years, by a referendum; or (3) to the extent authorized by law, by a county furnishing municipal services, within the taxing limits fixed for municipal purposes.

The constitutional provision requires that the referendum be limited to freeholders. However, this limitation clearly violates post-1968 case law of the United States Supreme Court,584 and has been declared inoperative in Florida.585 The referendum must now be open to all electors in the taxing unit.

Taxation by a county rendering municipal services has been discussed under a previous heading.586

d. Distinction between void and voidable tax assessments

In Florida East Coast Railway v. Reid,587 the court distinguished between void tax assessments, which can be judicially reviewed even after expiration of the statute of limitations for filing suit, and voidable assessments, which cannot be judicially reviewed thereafter.

K. Borrowing

1. PLEDGING CREDIT

The 1968 revision prohibits the state and local governments from pledging or lending their credit to any individual or corporation and from becoming a stockholder in any corporation. The 1968 revision, however, introduces some exceptions.588 First, public trust funds may be invested without regard to the general prohibition, a result which had developed under the pre-1968 case law.589 Second, other public funds may be invested in obligations issued or insured by the United States or any of

582. Fla. Const. art. VII, § 9(b).
583. Id.
585. State v. City of Miami Beach, 245 So. 2d 863 (Fla. 1971).
586. See notes 523-24 supra and accompanying text.
587. 281 So. 2d 77 (Fla. 4th Dist. 1973).
its instrumentalities. Third, an important change has been made regarding the ability of local governments to issue industrial aid bonds.

a. General rule—the public purpose test

In situations where none of the 1968 exceptions apply, the general prohibition against the pledge or loan of credit and the ownership of stock means the same under the 1968 revision as under the 1885 constitution. The test continues to be the public purpose test developed by the supreme court in numerous pre-1968 cases and reiterated in cases decided under the 1968 constitution: a bond issue will be approved if the primary purpose is public, even though incidental private benefits may be enjoyed, and conversely the bond issue will be disapproved if the primary purpose is private, even though incidental public benefits ensue.

The general rule was applied by the supreme court in the 1972 case of Hillsboro Island House Condominium Apartments, Inc. v. Town of Hillsboro Beach. The town proposed an $800,000 bond issue to finance anti-erosion measures. The town is a peninsula, joined to the mainland at the northern end, which is less than 600 feet wide. The length of the town (from north to south) is approximately 3.2 miles, with the eastern side fronting on the Atlantic Ocean, and the western side fronting on the Intracoastal Waterway. Most of the proceeds of the bond issue were to be used to add sand along the northernmost one mile of the Atlantic shore, and the remaining proceeds were to be set aside for other anti-erosion measures as needed.

Objection to the bond issue was raised by a group of citizens residing on the western side of the town, who claimed that their property would not be benefited by the anti-erosion measures undertaken on the opposite side of the peninsula. They therefore argued that the project should be financed by special assessments against the property owners directly affected, rather than by a bond issue payable by taxpayers throughout the town. The supreme court rejected this argument and approved the bond issue, finding that the private benefit to the owners of property on the Atlantic shore was incidental to the public benefit arising from preservation of the shore line.

The supreme court also applied the rationale of Seadade Industries, Inc. v. Florida Power & Light Co. The anti-erosion project in Hillsboro Beach required approval by various independent regulatory agencies. The court held, on the basis of the Seadade precedent, that the bond issue could be validated where the proponents had made a reasonable showing that the necessary approvals would be forthcoming.

590. Id.
591. Id. See notes 595-604 infra and accompanying text for a discussion of this provision. 592. See cases cited in notes 592-94 infra; see also Betz v. Jacksonville Trans. Auth., 277 So. 2d 769 (Fla. 1973).
593. 263 So. 2d 209 (Fla. 1972).
594. 245 So. 2d 209 (Fla. 1971). See note 485 supra and accompanying text.
b. Industrial aid bonds

Pre-1968 case law applied the general public purpose test to industrial aid bond projects as well as to others. A classic statement appeared in the 1967 decision in State v. Jacksonville Port Authority, where the supreme court expressed the general rule: "If the paramount purpose is a public purpose, such project may as an incident thereto lawfully benefit private corporations or individuals." Applying this rule, a four-to-three majority of the court invalidated a proposed bond issue for the construction of a shipyard to be leased to a private corporation. The dissenting justices pointed out that previous decisions had found the requisite public purpose in such different things as golf courses, race tracks, fraternity houses, trade marts, concessions, fishing piers, marinas, garages and filling stations, airports, overhaul and repair facilities for aircraft, airport hotels and urban renewal private housing.

In State v. Reedy Creek Improvement District, decided in 1968, the supreme court validated drainage revenue bonds, to be issued by the District in the vicinity of the proposed new Disneyworld project. The court observed:

Successful completion and operation of the District no doubt will greatly aid the Disney interest and its contemplated Disneyworld project. However, it is obvious that to a lesser degree the contemplated benefits of the District will inure to numerous inhabitants of the District in addition to persons in the Disney complex.

The proposed improvements also embrace measures designed to develop improved sanitation and pest control conditions as well as aiding the conservation of natural resources. Besides the public benefit derived by inhabitants of the District from such measures, we conclude that the integrated plan or workings of the District and its related improvements are essentially and primarily directed toward encouraging and developing tourism and recreation for the benefit of citizens of the state and visitors to the state generally.

Thus, the promotion of tourism is regarded as a public purpose, even where private interests are "incidentally" benefited.

Another 1968 decision, State v. Ocean Highway & Port Authority, emphasized the weight accorded to a legislative pronouncement that a project constitutes a public purpose. The supreme court approved a bond issue for the construction of a pulp and paper plant to be leased to a

---

595. 204 So. 2d 881 (Fla. 1967).
596. Id. at 884.
597. Id. at 891 (Ervin, J. dissenting).
598. 216 So. 2d 202 (Fla. 1968).
599. Id. at 205-6.
600. 217 So. 2d 103 (Fla. 1968).
private corporation, where the authorizing statute declared it was for a public purpose. The court noted:

We do not hold that legislative action can convert black into white. However, in this matter of defining what is or is not a "public" as distinguished from a "private" purpose, we labor in a "judicial grey zone" where the ultimate judgment may be colored, if not concluded, by definitive legislative pronouncements.601

The public nature of the project in this case was buttressed by the circumstance that the statute's effectiveness was conditioned on the favorable outcome of a referendum on the project in Nassau County, and that the referendum resulted in a vote of 1,340 in favor of the project and 493 opposed.

Against this background, the 1968 revision preserved the general public purpose test, but added completely new language regarding industrial aid bonds. Article VII, section 10(c) permits statutes authorizing:

(c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

Thus if a project satisfies the requirements of article VII, section 10(c), it has thereby satisfied the public purpose test without the need for further inquiry. If, on the other hand, a project does not fit within this new subsection, it must still satisfy the public purpose test, and the inquiry proceeds along the same lines and subject to the same precedents as controlled before 1968.

The impact of article VII, section 10(c), added by the 1968 revision, became apparent in the 1972 supreme court decision in *State v. Jacksonville Port Authority.*602 The Authority proposed to issue $1 million of Industrial Development Revenue Bonds to finance the acquisition and construction of an industrial plant for the bottling, storing, shipping and distribution of wines and liquors. By a vote of four to three, the supreme court found that the project was authorized by statute and by the Au-

601. Id. at 104-5
602. 266 So. 2d 1 (Fla. 1972).
authority's charter as one which would promote waterborne commerce. Upon finding this authorization, the court next found that the project fell within the category of industrial aid bonds authorized by article VII, section 10(c). Accordingly, no determination of public purpose was necessary and the bond issue was approved.

Another example is the 1971 decision in State v. Dade County. The county proposed to issue $3.85 million in Industrial Development Bonds for the purpose of financing the acquisition of an industrial or manufacturing plant for processing meats, and for the rehabilitation, improvement, renovation and equipment of the plant so acquired. The plant, as renovated and equipped, would be leased to a private corporation. The supreme court approved the project and ruled on two points which had been urged by the objectors. First, the court held that renovation and improvements, as well as original acquisitions, could properly be financed under the relevant statutes and under article VII, section 10(c). Second, the court addressed the question of how the Florida courts, in bond validation proceedings, should determine whether the project will yield interest which is exempt from federal income tax, as required by article VII, section 10(c). The supreme court stated:

[W]e hold that it is not necessary for a local agency contemplating a revenue bond issue to obtain a determination of exemption from the Federal Government, although of course such local agency may go through the Internal Revenue Service or the U.S. Tax Court if it desires to do so.

However, this does not mean that no safeguards surround such determination at the state level. The question is one of law to be decided under the facts of each case. Initially, the County Commission makes the determination upon advice of the county attorney in conjunction with qualified bond counsel, but because the question is one of law, it is subject to review by both the Circuit Court and this Court. If an erroneous determination of exemption is made, this Court is empowered to overturn such determination on appeal.

2. STATE BONDS

The 1968 revision deals separately with two types of state bond: full faith and credit, and revenue.

a. State full faith and credit bonds

As a departure from the limited ability of the state to issue bonds under the 1885 constitution, the 1968 revision grants a broad authoriza-

603. 250, 2d 875 (Fla. 1971).
tion for bonds pledging the full faith and credit of the state, if issued to finance or refinance the cost of state capital projects upon approval by a statewide referendum. The referendum is not required for an issue of bonds which refunds an outstanding issue at a lower net average interest cost. The total outstanding principal of state bonds issued pursuant to this provision shall never exceed fifty percent of the total tax revenues of the state for the two preceding fiscal years.

Another source of state bonding authority is article XII, sections 9(c) and (d), which authorize the “second gas tax” monies to be pledged for highway and road construction and which authorize the state to pledge the full faith and credit of the state to guarantee school bonds funded by the motor vehicle license tax. In State v. Division of Bond Finance, decided in 1971, the supreme court sustained the validity of $4.9 million in bridge bonds proposed by the state and Escambia County for the construction of a four-lane toll bridge and causeway across Santa Rosa Sound. The bonds were to be secured by: (1) net tolls collected from the project; (2) 80% of the gasoline tax funds accruing to the Department of Transportation and allocated to Escambia County under the “second gas tax” provision; and (3) the full faith and credit of the State of Florida. The court found that the project was authorized under article XII, section 9(c) and therefore the full faith and credit of the state could be pledged without a referendum.

b. State revenue bonds

The 1968 revision authorizes the state or its agencies to issue revenue bonds without referendum only to finance or refinance the cost of state capital projects. Such bonds shall be payable solely from funds derived from sources other than state tax revenues or rents or fees paid from state tax revenues.

In State v. Inter-American Center Authority, the supreme court approved a proposed issue of $203 million development revenue bonds by the Inter-American Center Authority, an instrumentality of the state created by statute. In connection with this project, Dade County entered into a cooperation agreement to aid the Authority on a deferred basis.

Under the 1885 Constitution, the state had the power to issue state bonds only for the purpose of repelling invasion or suppressing insurrection (Article IX, Section 6). Of course other obligations of state revenues were incurred generally through one of the specific authorizations in the 1885 Constitution (i.e. school bonds, gas anticipation certificates, etc.), or through the revenue bond concept. The Florida Supreme Court allowed the state to build capital facilities through bonding with the bonds repaid by “rents” paid to the agency operating the facility. This stretched the revenue bond concept somewhat for in substance, if not in form, it obligated the tax resources of the state.

606. 281 So. 2d 201 (Fla. 1971).
607. 1 Fla. Const. art. VII § 11(c).
608. 246 So. 2d 102 (Fla. 1971).
with certain funds other than ad valorem tax revenues; the Authority in
turn undertook to make certain land and recreational facilities available
to the county. The court held that Dade County’s proposed aid, coming
from sources other than ad valorem taxes, did not violate the constitution
and did not require the project to be approved by a referendum.

3. LOCAL GOVERNMENT BONDS

The 1968 constitution clarifies and only slightly changes prior pro-
visions on local government bonds.609

a. Local government bonds payable from ad valorem taxation

Article VII, section 12 authorizes counties, school districts, munici-
palities, special districts and local governmental bodies with taxing powers
to issue bonds, certificates of indebtedness or any form of tax anticipation
certificate, payable from ad valorem taxation and maturing more than
twelve months after issuance. Generally, such bonds must be for the pur-
pose of financing or refinancing capital projects authorized by law and
approved by a referendum. As an exception, the referendum is not re-
quired when the bonds are issued to refund outstanding bonds and interest
and redemption premium thereon at a lower net average interest than the
original. The constitution limits the referendum to freeholders, but post-
1968 United States Supreme Court and Florida case law has extended
the franchise to all electors in this situation, as with the elections for ad
valorem taxes in excess of the millage gap.610

The 1970 Supreme Court of Florida decision in State v. Dade
County611 pointed out that the 1968 revision closed a loophole. Certificates
of indebtedness were not mentioned in the 1885 constitution and the
supreme court had not subjected them to the same referendum require-
ment as applied to bonds. But the 1968 constitution, by making express
mention of certificates of indebtedness, clearly brought them into the same
category as bonds with regard to the need for referendum.

b. Local government revenue bonds

The conditions imposed by article VII, section 12, discussed above,612
apply only to obligations payable from ad valorem taxation. Other types
of obligation are, by implication, unaffected by these conditions. The
supreme court recognized this implication in the 1973 decision in State
v. Orange County.613 The county proposed to issue $3 million in capital
improvement bonds, payable solely from the proceeds of race track funds

609. FLA. CONST. art. VII, § 12; FLA. CONST. art. IX, § 6 (1885).
610. State v. City of Miami Beach, 245 So. 2d 863 (Fla. 1971), applying City of Phoenix
611. 234 So. 2d 651 (Fla. 1970).
612. See notes 610-11 supra and accompanying text.
613. 281 So. 2d 310 (Fla. 1973).
and jai alai fronton funds accruing annually to Orange County pursuant to statute. The county, a non-charter county, adopted this proposal by ordinance, in reliance upon general law. By a vote of four to three, the supreme court held that article VIII, the Local Government article of the 1968 constitution, together with the general law and county ordinance, authorized the project. Further, the court found nothing in the 1968 constitution to preclude the issuance of such bonds without a referendum, since the bonds were not payable from ad valorem taxes.

In another four to three decision, the supreme court validated a proposed bond issue by Orange County Civic Facilities Authority for enlargement of the Tangerine Bowl, where the county guaranteed to pay the authority $200,000 from revenues other than ad valorem taxation. The court held no referendum necessary since the ad valorem taxing power was not committed.

Two 1971 supreme court decisions considered whether mortgages could be used as security for bonds issued without an election. In *Nohrr v. Brevard County Educational Facilities Authority*, a revenue bond was proposed to finance construction of a dormitory and a cafeteria at a private junior college. As security for the bondholders in case revenues from the facility were insufficient to provide for payments, the proposed bond issue included a mortgage of the facility in favor of the bondholders. The supreme court held that the mortgage was not valid without an election. The court noted that the same statute could also authorize a similar bond issue for a public institution of higher learning, in which event the county might incur a moral obligation to pay the bondholders from general county funds to prevent foreclosure against the facility. This was the equivalent of a pledge of ad valorem taxes and therefore required an election.

No election, however, was needed in *State v. Putnam County Development Authority*. The Authority issued revenue bonds to finance acquisition and construction of a water treatment facility needed by a business corporation in order to meet standards promulgated by the state for pollution control. The bonds included a mortgage of the facility to protect bondholders in case the revenues were insufficient. In holding the mortgage valid without the need for an election, the court found that the county would not be under a legal or even a moral obligation to pay the bondholders from public funds in the event of default and threatened foreclosure.

*State v. City of Miami Beach* sustained the validity of $12 million of bonds payable from the proceeds of the resort tax, which was an excise tax authorized by population act and imposed by the city. The supreme

615. 247 So. 2d 304 (Fla. 1971).
616. 249 So. 2d 6 (Fla. 1971).
617. 234 So. 2d 103 (Fla. 1970).
court held that no election was required, since the ad valorem taxing power was not committed.

4. POST-1968 AMENDMENTS

Four amendments of the constitutional provisions on borrowing have been approved since 1968.

The November, 1970 election adopted the new article VII, section 14, authorizing certain state bonds to be issued, without election, to finance the construction of air and water pollution and abatement and solid waste disposal facilities, to be operated by any municipality, county, district or authority, or by any agency of the state. In the 1973 decision of State v. Division of Bond Finance, the supreme court held that this new section must be given full effect, as authorizing certain types of full faith and credit bonds to be issued without referendum, as a special exception to article VII, section 11 which expresses the general requirement of a referendum for state full faith and credit bonds.

The March, 1972 special election adopted the new article VII, section 15, authorizing revenue bonds to establish a fund to make loans to students, as prescribed by law.

The November, 1972 election approved the amendment of article XII, section 9(a) to restore a provision of the 1885 constitution which had been eliminated in the 1968 revision, so as to allow the state to issue revenue bonds for the purchase and improvement of land and water areas to promote outdoor recreation and natural resources conservation.

The same election also approved the amendment of article XII, section 9 to extend the duration and coverage of the allocation of motor vehicle license tax revenues for school capital outlay debt service.

L. Spending and Using Public Resources

The 1968 revision restates the provisions of the 1885 constitution regarding the spending and use of public resources. Article III, section 12 prohibits appropriation bills from containing provisions on other subjects. Article VII, section 1(c) prohibits money from being drawn from the treasury except in pursuance of appropriation made by law. And article VII, section 10, previously discussed in connection with borrowing, also imposes limitations on the purposes for which funds may be spent, by prohibiting the state and local governments from giving, lending or using their taxing power to aid private parties.

1. APPROPRIATIONS PROCESS

An advisory opinion rendered in 1970 interpreted the constitutional requirement that appropriation bills contain provisions on no other subject. The justices advised that:

618. 278 So. 2d 614 (Fla. 1973).
619. See notes 602–04 supra and accompanying text.
620. Advisory opinion to the Governor, 239 So. 2d 1 (Fla. 1970).
The Legislature does not have the power nor the right under the Constitution of this State to make law in an appropriations bill on other subjects, unless the other subjects are so relevant to, interwoven with, and interdependent upon, the appropriations so as to jointly constitute a complete legislative expression on the subject.\footnote{621}

While certain individual items in the 1970 appropriation bill might at some future time be found to violate this requirement, those items could be severed from the remainder of the statute; accordingly, the justices advised that the statute as a whole should be regarded as valid.

In \textit{Dickinson v. Stone},\footnote{622} the supreme court held that the "no other subject" provision was violated by the 1971 appropriations act which provided for the transfer of personnel and data processing equipment from the Comptroller to the Department of General Services. But in \textit{Thomas v. Askew},\footnote{623} the court sustained the validity of the 1972 appropriations act, including a provision requiring the construction of a new state capitol building. In distinguishing this result from \textit{Dickinson v. Stone}, the court stated:

\begin{quote}
It has never been seriously contended that a new building, a new state service or function, or a new state program could not have its genesis in a line item appropriation. The prohibition of Article III, Section 12 has only been applied to substantive other matters wholly independent of or unconnected with an appropriated item which matters were improperly but expressly written into the general appropriations act. Implied or secondary results from the operation of a line item appropriation have never been raised to the equivalent status of an ungermane written rider improperly inserted into an appropriations act.\footnote{624}
\end{quote}

\textit{Department of Administration v. Horne}\footnote{625} held that a taxpayer has standing to contest the validity of provisions of appropriations acts on constitutional grounds related solely to the taxing and spending power, without the need to show that the taxpayer is subject to any special injury.

In \textit{O'Malley v. Florida Insurance Guaranty Ass'n},\footnote{626} the supreme court held that the constitutional provisions regarding the appropriations process do not apply to all public funds. The association is a public corporation created by statute, as a mechanism for paying claims on certain classes of insurance policy if the insurance company becomes insolvent. The statute authorizes the corporation to assess and collect payments from insurance companies doing business in the state and selling the class of insurance involved. The court held that the funds of this non-profit, public corporation were connected with the administration

\begin{small}
\footnote{621}{Id. at 11.}
\footnote{622}{251 So. 2d 268 (Fla. 1971).}
\footnote{623}{270 So. 2d 707 (Fla. 1972).}
\footnote{624}{Id. at 711.}
\footnote{625}{269 So. 2d 659 (Fla. 1972).}
\footnote{626}{257 So. 2d 9 (Fla. 1971).}
\end{small}
of government, but were not subject to the appropriations process nor to control by the comptroller of the state or other constitutional provisions relating to public funds. The court characterized the corporation's funds as trust funds separate and apart from general tax funds or other state revenue.

2. ACQUISITION OF PROPERTY

In an opinion rendered in 1972, the attorney general advised that a county is constitutionally prohibited from constructing an office building for the purpose of leasing facilities in the building to private physicians. This project would involve the expenditure of the county's resources—and thus the use of its taxing power—primarily for the benefit of private parties, in violation of article VII, section 10.

3. LEASING PROPERTY

Once a governmental unit has acquired property for a proper purpose, a subsequent lease of the property to private parties for private purposes is, apparently, not precluded. This rule is implied by Bannon v. Port of Palm Beach District. The Port District owned Peanut Island, an artificial island which had been created during the dredging of Palm Beach Inlet. The island had for some years been used primarily as an undeveloped recreation facility until the Port District leased it to a private corporation for development purposes. After finding the project authorized by statute, the supreme court noted that the project did not commit the Port District to any expenditure or pledge of financial obligation. Accordingly, stated the court: "We do not find it necessary to determine whether the purposes to be served by the development of the leased property are primarily public or private in nature." The court's opinion does not discuss whether the rental under the lease was equal to the fair rental value of the property. This point seems to have a bearing on the validity of the project. If the rental was less than the fair rental value, arguably the Port District was conferring a subsidy upon the lessee to the extent of the rental bargain, which could be regarded as a use of public resources for the benefit of private parties.

In City of West Palm Beach v. Williams, the supreme court followed Bannon and concluded:

In summary, we hold that where bonds are not issued, public funds are not spent, and the power of eminent domain is not exercised in furtherance thereof, a municipality can lease public land for private uses in accordance with legislative authority.

629. 246 So. 2d at 740.
630. 291 So. 2d 572 (Fla. 1974).
631. Id. at 578.
As in *Bannon*, the court failed to discuss whether the situation would be affected if the rental were less than the fair rental value.

**M. Claims Against State and Local Government and Officers**

Article X, section 13 of the 1968 constitution states: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." This is identical to the corresponding section of the 1885 constitution and has received identical judicial interpretation. The courts continue to hold that the state is immune from suit except to the extent this immunity is waived by general law. The same immunity is enjoyed by counties, on the theory that they are subdivisions of the state. However, municipal corporations do not derive immunity from this constitutional provision. The courts have developed doctrines of partial municipal immunity, independent of any constitutional text.

**1. IMMUNITY OF STATE AND COUNTIES**

The 1969 legislature enacted two statutes concerning claims against the state. The first statute waived immunity in connection with certain types of claim; the second statute repealed the first, effective one year later. Thus, Florida waived its immunity, in some respects, for a twelve month period which ended on June 30, 1970. A follow-up statute enacted in 1971 revived all causes of action which had accrued during the one-year waiver period and conferred continuing jurisdiction on the courts to dispose of such cases.

The 1973 legislature enacted a new tort claim act, permitting suit to be brought against the state for certain types of incident occurring on or after January 1, 1975.

In *Schmauss v. Snoll*, the district court reiterated that the immunity of counties is coequal with the immunity of the state itself. The court further held that, for purposes of immunity, Metropolitan Dade County should be regarded as a county, and therefore immune, although for certain other purposes Dade may be regarded as a municipality.

Even when suit against the state is barred by immunity, a claimant may still seek relief from the legislature in the form of special legislation.

---

633. See notes 639-41 infra. A general statement of the rule under the 1885 constitution is *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968).
634. See notes 643-51 infra and accompanying text.
639. 245 So. 2d 112 (Fla. 3d Dist.), cert. denied, 248 So. 2d 172 (Fla. 1971).
The two-thirds vote which the 1885 constitution required for such legislation is no longer required by the 1968 constitution, as interpreted by the Attorney General; a simple majority is now sufficient.\footnote{640. See notes 19-21 supra and accompanying text.}

In \textit{Willits v. Askew},\footnote{641. 279 So. 2d 1 (Fla. 1973).} petitioner had obtained a judgment against the state, arising out of a tort which had occurred during the one-year waiver of immunity. The Governor declined to cause a state warrant countersigned by him to be issued to pay the amount of the judgment. The supreme court, in the exercise of its original jurisdiction, issued a peremptory writ of mandamus to require the Governor to issue the warrant. The court noted that article IV, section 4(e) of the constitution provides:

The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.

In situations where this newly added language is applicable, it deprives the Governor of his prior immunity.

In \textit{State Department of Education v. Howard},\footnote{642. 279 So. 2d 15 (Fla. 1973).} the supreme court sustained an order issued by the Career Service Commission, granting thirty days' severance pay to a former department employee. The Commission and the court rejected the department's argument that it could not disburse the severance pay because the legislature had not appropriated any funds for this purpose.

2. \textbf{PARTIAL IMMUNITY OF MUNICIPALITIES}

Adoption of the 1968 constitution had no effect on the judicial development of the partial immunity of municipalities.

\textit{City of Tampa v. Davis}\footnote{643. 226 So. 2d 450 (Fla. 2d Dist. 1969).} denied recovery to a plaintiff for injuries sustained in an automobile accident resulting from failure of city employees to replace a stop sign which had been knocked down in a prior accident. The district court noted that the control of highway traffic is a governmental, not a proprietary function; consequently, the case was governed by \textit{Hargrove v. Town of Cocoa Beach}\footnote{644. 96 So. 2d 130 (Fla. 1957).} and \textit{Modlin v. City of Miami Beach},\footnote{645. 201 So. 2d 70 (Fla. 1967).} and not by the general principles of tort law which would apply if a proprietary function were involved. The \textit{Davis} opinion phrased the \textit{Hargrove-Modlin} holding as follows:

[A] municipality is liable in tort, under the doctrine of respondeat superior, when its agent or employee commits a tort in the performance, or by the nonperformance, of an executive...
(or administrative) duty within the scope of a governmental function, only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.646

In Town of Largo v. L & S Bait Co., Inc.647 the same court, quoting its Davis holding with approval, ruled that the construction and operation of a municipal sewage disposal system is a governmental, not a proprietary function. Consequently, unless the plaintiff could prove that the town owed him a special duty, he could not recover damages from the town for the flooding of his property caused by the negligence of town employees in operating the sewer system.

Similarly in Moore v. City of St. Petersburg,648 the same court reiterated that construction and operation of a sewer system is a governmental function, as opposed to a “corporate or proprietary” function “such as street and sidewalk maintenance.” Therefore the plaintiff, who had been injured by falling into a caved-in sewer area, could not recover against the city without showing a “direct transaction or confrontation” with the tortfeasor.

Wong v. City of Miami649 involved the liability of a municipality for damage sustained by a citizen during a time of civil disturbance. Shortly before a civil rights rally, merchants in the neighborhood asked for additional police protection. In response to this request numerous police officers were sent to the area. Subsequently the officers were removed by order of the mayor, confirmed by the sheriff. Thereafter, some participants in the rally became riotous and inflicted more than $100,000 of damage to the merchants' stores. In damage suits filed by the merchants against the city and county, the supreme court denied relief on four grounds. First, no sufficient connection was alleged between withdrawal of the officers and the alleged damages. Second, police protection was a duty owed to the public generally which would not inure to the benefit of private citizens, even though police officers had been sent to a specific area upon the request of the plaintiffs. Third, removal of the officers was within the realm of governmental discretion. Fourth, the plaintiffs had not convinced the court that the decision to withdraw the officers was negligent. The court posed the question:

Who can say whether or not the damage sustained by petitioners would have been more widespread if the officers had stayed, and because of a resulting confrontation, the situation had escalated with greater violence than could have been controlled with the resources immediately at hand? If that had been the case,

646. 226 So. 2d at 454 (emphasis in original).
647. 256 So. 2d 412 (Fla. 2d Dist. 1972).
648. 281 So. 2d 549 (Fla. 2d Dist. 1973).
649. 237 So. 2d 132 (Fla. 1970).
couldn’t petitioners allege just as well that that course of action was negligent?\textsuperscript{650}

\textit{Cleveland v. City of Miami,}\textsuperscript{651} by a vote of four to three, sustained a jury verdict awarding damages to a widow whose husband, an innocent bystander, had been killed by police gunfire during a disturbance. The supreme court held that the trial judge was correct in not sending the question of assumption of risk to the jury since no evidence had been introduced to show that the victim “willingly exposed himself” to the gunfire, and assumption of the risk could not be established without such evidence. The court held also that the trial judge was correct in instructing the jury to award damages if they found that the police officers, under the circumstances, were negligent in the manner in which they conducted themselves in firing upon the building; the question of negligence was not precluded by the statutory provision\textsuperscript{652} that officers “shall be held guiltless and fully justified in law” if any person participating in an assembly “or other person present,” is killed or wounded by reason of the efforts made by the officers to disperse the assembly or apprehend the participants.

3. DEFAMATORY STATEMENTS MADE BY OFFICERS

In \textit{Roberts v. Lenfestey,}\textsuperscript{653} the district court held that a junior college president was immune from suit arising out of statements made at a faculty meeting explaining why he had not appointed a certain candidate to the faculty. The court followed \textit{McNayr v. Kelly,}\textsuperscript{654} which held that executive officials of government are absolutely privileged as to defamatory publications made in connection with the performance of the duties and responsibilities of their office, to the same extent as such absolute immunity is afforded to members of the legislative and judicial branches of government.

4. IMMUNITY OF OFFICERS FOR DISCRETIONARY AND LEGISLATIVE DUTIES

In \textit{City of Homestead v. International Association of Firefighters, Local No. 2010,}\textsuperscript{655} the court held that a councilman was immune from personal liability to the labor union arising from his acts in negotiating labor contracts establishing salary levels and working conditions for the city’s firemen, since he was performing discretionary and legislative functions.

\begin{itemize}
  \item \textsuperscript{650} \textit{Id.} at 134 (emphasis in original).
  \item \textsuperscript{651} 263 So. 2d 573 (Fla. 1972).
  \item \textsuperscript{652} FLA. STAT. § 870.05 (1973).
  \item \textsuperscript{653} 264 So. 2d 449 (Fla. 2d Dist. 1972).
  \item \textsuperscript{654} 184 So. 2d 428 (Fla. 1966) where the Florida court adopted the reasoning of \textit{Barr v. Matteo,} 360 U.S. 564 (1959).
  \item \textsuperscript{655} 291 So. 2d 38 (Fla. 3d Dist. 1974).
\end{itemize}
5. LIMITS OF RESPONDEAT SUPERIOR

In Reina v. Metropolitan Dade County, a passenger had alighted from a county bus and was across the street when he made an obscene gesture to the bus driver. The driver stopped the bus, ran after and beat the passenger. The court held that the county was not liable for the driver's tort, since he was not furthering the interests of the county when he left the bus and pursued the passenger.

N. Education (Including Student Discipline)

In Conyers v. Glenn, the district court issued an injunction to restrain the Pinellas County School Board from suspending a student who, with parental consent, wore his hair longer than permitted by the Board's regulations. Citing United States Supreme Court decisions on the right to privacy, the court held: "[S]ome showing of overriding public necessity is a necessary predicate to state action interfering with the freedom of the individual." The court found nothing in the record of the case to indicate that the student's hair style had caused disruption.

Satz v. Board of Public Instruction, a reported decision of the Dade County Circuit Court, sustained the validity of the statute and school board regulations providing for the "paddling" of students as a means of discipline. The court urged the school board to amend its regulations to provide safeguards to arbitrary and excessive paddling.

A federal district court, in Augustus v. School Board, barred Confederate symbols from a school, in view of the circumstances of the times.

In Canney v. Board of Public Instruction, the supreme court held, by a vote of four to three, that the Government in the Sunshine Law requires a county school board to keep its meetings open to the public even when engaged in quasi-judicial decision-making. The court observed that when the legislature conferred quasi-judicial powers on the school board, it did not thereby convert the board into a judicial body beyond further legislative control. To the contrary, the legislature retained control and was authorized to require openness of the process. Thus, the court vacated a disciplinary decision which had been reached by the board after a recess for private deliberations during an otherwise public hearing.

O. Homestead Exemption from Alienation

This topic is distinct from homestead exemption from taxation, which is discussed under a previous heading of this survey.

656. 285 So. 2d 648 (Fla. 3d Dist. 1974).
657. 243 So. 2d 204 (Fla. 2d Dist. 1971).
658. Id. at 206.
662. See notes 560-68 supra and accompanying text.
1. FAMILY RELATIONSHIP

The 1968 constitution makes homestead exemption available to the “head of a family.” The 1885 constitution used the expression “head of a family residing in this State.” The significance of this change has yet to be interpreted by the courts.

According to In re Estate of Wilder, a person qualifies as head of a family where there is a continuing communal living by at least two persons, one of whom is recognized as being in charge of the household, and the person claiming the exemption is under a duty to support the others. Thus, a woman was declared ineligible for homestead exemption where the “family” consisted of herself and her gainfully employed grandson and his wife. The woman was under no duty to support the other members of the household.

2. TYPE OF PROPERTY

The 1885 constitution provided that the homestead exemption on property located inside a municipality “shall not extend to more improvements or buildings than the residence and business house of the owner.” By contrast, the 1968 constitution refers only to “the residence of the owner or his family.”

3. TIMING OF CONVEYANCES AND ENCUMBRANCES

In Quigley v. Kennedy & Ely Insurance, Inc., a judgment had been rendered against the owner of a homestead located outside a municipality. Subsequently, he purchased an adjacent tract of land. The new and the old land combined amounted to less than 160 acres. The owner then claimed that the new as well as the old land was protected by homestead exemption from the judgment debtor. The supreme court sustained the claim for exemption. Where the homestead status and the judgment lien attach at the same time, as in the case of a purchase or inheritance of land by a judgment debtor, the homestead prevails.

Conversely, in Aetna Insurance Co. v. LaGasse, a claim for homestead exemption was denied where the court found that the judgment lien had attached before the homestead status. The judgment was recorded in 1961. Debtor's father died in April, 1965, at which time debtor's mother acquired life tenancy and debtor acquired a vested remainder.

663. FLA. CONST. art. X, § 4(a).
664. FLA. CONST. art. X, § 1 (1885).
665. 240 So. 2d 514 (Fla. 1st Dist. 1970).
666. FLA. CONST. art. X, § 1 (1885).
669. 223 So. 2d 727 (Fla. 1969); noted in 22 U. FLA. L. REV. 321 (1969).
interest in the property which had been the father’s homestead. Debtor’s mother then died in September, 1965. The court held that the judgment lien attached to debtor’s vested remainder interest at the time of her father’s death in April, 1965, while homestead could not be claimed by debtor until her mother’s death in September, 1965.

4. Devise and Descent

The 1885 constitution permitted the owner to devise his homestead “if the holder be without children.” The 1968 revision changed the wording, declaring: “The homestead shall not be subject to devise if the owner is survived by spouse or minor child.” A 1972 amendment added: “except the homestead may be devised to the owner’s spouse if there be no minor child.”

The effect of the 1968 revision was considered in In re Estate of McGinty. A statute enacted before 1968 provided that the homestead should not be the subject of devise if the decedent was survived by a widow or lineal descendants. A majority of the supreme court held that this statute had been rendered unconstitutional by the 1968 revision which prohibited devise if the owner is survived by spouse or minor child. Thus the decedent could validly devise his homestead to one of his daughters since at the time of his death he was a widower with four children, all over the age of twenty-one years; he was survived by lineal descendants, but not by any minor child. Justice Adkins dissented, contending that

‘[t]he legislature is empowered to determine the law of succession as long as such laws are not in conflict with the Constitution and additional legislative restrictions should be held valid... The majority opinion can be justified only if we overlook the basic principle that the Constitution is a limitation upon power, not a grant of power.’

P. Coverture and Property

The status of married women’s property was significantly changed by the 1968 revision. Article X, section 5 provides: “There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.”

Pre-1968 law is illustrated by Bogle v. Perkins, decided by the su-

672. 258 So. 2d 450 (Fla. 1971), noted in 24 U. Fla. L. Rev. 801 (1972).
674. 258 So. 2d at 452 (Adkins, J., dissenting).
675. 240 So. 2d 801 (Fla. 1970).
The supreme court in 1970 under the 1885 constitution. The court denied specific performance against a married woman on her contract to sell her real estate because her husband had not joined in signing the contract.

The change brought about by the 1968 revision is illustrated by Hallman v. Hospital & Welfare Board. A wife signed a promissory note payable to the hospital at the time her husband was discharged. Later, she argued that the note should not be enforced against her separate property since she had not executed an instrument expressly subjecting her separate property to her husband's debts, as required by pre-1968 law. The supreme court decided, in 1972, that Article X, section 5 superseded prior law, and that the wife should be liable on the note. The court stated:

The people of our State, in adopting [art. X, § 5], recognized that married women had assumed a position of prominence in the daily marketplace, so the legal shackles which hindered the progress of married women in the business world should be removed. In removing the shackles it was also necessary to lower the protective wall immunizing married women from various causes of action, for freedom of activity carries with it many responsibilities. It is inconsistent to say that the distinction between married women and men in encumbering their property is removed and, at the same time, hold that a married woman may be held liable for the payment of her husband's debt only if she executes an instrument in writing according to the law respecting conveyances by married women.

The supreme court relied upon Article X, section 5 along with other provisions as the basis of its 1971 decision in Gates v. Foley. A wife sued for damages for loss of consortium as a result of injuries to her husband, caused by the negligence of the defendant. Prior Florida case law had followed the common law in denying such a cause of action. The supreme court noted the "recent changes in the legal and societal status of women in our society," including article X, section 5, and held that a wife can henceforth maintain the action for loss of consortium. However, article X, section 5 has not changed every aspect of married women's property. In First National Bank v. Hector Supply Co., the supreme court held that article X, section 5 did not affect the law regarding tenancy by the entireties by a husband and wife in a joint checking account, since the provision dealt with capacity of parties, whereas the tenancy must be viewed with regard to their intent.

In Yordon v. Savage, the supreme court traced the development of

676. 262 So. 2d 669 (Fla. 1972).
677. Id. at 670.
678. 247 So. 2d 40 (Fla. 1971). This decision was applied retroactively in Ryster v. Brennan, 291 So. 2d 55 (Fla. 1st Dist. 1974).
679. 254 So. 2d 777 (Fla. 1971).
680. 279 So. 2d 844 (Fla. 1973).
equal treatment of men and women in various legal contexts and held that this principle must prevail with regard to the right to bring suit for injury to a child. Either parent, or both together, must be able to bring suit. Both parents are necessary parties. If one parent files suit alone, he must either file as trustee for the other parent, or must name the other parent as defendant. The court may appoint a guardian ad litem to protect the interest of the non-participating parent. The court shall apportion the proceeds to either or both parents.