Substantive Due Process in Florida

Michael Nachwalter

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# Substantive Due Process in Florida*

**Michael Nachwalter**

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* This Survey includes all cases reported through 178 So.2d.

** Editor-in-Chief, *University of Miami Law Review*, and Student Instructor for Freshman Research and Writing.
I. INTRODUCTION

The phrase “due process of law” is a modification of the correlative expression “by law of the land” which appears in the Magna Carta. This modification was first manifested in legislation enacted by Edward III to protect his subjects. In English law the two expressions had the same meaning, and were directed to limit action by the crown. ¹

Courts in the United States have approved the doctrine that the import of the phrase “due process of law” must be defined by the gradual process of judicial inclusion and exclusion as cases are presented for decision. ²

Both the United States Constitution, Fourteenth Amendment, and the Florida Constitution, section 12 of the Declaration of Rights, guarantee the concept of substantive due process to citizens of the state of Florida as a safeguard against state actions. To the United States Supreme Court, under Fourteenth substantive due process, a state statute is valid if the Court “can conceive of any facts” which will demonstrate its reasonableness. The Florida Supreme Court treats substantive due process as a more severe limitation than the federal courts on the scope of the state's “police power.” In order to be valid the action of the state must be reasonable in the sense that it must be related to the “health, safety, morals or general welfare” of the citizens of Florida. Thus, it is easier for a citizen to obtain an invalidation under Florida due process concepts than it is under federal due process. The national Supreme Court can usually conceive of facts that will demonstrate reasonableness of a state law. The Florida Supreme Court, on the other hand, has less inclination to invent or discover a reasonable relationship between the law being tested and the “health, safety, morals or general welfare” of the state's citizenry. The state court must both know of the reasonableness and approve it.

Under Florida's substantive due process guarantee, a law cannot be saved which is found to be “unreasonable” or “arbitrary.” These oft used terms imply that the state cannot justify the law's utility or defeat the affected citizen's claim that the operation of the law has an unnecessarily harsh, cruel or invidious impact upon him.

¹ State v. Dowling, 92 Fla. 848, 110 So. 522 (1926).
Florida courts do, however, recognize a duty to construe a statute so as to save it from constitutional infirmities. Thus if a statute is susceptible to several interpretations, the language is construed to uphold its validity. Furthermore, the state's police power is treated as non-static in nature and the courts "recognize its expansion in proper cases to meet conditions which necessarily change as business progresses and civilization advances."

It has been said that the principle of due process of law secures to the citizen the right against any arbitrary legislation. This does not deprive the state of the power to regulate as such, but it does require the state to insure that the ends sought by legislation will be accomplished by methods consistent with due process.

Having expressed these general principles, this examination will proceed to the judicial concept of substantive due process in a number of more specific areas of legislation.

II. SPENDING, DISPOSING, BORROWING AND TAXING IN FLORIDA
   
   A. Generally
   
   Article IX, section 10 of the Florida Constitution provides that:
   
The credit of the State shall not be pledged or loaned to any individual, company, corporation or association. The legislature shall not authorize any county, city, borough, township or incorporated district to obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.

   The Supreme Court of Florida has used this limitation as a vehicle to articulate the so-called "public purpose doctrine." Under this doctrine the state must tax, for a public, as opposed to a private purpose. At times, however, the Florida Supreme Court has resolved the issues in terms of substantive due process, when determining whether or not a particular case involves a valid public purpose.

   In an historically focused opinion, Mr. Justice Terrell pointed out that section 10 of Article IX was first adopted in 1875. The reason for its adoption was that prior to its enactment state, county and city governments by legislation had become stockholders or bondholders, or in other ways had become financially interested in the organization and

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3. Redwing Carriers, Inc. v. Mason, 177 So.2d 465 (Fla. 1965); Smith v. Ayres, 174 So.2d 727 (Fla. 1965).
4. L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 577, 139 So. 121, 131 (1931). "The police power has its origin, purpose and scope in the general welfare of the state."
operation of railroads, banks and other private commercial institutions. The essential purpose of the amendment was "to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises for profit."

The Florida Supreme Court has explicitly held that under both substantive due process and Article IX, section 10, the expenditure of public money for a private purpose is invalid. Whether the money is derived by ad valorem taxes, by gift, or otherwise does not matter. In Florida public money cannot be appropriated for a private purpose or used to acquire property for the benefit of a private concern. Mr. Justice Mathews emphatically summarized the position:

It does not matter that such undertakings may be called or how worthwhile they may appear at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.

B. Spending, Disposing and Borrowing

Unless expressly authorized by legislation, a municipality may not donate money, issue bonds, subscribe to stock, or otherwise aid a private corporation, notwithstanding the fact that the municipality may be incidentally benefited by the location of the company in the area. The same rule applies to the other divisions of the state government. The problem as it affects this discussion, is whether or not once granted such a legislative delegation of power is valid under the Florida Constitution.

City of Bradenton v. State involved the validation of bonds issued by a municipality, the proceeds of which were to be used for the maintenance and enlargement of a golf course in the city for the benefit of a private chartered golf club. The court held that although the city may have the power to purchase and maintain a golf course owned and operated by the city, it could not use the proceeds for the purpose intended. The purpose was not sufficiently "public." In a similar case involving a golf course the court clearly expressed its reasons for holding such bond issues invalid. The court was afraid that if the taxpayer's money could be diverted to finance a private golf course, then nothing would prevent a city from financing private billiard parlors, dance halls, baseball teams, or establishing private drugstores and automobile businesses.

8. Id. at 1035, 111 So., at 120.
10. 5 McQuillan, Municipal Corporations 1298 (2d ed. 1947).
11. 88 Fla. 381, 102 So. 556 (1924).
A case involving a similar invalidation on different facts is *Brumby v. City of Clearwater.* The city attempted to spend public funds for the purpose of dredging a channel and basin for the use of an individual to carry on a private business. Even though the contract referred to the enterprise as a public utility, it was invalid because the terms of the contract showed its purpose was to provide facilities for the operation of a private business for profit.

In the leading case of *State v. Town of No. Miami,* proposed certificates of indebtedness were to be issued by the municipality; the proceeds were to be used to acquire land, and to erect an aluminum plant thereon. Thereafter, the city planned to rent the project to a private industry. The court determined that neither the legislative spending nor eminent domain powers could sustain such an expenditure of public funds. The proposed lease of such property to a private corporation for private profit was in direct violation of the constitutional provision against the lending of credit.

More recently, the supreme court demonstrated that it still adheres to this "public purpose doctrine." The court invalidated county revenue certificates in the 1962 case of *State v. Clay County Dev. Authority.* Here the Authority acquired a surplus airfield and entered into a contract with a private company whereby the Authority agreed to build an industrial plant on a portion of the field; in return the company was to enter into a lease for the property. The cost of the project was to be financed by issuing revenue anticipation certificates. During the term of the lease, the company was to have exclusive use and control over the premises. In reversing a district court decision, the supreme court stated that the plan violated the constitutional proscription against lending of credit by a county. Noting that the only possible public purpose would be promotion of employment in the county, the court stated that the dominant and paramount purpose obviously was to finance a private enterprise for private profit. The fact that only a small portion of the land was being used for this purpose did not deter the court’s invalidation. In dissent the late Mr. Justice Terrell argued for an end to such curbs on the power of smaller counties to create an attractive climate for new business.

To illustrate some valid public purposes *State v. City of Tallahassee* is an appropriate starting point. In this case there was a specific

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13. 108 Fla. 633, 149 So. 203 (1933).
14. 59 So.2d 779 (Fla. 1952).
15. FLA. CONST. art. IX, § 10.
16. 140 So.2d 576 (Fla. 1962).
17. Mr. Justice Terrell's dissent is well worth reading. One case mentioned in it was *State v. Cotney,* 104 So.2d 346 (Fla. 1958) in which the court had upheld a statute creating an authority with a power to lease portions of surplus land to private concerns for construction of industrial and commercial plants.
18. 142 Fla. 476, 195 So. 402 (1940). See Buchanan v. City of Miami, 49 So.2d 336 (Fla. 1950) (sewage disposal plant held to be a governmental function).
legislative determination that the erection of an office building in the capital would serve a public purpose. Erection of the building in question served both a state and municipal purpose. In validating, the court held that the state was not a corporation within the meaning of Article IX, section 10 of the constitution and actions such as those involved were in pursuance of a valid public purpose.

In another case the city of Fernandina contracted to pay for services rendered in bringing about the location of pulp and paper mills in the city. It offered no inducement to location of the mills in the area other than its natural advantages. A special act authorized issuance of funding bonds for the funding of the city's indebtedness, including indebtedness for the services. In validating the bonds the supreme court took the position that the city was not lending its credit. The city did not buy the land, erect the buildings, own any stock in the corporation, nor lend its credit or property to the corporation. It was a valid function for the city to advertise its assets, since the only inducements it offered were natural advantages, not economic ones.

When land was deeded by the United States Government to a county for a “public purpose,” a question arose as to the validity of a special act authorizing the issuance of revenue certificates to accomplish the development of recreational projects on the beaches. In State v. Escambia County, authority was granted by the legislature for the construction of facilities on the beaches for recreational purposes and these activities were held to be for a public purpose. There was no suggestion that the beaches would be used or developed for the use of private corporations for private profit or gain. Therefore, recreational facilities are a proper matter for expenditure of public funds.

An important step was taken by the Supreme Court of Florida in State v. Dade County. In that case the court recognized that Miami has the potential of becoming a great air transportation center and that Florida is a port of entry for air transportation from South and Central America, the West Indies, and Africa. The airport in question was to be publicly owned and operated, and air transportation was found to be a

20. 59 So.2d 125 (Fla. 1951). See also State v. City of Jacksonville, 53 So.2d 306, 307 (Fla. 1951), where the city acquired real estate under a special act, for the extension of recreational facilities. In holding the special act valid, and that the issuance of certificates of indebtedness were for a municipal purpose the court said:

Athletic sports have long been required as part of the public school and community program and they are being provided everywhere . . . . What the city is proposing here is in harmony with municipal and community programs in every progressive locality and are generally approved.

[S]tate and City legislatures have found that recreational facilities are proper subjects for the expenditure of public funds. It is a proper exercise of legislative power and so long as reasonable and in the range of legislative ambit this court is without power to strike it down.

public purpose. The court stated that in developing this airport, and in
owning and operating it, Miami could not be said to be serving anything
other than a public and municipal purpose. It did not seem to disturb
the court that much of the airport facilities would be leased to private
enterprise.

When the purpose of the Inter-American Center Authority in Dade
County was brought into issue it was also found to be on the public
side. Under legislative authorization the Authority sought to issue bonds
to finance the construction of an Inter-American Trade Center. The
court validated the issue by characterizing the legislative objectives as a
“public purpose” in that the property was to be put to an educational and
scientific use. In addition the Center’s tourist attraction possibilities
would economically benefit Florida, and this was the factor which
weighed heavily with the court in reaching its decision. Again, private
leaseholds for profit did not inhibit the court’s determination.

It has generally been held that if the constitutional provision against
the lending of credit is not to be violated a proposed plan which benefits
private enterprise must be a “pure incident” of a public purpose, and it
must not destroy the “main or primary purpose,” which must be
“public.”

In State v. Daytona Beach Racing & Recreational Facilities Dist.,
bonds were issued to construct and operate racing and recreational facili-
ties, to be governed by the establishment of a governmental district. The
court in validating the bond issue found the purpose to be predominantly
public, and the district’s desire to lease the facilities for six months each
year to a private corporation was also classified so that the “private
benefit” was merely “incidental” to the public purpose.

In State v. Suwannee County Dev. Authority, an authority was
created to plan and develop Suwannee County. It had the power to ac-
quire real estate, construct projects, and lease or make contracts with
respect to them in any manner the Authority deemed appropriate. The
case involved the question of whether or not the proceeds from the sale
of certificates could be used to purchase land and construct buildings for

22. State v. Inter-Am. Center Authority, 143 So.2d 1 (Fla. 1962); State v. Inter-Am.
Center Authority, 84 So.2d 9 (Fla. 1955).
24. 89 So.2d 34 (Fla. 1956).
25. 122 So.2d 190 (Fla. 1960). In its decision the court distinguished State v. Cotney,
supra note 17, on the following grounds: (1) No proposed issue of revenue certificates
was before the court in that case and; (2) In Cotney, the Development Authority had already
acquired a tract of surplus land from the federal government and it proposed to develop
that land as one project, including an airport and golf course, with the remainder to be
sold or leased to private enterprise for commercial use; (3) There was nothing in the
record of Cotney to show that the leasing or selling to private enterprises “for private use”
of a portion of the lands was the “primary purpose” for the acquisition of the land. Alloway
& Knight, Trends in Florida Constitutional Law, 16 U. MIAMI LAW 685 (1962).
the use of private enterprise as a "public" instead of a "private" purpose. In invalidating, the court stated that it believed that the certificate proceeds would be used for a private rather than a public purpose.

Finally, in Wiggins v. City of Green Cove Springs, the issuance of revenue certificates to finance a purchase by the city of a deactivated naval station was held to be primarily for municipal purposes. Any private purpose temporarily served by the leasing for private use of the buildings or facilities which were not essential to municipal purposes at the present time was purely incidental to the public improvement and did not invalidate the certificates.

These cases demonstrate that when there is a private use involved with public funds it must be incidental to a valid "public purpose." The primary purpose must still be public for an act to be valid with respect to spending, borrowing and pledging. This generalization is, of course, somewhat meaningless. For example, how can one justify, by reference to the generalization, the action of the court in treating public funding to end depressed economic conditions in a county as a "private" purpose while treating public funding for amusement of the public as a "public purpose?"

b. Taxation

1. IN GENERAL

As Colbert, the Minister of Louis XIV put it, "The science of taxation consists of getting the most feathers from the goose with the least amount of squawking."

The Florida Supreme Court requires that taxes bear equally, or as equally as possible, on all taxpayer classes, and that taxes be imposed only for support of legitimate expenses of the government and to promote the general welfare. Furthermore, taxes may be burdensome in nature, but they may not become confiscatory.

Likewise, in Florida, the purpose for which a tax is laid must be a
"public" one. Taxation for other than a public purpose is a taking of property without due process and is therefore invalid.

In State v. City of Stuart, the court stated that two questions are generally raised when the legislature exercises its power of taxation; first, whether the purpose of the burden is public, and second, if public whether the burden is one which should properly be borne by the district upon which it is imposed. If the answer to either of these questions is in the negative, then the legislation violates substantive due process in Florida.

2. TAX DISTRICTS

With regard to taxing districts the geographical dimensions of a taxing unit should be confined to a designated district or subdivision whose inhabitants may be directly or peculiarly benefited by the application of the tax money for the intended purpose. The fact that persons not taxed may be benefited by a public undertaking does not affect the taxing power. The court has repeatedly held that it is within the power of the legislature to establish a district as a governmental agency "to effect the lawful public purpose of conserving the public health, comfort, convenience, and welfare of the district and its inhabitants. . . ."

The Supreme Court of Florida has consistently decided that the legislature has the power to create special taxing districts with the power to levy an ad valorem tax.

In Miller v. Ryan, the legislature passed an act authorizing the County Commissioners of Volusia County to levy a tax for the purpose of advertising the advantages, facilities, and products of various taxing districts set up by the commissioners. The commission established the

31. Burnett v. Greene, 97 Fla. 1007, 122 So. 570 (1929). See City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938). In speaking of public purpose the court said: [T]he determination of the legislature on this question (public purpose) is not, like its decision on ordinary questions of public policy, conclusive either on the other departments of government, or on the people. The question, what is and what is not a public purpose, is one of law; and though unquestionably the legislature has large discretion in selecting the object for which taxes shall be laid, its decision is not final. In any case in which the legislature shall have clearly exceeded its authority in this regard, and levied a tax for a purpose not public, it is competent for anyone who in person or property is affected by the tax, to appeal to the courts for protection. Id. at 283, 181 So., at 5.

32. 97 Fla. 69, 120 So. 335 (1929). The constitutional provision against the taking of property without just compensation does not apply when the state exercises a legitimate facet of its police power such as taxation, because in such a situation there is no taking.

33. Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920).

34. Id. at 829, 86 So., at 844.

35. 54 So.2d 60 (Fla. 1951). Compare Paul Bros. v. Long Beach & L.S. Rd. & Bridge Dist., 83 Fla. 706, 92 So. 687 (1922). In this case an act purporting to create a special road and bridge district was found so arbitrary and oppressive in the tax burdens it imposed upon the lands in the district that it was an abuse of the police and taxing powers of the state and the court held that such an action would deprive landowners of their property in violation of the constitution.
separate taxing districts, held referendum elections, and imposed taxes on property owners in those districts approving the tax. In validating the action the court held that a tax for the purpose of financing advertising is constitutional, and that since the tax only applied to those districts which approved, it was neither unreasonable nor arbitrary.

3. PUBLIC PURPOSE DOCTRINE

It is simple to illustrate the public purpose doctrine as it relates to taxation. The supreme court in *C. V. Floyd Fruit Co. v. Florida Citrus Comm’n*\(^{36}\) held that a tax imposed on each standard-packed box of oranges, grapefruit and tangerines grown in the state, for the purpose of providing funds for advertising the citrus industry in Florida, was a matter of public concern. Therefore, advertising was a proper method for promoting the public welfare and a tax levied to provide funds for advertising served a public purpose.

An illustration of an invalid tax appears in the case of *Olds v. Alvord*.\(^ {37}\) There the court issued a final decree restraining the town and its officers from levying any tax on property in the town. The proceeds were to be used to pay the principal and interest on bonds which were to be utilized to construct streets and highways in a private real estate development, and to improve the waterfront property of a private hotel. Such a tax was found to be in violation of the constitution, Article IX, section 10, as a tax levied for a private instead of a public purpose.

As in *State v. Dade County*,\(^ {38}\) the supreme court in *Seaboard Air Line R. Co. v. Peters*\(^ {39}\) demonstrated its cognizance of the importance of air transportation. Revenue certificates were issued by the Dade County Port Authority to finance the acquisition and development of additional land essential to safe operation of the International Airport. The revenue certificates were to be payable out of a special fund consisting of net profits from the operation of the airport and from proceeds of an ad valorem tax to be levied for such purposes. The court in validating the tax reiterated its position that airports render a public service which promotes the general welfare.

Recently, in *Knight Wall Co. v. Bryant*\(^ {40}\) the supreme court upheld a statute which levied a tax on manufacturers of fishing, hunting, camping, and swimming and diving equipment. The court validated on the basis that the objects sought to be taxed were those used in outdoor

\(^{36}\) 128 Fla. 565, 175 So. 248 (1937).
\(^{37}\) 133 Fla. 221, 183 So. 711 (1938), reconsideration granted, 136 Fla. 549, 188 So. 652 (1938), modified on other grounds, 139 Fla. 745, 191 So. 434 (1939), cert. denied, 308 U.S. 603 (1939).
\(^{38}\) 157 Fla. 859, 27 So.2d 283 (1946).
\(^{39}\) 43 So.2d 448 (Fla. 1949).
\(^{40}\) 178 So.2d 5 (Fla. 1965).
activities which utilized the natural resources of the state. The funds derived from the tax were to be used to finance programs under the Outdoor Recreation and Conservation Act of 1963. The court indulged in the judicial presumption that all acts of the legislature are presumed valid unless determined invalid beyond a reasonable doubt, and sustained the statute on the basis that it was reasonable in this instance.

III. EMINENT DOMAIN

A. Generally

The superior dominion, “the eminent domain,” which the state holds over all land within its bounds, is part of the state’s police power; it is an inherent aspect of the state’s sovereignty which may be exercised for the public good.41 It is, therefore, limited by the constitution, but not created by it.42 Moreover, the power can be exercised without the payment of any compensation to the owner of the land taken, absent a contrary provision in the constitution. Thus in earlier days it was common practice to take land for highways without compensation to the owner of the land, the state relying for such confiscation either on the long established practice predicated on the slight value of the land and the general need for roads, or relying on public rights reserved in the grant of all lands.43

The fact that private property should not be “taken” without compensation was considered so fundamental a requirement of natural justice that almost all of the states included provisions in the statutory law which forbade the taking of private property without just compensation. Such a provision has been part of Florida’s law since 1835. It has been included in each of Florida’s constitutions and is now found incorporated as section 12 of the Declaration of Rights of the presently effective Constitution of 1885. Section 12 provides in the traditional manner that private property shall not be taken “without just compensation.” A second limitation was also adopted relating to the exercise of the right of eminent domain, namely Article XVI, section 29. It appears by the latter provision (that private property shall not be appropriated to the use of any corporation or individual until full compensation has been paid to the owner) that the framers of the Constitution of 1885 intended to specify an additional statutory limitation upon the exercise of eminent domain, as well as a limitation upon the “taking” of private property under the state’s police power. Clarifying the meaning of Article XVI, section 29, the Supreme Court of Florida in Daniels v. State Rd. Dep’t44

42. Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).
43. Daniels v. State Rd. Dep’t, 170 So. 846 (Fla. 1964).
44. 170 So.2d 846 (Fla. 1964).
held that the provision applies only to private corporations and individuals, not to the state, its agencies or its political subdivisions.

The power of eminent domain is distinguished from the police power to regulate in that under eminent domain physical possession and use of property are taken from a private owner and transferred to the public or one of its agencies. Under the police power the government at times may regulate or even destroy private property in the interest of the public welfare. Compensation is required when the state "takes" private property under eminent domain, but compensation is not required when the state regulates property under the police power. Property rights are held subject to the exercise of the police power which is reasonably necessary to secure the general welfare of the state; when private interests and public welfare conflict, the former must give way to the latter.

B. Public Purpose

1. IN GENERAL

When an eminent domain statute is read in connection with the section of the Declaration of Rights dealing with substantive due process (section 12) and the constitutional provision that no private property or right of way shall be appropriated until full compensation shall first be made to the owner (Article XVI, section 29), they are interpreted to mean, inter alia, than when private property is "taken" it must be taken for a "public use or purpose," not a private use or purpose. Likewise when the state "takes" private property for a public use, the state must fully compensate the owner for it.

An early case established the Florida position with regard to the public purpose limitation on eminent domain. The case involved the

45. See generally 6 FLA. JUR. Constitutional Law § 192 (1956).
46. Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535 (1917) (dam involved); Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282 (1914) (cattle fell into pit). See also the recent case of Coast Cities Coaches, Inc. v. Dade County, 178 So.2d 703 (Fla. 1965). The county sought a declaratory decree determining the legality of the proposed extension of the county's transit system within the county. The court affirmed the lower court's finding that the county possessed the power, privilege and right to extend its business transportation system into all parts of the area within which the private company was presently operating and could so compete without any obligation to compensate the private company. The court was of the opinion that loss of business through competition with a governmental agency, is not a taking of private property in violation of § 12 of the Declaration of Rights.
47. Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938).
48. Demeter Land Co. v. Florida Pub. Serv. Co., 99 Fla. 954, 128 So. 402 (1930). For cases concerning drainage operations see Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925); Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 87 So. 68 (1921). In Davis v. Florida Power Co., 64 Fla. 246, 60 So. 759 (1913) the court stated that the discretion of the legislature when exercised for the public welfare in selecting the subject of police regulations and in determining the nature and extent of such regulations is limited only by the requirements of the fundamental law that the regulations shall not invade private rights secured by the constitution, and shall not be merely arbitrary in applying to some persons and not to others similarly situated.
exercise of the eminent domain power for a public work. The court held that property sought to be appropriated for constructing, maintaining and operating public works could be taken only for a public use, a use which would justify condemnation by the public work because the public had an interest in the project. However, the court did state that the use need not be exclusively for public benefit, and hence there can be some incidental private gain in the exercise of eminent domain.40

2. DESTRUCTION OF PROPERTY

An interesting situation was presented by the State Plant Board cases. In these cases the Board's "pull and treat" program was challenged. Legislation characterized as a public nuisance any plant infested with or exposed to infestation of the burrowing nematode. An emergency condition in the citrus industry was declared by the legislature because of the decline in production caused by these nematodes. The Board authorized removal and burning in all infested citrus zones. If the court classified the legislature's program as an exercise of police power, compensation would not be required to the owners; however, if classified as a "taking" or under eminent domain, compensation would be required. The supreme court required compensation to be paid to the grove owners for destruction of "healthy trees" which, while not infected, had been exposed to the infection. The court thus established a standard. Only in the most extreme emergencies could the state destroy private property to protect the property of a neighbor, without compensation. Therefore, the state's police power to regulate, exercised without the aspect of just compensation, violated section 12 of the Declaration of Rights. Due process demanded just compensation to the owners of trees destroyed by the state.

In the recent case of Zabel v. Pinellas County Water & Nav. Control Authority, it was held that a denial of permission to fill bottom land, to permit extension of a trailer park situated on the plaintiff's

49. The Supreme Court of Florida in an early decision invalidated the actions of the county in Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483 (Fla. 1947), and held that hunting and fishing were not county purposes and had no relation to public health, morals or safety. The use of land for such purposes was stated to be a private use of land not a public one, and hence the county in the exercise of its delegated police power could not condemn the land to provide a hunting and fishing area as a public facility. But see Knight Wall Co. v. Bryant, 178 So.2d 5 (Fla. 1965) for a more realistic attitude towards hunting and fishing and the use of natural resources as "public purposes."

50. Corneal v. State Plant Bd., 95 So.2d 1 (Fla. 1957). See also State Plant Bd. v. Smith, 110 So.2d 401 (Fla. 1959), which involved the same facts as the Corneal case. The court used § 12 of the Declaration of Rights, and art. XVI, § 29 of the Florida Constitution. The court invalidated the legislation as an exercise of the police power to this extent: (1) Since the legislation limited compensation to one thousand dollars for owners of uninfected trees, per acre; (2) Since the legislature provided that no compensation should be made to owners of infected trees, even if the trees were still "commercially profitable." See Alloway & Knight, Trends in Florida Constitutional Law, 16 U. Miami L. Rev. 685 (1962).

51. 171 So.2d 376 (Fla. 1965).
upland property along shore, amounted to a taking of property without just compensation. It was not established to the court that granting of the permit would materially and adversely affect public interest. By the prohibition upon filling and dredging, the owner was deprived of a valuable use of his property. The court stated that the regulation could not be valid unless an "overriding public necessity" could be demonstrated to support it. The court established these constitutional ground rules in testing the validity of regulations: If the regulatory measures protect, but do not destroy property, the legislature need not restrict itself to conditions actually harmful but may require precautions within the whole range of possible danger. On the other hand, the absolute destruction of a valuable property right, albeit potential, is an extreme act of the police power which is justified only within the narrowest limits of actual necessity. Absent such necessity the state must pay just compensation for the taking.

3. PRIVATE USE

The police power under substantive due process cannot sustain action whereby land is taken from one private owner for the use of another private owner. In the case of South Dade Farms v. B & L Farms Co., the court invalidated, under substantive due process, a taking from one private owner for the use of another pursuant to a statute permitting the owners of shut-off lands having no practicable route to the nearest road to use an easement over the lands between the shut-off lands and such roads.

4. TRESPASS

In White v. Pinellas County, a county employee allegedly trespassed on private land during maintenance operations on an adjacent right-of-way and caused some damage to the trespassed property. The court held that the trespass was not an exercise of the power of eminent domain, hence, there was no expropriation or taking for a public use. The court held that in an action ex delicto there must be circumstances which bring the cause within the exception to sovereign immunity. The pleadings and proof must demonstrate a taking for a public purpose, not merely a trespass unrelated to the legitimate governmental power over private property in order to obtain compensation.

5. SLUM CLEARANCE

The cases in the area of slum clearance show an interesting history. Marvin v. Housing Authority of Jacksonville was the first slum clear-

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52. 62 So.2d 350 (Fla. 1952).
53. 174 So.2d 88 (Fla. 2d Dist. 1965). See, e.g., Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925).
54. 133 Fla. 590, 183 So. 145 (1938).
ance and public housing case decided in Florida. In the Marvin case an act created the housing authority which had the power to undertake slum clearance and exercise eminent domain. The act was found valid under substantive due process despite the contention that low cost housing and slum clearance was not a public purpose. The court found that the project provided for "better citizenship, better notions of necessity for law and order, and a sounder and saner patriotism." 55

The next case decided was Adams v. Housing Authority. 56 As a result of this decision for a long time thereafter it was impossible for local governments in Florida to acquire a depressed area, plan an appropriate development, rezone, and sell or lease the project to private enterprise to be used in accordance with the new zoning. The theory of the Adams case was that the police power, aided by eminent domain, was restricted to a public use or public purpose. The court believed that a public use would not be found when property was taken by eminent domain, rezoned, and sold or leased to private enterprise under a new plan. This case appeared to proclaim an end to major slum clearance programs in Florida.

However, the Supreme Court of Florida in Grubstein v. Urban Renewal Agency 57 finally broke the barrier apparently erected by the Adams case. In Grubstein the City of Tampa approved a plan for clearance and redevelopment of a slum area within the city. The area was to be returned primarily to private residential use after the redevelopment. The question in the case was whether this exercise of the eminent domain power qualified as a public purpose. 58 The court declared that a public purpose does exist when eminent domain is used for slum clearance and construction of low-rental public housing, and similarly exists when it is used to condemn slum areas which will thereafter provide for private ownership and development. In either instance, the court found that the principal and public effect is the removal of a breeding place for crime and disease, thereby promoting the "health, safety, morals and general welfare" of the people. The court went on to indicate that though incidental benefits might inure to private individuals or corporations under an urban renewal law, if slum clearance is the dominant or primary purpose the plan, including the redevelopment scheme, may be regarded as public.

55. Id. at 605, 183 So., at 151. See Lott v. City of Orlando, 142 Fla. 338, 196 So. 313 (1939). The action of the city under a statute relating to municipal housing authorities, in establishing a housing authority to carry out housing projects for low income classes was an "action taken for a public purpose." The slums would be made safe and sanitary, preventing crime and the spread of disease.
56. 60 So.2d 663 (Fla. 1952).
57. 115 So.2d 745 (Fla. 1959).
As a result of this decision two important requirements emerge with reference to urban renewal laws: (1) Evidence tendered by the local government must not only indicate that slum clearance is necessary, but also that it is the purpose and objective of the entire project; (2) Evidence should also demonstrate that the major purpose of the slum clearance and redevelopment is principally for public as opposed to private benefit. The Adams case, however, remains in effect with reference to blighted areas; areas as to which the local government simply contends or believes that the land could be used in a more efficient or economical manner. The area to be redeveloped must apparently be more than “blighted;” it must be a “slum.”

C. Valuation

1. Value of Property

In Sunday v. Louisville & Nashville Ry., the court held that an increase in value of lands, occurring in anticipation of a proposed improvement, was a factor to be considered in determining the compensation to be paid for taken land. While this case has been distinguished, it has never been explicitly overruled and appears to still be the law.

In the landmark case of Yoder v. Sarasota County, the compensation awarded a property owner had been based upon the “value” of the property as it was utilized at the time it was lawfully appropriated. On appeal, the court held that evidence should be entered to indicate the uses to which the property was or might reasonably be applied. However, the court also stated that it was not proper to enter speculative evidence on what could be done to make the land more valuable. Where the value is depreciated because of the imminence of a taking, compensation is to be fixed at a time prior to the effect of the prospect of condemnation. The point in time to fix value was said to be “when the condemnation suit is filed in the proper court.”

“Value” in most condemnation actions today is generally defined as the amount which would be paid on the assessing date to a willing seller not compelled to sell, by a willing purchaser not compelled to purchase, considering all the uses to which the property reasonably is adapted.

59. Ibid. Particularly emphasized in Thornal’s concurring opinion in the Grubstein case supra note 57, at 752.
60. Supra note 58, at 718.
61. 62 Fla. 395, 57 So. 351 (1912).
63. 81 So.2d 219 (Fla. 1955); accord, Culberson v State Rd. Dep’t, 165 So.2d 255 (Fla. 1st Dist. 1964).
64. Yoder v. Sarasota County, 81 So.2d 219, 221 (Fla. 1955).
65. Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2d Dist. 1963). See also Walter v. Schuler, 176 So.2d 81 (Fla. 1965). In State Rd. Dep’t v. Chicone, supra note 62, the supreme court was faced with an alleged conflict between the district court’s decision and Sunday v. Louisville & Nashville Ry., 62 Fla. 395, 57 So. 351 (1912). The court, however, distinguished
In the more recent case of *Gleason v. State Rd. Dep't*, the district court once again used the test of the *Yoder* case, and reiterated that the value of the property at the time of the taking, as depreciated or depressed by the prospect of condemnation, is not a proper basis for measuring compensation for property taken. However, Judge Allen's statements in the *Gleason* case appear to be a call for legislative re-evaluation of this problem:

Perhaps the time has arrived for the reexamination of the present system of compensation in eminent domain. We feel, however, that this is not a proper undertaking of the judicial branch of our State government. The responsibility rests with the legislative branch, and any redress of the inequities of the existing system must be sought in the channels connected therewith.

2. **JUST VALUATION**

With regard to the classification of property for purposes of just valuation the court in *Lanier v. Overstreet*, dealt with a statute providing that lands used for agricultural purposes would be assessed as agricultural lands on an acreage basis regardless of the fact that any or all of the lands were embraced in a plot or subdivision or other real estate development. The court held that the statute provided a valid legislative classification of agricultural lands. The "uniformity" requirement of Article IX, section 1 was held to be applicable only to the rate of taxation, and not to legislative regulations to secure "just valuation" of property.

D. **Compensation**

1. **CONFISCATORY**

A taking under eminent domain must be for a public purpose, and there must be just compensation for the taking. If the taking is confiscatory as it was in the case of *Glisson v. Hancock*, it will be invalid.

between the two. While the *Sunday* case dealt with the effect on value caused by anticipation of a proposed public improvement, *Chicone* dealt with the effect on the value of land of the imminence of its being taken. In addition, in *Sunday* there was the possibility of an increase in value; in *Chicone* the prospects of anything other than a decrease in value were very remote. Therefore, as the court in the *Chicone* case put it, compensation should be based on the value of the property at the time of the taking as if it had not been subjected to the debilitating threat of condemnation.

The whole purpose of the constitutional provisions relating to compensation for property condemned is to insure that the property owner will be adequately and fairly compensated in money for property which is taken from him. See also *State Rd. Dep't v. Abel Inv. Co.*, 165 So.2d 832 (Fla. 2d Dist. 1964). The right of condemnees to damages for business losses as consequence of taking of land is derived solely from statute and not from the "full compensation" provision of the constitution.

66. 178 So.2d 199 (Fla. 2d Dist. 1965).
67. *Yoder v. Sarasota County*, 81 So.2d 219 (Fla. 1955).
68. *Supra* note 66, at 201.
69. 175 So.2d 521 (Fla.: 1965).
70. 132 Fla. 321, 181 So. 379 (1938).
dated as a denial of due process. In the Glisson case legislation was enacted permitting any person to impound hogs, goats and sheep running at large. Fifty cents could be demanded for each day the animal was impounded, up to twelve days preceding their sale. The act was held invalid as confiscatory because the fees were unreasonable, in that they greatly exceeded the value of the animals.

2. WHO IS ENTITLED TO COMPENSATION?

Whenever it appears that there has been a “taking” of land it is not merely the owner of the fee who is entitled to compensation. Every person holding a legally or equitably cognizable interest in the subject matter is equally protected. The fact that the interest of such person is less than the full interest has no bearing upon the right to compensation.71 Thus, a lessee for a term of years is, for purposes of the eminent domain statute, an “owner” and is entitled to recover damages.72 Similarly, in a proceeding to condemn a private road as an easement for a public way the court held that owners of interests in a private road were entitled to compensation, since a portion of the road had long been used by the owners for private use.73

E. Restrictive Covenants

The Supreme Court of Florida dealt with restrictive covenants on realty in the case of Griffin v. Sharpe.74 Private parties in individual deeds of conveyance imposed restrictions on the use of the land conveyed. The restrictions ran for a definite period of time. Legislation had been enacted to remove such an expiration date and discontinue the restrictions. The court declared the act invalid as constituting a taking of property without just compensation.

F. Inverse Condemnation

City of Jacksonville v. Schumann75 was a case of first impression in Florida. It involved the concept of “inverse condemnation,” which is a cause of action against a governmental defendant to recover the values of property taken in fact, even though the power of eminent domain has not been formally invoked. In Schumann jet aircraft using the airport operated by the city were shown to have flown at altitudes less than

71. Nichols, Eminent Domain § 5.1(2) (Rev. 3d ed. 1963).
72. State Rd. Dep’t v. White, 161 So.2d 828 (Fla. 1964).
73. City of Miami Beach v. Belle Isle Apt. Corp., 177 So.2d 884 (Fla. 3d Dist. 1965). An easement or other right to use adjoining property can have considerable value when used in connection with adjoining property owned in fee. City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888 (1932). See generally 29A Am. JUR. Eminent Domain §§ 107-126 (1965).
74. 65 So.2d 751 (Fla. 1953).
75. 167 So.2d 95 (Fla. 1st Dist. 1964).
five hundred feet above the owner's adjacent property, caused terrific vibrations, concussions and sound waves while warming up engines, and caused exhaust fumes, gases and heavy black smoke to be transmitted to adjacent property. The property owners were held to be entitled to recover from the city on the theory of inverse condemnation. The court reasoned that the theory is founded upon an acknowledgement that the doctrines of nuisance and continuing trespass may ripen into a constitutional taking of property within the area of the provisions prohibiting the taking of property without just compensation. Such a theory has already been recognized in Florida.

IV. ZONING

A. Generally

As the area of zoning is extensively dealt with in another article in this issue of the Law Review, only a sketch of the relationship of substantive due process and zoning will be discussed here.

Under substantive due process standards the Florida courts have granted zoning officials a healthy range of discretion in promulgating orders and regulations. As applied to the property in question the zoning requirement must not be unreasonable; however, there is a presumption that the zoning ordinance is valid, so that the owner bears a heavy burden of proving the ordinance invalid. Furthermore, Florida courts repeatedly refuse to substitute their judgment for that of the zoning officials where the question of reasonableness is "fairly debatable." As in other areas, restrictions on the use of the property must be predicated upon the safety, health, morals or general welfare of the community. Nonetheless, when a zoning ordinance has the effect of completely depriving the owner of the beneficial use of his property, the ordinance must be altered or amended so as to prevent a confiscation of property without due process.

The traditional position of the Florida courts is demonstrated by

76. Id. at 102.
77. State Rd. Dep't v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941).
79. Mayer v. Dade County, 82 So.2d 513 (Fla. 1955).
81. City of Miami Beach v. Wiesen, 86 So.2d 442 (Fla. 1956). See Alloway & Knight, Trends in Florida Constitutional Law, supra note 58, at 714.
the opinion in Blank v. Town of Lake Clarke Shores, which involved an ordinance restricting property in a certain area to single family residences. In upholding the ordinance the court stated that, since under the circumstances it could not be said that the restriction of the zoning ordinance was not reasonably related to the public welfare, the question was at least fairly debatable. Therefore, the court could not substitute its judgment for that of the legislative body of the town.

B. Aesthetic Zoning

Zoning, based on aesthetic considerations, has been sustained at times by Florida courts. For example, in International Co. v. Miami Beach there was a zoning ordinance which permitted coffee shops and cocktail lounges in hotels for the use of guests only when the facilities had no entrance from the outside. The apparent intention was to have these lounges used only by guests of the hotel. Signs were put up to advertise and were found to be in violation of a zoning ordinance since they appeared to be designed to attract non-guests. The court upheld the conviction, and hence the comprehensive zoning plan, because the "general welfare" of this particular community depended upon preserving its beauty. Aesthetic values, where necessary to the general welfare in certain resort communities, such as Miami Beach, warrant aesthetic regulation of the use of property.

The cases dealing with sign ordinances present an interesting aspect of zoning regulation. The leading case in this area is Sunad Inc. v. City of Sarasota. In Sunad the city adopted an ordinance which limited the size of wall signs in business and industrial districts and put them into two classifications denominated "point of sale" and "non-point of sale." The "point of sale" signs were not limited in size, but "non-point of sale" signs were limited to three hundred square feet. All other signs in the city were limited to one hundred and eighty feet.

The court concluded that aesthetic considerations could be a valid purpose for regulating advertising signs in Sarasota since that city is a center of culture and beauty; hence aesthetics are a factor properly to be considered by the city commissions of centers of culture and beauty. However, the court invalidated the ordinance because it was unreasonable and discriminatory.

The due process aspects of this decision have been generally followed and zoning ordinances regulating signs will be upheld under

83. 161 So.2d 683 (Fla. 2d Dist. 1964).
84. 90 So.2d 906 (Fla. 1956).
86. 122 So.2d 611 (Fla. 1960).
due process attack if they are shown to have a solid foundation in some reasonable relation to the general welfare of the community.87

C. Distance

Distance requirements in zoning laws have also generally been upheld in Florida. For example, a one thousand foot distance between liquor stores was sustained; the court condoned the basic purpose of such restrictions as legitimately founded in the protection of the health and morals of the general public.88 Similarly, distance requirements between filling stations and churches,89 and between two filling stations,90 have been upheld. In City of Miami v. Walker91 the city permitted several hundred filling stations to construct within the distance prohibitions of an ordinance requiring that filling stations be seven hundred and fifty feet apart. The court believed that this did not constitute a waiver of the ordinance vis-à-vis owners who sought a variance from such regulation. The city was on uneasy constitutional grounds in liberally construing its prohibitory ordinance. As a general rule it is easier to validate a zoning ordinance under substantive due process, if the city has a master zoning plan and does not grant variances under it. Sometimes one variance can make a whole area of zoning debatable.

D. Strip Zoning and Set Back Ordinances

Strip zoning92 and set back ordinances93 have also been upheld if they meet the traditional tests under substantive due process.

E. Economic Zoning

Zoning for economic considerations is invalid under substantive due process. In the case of Miami Springs v. Scoville94 an ordinance regulating the size and location of advertising signs displayed by gasoline filling stations was invalidated. The plaintiff sold an unusual product in that he only sold high test gasoline, and did so at a price competitive with regular gasoline sold by other dealers. His earnings dropped when he complied with the ordinance, and hence filed suit. In invalidating the ordinance the court rejected it as a regulation of advertising designed to prevent price wars between dealers. The ordinance, motivated by a desire to regulate economic competition, does not have the necessary relation to the general welfare, safety, health and morals.

87. See Eskind v. City of Vero Beach, 159 So.2d 209 (Fla. 1963); Abdo v. City of Daytona Beach, 147 So.2d 598 (Fla. 1st Dist. 1962).
88. Glackman v. City of Miami Beach, 51 So.2d 294 (Fla. 1951).
89. City of Miami v. Thompson, 169 So.2d 838 (Fla. 3d Dist. 1964).
90. City of Miami v. Walker, 169 So.2d 842 (Fla. 3d Dist. 1964).
91. Ibid.
92. Edelstein v. Dade County, 171 So.2d 611 (Fla. 3d Dist. 1965).
93. Sharrow v. City of Dania, 83 So.2d 274 (Fla. 1955).
94. 81 So.2d 188 (Fla. 1955).
F. Changing the "Fairly Debatable Rule"

An interesting possibility with relation to the "fairly debatable rule" has recently developed. The Burritt case involved a suit by owners of property to enjoin county officials from enforcing zoning regulations affecting their property. The court first stated the general proposition that if the zoning restriction exceeds the bounds of necessity for the public welfare it must be stricken as an unconstitutional invasion of property rights under substantive due process. It then went on and found this to be the case in Burritt and held that the plaintiff sustained his burden of proving that his property was unsuitable for the classification it had been given.

To substantiate the position that the "fairly debatable rule" is changing, two second district cases must be examined. In the first of these cases, an owner's property was no longer adaptable for residential purposes and evidence failed to establish that restricting his land to a residential use was substantially related to the health, safety, morals and welfare of the town in which the property was located. The court stated that the refusal of the town to rezone the property to a commercial classification constituted an abuse of discretion. Besides following the traditional view that changes in the physical character of land from natural causes may warrant relaxation of the zoning board's restrictions to prevent classification, the court apparently reversed the normal presumption of validity under the fairly debatable rule by stating that the zoning authority has the burden of establishing, by a preponderance of the evidence, that the zoning restrictions under attack relate substantially to the public health, morals, safety or welfare of the community.

When confronted with a similar situation in a subsequent case the second district seemed to retract from its earlier position when it found an ordinance "not fairly debatable" because it was arbitrary and unreasonable in its application. However, the court again reiterated its displeasure with the "fairly debatable" test by saying that zoning boards are not infallible and that their ordinances and regulations would be looked into to determine if they are unreasonable and violative of the due process clause.

V. Health

A. Generally

It is recognized that the preservation of the public health is one of the prime duties of the state, thus, the enactment and enforcement of

95. Burritt v. Harris, 172 So.2d 820 (Fla. 1965).
96. Lawley v. Town of Golfview, 174 So.2d 767 (Fla. 2d Dist. 1965).
97. *Ex parte* Wise, 141 Fla. 222, 192 So. 872 (1940); State v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931).
necessary and reasonable\(^9\) health laws and regulations is a legitimate exercise of the police power inherent in the state.\(^10\) Constitutional provisions are liberally construed to uphold acts to protect the community's health.\(^10\)

When the validity of health regulations is questioned the test generally used by the court is whether the regulations have some actual and reasonable relation to the maintenance and promotion of the public health, and whether health is in fact the end sought to be attained.\(^10\)

Reasonable laws and regulations have been enacted and judicially approved to govern, *inter alia*, the practice of medicine,\(^10\) the sale of drugs,\(^10\) the prevention of the spread of contagious diseases,\(^10\) the prevention and elimination of disease among people\(^10\) and animals,\(^10\) the prohibition of the sale of impure and unwholesome food,\(^10\) and the governing of drainage and disposal of sewage.\(^10\)

**B. Physicians**

Physicians who obtain a license to practice medicine in Florida do so with full knowledge of the state's inherent power to enact laws and promulgate rules and regulations controlling the practice of medicine. This privilege of license, once extended, may be withdrawn when it becomes necessary to preserve the public health, morals, comfort, safety and good order of society.\(^110\)

**C. Pharmacy**

There must be a substantial relation between the regulation and public health, not a weak one. In the *Stadnik* case,\(^111\) the Florida Board of Pharmacists promulgated a regulation prohibiting licensed pharmacists

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100. Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943).
102. *Supra* note 98.
104. *Stadnik* v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962) (pharmacist); State v. Leone, 118 So.2d 781 (Fla. 1960) (pharmacist).
105. Moore v. Armstrong, 149 So.2d 36 (Fla. 1963) (tuberculosis); Moore v. Draper, 57 So.2d 648 (Fla. 1952) (confined); Varholy v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943) (venereal disease).
106. City Comm'n of Fort Pierce v. State, 143 So.2d 879 (Fla. 2d Dist. 1962) (fluoridation of water).
108. Polar Ice Cream & Creamery Co. v. Andrews, 208 F. Supp. 899 (N.D. Fla. 1963) (milk); Borden Co. v. Odham, 121 So.2d 625 (Fla. 1959) (milk); Shiver v. Lee, 89 So.2d 318 (Fla. 1956) (milk); L. Marx, Inc. v. Mayo, 103 Fla. 552, 129 So. 121 (1931) (arsenic spray); Lewis v. Florida State Bd. of Health, 143 So.2d 867 (Fla. 1st Dist. 1962).
110. State v. Davis, 143 Fla. 236, 196 So. 491 (1940).
or owners of retail drugstores from advertising the name or price of tranquilizing drugs or antibiotics which could be purchased only by prescription. The rationale behind the regulation was a fear that if certain drugs were advertised there would be pressure on doctors to prescribe them. The court invalidated the regulation, noting that the Board's findings dealt with the welfare of physicians and not pharmacists. This was found to be an unreasonable intrusion upon private rights and completely lacking in relation to the public health. The court found, instead, that the regulation was not an effort to protect the public health, but rather an economic regulation prohibiting price competition. Substantive due process disallows such an economic regulatory purpose.

D. Contagious Diseases

With regard to contagious diseases, it is generally held that a person with such a disease can be confined against his will if necessary. For example, in Moore v. Draper,112 a statute relating to compulsory isolation and hospitalization of tubercular persons was held a proper exercise of the police power and not violative of due process.

E. Health Improvement

Improvement of health was the supporting rationale of legislation attacked in City Comm'n of the City of Fort Pierce v. State.113 The precise question was whether a city had the authority to fluoridate water. Even though the court recognized a logical distinction between preserving and improving health, they concluded that the question of whether a particular health measure is a reasonable or legitimate exercise of the police power does not turn upon this distinction. As the court considered fluoridation a valid health measure, the attributes of fluoridation were not in issue. The only question was whether the city had the authority to fluoridate the water, and the court believed that it did.

F. Sewage

A Miami city ordinance authorizing shutting off water service of any consumer who failed to pay sewer service charges, was held constitutional and not a deprivation of property without due process. Water and sewer services are so interlocked that neither can be effective without the other. The court was aided in its determination by a showing that the situation, as it existed in Miami at the time, constituted a serious menace to

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112. 57 So.2d 648 (Fla. 1952). Upheld in Moore v. Armstrong, 149 So.2d 36 (Fla. 1963) (isolation and hospitalization of tubercular persons). See Varboly v. Sweat, 153 Fla. 571, 15 So.2d 267 (1943) (venereal disease-patient had gonorrhea and was quarantined). See also Florida Livestock Bd. v. Gladden, 76 So.2d 291 (Fla. 1954) which held that an act permitting destruction of diseased animals without compensation, and under certain reasonable conditions, was valid as a health measure.

113. 143 So.2d 879 (Fla. 2d Dist. 1962).
the health of the inhabitants of the city. The court thus found an urgent and imperative need for the existing sewer system to be extended, and hence for the ordinance.¹¹⁴

G. Food Cases

Price fixing, with at least a nominal relation to public health, is valid in Florida. This point is illustrated by the cases dealing with the milk industry. *Borden Co. v. Odham,*¹¹⁵ exemplifies the sustainable broad powers of the Florida Milk Commission. The Commission was authorized to compel distributors to accept any part of the milk produced and delivered to them by their producers, regardless of the distributor's need or desires. In addition, the Commission could require distributors to pay for all milk at minimum prices fixed by the Commission. After noting that the evils that prompted such a delegation of the state's police power were the "unhealthful, unfair, unjust, destructive . . . trade practice, which had grown up and been carried on in the production, sale and distributions of milk . . . imperiling the constant supply of pure and wholesome milk,"¹¹⁶ the court found the statutes involved to be valid.

VI. SAFETY

A. Generally

Regulations dealing with public safety, enacted by virtue of the police power, usually are valid under substantive due process standards.¹¹⁷

B. Railroads

Regulations of railroads on the basis of safety present a peculiar dichotomy. In *Weeks v. Welch*¹¹⁸ the court upheld the power of the state to pass regulations requiring trains to stop and be preceded by a flagman over a crossing, where the crossing was not protected by a flagman or electrical equipment. On the other hand, there is the case of *Loftin v. City of Miami*¹¹⁹ where a safety ordinance was enacted which

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¹¹⁵. 121 So.2d 625 (Fla. 1959). See Shiver v. Lee, 89 So.2d 318 (Fla. 1956). See also Polar Ice Cream & Creamery Co. v. Andrews, 208 F. Supp. 899 (N.D. Fla. 1962). For a case dealing with the citrus industry see L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 139 So. 121 (1931) (criminal offense to use arsenic sprays on bearing citrus trees held constitutional). On the other hand, where a regulation of the State Board of Health governing commercial spraying of lawns and ornamental shrubbery in residential areas with toxic pesticides was so vague and indefinite as to constitute a violation of due process. See Lewis v. Florida State Bd. of Health, 143 So.2d 867 (Fla. 1st Dist. 1962).
¹¹⁶. 121 So.2d, at 632.
¹¹⁹. 53 So.2d 654 (Fla. 1951).
limited the speed of trains and required them to stop at crossings, un-
less certain safety devices were installed. The court found the expense
would be great for the railroad to conform to the ordinance and it was
invalidated as unreasonable. Therefore, it is quite difficult to say just
what the position of Florida is with relation to railroad crossing regu-
lations. 120

C. Motor Vehicles

The greatest number of regulations are in the area of motor vehicles
and traffic. The courts have long recognized that a motor vehicle is a
dangerous instrumentality and that the regulation of the use of such
vehicles, a privilege rather than a right, is a proper matter for the police
power. The state has the power to require licenses under appropriate con-
ditions. 121 An interesting case in connection with licenses is City of Miami
v. Aronovitz. 122 Involved was the implementation of a Florida statute re-
quiring a person to have his operator's license in his possession at all
times while operating a motor vehicle. The operator is required to dis-
play it upon demand of a police officer. The plaintiff refused to show
his license when stopped at a massive roadblock set up for the purpose,
inter alia, of checking licenses. In view of the police power safety pur-
pose behind the regulation it was validated. Roadblocks are the only
practical method of determining whether persons are driving with licenses
which have been suspended or revoked. The court also noted that this
regulation did not have significant injurious impact on the use of the
highways.

was validated. The act required owners and operators of vehicles in-
volved in an accident to respond for damages and show proof of financial
ability to respond for damages in future accidents, as a requisite for
the further exercise of the privilege to drive. Interestingly employing the
reasoning of Buck v. Bell, 125 and recognizing the dangerous propensities
of an automobile, the court held the statute valid as an attempt to promote
public safety and to provide security for those injured in an accident. 126

Traffic is another subject matter properly regulated by the state. In Tamiami Trail Tour Inc. v. City of Orlando 127 an ordinance was

120. By way of note, the Weeks case, supra note 118, was the later in time.
121. Smith v. City of Gainesville, 93 So.2d 105 (Fla. 1957); Miami Transit Co. v.
McLin, 101 Fla. 1233, 133 So. 99 (1931).
122. 114 So.2d 784 (Fla. 1959). See Alloway & Knight, Trends in Florida Constitutional
Law, supra note 117, at 721.
123. 132 So.2d 177 (Fla. 1961).
125. 274 U.S. 200 (1927). Sterilization of mental defectives was the issue here. The case
is the source of Justice Holmes' famous declaration, "three generations of imbeciles are
enough."
127. 113 So.2d 723 (Fla. 2d Dist. 1959). In City of Miami v. Girtman, 104 So.2d 62
enacted which required common carriers to obtain permits from the city in order to utilize the city's loading zones. The purpose of the ordinance was to eliminate traffic hazards, and was upheld as well within the police power since its basis was safety.\textsuperscript{128}

D. Comparative Negligence

The recent case invalidating the Comparative Negligence Statute,\textsuperscript{129} while being based primarily on equal protection, had some interesting substantive due process aspects. The statute was originally enacted in 1887. At that time the legislature in exercising its police power in the interest of public safety could validly deal with the then sole dangerous instrumentality operated in the state. However, the court recognized that times have changed; a statute valid when enacted may become invalid by changes in the conditions to which it applies.\textsuperscript{130} The court invalidated the statute as discriminatory and burdensome under both due process and equal protection.

VII. Morals

A. Generally

The state's police power extends to the regulation of its citizen's morals, and such regulations are upheld when they are neither unreasonable nor arbitrary.

B. Liquor

The sale of liquor is considered to be closely related to morals and the state can regulate the liquor industry in various ways. An illustration of an invalid exercise of the police power was the early case of \textit{In re Seven Barrels of Wine}\textsuperscript{131} involving a statute which prohibited the possession of alcoholic beverages in conjunction with the eighteenth amendment. The court believed that it was unreasonable for the state (Fla. 3d Dist. 1958) parking lot operators were denied ingress and egress under a city ordinance, on one of two streets running on either side of their lot. Permission was denied because of the traffic difficulties incident to the nearby fire station.

\textsuperscript{128} In Southern Bell Tel. & Tel. Co. v. State, 75 So.2d 796 (Fla. 1954) the court validated an act forcing a utility to relocate its facilities to accommodate a new highway and declared that highways provide one of the clearest fields for the exercise of the police power. In Garvin v. Baker, 59 So.2d 360 (Fla. 1952), a city ordinance provided a minimum requirement for streets and sidewalks. A plot was to have an area for sidewalks with the remainder to be used for street and curb purposes, and all dead end streets were to show a turning circle. Such an ordinance was reasonable and did not deprive property owners of property without due process.


\textsuperscript{130} Caldwell v. Mann, 157 Fla. 633, 26 So.2d 788 (1946); Atlantic Coast Line R. Co. v. Ivey, 148 Fla. 680, 5 So.2d 244 (1941).

\textsuperscript{131} 79 Fla. 1, 83 So. 627 (1920).
to destroy the right to acquire, possess and protect such alcoholic property lawfully acquired, and possessed for a legal purpose before enactment of the statute. The wine owner was not afforded a reasonable opportunity to lawfully dispose of the property before seizure; this was unreasonable unless, because of its nature, the property jeopardized the public health, safety, morals or general welfare, or the property was knowingly used in violation of the law to the detriment of the public.

An illustration of the permissible use of the police power in relation to the liquor industry is *Leafer v. State.* Legislation prohibited the issuance of motel liquor licenses except to the owner or lessee of a motel. Prior to the enactment of the law, the plaintiff had purchased a liquor license from a motel owner. The effect of the law was to disallow the renewal of the license except by issuance to the lessee or motel owner. The court upheld the legislation, basing its decision on the broad police power in this area.

**C. B-Girls**

Ordinances against B-girls have also been upheld. Such ordinances usually prohibit female employees of drinking establishments from accepting drinks paid for by the customers. Such conduct is considered to be immoral and can reasonably be regulated by the state.  

**D. Gaming and Gambling**

Gaming and gambling are also areas subject to valid exercise of the police power. As the Supreme Court of Florida has put it: "The sovereignty in the exercise of its police power may enact such laws as are necessary to protect certain inalienable rights of the public, including the protection of good morals." Therefore, legislation making it unlawful for public utilities to knowingly lease private wires for use in dissemination of information in the furtherance of gaming, or racing, have been upheld. Gambling machines can also be confiscated by the state without compensation, and their use is validly prohibited by statute.  

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132. 104 So.2d 350 (Fla. 1958). See Keating v. State *ex rel.* Ausebel, 173 So.2d 673 (Fla. 1965).
133. City of Miami v. Jiminez, 130 So.2d 109 (Fla. 3d Dist. 1961) (ordinance validated—MIAMI FLA. CODE § 4-10 (1957)). In City of Miami v. Kayfetz, 92 So.2d 798 (Fla. 1957), an ordinance making it unlawful for female employees and entertainers to mingle or fraternize with customers was held valid as a reasonable exercise of the police power; but a provision precluding employees from drinking in place was unreasonable exercise of power.
136. State v. Ucciferri, 61 So.2d 374 (Fla. 1952).
137. Pasternack v. Bennett, 138 Fla. 663, 190 So. 56 (1939).
E. Fraud

The state's police power is not confined to preservation of life, health, order and decency, but may extend to laws providing for the detection and prevention of fraud.\textsuperscript{139} The Florida Citrus Commission promulgated regulations establishing production standards and labeling requirements for "chilled orange juice," including a prohibition against the inclusion of any additives. The plaintiff in Florida Citrus Comm'n v. Golden Gift Inc.\textsuperscript{140} wanted to add sugar. The Commission's action to protect the public against fraud and deception was upheld as a valid exercise of the police power by regulation of the standards of Florida's citrus industry.

The supreme court invalidated a law\textsuperscript{141} which prohibited the sale or exchange of new and used motor vehicles on Sunday, in Moore v. Thompson.\textsuperscript{142} The court insisted that free enterprise should not be regulated in this fashion, employing the usual presumption of invalidity to any regulation which had a tendency to prohibit business activity. The court refused to find reasonable a relation between fraud or deception and the prohibitions of the statute. In finding this law unreasonable the court disregarded the legislative finding of the relation to fraud by saying: "Findings of fact made by the legislature do not carry with them a presumption of correctness if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice."\textsuperscript{143}

VIII. Regulation of Businesses and Occupations

A. Affected with a Public Interest

1. Generally

Generally the legislature may more strictly regulate those persons or corporations engaged in any trade or business "affected with a public interest."\textsuperscript{144}

The phrase "affected with a public interest" is interpreted to mean that the occupation or industry closely affects the health, safety, and welfare of the people. In such areas the public is interested to such an extent that reasonable laws can be enacted for control and regulation. The extent to which an occupation may be regulated necessarily varies with the different kinds of businesses.\textsuperscript{145}

\begin{footnotes}
\item[139] State v. Rose, 97 Fla. 710, 122 So. 225 (1929).
\item[140] 91 So.2d 657 (Fla. 1956).
\item[141] Fla. Laws 1959, ch. 59-295.
\item[142] 126 So.2d 543 (Fla. 1960).
\item[143] Id. at 549-50. See Alloway & Knight, Trends in Florida Constitutional Law, 16 U. Miami L. Rev. 685 (1962).
\item[144] Lambert v. State, 77 So.2d 869 (Fla. 1955).
\item[145] McRae v. Robbins, 151 Fla. 109, 9 So.2d 284 (1942).
\end{footnotes}
2. TRANSPORTATION AND COMMUNICATION

An ordinance making it unlawful for drivers of taxicabs, or any other passenger vehicle for hire, to solicit the patronage of passengers for hotels or apartment houses was held reasonable and valid in the case of *State v. Yocum*. The court determined that though the fundamental right to earn a living is protected by due process and cannot be abrogated, it may, nonetheless, be subject to reasonable regulation. Some of the evils sought to be corrected by the ordinance regulating the taxicab industry were: avoidance of deceptive practices, harmful misrepresentation, annoyance of tourists, unethical practices of hotels and apartment houses, and traffic problems.

The legislature is normally permitted to heavily regulate both transportation and communication companies with regard to rates and practices. In *Greyhound Corp. v. Carter* the railroad commission denied a petition to Greyhound to discontinue a scheduled route. If the company abandoned the service one result would be to completely deprive a number of commuters of all public transportation facilities. The court set forth the standard required in order to frustrate an order to abandon such public service. It is necessary that the transportation company show that the facility was being operated at a loss and that the loss affected substantially the overall operation of the company.

a. Rate Determination

While substantive due process disallows state regulatory agencies from fixing a confiscatory rate structure for a corporation affected with a public interest, it is the overall company operation which furnishes the proper factors to be used by the regulatory agency in fixing the lawful charges for the use of the company facilities.

A case dealing with rate fixing was *General Tel. Co. v. Carter*. The petitioning telephone company was a Florida corporation conducting a general telephone business in the state, including local and long distance service. Through its connections with other companies within Florida and other states the telephone company provided long distance service outside of the territory it serviced. The court was bound by federal decisions stating that where the business of the carrier is both interstate and intrastate, the question of whether a scheme of maximum

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146. 136 Fla. 246, 186 So 448 (1939). The court declared that when a business is essentially public in character and assumes proportions which may injuriously affect or menace the welfare, health, safety or public interest, or which may be commonly classified under the police power, then the business or occupation must be regulated in behalf of the public welfare.

147. 131 So.2d 735 (Fla. 1961).

148. *Ibid*.

149. 115 So.2d 554 (Fla. 1959).
rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property being used in the intrastate business, and the compensation allowed in that business under the rates prescribed. A state cannot justify unreasonably low rates for domestic transportation, considered alone, on the ground that the carrier is earning large profits in interstate business. On the other hand, the carrier cannot justify unreasonably high rates on the domestic business simply by contending that only in such a way is it able to meet intrastate business losses. Therefore, the Commission in fixing rates must separate the corporation's capital devoted to the independent spheres of commerce, where a corporation does both an intrastate and an interstate business.150

b. Communication

A Florida court has validated legislation authorizing the removal of communication facilities utilized by a hotel in violation of the state's gambling laws.151 The hotel business was "affected with a public interest" and the court classified hotels, along with the beverage business, as a "fit subject for special legislation."152

3. INHERENTLY HARMFUL ACTIVITIES

Activities deemed inherently harmful to the public welfare may be prohibited. Moreover, the state may establish rigidly controlled monopolies when the public interest warrants it. On the other hand, when there is an absence of a clear public interest, the court will refuse to permit this kind of interference.153 One area of such strict regulation is that of food. In Connor v. Alderman, a citrus fruit dealer was required to keep records of his business. The court stated that it was a proper exercise of the police power for the dealer to be required to keep records and make them available for inspection, since the business was one of public interest. The records were not considered private papers and had to be produced for inspection despite incriminating possibilities to their maker.

150. Alloway & Knight, Trends in Florida Constitutional Law, supra note 143.
151. Southern Bell Tel. & Tel. Co. v. Nineteen Hundred One Collins Ave., 83 So.2d 865 (Fla. 1956).
152. Id. at 871.
153. For an absence of a clear requirement of public interest see Stadnik v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962); Larson v. Lesser, 106 So.2d 188 (Fla. 1958); Town of Bar Harbor Islands v. Schaplik, 57 So.2d 855 (Fla. 1952); Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949); City of Miami Beach v. Seacoast Towers, 156 So.2d 528 (Fla. 3d Dist. 1963). But see McRae v. Robbins, 151 Fla. 109, 9 So.2d 284 (1942) where minimum prices and hours in barber shops were held valid as inclined to make them more sanitary.
154. 159 So.2d 890 (Fla. 2d Dist. 1964). See Mayo v. Bossenbury, 10 So.2d 725 (Fla. 1942) (regulation of eggs valid).
4. CONCLUSION

An invalid attempt at regulation is illustrated in the case of *Larson v. Lesser*. Therein, the Florida Supreme Court invalidated an act which prohibited public insurance adjusters from soliciting business. The court found no reasonable basis for the legislative restriction and utilized a presumption of invalidity upon the statute by stating that freedom of contract is the general rule, restraint is the exception. To validate there must exist a substantial relation between the law and the public health, safety, morals, or general welfare.

Unfortunately, the Florida Supreme Court has not yet eliminated the label “affected with a public purpose” as suggested by the late Mr. Justice Terrell:

> There is no magic in the phrase “clothed with or affected with a public interest.” Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public, and when this point is reached, the liberty of contract must necessarily be restricted. . . . The regulation . . . will be upheld unless clearly shown to be arbitrary, discriminatory or beyond the power of the legislature to enforce.

B. Other Examples

The police power is paramount to the right of any person to engage in a particular business or calling, although the business or calling is legitimate and is not of such character that it may be entirely forbidden as hostile to the general welfare. One's business is a property right, however, and it cannot be taken, destroyed, nor injured without due process of law. Therefore, the legislature cannot, under the guise of protecting the public, arbitrarily interfere with private business nor impose unnecessary restrictions on lawful occupations.

Based on these concepts a statute regulating real estate brokers and creating the Real Estate Commission was held constitutional; a statute requiring that all applicants who desire to take examinations to practice veterinary medicine and surgery must be a graduate of an accredited school was validated; statutory classifications, drawn in terms of monetary cost, governing the right of sons not registered as architects

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155. 106 So.2d 188 (Fla. 1958).
156. Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 5, 183 So. 759, 763 (1938). (Price fixing of laundry and dry cleaning was sustained on the basis of general welfare.)
159. State v. Rose, 97 Fla. 710, 122 So. 225 (1929).
160. State v. Dee, 77 So.2d 768 (Fla. 1955).
or engineers to prepare plans and specifications for one or two family residences or other buildings was held not violative of due process; and an ordinance prohibiting the location of undertaking within a specified area and prohibiting the practice of embalming without a permit, was held valid as a regulatory measure adopted in the exercise of police power.

On the other hand, an act regulating and controlling the practice of photography was held invalid, as was an ordinance providing that only licensed auctioneers or owners of goods might conduct an auction. Likewise, regulations which would put a security dealer out of business were invalidated, and a lien put on a bulk purchaser’s merchandise was held a deprivation of property without due process of law.

Regulation of the accounting profession presents an interesting picture of substantive due process in Florida. In *Heller v. Abess* a statute providing for the issuance of certificates to persons who have qualified as certified public accountants and requiring a license tax for practicing in the state was held valid. However, in *Florida Accountants Ass’n v. Dandelake*, a rule promulgated by the State Board of Accountancy that only certified individuals could utilize the title of “accountant” in preference to that of “bookkeeper” was rejected. The court judicially noticed both the need of the small businessman to have ordinary accounting work, and the relatively small number of accountants who were certified by the Board and practicing in the state. Weighing the needs of the small business and the right to enter into personal employment contracts against the power of the state to regulate the practice of accountancy, the court reached the conclusion that the police power was insufficient under substantive due process standards. Therefore as a result of this decision, individuals have a constitutional right to call themselves “accountants” rather than “bookkeepers.” It is strange that Florida due process should not be able to accommodate guild efforts. The justification behind certification of medicine and law would seem to substantiate the similar regulation of accountancy. A bookkeeping error can also be disastrous.

161. Richmond v. Florida State Bd. of Architecture, 163 So.2d 262 (Fla. 1964).
162. Hunter v. Green, 142 Fla. 104, 194 So. 379 (1940).
163. Sullivan v. DeCerb, 156 Fla. 496, 23 So.2d 571 (1945).
165. Riley v. Sweat, 110 Fla. 362, 149 So. 48 (1933).
166. Faber Coe & Gregg, Inc. v. Wright, 178 So.2d 51 (Fla. 3d Dist. 1965).
167. 134 Fla. 610, 184 So. 122 (1938).
168. 99 So.2d 323 (Fla. 1957).