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## Trends in Florida Constitutional Law

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# TRENDS IN FLORIDA CONSTITUTIONAL LAW

CLIFFORD C. ALLOWAY\* AND RICHARD B. KNIGHT\*\*

## INTRODUCTION

The following outline generally illustrates the materials discussed in the First, Second, Third, and Fourth *Surveys* of Florida constitutional law. Subjects followed by an asterisk (\*) have been transferred, in whole or in part, to other authors in the Fifth Florida Law *Survey*. Subjects followed by two asterisks (\*\*) have not been discussed, since the decisions did not reflect significant changes.

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## BOND FINANCING\*

## METROPOLITAN GOVERNMENT\*

## AMENDING PROCESSES\*\*

## FALLS FROM CONSTITUTIONAL GRACE

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The present article analyzes selected decisions disposing of Florida constitutional issues; Florida court interpretation of United States constitutional law is generally<sup>1</sup> omitted. Volumes 113 through 131, Southern Reporter, second series, mark the limits of research. Selected books, articles and decisions from other states are incorporated in appropriate footnotes for the convenience of the reader who desires more depth in a particular subject matter.

In the 1960 general election the voters amended our state constitution in several particulars.<sup>2</sup>

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1. Unless Florida courts treat federal court decisions, interpreting the federal instrument, as binding or highly persuasive on Florida court interpretation of the Florida instrument. The most dramatic example of this involves the freedoms of speech, press, assembly and religion, protected in both instruments.

2. Selected items: FLA. CONST. art. V, § 5, art. VI, § 2, art. XVI.

## SEPARATION OF POWERS

This section will be organized, as are the Florida decisions, into the traditional fields of power.<sup>3</sup>

## II. LEGISLATIVE POWER PROBLEMS

A. *Exclusive Legislative Power*

The Florida Supreme Court again stated that the legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law. What the legislature may do is to enact a law complete in itself, designed to accomplish a general public purpose, which may expressly authorize designated officials within definite limitations to provide regulations for the operation and enforcement of the law.<sup>4</sup> The legislature had adopted a map and plat law which stated that the act should affect only such county commission districts in Volusia County as the Board of County Commissioners determined advisable. The court held that the Board had power to activate the map and plat law as to part or all of the districts in the county. The Board was not exercising exclusive legislative power.

According to the court the legislative language did no more than authorize the Board to "exercise its discretion as to time of executing the act which must be done pursuant to the provisions thereof." Although the Board had power under the act to make it apply or not, as to part or all of the districts in the county, the court's position was that the Board was not acting as a legislature.<sup>5</sup>

B. *Legislative Establishment of Standards*

Again<sup>6</sup> the court required that the legislature, in order to enact a valid delegation of legislative power to an administrative agency, must fix adequate standards to guide the actions of the administrative agency. This requirement is in line with the general law in the United States on

3. FLA. CONST. art. II divides the total Florida governmental power "into three departments" (legislative, executive and judicial). Perhaps the most illuminating article on the problems inherent in attempts to sharply define exclusive functions is Jaffee, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359 (1947).

4. *Stewart v. Stone*, 130 So.2d 577, 579 (Fla. 1961). Also in issue in the case were the parallel problems of delegation of legislative power, FLA. CONST. art. III, § 20, and substantive due process.

5. The decision is in line with modern cases. See *Currin v. Wallace*, 306 U.S. 1 (1939). An excellent state decision relating the techniques of determining which departments should exercise particular functions is *Trustees of Village of Saratoga Springs v. Saratoga Gas., Elec. Light & Power Co.*, 191 N.Y. 123, 83 N.E. 693 (1908).

6. See, e.g., *Diamond Cab Owners Ass'n v. Florida R.R. & Pub. Util. Comm'n*, 66 So.2d 593, 596 (Fla. 1953).

the subject.<sup>7</sup> The purpose of the rule is to ensure that the administrative agency will follow the guide-lines established by the legislature. A second beneficial effect from the requirement is that a respondent, who is regulated by the agency, will be able to determine whether or not the agency is acting within the scope of granted legislative power.

In *Husband v. Cassel*,<sup>8</sup> the plaintiff, whose vocational pursuit was that of a "psychologist," brought suit in a declaratory action against the Florida State Board of Examiners of Psychology. The Board threatened plaintiff with criminal prosecution if he used the title "Psychologist" when he had not been issued a certificate entitling him to do so by the Board under Florida statutes.<sup>9</sup> The court believed that the only limitation imposed upon the Board was that the examination to be given by the Board must be in the field of psychology. The legislature had failed to properly define standards to guide the Board's discretion. Therefore, the Board had complete discretion to determine the nature and scope of the field to be encompassed in the examination which determined the applicant's qualifications as a psychologist.<sup>10</sup>

### C. Delegation of Legislative Power Must Be Clear

The Florida Constitution, article IV, section 30, states that the Florida Game and Fresh Water Fish Commission is granted the "management, restoration, conservation and regulation" of the "birds, game, fur-bearing animals, and fresh water fish of the State." Among other powers granted to the Commission by this section are the powers to regulate the manner and method of "taking, transporting, storing and using birds, game, fur-bearing animals, fresh water fish, reptiles, and amphibians." In *Barrow v. Holland*,<sup>11</sup> the plaintiff, an operator of a wild life exhibit which was maintained as a tourist attraction, sued for a declaratory decree and an injunction against the closing of his business by the Commission. The court apparently held that the constitutional terminology did not grant the Commission power to regulate wild animals

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7. Jaffee, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 561 (1947) (state practice also). One still finds the improper delegation issue argued in the federal courts (see *United States v. Lauer*, 287 F.2d 633 (7th Cir.), *cert. denied*, 82 Sup. Ct. 34 (1961)), but not successfully argued.

8. 130 So.2d 69 (Fla. 1961). At issue was FLA. CONST. art. III, § 1 (legislative power).

9. FLA. STAT. § 490.041 (1961) provides that before the Board may issue a certificate to one as a psychologist, the Board shall require the applicant to "pass a representative assembled written, and an oral or practical examination in psychology or both . . . oral and practical examinations . . ." The Board is empowered to "rate the applicant and its decision is final in any examination."

10. *Accord*, *State v. Dade County*, 120 So.2d 625, 627 (Fla. App. 1960), *cert. quashed*, 126 So.2d 147 (Fla. 1961).

11. 125 So.2d 749 (Fla. 1960). Also at issue were clarity requirements for agency rules and substantive due process (dictum).

been brought within confinement through private ownership. Since the which have been removed from their natural condition and which have language could easily be read as granting such power to the Commission, it is obvious that the Florida court is demanding a very clear grant of power to an administrative agency over a particular subject matter.<sup>12</sup>

#### D. Clarity of a Regulation of a State Administrative Agency

The court has consistently required that regulations of a state agency must be clear. In *Barrow v. Holland*,<sup>13</sup> the Florida Game and Fresh Water Fish Commission promulgated Commission Rule 6.<sup>14</sup> No other rule of the Commission indicated to persons desiring a permit what they would have to do in order to obtain one. The only stated requirement imposed upon a person was that he satisfy the Director of the Commission. The Director, acting through his inspector, had absolute discretionary power to decide who would and who would not be granted a permit. The court struck down the rule.<sup>15</sup>

#### E. Delegation of Legislative Power to the National Government

In *National Dairy Prods. Corp. v. Odham*,<sup>16</sup> the Florida Milk Commission issued the following order: "For all Class II Milk delivered by producers during any period in excess of five per cent (5%) of the volume of Class I Milk as defined by Official Order of the Florida Milk Commission the price per gallon shall be the price established each month for Class II Milk, pursuant to the Miami, Florida, Federal Milk Market-

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12. *But see* *Foremost Dairies v. Odham*, 121 So.2d 636 (Fla. 1959) (Thomas, C.J., dissenting). On rehearing, 121 So.2d 636, 639 (Fla. 1960) (Thomas, C.J., dissenting and Terrell, J., adhering to original opinion), the original opinion was modified on a statutory construction issue. Here the court more easily found a "necessarily inferred power." One could distinguish these decisions on the basis that *Barrow v. Holland*, *supra* note 11, involved a constitutional grant of power.

13. *Supra* note 11.

14. "The Director may issue permits giving the right to take or to be in possession of wildlife or fresh water fish, or their nest of eggs, for scientific, educational, exhibition, propagation or management purposes. Such permits shall be subject to such terms . . . as may be prescribed by the Commission . . . Traveling shows, zoos, or wildlife exhibits, exhibiting wildlife and/or fresh water fish native to Florida, shall be required to secure a permit before entering the State . . . All such traveling shows, zoos or wildlife exhibits shall be subject to inspection at all times by Wildlife Officers . . . and failure to comply with all requirements set out by the Commission, including mistreatment or neglect of such animals, shall be cause for immediate cancellation of the permit issued for the operation of the show or exhibit."

15. The basis of decision is either procedural due process clarity requirements or clarity requirements under some separation of powers rationale.

16. 121 So.2d 640 (Fla. 1959). On rehearing, 121 So.2d 643 (Fla. 1960) (Thomas, C.J., dissenting and Terrell, J., adhering to original opinion) the original opinion was modified on a statutory construction issue. At issue in the case were FLA. CONST. DECL. OF RIGHTS § 12 and U.S. CONST. amend. XIV (substantive due process and procedural due process) (hearing requirements, improper delegation and confiscation). Compare *National Dairy Prods. Corp. v. Odham* *supra* with *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940).

ing Order." The court chose not to treat this order as granting to the Federal Government, through the federal administrator, the power to determine milk prices for the Commission. Instead the court stated that the monthly price "computed is ministerial and can be delegated." The court was assisted by the fact that the order was limited to a single federal order and had no reference to further orders or amendments. To the court the fact that the order employed the terminology "shall be the price established each month" was nothing more than "an element in the application of the formula." In other words, the federal order was "employed to reflect changes in the price of milk ingredients," not to grant to federal authorities any facet of state power.

#### F. *Delegation of Legislative Power to Private Individuals*

The Florida Legislature enacted a statute<sup>17</sup> which provides that "mineral, oil or other sub-surface rights, when owned in fee simple separately from the ownership of the surface of the land" shall be "taken and treated as real property and shall be subject to taxation separate from the fee." The statute imposes the duty on the owner of the severed sub-surface rights to return the same for taxation and if this is not done by the owner thereof the duty to assess the severed sub-surface rights for taxation is imposed upon the tax assessor. However, the separate assessment by the assessor is required only when the owner of some record interest in the land files with the tax assessor of the county a written request for a separate assessment of these sub-surface rights. To the court the effect of the statute was to vest in the owner of some record interest in the surface of the land a discretion as to when the authority to assess severed sub-surface rights for ad valorem tax purposes should be exercised. This was held to be an unauthorized delegation of legislative power.<sup>18</sup>

#### G. *Legislative Functions*

The courts declared a number of functions and powers of the legislature recently. These ranged over the following subject matters: (1) the legislature has the power to exact from candidates for public office reasonable fees;<sup>19</sup> (2) the constitution does not limit the power of the

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17. FLA. STAT. § 193.221 (1961).

18. *Cassady v. Consolidated Naval Stores Co.*, 119 So.2d 35 (Fla. 1960). At issue therein were the following: improper delegation of legislative power; FLA. CONST. art. IX, § 1 (uniform rate of taxation); FLA. CONST. art. IX, § 5 (legislative delegation of power to assess and impose taxes); equal protection (decision does not state which constitution involved). On this subject see Jaffee, *Law-Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

19. *Bodner v. Gray*, 129 So.2d 419 (Fla. 1961) (dictum). At issue were FLA. CONST. art. V, § 13 (eligibility requirements for justices) and FLA. CONST. DECL. OF RIGHTS § 12 (substantive due process) or the definition of a legislative function (regulation of elections).

legislature to prescribe procedures for municipal courts;<sup>20</sup> (3) it is a legislative function to deprive a witness of his constitutional privilege against self-incrimination by according him immunity;<sup>21</sup> (4) the doctrine of sovereign immunity, which extends to state agents or employees, can only be changed by constitutional amendment or by enactment of legislation or by both;<sup>22</sup> (5) where the constitution, as with qualifications of electors for elections for municipal offices, does not confer the right to vote or prescribe the qualifications of voters, the legislature may do so.<sup>23</sup>

### III. EXECUTIVE POWER<sup>24</sup>

#### A. *Limitation on Utilization of Advisory Opinions*

In 1959, the court took a healthy step towards a reduction of its advisory opinion function for the governor.<sup>25</sup> The governor requested the opinion of the justices as to whether or not an act of the legislature which sought to abolish the civil court of record for Duval County was constitutional. If the act were invalid there existed a vacancy in the office of the judge of this court. Assuming a vacancy, the governor wished to know whether or not he could appoint and commission a successor under Florida Constitution, article X, section 7, which details the governor's appointment power.

A majority of the members of the court believed that the constitutionality of the statute should only be passed upon in an adversary proceeding. The effect of this opinion should be to strictly channel the advisory opinions of the court to construction of clauses of the constitution affecting the governor's executive powers and duties.<sup>26</sup>

20. *Boyd v. County of Dade*, 123 So.2d 323 (Fla. 1960) (dictum) (Thomas, C.J., agreeing to conclusion and Hobson, J., not participating). At issue were FLA. CONST. DECL. OF RIGHTS §§ 3, 11 (right to trial by jury); FLA. CONST. art V, § 4(2) (court jurisdiction) and FLA. CONST. art. VIII, § 11 (Dade County home rule).

21. *Brizzie v. State*, 120 So.2d 27, 30 (Fla. App. 1960).

22. *Buck v. McLean*, 115 So.2d 764 (Fla. App. 1960) (dictum). At issue was FLA. CONST. art. III, § 22 (suits against the state).

23. *Hisgen v. Raleigh*, 115 So.2d 715 (Fla. App. 1959) (dictum). At issue was FLA. CONST. art. V, § 6 (qualifications of electors). It is difficult to state whether the Florida courts, in the decisions related in this section, are declaring functions which are properly legislative in nature under separation of powers or whether the courts are construing particular constitutional language.

24. Included herein are several administrative law problems with a constitutional flavor (see sections D, E and F).

25. *In re Advisory Opinion to the Governor*, 113 So.2d 703 (Fla. 1959) (Thomas, C.J., and Roberts, J., disagreeing with their colleagues Hobson, Drew, Thornal, and O'Connell, J.J.).

26. FLA. CONST. art. IV, § 13: "The Governor may, at any time, require the opinion of the Justices of the Supreme Court, as to the interpretation of any portion of this Constitution upon any question affecting his Executive powers and duties, and the Justices shall render such opinion in writing." An analysis of the proper limitations of the advisory opinion can be found in Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).



### B. *The Veto Power of the Governor*

In *In re Advisory Opinion to the Governor*,<sup>27</sup> the governor explained to the court in his letter requesting an opinion that the legislature had conveyed to his office for executive consideration a number of bills which had cleared the legislative process and which were subject to his action. Florida Constitution, article III, section 28, states: "If any bill shall not be returned within five days after it shall have been presented to the Governor, (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the Legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty (20) days after the adjournment, shall file such bill, with his objections thereto. . . ."

The legislature adjourned on Friday, June 2nd, and the governor wished to know whether he would have twenty days after Friday, June 2nd, within which to act upon bills which reached his office on or after Saturday, May 27th. In computing the time allowed for the approval of a bill by the governor, the court stated that the day of presentation is excluded and the last day of the specified period is included. Therefore, Saturday, May 27th, 1961, should not be included as part of the constitutional five day period allowed the governor for executive action. Under the constitutional language, Sunday, May 28th, 1961, is specifically excepted from the five day period; so the first "day" of the five day period referred to in article III, section 28, began at 12:01 A.M. Monday, May 29th, 1961, and the final day of the five day period expired at midnight, June 2nd, 1961. The legislature, by its final adjournment at noon on June 2nd, 1961 interrupted the continuity of this constitutional five day period. The result was that the governor was prevented from returning any of the bills in question to the house of origin after noon, June 2nd, 1961. Therefore, the final adjournment of the legislature brought into action that portion of article III, section 28, which allows the governor twenty days after final adjournment in which to consider appropriate action on pending bills.<sup>28</sup>

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27. 131 So.2d 196 (Fla. 1961). The court has generally been liberal with veto time periods. See *Advisory Opinion to the Governor*, 95 So.2d 603 (Fla. 1957).

28. *Green v. Rawls*, 122 So.2d 10 (Fla. 1960) (Roberts, J., concurring specially and Terrell, J., agreeing with judgment), involved a somewhat different veto problem. A suit had been brought to enjoin the state comptroller from issuing and delivering warrants for salary to state officers in excess of annual salaries fixed by the legislature in a general appropriation bill. The supreme court held that the State Budget Commission had power to establish salaries for two government employees for amounts in excess of specific sums for the employees stated by the legislature in an appropriations bill, after a veto by the governor of the items of the bill specifying the salaries. The case relates to the item veto power of the governor. FLA. CONST. art. IV, § 18, reads as follows: "The Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to

### C. Power to Appoint Circuit Judges

In *Gray v. Bryant*<sup>20</sup> Governor-elect Farris Bryant sued for a declaratory decree with respect to vacancies in the office of circuit judge and his power to fill such vacancies by appointment. The case is important in the sense that its decision dictated the power to appoint an exceptional number of circuit judges to newly created judicial offices. The supreme court held that ad interim vacancies in elective judicial offices are filled by appointment of the incumbent governor for a "term extending until the first Tuesday after the first Monday in January next after the election and qualification of the successor at the next general election." Therefore, the next governor (Bryant) would have no authority to appoint a person to the office of circuit judge where the office had been filled by appointment of the incumbent governor.

Florida Constitution, article V, section 6(2) gives the formula by which the number of circuit judges in each of the sixteen judicial circuits is to be determined. It reads as follows: "The Legislature shall provide for one circuit judge in each circuit for each 50,000 inhabitants or major fraction thereof according to the last census authorized by law." The legislature had already acted to enforce this constitutional requirement as to part of the circuits. The court held that article V, section 6 was self-executing once the 1960 federal census had revealed that these circuits

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the rules and limitations prescribed for the passage of other bills over the Executive veto." The question was whether the words "of \$12,000 per annum" and "of \$10,000 per annum" used in the appropriations bill by the legislature constituted distinct "items" of appropriations subject to veto by the governor. After the governor's veto the State Budget Commission set the salaries of the two officers at \$13,000 and \$12,000. Quoting from *Fairfield v. Foster*, 25 Ariz. 146, 157, 214. Pac. 319, 323 (1923), the court accepted this definition of an item in an appropriations bill: "'Whenever the Legislature goes to the extent of saying in any bill . . . that a specified sum of money . . . shall be spent for a specified purpose . . . while other sums mentioned in the bill are to be used otherwise, . . . it is . . . an 'item' within the bill . . .'" *Id.* at 16. Therefore, the governor's vetoes struck down constitutional "items." Under this definition the general sums for salaries for each department, office or agency are also "items" so there may be items within items. The court also stated that the effect of the vetoes was not to reduce the appropriations for salaries for the two departments, leaving no funds for the payment of the two employees' salaries. FLA. CONST. art. IV, § 18 provides that "the part or parts of the bill approved shall be the law. . ." and that only the item or items disapproved shall be void. Here the legislature provided a general item of salary in the amount of \$143,580 for each year of the biennium for the Division of Corrections, and \$1,014,794 and \$1,005,004 for the two years for the Florida Board of Forestry. Included within the totals appropriated for these general items were specific items of salaries for the two employees. Although the governor had the power to veto the entire appropriation for salaries for the departments, he had not done so and he could not *reduce* the amount of the appropriations for salaries. The creation of the salaries finally given the two employees came through use of the Budget Commission's statutory powers. The Commission established the salaries of the two employees in amounts greater than that established by the legislature.

29. 125 So.2d 846 (Fla. 1960) (Terrell and Roberts, JJ., dissenting; Hobson, J., concurring in part and dissenting in part; Thornal, J., concurring). At issue were FLA. CONST. art. V, § 6(2) (number of circuit judges), art. IV, § 7 (Governor's power to fill vacant offices), art. XVIII, §§ 6, 7, 9 (general election time), art. V, § 14 (judicial office vacant—term for successor).

had populations which would authorize additional judges. The court believed that the basic test in determining whether a constitutional provision should be construed as self-executing had been satisfied. The test is whether or not the provision lays down a sufficient rule by which the purpose it is intended to accomplish may be determined, enjoyed, or protected without the aid of legislation.

Governor-elect Bryant contended that the terms of all circuit judges expired at midnight, January 2nd, 1961. He would become governor on January 3rd. He argued that any appointments made by Governor Collins, filling the vacancies in this office, should expire at midnight, January 2nd, 1961.

The court stated that three sections of our constitution control this problem; one chapter of the state statutes deals with this subject.

Article XVIII, section 6, is apropos to this discussion. It reads as follows: "The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution shall extend only to the first Tuesday after the first Monday in January next after the election and qualification of a successor." This is followed by section 7, which provides that: "In all cases of election to fill vacancies in office such election shall be for that part of the unexpired term commencing on the first Tuesday after the first Monday in January next after such election." The court construed these sections to provide a method for filling vacancies only until the electorate can vote on the office, at the same time preserving orderly cycles of terms of office. The intent of section 6 was construed so that a vacancy in an office is to be filled by appointment for special or ad interim term, which is to be terminated upon the people electing a qualified successor. Therefore, once the executive power is exercised to fill a vacancy in the elective office, the power is spent and may not be again exercised with respect to that office, unless it falls vacant from one of the causes provided by law before the people have an opportunity to elect a successor.

The court believed that the legislature, in adopting Florida Statutes, chapter 114, agreed with the court's construction of section 6.<sup>30</sup> Article 5, section 14, is the last constitutional provision relating to filling of vacancies. It reads: "When the office of any judge shall become vacant from any

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30. FLA. STAT. § 114.01 (1961) reads as follows: "Every office shall be deemed vacant in the following cases: . . . (6) When any office created or continued by the constitution or laws shall not have been filled by election or appointment under the constitution or law creating or continuing such office . . ." The court believed that the newly created offices of circuit judge fell within this provision. These offices had not been filled either by election or appointment. They were, therefore, subject to being filled by the authority of FLA. STAT. § 114.04 (1961), which reads: "[T]he governor shall fill such office by appointment, and the person so appointed shall be entitled to take and hold such office until the same shall be filled by an election as provided by law . . . ."

cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy." The court construed this section to not apply to vacancies in newly created offices, such as those involved in this case, but only to those offices which have been filled once and have become vacant because of the "death, resignation, retirement, or other cause" which resulted in the vacation of the office by the previous holder. Therefore, the purpose of this section was read by the court to not operate as a limitation upon ad interim appointments to fill vacancies in judicial offices. In essence, section 14 was construed so that one elected to fill a vacancy in an elective judicial office does not receive a new full term but only that portion of the unexpired term of the officer or class of officers involved; construed this way it is not inconsistent with article XVIII, section 6. The ad interim term is a special term carved out of the regular term of office. It begins when the office falls vacant and terminates with the election and qualification of a successor.

The offices involved in the case were now vacant. The executive power of appointment can be exercised to fill an elective office when the office is deemed vacant under the law. If the incumbent governor filled the offices by appointment they would not thereafter be vacant in the sense that they may be filled by executive appointment, but they would be vacant in the sense that under the provisions of article XVIII, section 7, they are subject to being filled by the people at the next general election. Any commission issued by the incumbent governor in filling the vacant offices of circuit judge would run to the first Tuesday after the first Monday in January, following the next ensuing general election to be held in November 1962.

#### D. *Determination of Penalty by State Agency*

Traditionally, in the United States, determination of the question whether administrative agencies may penalize is answered in terms of separation of powers—is this a proper delegation of legislative power or is this a use of exclusive judicial power by the executive?

The Florida Real Estate Commission revoked the registration of petitioner as a real estate broker.<sup>31</sup> In the order of revocation the Commission stated: "It is our opinion and ultimate finding that defendant, John Murphy, is guilty of a crime against the laws of the State of Florida involving

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31. See *Murphy v. Florida Real Estate Comm'n*, 117 So.2d 1 (Fla. 1959) (O'Connell, J., dissenting to order denying petition for rehearing). The general law on this problem would seem to be in agreement with the dissenting justice; see 43 COLUM. L. REV. 213 (1943). To argue on the other side, for a moment, one could say that there is a "play" on words here, i.e., that the commission is simply accomplishing what the justice would allow—determination of fact which is related to an administrative sanction, not criminal penalty.

moral turpitude in violation of Subsection 475.25(1)(e), Florida Statutes . . . ." In the notice given petitioner it was charged that he was guilty of a crime against the laws of the state in that he, while acting as a notary public, falsified the acknowledgements of certain persons on applications for registration as real estate salesmen. Under the statute referred to above the registration of a broker may be suspended upon a finding of fact that the broker has been guilty of a crime against the laws of the state involving moral turpitude and the record of a conviction has been authenticated to make it admissible in evidence. As authenticated, it is admissible as prima-facie evidence of guilt.

The petitioner contended that the statute could be utilized by the Commission only where the broker had been charged and convicted of a crime in a court. Justice O'Connell, dissenting to the order denying petition for rehearing, agreed with the petitioner. He took the view that the legislature may not grant to a commission the power to adjudicate guilt or innocence of crime. Petitioner had not been adjudged guilty of a crime in a criminal court. The Commission took the position the legislature intended the Commission to make this determination. Apparently a majority of the justices agreed with the Commission. Justice O'Connell did agree that the Commission could determine that the registrant had in fact committed acts or engaged in conduct which, if presented in a court under proper charges and after trial, might justify adjudication by the court of guilt of crime. He also agreed that the Commission could use its determination thereof as a ground for the basis of revocation or suspension. But he argued that the Commission is without authority to "adjudicate" that acts constitute guilt of a crime. His plea was that Commission authority be limited to determination that certain acts are sufficient cause for revocation of a license.

#### *E. Court Review of Administrative Agency Finding of Fact*

Court review of the validity of administrative action is a problem in separation of powers. Generally it should parallel, at least to some extent,<sup>32</sup> court review treatment of the validity of statutes, since administrative action is normally inspired by legislation. In recent years one can see an improvement in the attitude of Florida courts toward the administrative process. Our courts now tend to grant a presumption of correctness or validity to administrative action, when constitutional issues are raised.<sup>33</sup>

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32. The position of administrative agencies vis-a-vis the courts is discussed in COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* (1951). Among other sources, DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 29-30 (1958) defines the technical differences in court review of "law" and "fact" findings or determinations.

33. Compare *City of Miami Beach v. First Trust Co.*, 45 So.2d 681, 687-89 (Fla. 1949) with *Miami Beach v. Hogan*, 63 So.2d 493, 495 (Fla. 1953).

In a number of cases the court reiterated its position on circuit court review of findings of fact of administrative agencies, boards and officials. In a typical case<sup>34</sup> a Florida corporation doing business as the Liberty City Amusement Park was proceeded against by the State Beverage Department for revocation or suspension of its liquor license. The Park was accused of selling whiskey during prohibited hours on Sunday and with permitting consumption of whiskey on the premises at the same time. The Park sought relief, from an order of suspension entered by the Department, by filing a petition for certiorari in the circuit court. The court granted certiorari and quashed the Department's suspension order. The Department then filed a petition for certiorari in the district court of appeal. The appellate court held that on review of the Department's order the circuit court was not free to weigh or evaluate the evidence which had been presented to the director but was charged with the "duty to examine the record and determine whether the director's order was in accord with the essential requirements of law and whether the director had before him competent substantial evidence to support his findings and conclusions."<sup>35</sup> The writ of certiorari only authorized the appellate court to determine whether the circuit court order was "illegal or is essentially irregular or prejudicial and materially harmful to the party duly complaining by a departure from essential requirements of law." Further, an appellate court will not consider the "sufficiency of the evidence, or the weight and probative force of the conflicting testimony." However, the evidence which was before the agency will be reviewed to determine whether the findings and conclusions of the agency are supported by "competent substantial evidence" if it appears that the circuit court reviewed the evidence under an illegal approach. Here the appellate court believed that the circuit court did not review the agency's action on the basis of the presence or absence of competent substantial evidence to support the director's order, but proceeded to re-weigh and re-evaluate the evidence and conflicting testimony. The term "competent and substantial evidence" was defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." It must be evidence which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the substantial evidence should also be competent." So the effect of conflicting evidence and questions as to the weight and evaluation of the testimony are for the agency, whose findings and conclusions are entitled to stand unless it is made to appear that the agency departed in some manner from the

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34. *State Beverage Dep't. v. Enal, Inc.*, 115 So.2d 566 (Fla. App. 1959) (review of agency fact findings). Many of the decisions reviewing agency action have little to do with constitutional law. Yet a large part of the decisions deal with court review of agency action in the context of constitutional argument—particularly court review of zoning action or license revocation.

35. Correctly citing *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).

"essential requirements of the law" or that the decision reached was not supported on the record by competent and substantial evidence.<sup>36</sup> Certiorari was granted and the order of the circuit court was quashed.

### F. Exhaustion of Administrative Remedies

The rule requiring exhaustion of administrative remedies, similar to the rule restricting court review of administrative action, is a species of the separation of powers doctrine. Both rules operate to reduce the judicial function vis-a-vis the administrative agency.

Once again Florida courts held that one must exhaust all administrative remedies before he can complain before a court about administrative regulations, or statutes which authorize administrative regulations.<sup>37</sup> Therefore, to attack administrative regulations and orders, on the basis of possible unconstitutionality, it still is necessary in Florida for one to exhaust each administrative remedy through every administrative channel, obtaining a final administrative judgment before going into the courts.<sup>38</sup>

## THE "CLASSIC" FREEDOMS<sup>39</sup>

The last several years have recorded an unusual number of decisions in this critical area of constitutional law. Two limitations on state government should be differentiated. Normally, one who argues that the state has acted injuriously toward his freedoms of speech, press, assembly and religion pleads the federal constitutional inhibition as well as that of the state.<sup>40</sup> Florida courts tend to merge the two limitations to the point that federal and state cases are cited inter-changeably. This has resulted, no doubt, from a conscientious effort on the part of the Florida Supreme Court to properly effectuate the federal constitutional limitations on state power.

### I. SPEECH

May the Florida legislature penalize<sup>41</sup> a public employee who merely

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36. Compare with approach in Jaffee, *Judicial Review: "Substantial Evidence On The Whole Record,"* 64 HARV. L. REV. 1233 (1951) (an excellent article).

37. *Stewart v. Stone*, 130 So.2d 577 (Fla. 1961) and *Wood v. Twin Lakes Mobile Homes Village*, 123 So.2d 738 (Fla. App. 1960).

38. In general, the federal requirement requires more "exhaustion" than does the state law requirement. Compare *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) with, e.g., *Ritholz v. Ammon*, 240 Wis. 578, 4 N.W.2d 173 (1942).

39. The author has arbitrarily classified the decisions under one of four categories. It should be noted, however, that in nearly every opinion the parties argued more than one of the freedoms.

40. U.S. CONST. amend. XIV, § 1 (due process), incorporating U.S. CONST. amend. I (freedom of speech, press, assembly and religion). In Florida constitutional law: FLA. CONST. DECL. OF RIGHTS § 5 (freedom of religion), § 6 (establishment of preference clause), § 13 (freedoms of speech and press), § 15 (freedom of assembly and right to petition).

41. FLA. STAT. § 104.31 (1961).

advises a fellow employee to make a political contribution? Or is the penalty invalid unless the advice is given in a coercive context? Moving under the protective coloring of analogous federal decisions,<sup>42</sup> the Florida Supreme Court upheld an information charging defendant with giving simple advice.<sup>43</sup> Among several rationales, preservation of the "political purity" of public employees amply justified the court's conclusion.

In *State v. Smith*,<sup>44</sup> the court neatly sidestepped Supreme Court decisions<sup>45</sup> to save Florida Statute, section 447.04, which requires business agents to obtain a license before representing a union. The license requirement was construed so that it only applies to the functions of a business agent which are unrelated to collective bargaining. So construed the court found no "undue restraint" in the law on speech or assembly rights. This division of a union agent's profession into two independent facets (speech and business) could be questioned under federal constitutional requirements.<sup>46</sup> Since the agent will have to act for his union in both capacities, the license requirement will restrict his speech function as well as his non-speech or business function.

## II. PRESS

### A. *Obscenity and its Control*

Federal constitutional standards<sup>47</sup> defining state control of the "obscene" have not yet been articulated by the United States Supreme Court. Everyone patiently waits—courts, prosecutors, publishers, readers and so on—for Supreme Court clarification of the *Roth-Alberts* opinions.<sup>48</sup> In the meantime, unsophisticated interpretations of *Roth-Alberts* flood the reporters. We know that the First Amendment does not protect the "obscene." We do not know what the "obscene" is. The basic issue is whether the Supreme Court intended to thrust from constitutional protection only the so-called "hard-core" pornography, or whether literature outside of this pure "filth" has also been stripped of constitutional protection.<sup>49</sup>

42. E.g., *Ex parte Curtis*, 106 U.S. 371 (1882).

43. *State v. Stuler*, 122 So.2d 1 (Fla. 1960) (Hobson, J., concurring in the conclusion and judgment; Roberts, J., not participating in the decision). Freedom of assembly was argued also.

44. 123 So.2d 700 (Fla. 1960). At issue were U.S. CONST. art. VI, cl. 2 (supremacy clause); U.S. CONST. amends. I, XIV (freedoms of speech and assembly).

45. Insofar as *Hill v. Florida*, 325 U.S. 538 (1945) is concerned, the author will not comment; *Hill* involved a statutory pre-emption problem.

46. *Thomas v. Collins*, 323 U.S. 516 (1945), would seem to make the Florida Supreme Court's maneuver a somewhat uneasy one. However, *American Fed'n of Labor v. Mann*, 188 S.W.2d 276 (Tex. Civ. App. 1945), would seem to support the Florida court.

47. See note 40 *supra*.

48. *Roth v. United States and Alberts v. California*, 354 U.S. 476 (1957).

49. Whether material such as Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* is that which the Court will describe as "obscene" is the problem. Compare the *Tropics* with the material (for example, *Memoirs of a Spankee* and *Slaves of the Lash*) kept by the *Alberts* for sale, *supra* note 48.



Intertwined in this problem are others. What procedures are constitutionally necessary to determine the "obscene"? Must a jury be used, if requested? May the trial court decline an offer of expert testimony on the literary qualities of that which the state claims is "obscene"? Is it significant if the retailer sells to children as well as to adults? Does the intent of the seller or publisher make a constitutional difference? (For example, some material is purposely advertised for and sold to a limited audience of sexual deviates.) Is "obscene" material that which arouses an impure thought, or that which arouses an impure thought which is likely to be followed by unlawful action?

One comment might be made. Careful scholarship<sup>50</sup> indicates that at least a majority of the Justices on the Supreme Court will limit state power to regulate literature to the "hard-core" material. This definition of "obscene" will grant constitutional protection to relatively serious literary works, such as Miller's *Tropic of Cancer* and Wilson's *Memoirs of Hecate County*. It will deny constitutional sanctuary to "filth," published and sold to the sick of our society.<sup>51</sup> Certainly the Court will not deny literature to adult consumers because of the fear of a state (acting through a legislature, prosecutor, jury and judge) that its children's morals need protection.<sup>52</sup>

There are several recent Florida cases. *Tracey v. State*<sup>53</sup> construed Florida Statutes, section 847.01(1)(b) (1959), which made it unlawful to possess "obscene" material. Justice O'Connell's opinion declared the statute valid, against freedom of speech and press arguments. In view of a federal decision,<sup>54</sup> the court wisely required that the defendant have "knowledge of the obscene character of the materials possessed and sold." *Scienter*, therefore, is an essential element of the crime charged and must be alleged in the information and proven by the state at trial.<sup>55</sup>

50. See, e.g., Lockhart & McClure, *Censorship of Obscenity*, 45 MINN. L. REV. 5, 60 (1960).

51. The Court may even be limiting regulatory power beyond this strict standard. See *Manual Enterprises v. Day*, 82 Sup. Ct. 1432 (1962).

52. *Butler v. Michigan*, 352 U.S. 380 (1957). "Surely, this is to burn the house to roast the pig." *Id.* at 383.

53. 130 So.2d 605 (Fla. 1961). At issue were U.S. CONST. amends. I, XIV (freedoms of speech and press; procedural due process-clarity); FLA. CONST. OF RIGHTS § 12 (procedural due process-clarity), and § 13 (freedoms of speech and press). A second count charged the defendant with sale of an obscene book, prohibited by FLA. STAT. § 847.01(1) (1959). In the 1961 revision of Florida Statutes, the possession and sale prohibitions are found in §§ 847.011(2) and 847.011(1)(a) respectively.

54. *Smith v. California*, 361 U.S. 147 (1959).

55. Since the defendant apparently admitted possession with knowledge of the obscene character of the material, the difficult problem, raised in the *Smith* opinion, *supra* note 54, of how the state can prove "scienter", was not presented. Likewise, since the *Roth* case, *supra* note 48, charge ("obscene, lewd and lascivious") was used in this case, the court assumed that no real problem of due process clarity was raised. In *Cohen v. State*, 125 So.2d 560 (Fla. 1961) (Roberts, J., concurring specially), FLA. STAT. § 847.01(1) (1959), penalizing sale of any "obscene, lewd, lascivious, filthy, indecent, immoral, degrading, sadistic, masochistic or disgusting" book, magazine, etc., was upheld. The court required

The First District Court of Appeal, in an opinion<sup>56</sup> written by Associate Judge Mason, avoided research and analysis on several questions still unanswered since *Roth-Alberts*. Florida Statutes, section 847.01(1)(c) (1959) authorized state and county prosecuting officials to seek a declaratory judgment to determine whether "printed matter" was "obscene." If the circuit court answer was yes, that court entered an order under which one who sold or distributed the "printed matter" was guilty of a felony. Among the arguments pressed on the court by the defendant were the following:

- (1) Must a jury<sup>57</sup> decide the *Roth-Alberts* test for obscenity? ("whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to purient interest?")
- (2) Is it constitutionally necessary for the state to prove the "contemporary community standards in Duval County"?<sup>58</sup>
- (3) May the state penalize sale and distribution of literary endeavors which are peripheral to "hard-core pronography"?<sup>59</sup>

The First District Court of Appeal, with apparent ease, answered each question in line with the state's position.

Perhaps even more disturbing was this court's solution to another *Roth-Alberts* problem. In evaluating whether the material (the sale or distribution of which was the basis of the state's action) was, in fact, obscene, the First District Court of Appeal did not have the "exhibits" before it, as part of the record. The trial judge's conclusion apparently was final. The effect of this constitutional anomaly would seem to be as follows: (1) if the publisher or major distributor, to pose a likely case, of the literature in Florida is

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knowledge on the part of the seller here, also. Omission of this element in the information led the court to remand. Thoughtfully, from the state's point of view, the court relieved the state of the burden of proving that the seller had read the material sold; instead, conviction was authorized on circumstantial evidence. There may be some federal constitutional limits on this type of evidence. See *Smith v. California*, note 54 *supra*; *Manual Enterprises v. Day*, 82 Sup. Ct. 1432, 1440-41 (1962).

56. *Rachleff v. Mahon*, 124 So.2d 878 (Fla. App. 1960). At issue were U.S. CONST. amends. I, XIV (freedom of press) and procedural due process under one or both constitutions.

57. States Judge Mason: "We brush this argument aside . . . we know of no constitutional or statutory requirement of jury trial in this kind of declaratory decree proceeding . . ." The judge should have stopped with the statement that defendant waived jury trial. See the possibility suggested in Kalven, *The Metaphysics of the Law of Obscenity*, The 1960 Supreme Court Rev., p. 1, 38-40.

58. Judge Mason states that the trial judge can determine "the common conscience of the community." *Rachleff v. Mahon*, 124 So.2d 878, 881 (Fla. App. 1960). Again Judge Mason was aided by a failure of counsel—this time because the defense did not produce such testimony. Still, the problem merits thought. See *Manual Enterprises v. Day*, 82 Sup. Ct. 1432, 1436 (1962), for a recent Court comment on proof necessity.

59. Judge Mason states that it may do so, and the statute, as he interprets it, sustains his position. *Rachleff v. Mahon*, 124 So.2d 878, 882 (Fla. App. 1960). This court might well read the articulate opinion of the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681 (1961).

the defendant, a single circuit judge, manipulating the *Roth-Alberts* standard, apparently has the power to withdraw from Florida readers literature which, in his judgment, is obscene; (2) what is, in essence, a question of law and fact becomes a sacred one of fact, contrary, at least, to the practices of the majority of the Justices of the Supreme Court.<sup>60</sup>

If state, county and municipal authorities sought to curb only the so-called "hard-core" pornography, serious constitutional questions would not arise under *Roth-Alberts*. Traditional patterns of censorship in the United States indicate strongly that such will not be the case.<sup>61</sup> Unsophisticated censorship is not a seldom thing.<sup>62</sup>

### B. Invasion of Privacy and Libel

The Third District Court of Appeal balanced the right of an individual to privacy against the freedoms of speech and press<sup>63</sup> in a suit against a newspaper and writer for invasion of plaintiff's privacy. The inane<sup>64</sup> comment about the plaintiff by a gossip columnist led to provable injury and the item published involved neither a "public personage" nor information that was of "public interest." The complaint stated a cause of action.<sup>65</sup>

*Miami Herald v. Brautigam*<sup>66</sup> presents a more difficult freedom of press question. The Herald criticized in two editorial statements<sup>67</sup> the state

60. See Mr. Justice Black's cry in the wilderness. *Kingsley Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 690-91 (1959).

61. See, e.g., DOWNS, *THE FIRST FREEDOM*, 133-250 (1960).

62. See, e.g., Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938). It is rare that one reads literate judicial opinions in this area. For two very literate opinions, however, see District Judge Woolsey and Circuit Judge Augustus Hand, *United States v. Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933) and 72 F.2d 706 (2d Cir. 1934).

63. The opinion mentions these freedoms; however, no specific constitutional inhibitions are discussed.

64. "Wanna hear a sexy telephone voice? Call \_\_\_\_\_ and ask for Louise."

65. *Harms v. Miami Daily News*, 127 So.2d 715 (Fla. App. 1961). The decision would not seem to be injurious to legitimate press and reader relations. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) and Nizer, *Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941). Florida courts might consider another factor in testing such claims—whether or not the *purpose* of publication was to report news. See *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959).

66. 127 So.2d 718 (Fla. App. 1961) (Carroll, J., dissenting), *cert. denied*, 82 Sup. Ct. 828 (1962) (Black and Douglas, JJ., were of opinion that certiorari should be granted). At issue were U.S. CONST. amends. I, XIV (freedoms of speech and press); FLA. CONST. DECL. OF RIGHT § 13 (freedoms of speech and press).

67. One of the editorials reads as follows:

"Why Does State Attorney Muzzle The Grand Jury?

The Action of George A. Brautigam, state attorney, in throwing a road block in front of a hard-working, conscientious Grand Jury, raises two immediate questions: Is he afraid of something, or of someone? Is he trying to protect someone?

Neither may be the reason, but the State Attorney has invited both questions. The Grand Jury is the people's agency of investigation. It supplements the work of the State Attorney, who is the people's prosecutor in important cases.

His office, however, is not above the Grand Jury's attention. When the

attorney's efforts to suppress an interim report of the Dade County Grand Jury. In an action for libel, defenses were pleaded of truth, fair comment made in good faith and without malice, and privilege under the federal and state constitutions.

Subsequent to the publication, the Florida Supreme Court upheld Brautigam's motion to suppress and ordered the grand jury report expunged in *State ex rel. Brautigam v. Interim Report of Grand Jury*.<sup>68</sup> Then, before the supreme court validated his motion to suppress, the plaintiff was defeated in his bid for re-election as state's attorney.

The court dismissed the constitutional issues by apparently treating the freedoms of speech and press limitations as inapplicable to state court effectuation of private libel suits; that is to say, private law sanctions rather than public law sanctions were laid upon the press here.<sup>69</sup> Further, Florida libel law was described as requiring the press to publish the truth with a "high degree of care" demanded of the press.<sup>70</sup> The defense of fair comment was heavily restricted by the requirement that no comment can be fair if it is based on misstatement of fact.<sup>71</sup> The court further narrowed the fair comment defense by insistence that a newspaper is liable for imputing "one's motives, want of loyalty or misconduct in office" unless the newspaper can prove the absolute "truth" of the imputation. The burden of proof on the defense of "truth, plus good motives and fair comment" was placed upon the defendant. Since the jury returned a verdict of \$25,000.00 compensatory damages and \$75,000.00 punitive damages, the impact of this decision on what Florida subscribers will read in local newspapers is fairly obvious. Libel experts will now advise that, for example, the words in one of the editorials "Is he trying to protect someone?" be weak-

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State Attorney and the Grand Jury are in conflict, as in this instance, the people's rights are in jeopardy. In asking Judges [sic] Robert L. Floyd of Circuit Court to withhold the jury's report, Brautigam is off the track of his public responsibility. We think the judge should have told him so instead of granting his request.

As Long as Brautigam stands in the untenable position of asking the court to keep the jury's findings from the people he invites suspicion. He can remove it only by reversing his course; By making available to the people, who have the right to know, what the Grand Jury has uncovered. As it stands, Brautigam, the man the people elected to represent them, has run out on them.

Who will speak for the people in Judge Floyd's court Monday?"

68. 93 So.2d 99 (Fla. 1957).

69. This may be a questionable basis for decision. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953). The approach of the Court in *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), would, of course, sustain the Florida court's action. The problem is whether state court enforcement of "private" libel law can be official governmental action limited by the First and Fourteenth Amendments.

70. *Bailey v. Alabama*, 219 U.S. 219 (1911), indicates, in another context, how evidentiary evaluation requirements can shade into constitutional problems.

71. The court accepted RESTATEMENT, TORTS § 606 (1938) (Privileged Criticism) but not the extension thereof. See § 607, comment c at 280, concerning public officers—"honest criticism even though it be extravagant and unjustified."

ened drastically. Florida courts will, apparently, hold harmless the editorial writer "who adds to the recital (of 'facts') a little touch by his piquant pen." Those newspaper readers who enjoy their editorials on the rocks will now receive them in the sweet syrup of "slight irony" or "delightful touches of style" (quotes by the court).

Judge Carroll's dissent thrust to the heart of the case. The trial court judge had permitted the opinion of the Florida Supreme Court, in the *Interim Report of Grand Jury* decision, to be entered into evidence by the plaintiff and argued to the jury. That decision supported, even commended, Brautigam's action to suppress the grand jury report. At the time of the Herald's editorials, the legality of Brautigam's action had not been determined by the Florida Supreme Court. Judge Carroll believed that the defense of fair comment was "doomed" once the jury understood that Brautigam's actions *were* legal, even though the decision determining the legality of Brautigam's actions was rendered subsequent to the Herald's comments. To put it another way, no attorney could have advised the Herald that Brautigam's actions were within the law when the Herald spoke. To Judge Carroll, whether publications are libelous is to be judged as of the "time and surrounding circumstances when they were made." The effect was to impose "absolute liability" if dishonorable or corrupt motives are imputed, regardless if the "facts" are not necessarily untruthful at the time of publication.<sup>72</sup> In stripping the Herald of "its shell of fair comment" the court may have violated the press's freedom of speech and press.<sup>73</sup>

### III. ASSEMBLY<sup>74</sup>

#### A. Legislative Investigations

In *Graham v. Florida Legislative Investigation Comm.*<sup>75</sup> the critical question put to the Reverend Graham by the committee was "Are you a member of the N.A.A.C.P.?" The case arose out of a proceeding to adjudge the witness in contempt of a circuit court for refusal to answer the legislative committee's question. Record testimony indicated possible reprisals against any "known active leader of N.A.A.C.P.," amply demonstrating that a severe impact on freedom of assembly follows such public disclosure. Justice Thornal's opinion properly required the state to prove a

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72. This would not seem to be in line with the Restatement view: "reasonable grounds" for belief of publisher would seem to be a defense in the present case. See RESTATEMENT, TORTS § 601 (1938).

73. Denial of certiorari, at least in theory, has little legal significance. See Mr. Justice Frankfurter's opinion in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950). Strangely, see note 66 *supra*, in our present case, two Justices of the Supreme Court noted their view that certiorari should have been granted.

74. A recent and interesting essay on the state and federal cases is ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961).

75. 126 So.2d 133 (Fla. 1960). At issue were U.S. CONST. amends. I, XIV (freedoms of speech and assembly).

"necessity for disclosure of membership by this witness," a "showing that the State labors under a compelling and pressing need for the information." The "burden" of proof was placed upon the state, which is probably another way of saying that the presumption of validity does not assist the state when frustration of a First Amendment freedom is pleaded.<sup>76</sup>

If Graham answered the question the state would gain nothing but an admission that he associated with an "organization perfectly legitimate but allegedly unpopular in the community." The record rationale for requiring the answer fell in the constitutional category of *N.A.A.C.P. v. Alabama*<sup>77</sup> and *Bates v. City of Little Rock*.<sup>78</sup> The Florida Supreme Court properly reversed the circuit court order adjudging Graham in contempt.

The Florida court came to a contrary conclusion in *Gibson v. Florida Legislative Investigating Comm.*<sup>79</sup> Justice Thornal, in a highly sophisticated opinion, may have captained this cruise of his court to the constitutional safety of *Uphaus v. Wyman*,<sup>80</sup> steering a course between the horns of the dilemma created by *N.A.A.C.P. v. Alabama* and *Sweezy v. New Hampshire*.<sup>81</sup> Then, again, he may not; the issue will probably be decided during the Supreme Court's present term.

Gibson was the president of a local N.A.A.C.P. branch; he was ordered by a circuit court to bring the local's membership list in order to answer committee questions. The questions required his answers as to whether certain persons, *already identified by other witnesses before the committee as communists*, were members of the N.A.A.C.P. Gibson refused to refer to the membership list in order to answer. In other words, Justice Thornal may have found the "impelling public need (for the information) that justifies subordinating the constitutionally assured private right (freedoms of speech and assembly) to the exercise of governmental power." And he could cite, among other decisions of the Supreme Court, *Uphaus v. Wyman* to support his court's thesis that governmental inquiries about communists, in view of the violence inherent in their objectives, weigh heavier on the constitutional scales than the First Amendment freedoms of speech and assembly.

On the other hand, this legislative thrust at the N.A.A.C.P. may well be frustrated on review by the Supreme Court. Even the *Uphaus* language

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76. See Justice Rutledge's language in *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

77. 357 U.S. 449 (1958).

78. 361 U.S. 516 (1960).

79. 126 So.2d 129 (Fla. 1961), restored to calendar of United States Supreme Court, 31 U.S.L. WEEK 3001 (1962). At issue were U.S. CONST. amends. I, XIV (speech and assembly).

80. 360 U.S. 72 (1959).

81. 354 U.S. 234 (1957) (insofar as the First Amendment issue is concerned).

may justify this result.<sup>82</sup> At any rate, Justice Thornal has given the Supreme Court an opinion which may sharply divide that Court's members.<sup>83</sup>

### B. Public Employment Requirements<sup>84</sup>

#### PUBLIC SCHOOL TEACHERS<sup>85</sup>

The Florida Supreme Court upheld the validity of a statute requiring a loyalty oath<sup>86</sup> in a suit brought by a public school teacher. Since the court had already construed<sup>87</sup> the statutory oath to reach only "knowing" membership in proscribed organizations, no support<sup>88</sup> apparently<sup>89</sup> remained in federal or state constitutional law to bolster the teacher's several constitutional arguments. The freedom of speech and assembly hurdles were not difficult for the Florida court.<sup>90</sup>

#### BOARD OF CONTROL EMPLOYEES<sup>91</sup>

In *Jones v. Board of Control*<sup>92</sup> the court validated a Board of Control

82. Justice Clark's opinion, see note 80 *supra*, requires that the state demonstrate a "nexus" between the suspect organization and "subversive activities." In *Gibson*, Florida may not have made this demonstration; the record showed that an "investigator" identified fourteen people by name and Communist Party membership card number. He testified that the fourteen "had been known to have participated" in the Miami branch of the N.A.A.C.P. In *Uphaus*, the state proved that "World Fellowship" (suspect organization) was related to "subversive" activities. This probably was impossible for the state to prove about the N.A.A.C.P. in *Gibson*.

83. In *Uphaus*, *supra* note 80, there were four dissenting Justices (each presently on the Court).

84. Much has been written on public employment requirements which involve constitutional issues. See, e.g., GELLHORN, *THE STATES AND SUBVERSION* (1952) (some of this relates to our problem); Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. 233 (1947); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916) (equal protection possibilities); Comment, *Constitutionality of State Legislation Affecting Public Employees*, 18 GEO. WASH. L. REV. 541 (1950).

85. See generally HAMILTON & MORT, *THE LAW AND PUBLIC EDUCATION* (1959).

86. *Cramp v. Board of Pub. Instruction*, 125 So.2d 554 (Fla. 1960), *rev'd*, 82 Sup. Ct. 275 (1961) (clarity requirement of due process, under U.S. CONST. amend. XIV). At issue in the Florida opinion were FLA. CONST. art. XVI, § 2 (oath of state officials); FLA. CONST. DECL. OF RIGHTS §§ 13 (speech), 15 (assembly); U.S. CONST. amends. I and XIV (freedoms of speech and assembly); U.S. CONST. art. I, § 10 (bill of attainder and ex post facto clauses); and U.S. CONST. amend. XIV (due process clarity requirement). Florida due process clarity requirements may also be in issue.

87. *State v. Diez*, 97 So.2d 105 (Fla. 1957).

88. *Wieman v. Updegraff*, 344 U.S. 183 (1952), probably requires nothing more.

89. Except that the oath was unconstitutionally vague; *Cramp v. Board of Pub. Instruction*, 82 Sup. Ct. 275 (1961). The Supreme Court's opinion *does* have a First Amendment flavor to it, however.

90. Among other federal decisions, *Adler v. Board of Educ.* 342 U.S. 485 (1952), may leave relatively limited areas in which teachers can still argue their First Amendment freedoms.

91. For an interesting treatment of some of the higher education problems, see BYSE & JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* (1959).

92. 131 So.2d 713 (Fla. 1961). At issue were U.S. CONST. amends. I, XIV (freedom of speech and association or assembly), XIV (administrative procedural due process and substantive due process); FLA. CONST. DECL. OF RIGHTS §§ 13, 15 (freedoms of speech and assembly), 12 (administrative procedural due process and substantive due process).

rule prohibiting university employees from seeking election to public office. The Board fired Professor Jones, during his term contract period, for running for the office of circuit judge. Jones sued for breach of contract, alleging invalidity of the Board's rule. The federal and state freedoms of speech and assembly, as they uniquely merge into an "academic freedom" when pleaded by a teacher, were argued by the plaintiff.

The court stated that it weighed the interests of the state in effectuating the rule against the rule's impact on the teaching profession's "academic freedom" and validated. Few today would deny the propriety of the rule as imposed upon the policeman<sup>93</sup> or mint roller.<sup>94</sup> The unusual relationship, in an intellectual community, between the teacher and the student, noted<sup>95</sup> in recent opinions of the Supreme Court did not dissuade the Florida court from vitiating the presumption of validity, even though the First Amendment freedoms were pleaded.<sup>96</sup> The court, however, was not directly bound by Supreme Court precedents and could, with constitutional propriety, follow the course it chose.<sup>97</sup> One can surmise that there are, at least, some federal constitutional limitations on state control of teachers' political activities.<sup>98</sup>

#### IV. RELIGION<sup>99</sup>

The court crippled the latest legislative endeavor to pass a valid Sunday closing law.<sup>100</sup> It is the authors' opinion, and probably also that of the members of the legislature, that it is not possible to write a valid Sunday closing law in Florida.<sup>101</sup> Admitting that the legislature can close Sunday businesses, to require a day of enforced rest without violating the "Wall" principle, the court this time, chose substantive due process and equal pro-

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93. *McAulliffe v. Mayor of City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

94. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

95. See *Shelton v. Tucker*, 364 U.S. 479 (1960) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

96. See note 94 *supra*.

97. For example, *Adler v. Board of Educ.*, 342 U.S. 485 (1952), plows a wide furrow through academic freedom arguments.

98. See note 95 *supra*.

99. See Paulsen, *State Constitution, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951).

100. *Moore v. Thompson*, 126 So.2d 543 (Fla. 1961) (Terrell and Roberts, JJ., dissenting). At issue were U.S. CONST. amends. I, XIV (separation of church and state); FLA. CONST. DECL. OF RIGHTS § 5 (same); U.S. CONST. amend. XIV (substantive due process and equal protection—read dissents); FLA. CONST. DECL. OF RIGHTS §§ 1 (equal protection), 12 (substantive due process); FLA. CONST. art. III, §§ 1 (legislative power), 16 (legislative title requirements). See *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); and *McGowan v. Maryland*, 366 U.S. 420 (1961), for the federal viewpoint toward Sunday closing laws.

101. See Alloway, *Florida Constitutional Law*, 14 U. MIAMI L. REV. 501, 514 (1960).



tection, under the Florida Constitution,<sup>102</sup> as its constitutional satellites from whence to strike.

In another case, taxpayer-parents sued public school officials for injunctive relief against distribution of the King James version of the Bible in public schools.<sup>103</sup> The Gideons had enlarged their distribution from hotel rooms to school rooms. The court of appeal held that the complaint stated a cause of action. Its basis was that distribution of this religious work in public schools violated the requirement of a "wall of separation" of church and state and demonstrated a state "preference" for one branch of religion. The opinion pointed out, in connection with the latter point, that "Protestant groups" might well show sectarian resentment if the Koran had been distributed.

*Southside Estates Baptist Church v. Board of Trustees*<sup>104</sup> involved the use of public school buildings for religious meetings. The Florida Supreme Court validated the usage because it was temporary in nature, to end when church buildings under construction were finished. Further, the usage was during "Sunday non-school hours." Since no sect had been denied the school building, no "preference" was found. Use of public property by churches in Florida does not seem curbed by our local constitutional law, as construed by Florida courts.<sup>105</sup>

## SUBSTANTIVE DUE PROCESS<sup>106</sup>

### I. INTRODUCTION

Substantive due process is the major constitutional vehicle utilized by the Florida Supreme Court to deny to the state the power to take or regulate life, liberty or property. This constitutional inhibition does not relate to the procedures necessary to take or regulate, but rather to the validity of the exercise of state power, as such. Traditionally, the Florida Supreme Court categorizes substantive due process as a problem relating to the breadth of the state "police power." Under Florida due process, the "police power" must be related to the "health, safety, morals or general welfare" of Florida's citizens. Generally speaking, this issue in Florida constitutional

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102. It is difficult, from the opinion, to determine which constitutions are involved and whether the invalidation is under substantive due process and/or equal protection requirements.

103. *Brown v. Orange County Bd. of Pub. Instruction*, 128 So.2d 181 (Fla. App. 1960), cert. denied, 129 So.2d 141 (Fla. 1961). At issue were FLA. CONST. DECL. OF RIGHTS § 6 (no "religious preference") and U.S. CONST. amends. I, XIV (freedom of religion). The decision is in line with *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), appeal dismissed, 348 U.S. 816 (1954).

104. 115 So.2d 697 (Fla. 1959). At issue were FLA. CONST. DECL. OF RIGHTS § 6 (religious preference); U.S. CONST. amends. I, XIV (freedom of religion).

105. See, e.g., *Koerner v. Borck*, 100 So.2d 398 (Fla. 1958).

106. See generally Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. REV. 226 (1958).

law is raised procedurally by causes of action which allow Florida courts to evaluate in de novo fashion, the factual basis for the necessity or reasonableness of the legislative police power activity. Florida courts, at least in theory, grant judicial grace to the legislative department by means of a "presumption of validity." This "presumption," however, has had an uneasy career in Florida.<sup>107</sup>

In theory, of course, a general police power is granted under our state constitution to the legislature. In practice, Florida courts tend to break the general police power into the traditional facets—safety regulations, zoning requirements, eminent domain and so on. This section will track the Florida court categories of the state police power.

## II. REGULATION OF BUSINESSES AFFECTED WITH A PUBLIC INTEREST<sup>108</sup>

Using substantive due process as the criterion, the Florida Supreme Court generally authorizes the legislature a greater amount of freedom to regulate so-called businesses "affected with a public interest," than those classified otherwise.

Normally, the court has permitted the Florida legislature to heavily regulate both transportation and communication companies in the state, both as to rates and practices. In *Greyhound Corp. v. Carter*<sup>109</sup> the Railroad Commission had denied the petition of the Greyhound Corporation to discontinue scheduled routes between Cedar Key and Gainesville. The court noted that if the company were permitted to abandon the service the result would be to completely deprive a number of communities of all public transportation facilities. The testimony was "quite clear that many people live in the affected area who do not own automobiles." The petitioner's evidence was "woefully inadequate to meet its burden of showing material adverse effect on its overall operation or financial structure on the operation of this line." The court stated that in order to abandon such a public service it was necessary that the transportation company show not only that the facility is operated at a loss but that the loss affects substantially the overall operation of the company.

Substantive due process requirements disallow a state regulatory agency

107. Compare, e.g., *Smith v. Ervin*, 64 So.2d 166, 169 (Fla. 1953) with *Miami Springs v. Scoville*, 81 So.2d 188 (Fla. 1955).

108. See McAllister, *Lord Hale and Businesses Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930). For a more recent treatment, see Paulsen, *Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 94 (1950).

109. 131 So.2d 735 (Fla. 1961) (Hobson, J., concurring specially in judgment; Roberts, J., concurring in judgment). At issue, probably, was FLA. CONST. DECL. OF RIGHTS § 12 (substantive due process). The case may simply relate to a statutory construction point.

from fixing a rate structure for a corporation, affected with the public interest, which is confiscatory in nature. The court took the view that it is the overall operation that furnishes the proper factors used by the regulatory agencies in fixing lawful charges for the use of the company facilities. The court noted that terminal points in public service lines are often operated at a loss. However, a state may require that this occasionally occur as part of the service expected of those who hold "public, or quasi-public, monopolies to promote the development and expansion of outlying and marginal areas."<sup>110</sup>

In *General Tel. Co. v. Carter*,<sup>111</sup> the Florida court took a position which apparently, but not really, was somewhat contrary to its position in the *Greyhound* case. The petitioning telephone company was a Florida corporation conducting a general telephone business in the state, including local and long distance telephone service. Petitioner also provided long distance telephone service outside of the territory it serviced, through its connections with other companies within Florida and other states. The petitioner filed a petition with the Florida Railroad and Public Utilities Commission requesting authority to increase its intrastate rates by an amount which would raise its rate of return to "not less than 7.25% per annum on its net investment of its property devoted to intrastate telephone service." After hearings, the Commission made an order incorporating the following findings: (1) a rate base of \$88,658,381.00 represents the reasonable value of the petitioner's property upon which it is entitled to earn a fair and reasonable return; (2) a return of 6.68% on the above rate base constitutes a fair and reasonable return on petitioner's property.

Petitioner requested a reconsideration and the Commission issued a new order. This order gave the utility a net operating income of "slightly more than 6.55% on its *intrastate* (italics added) exchange rate base of \$68,004,934.00." The second order specifically found that a return of 6.55% was not confiscatory in nature. The petitioner sought court review of the orders.

The court agreed with the petitioner that the Commission erred when it based the percentage increase granted on the "system" rate base. This followed, the court believed, because this method of calculation amounted to a consideration of the petitioner's "interstate property, operating expenses and revenues in determining the reasonableness of intrastate telephone rates." The Commission could not use the "system" figure of \$88,658,381.00

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110. Particular constitutional standards which bind the regulatory agency in fixing rates are difficult to ascertain. See Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 COLUM. L. REV. 488 (1944).

111. 115 So.2d 554 (Fla. 1959). At issue, although not cited precisely, were U.S. CONST. art. I, § 8 (interstate commerce clause) and FLA. CONST. DECL. OF RIGHTS § 12 (substantive due process—fair return).

and apply it to the 6.68% rate of return. The reason? The court believed itself bound by federal decisions stating that where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed 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 its interstate business. On the other hand, the carrier cannot justify unreasonably high rates on the domestic business because only in that way it is able to meet its losses on an interstate business.<sup>112</sup>

Therefore in fixing rates the Commission must, where a corporation does both an intrastate and an interstate business, separate the corporation's capital devoted to the independent spheres of commerce. However, the court found that the Commission had rectified its error in the first order and, in the second order, had made the requisite separation, finding that a return of 6.55% on the intrastate rate base of \$68,004,934.00 was a "just and reasonable rate of return."

The court in *General Tel. Co.* again authorized the regulatory commissions and agencies to follow such accounting methods as they may choose so long as the "end result" of such methods is the establishment of a just and reasonable rate. Introduction of the interstate commerce clause issue, in the *General Tel. Co.* case, easily distinguishes it from the *Greyhound* case. Certainly as to due process requirements of a "fair return," the cases are not at constitutional odds.

#### IV. SPENDING, DISPOSING AND BORROWING POWERS

At times the Florida Supreme Court uses the Florida Constitution, article IX, section 10,<sup>113</sup> as a vehicle to articulate the so-called public purpose doctrine (*i.e.*, the state must tax, spend, etc. for a public, as opposed to a private, purpose); likewise, from time to time, the court uses substantive due process. For convenience the author has classified *State v. Suwannee County Dev. Authority*,<sup>114</sup> as a facet of substantive due process.

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112. Citing, *e.g.*, *Simpson v. Shepard*, 230 U.S. 352 (1913). The Florida court's interpretation of federal requirements may be too inflexible; see generally Freeman, *An "Enlightened Judgment" Approach to Rate of Return*, 61 HARV. L. REV. 1380 (1948).

113. It reads as follows: "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 to loan its credit to, any corporation, association, institution, or individual."

114. 122 So.2d 190 (Fla. 1960) (Thornal, J., concurring specially; Terrell, J., dissenting; Roberts, J., hearing the argument but not participating in the decision), *appeal dismissed*, 132 So.2d 289 (Fla. 1961).

In the *Suwannee County* case, the state appealed from a final decree validating revenue anticipation certificates in the amount of \$100,000, proposed to be issued by the Suwannee County Development Authority. The Authority was created by a special act of the legislature "for the purpose of performing such acts as shall be necessary for the sound planning for, and development of Suwannee County."<sup>115</sup> It was empowered to "acquire real estate, to construct projects on such property and to lease or make contracts with respect to the use or disposition of same in any manner the Authority deems to its best advantage." "Project" was defined to mean the "acquisition of lands, properties and improvements for development, expansion and promotion of industry, commerce, agriculture, natural resources" and so forth and the "construction of buildings and plants for the purpose of selling, leasing or renting" to private persons or corporations. The Authority was granted the power to issue revenue anticipation certificates to pay for all or any part of the cost of its projects. By another act the legislature established a revolving fund for the Authority and directed the Board of County Commissioners to pay into the fund, from the county's share of race track funds, a certain amount of money each year for three years.

The constitutional issue in the case was whether or not the use of the proceeds from sale of the certificates for the purchase of land and construction of buildings thereon, for use by private enterprise, was a "public" or "private" purpose. The evidence entered by members of the Authority showed that the proceeds from the certificates would be used to purchase land, and construct buildings on it, to lease to private industry (which the Authority hoped to bring into the county). The Authority members did not present testimony about a *specific* program involving particular industries and particular lands and buildings. On this evidence a majority of the court held that the certificate proceeds would be used for a private rather than a public purpose.

The court distinguished the 1958 decision, *State v. Cotney*,<sup>116</sup> on the following factors: (1) no proposed issue of revenue certificates was before the court in that case; (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 *Cotney* record to show that the leasing or selling to private enterprise "for private use" of a portion of the lands was the "primary purpose" for the acquisition of the land.

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115. Fla. Laws 1959, ch. 59-1903.

116. 104 So.2d 346 (Fla. 1958).

On these facts the court stated that *Cotney* held that the private use was only "incident" to the total plan of the Authority. Reading the two decisions together it would seem that the test is that the "private use" must be "only incidental to a public purpose," when public benefits in Florida are granted to private entrepreneurs.

A possible path to constitutional safety for such development authorities was given by the court when it complained that no description was given of the specific program, by the Authority, to be financed by the certificates. The court requested that the description, to be incorporated in the petition to validate the certificates, should be sufficiently detailed to enable the public and the state to determine whether the issuing agency can lawfully expend public monies therefor (*i.e.*, whether the court's test, above, is met). These words have particular significance in view of Justice Thornal's concurring opinion. The justice stated that the testimony of the members of the Authority was "entirely speculative as to how or for what purpose the revenue bond proceeds will be used." He interpreted the opinion of the majority to hold that the construction and leasing of a warehouse to private concerns would in all events be illegal. He was not willing to go this far, but he did desire evidence "showing" that the money to be borrowed will be used for "the public purpose" contemplated by the authorizing statute.

Justice Terrell's dissent flatly determined that the proposed use of funds from the sale of certificates would be for a public purpose. Justice Terrell's position, unlike that of a majority of his colleagues, would seem to be in this century in constitutional law.<sup>117</sup> He carefully described the history of Suwannee County, which in many ways is a disturbing one. Suwannee has enjoyed a slowly decreasing economy. To use his words, it is "apparent that the economy of Suwannee County had gotten in a bad way. Its people were casting about for means to revive it. They adopted the plan defined in [the special act] . . . It is, of course, an experiment but if the means employed are lawful, it is not within the province of this court to say nay."<sup>118</sup>

#### V. ZONING POWER<sup>119</sup>

In general, the Florida courts have granted, under substantive due process standards, a healthy range of discretion to zoning officials whose orders and regulations affect property values. The zoning requirement

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117. See, *e.g.*, the approach of the Court of Appeals of New York to the public purpose, or use, doctrine in *Cannata v. City of New York*, 11 N.Y.2d 210, 227 N.Y.S.2d 903 (1962) (powers to condemn, and dispose of, property).

118. 122 So.2d at 198.

119. The impact on state appellate courts of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) has not been as great as one would think. See, *e.g.*, Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955).

must necessarily be not "unreasonable" as applied to the property in question;<sup>120</sup> but a zoning ordinance is presumptively valid "so that the appellant . . . assumes the 'extraordinary' burden" of proving the ordinance invalid.<sup>121</sup> Further, "the courts do not have the right . . . to substitute their judgment . . . where the question [of reasonableness, undoubtedly] is fairly debatable."<sup>122</sup>

*City of Sarasota v. Sunad, Inc.*,<sup>123</sup> is typical of recent Florida opinions following the above standards. A company in the poster panel business sued for declaratory decree to determine the validity of part of a city poster ordinance. The plaintiff argued against the validity of the ordinance provisions "limiting the size of signs to 180 sq. ft., prohibiting combustible material on poster panels in fire zones 1 and 2 of the City of Sarasota and requiring the removal or alteration of signs not meeting the requirements of the ordinance."<sup>124</sup> Apparently the substantive due process argument of the plaintiff was that Sarasota is not a city which is authorized, under decisions of the Florida Supreme Court<sup>125</sup> to zone for aesthetic considerations. The Second District Court of Appeal noted that the city charter indicated a legislative finding that Sarasota is a city which needs to zone for aesthetic considerations. Further, the city had introduced evidence and argument that Sarasota is a city in the same general position as Miami Beach, a city already determined by the court to be in a proper posture to utilize aesthetic zoning.<sup>126</sup> Manipulating the normal constitutional standards related above, the district court of appeal came to the conclusion that the zoning requirement at issue was valid. In other words the court easily found that the zoning requirement promoted the health, safety, morals, and general welfare of the public.<sup>127</sup>

In other decisions<sup>128</sup> Florida courts did not follow their own rules for the guidance of their review of zoning requirements, under substantive due

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120. *Mayer v. Dade County*, 82 So.2d 513, 519 (Fla. 1955).

121. *Miami Beach United Lutheran Church v. City of Miami Beach*, 82 So.2d 880, 882 (Fla. 1955).

122. *City of Miami Beach v. Wiesen*, 86 So.2d 442, 444 (Fla. 1956).

123. 114 So.2d 377 (Fla. App. 1959) (difficult to state which constitution is in issue; also an equal protection argument). See note 138 *infra*.

124. *Id.* at 378.

125. *E.g.*, see *City of Miami Beach v. Ocean & Inland Co.*, 3 So.2d 364 (Fla. 1941).

126. *Id.* at 367.

127. Apparently using the same standards, the supreme court disagreed on the merits and quashed the decision of the district court of appeal. *Sunad, Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960) (Drew, Thomal and O'Connell, JJ., dissenting). The supreme court may have given only "lip-service" to its own standards. Of like tenor are such cases as *Town of Bay Harbor Islands v. Burk*, 114 So.2d 225 (Fla. App. 1959), which follow the required standards of the supreme court in deciding substantive due process and equal protection issues related to zoning (both constitutions).

128. See, *e.g.*, *Fox v. Bancroft Hotel Assoc.*, 128 So.2d 771 (Fla. App. 1961). At issue was substantive due process (FLA. CONST. DECL. OF RIGHTS § 12 was not specifically cited, however). The case also has an equal protection flavor.

process. For example, in one case<sup>129</sup> a Miami Beach ordinance prohibited the use of a stove, hot-plate or like device in any single family unit, containing less than 400 square feet of space. A hotel, which owned and operated 150 rooms on Collins Avenue, Miami Beach, sued to invalidate the ordinance as applied to it. Strangely, the court took into account

the identity of the protagonists for the enactment and enforcement of this ordinance, namely, the Miami Beach Apartment Association, the contents of the minutes of the city Council of Miami Beach concerning this ordinance, the arbitrary and nowhere justified criteria of four hundred (400) square feet of floor space, the limited application of the ordinance, the effect of the ordinance upon competing groups in the tourist accommodation business, the . . . fact that the ordinance cannot be reasonably related to the police power<sup>130</sup>

and found that it was "patent and beyond real debate that the sole aim of the ordinance was to interfere with business competition and the operation of natural economic laws in a discriminatory manner."<sup>131</sup> While the invalidating factor of economic regulation is a proper one under Florida decisions<sup>132</sup> for the courts to consider, the Third District Court of Appeal's decision would not seem to have utilized the required standards of the supreme court in determining the validity of this zoning requirement under substantive due process.<sup>133</sup>

#### VI. EMINENT DOMAIN<sup>134</sup>

Since *Adams v. Housing Authority of City of Daytona Beach*<sup>135</sup> it has been impossible for local Florida governments to acquire a depressed area, plan a proper development for the area, rezone under that plan and sell or lease the project to private enterprise for usage in line with the new zoning. The theory of the *Adams* case was that the police power, aided by eminent domain, is restricted to a "public use." The court admitted that the police power, exercised by way of a regulatory requirement, can be utilized to abate a local area's slums. Such ailments can be abated by ordering discontinuance as a nuisance, or by condemnation of the slum housing under eminent domain, which may leave the land to be developed again by the same owners who originally permitted it to disintegrate. The key to the *Adams* case seemed to be that the state's eminent domain power must be utilized for

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129. *Id.*

130. *Id.* at 773.

131. *Ibid.*

132. See Alloway, *Florida Constitutional Law*, 12 U. MIAMI L. REV. 288, 302 (1958).

133. See notes 120-122 *supra*.

134. See generally *Urban Renewal*, 72 HARV. L. REV. 504 (1959).

135. 60 So.2d 663 (Fla. 1952).



a "public use" or a "public purpose," and such a public use or purpose will not be found by the court when property is taken by eminent domain, rezoned and sold or leased to private enterprise for development under a new plan. The effect of the decision was to deny to local Florida government federal monies authorized for urban renewal programs; in essence, this has meant an end to major slum clearance projects in our Florida cities.

In a 1959 decision, *Grubstein v. Urban Renewal Agency*,<sup>136</sup> a fairly good-sized hole was blasted through this constitutional dam. Involved in the case was an urban renewal law, a special act applicable to Tampa providing for the clearing and redevelopment of slum and blighted areas legislatively declared to exist in the city. A property owner sued to enjoin Tampa's Urban Renewal Agency from proceeding with a project covering an area in which the plaintiff owned property. The plaintiff proceeded with a galaxy of constitutional arguments.<sup>137</sup>

Tampa approved a plan for the clearance and redevelopment of a slum area within the city comprising some forty acres. The redevelopment plan contemplated the replatting of the entire area and the laying out of an entirely new street plan, including the closing off of some existing streets. The area would be returned primarily to residential use, consistent with the residential areas adjoining the project area with the remainder thereof to be devoted to neighborhood commercial uses necessary to serve the residents and to general commercial uses. For present purposes this discussion will be limited to the substantive due process issue—whether or not the eminent domain power of this state was being utilized for a public use or a public purpose.

The trial court's findings of fact may be summarized as follows: (1) the project area was a slum or blighted area which was a breeding place of disease and crime, requiring a disproportionate expenditure of public funds to preserve the public health and prevent crime, fire, accidents, and to supply public services to the residents of the area; further, that the tax income to the city, county and state was out of proportion to the amounts of public funds required to be expended in servicing the area and that nationally, where slums have been eradicated and the area redeveloped, the tax income accruing has been approximately seven times greater than when the area was a slum; (2) the police power of the city was definitely inadequate

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136. 115 So.2d 745 (Fla. 1959) (Thomas, C.J., and Drew and O'Connell, JJ, dissenting). At issue were FLA. CONST. DECL. OF RIGHTS § 1, 12 (substantive due process); FLA. CONST. art. IX, §§ 5 (taxes for county and city purposes), 10 (credit of state not to be loaned); FLA. CONST. art. XVI, § 29 (condemnation and compensation).

137. See note 136 *supra*. He attacked the Urban Renewal Law as "violative of his right to acquire, possess and protect property, as an unauthorized taking of private property for private use, and as an unauthorized expenditure of public funds for private use and gain, contrary to the provisions of §§ 1 and 12, Declaration of Rights, §§ 5 and 10 of Article 9, and § 29 of Article 16, of the Florida Constitution . . ." *Id.* at 746.

to accomplish the removal or elimination of the slum conditions because the area was so deteriorated that mere conservation methods would not accomplish the elimination of slum conditions; the complete replatting and redevelopment of the land on an area-wide basis was the only feasible method of slum elimination; (3) private enterprise could not accomplish redevelopment of the area because of the diversity of ownerships and the inability of one or more private organizations to obtain all the parcels therein without the power of eminent domain; in fact, such an endeavor would not have been profitable for private enterprise to undertake; (4) the project when completed would fit into the city's general plans of development, improve traffic and safety conditions in the area, and eliminate the blighted area in question with its disease, crime, fire hazard and other problems growing out of slum conditions; (5) finally, that the project would materially benefit, protect, and conserve the health, safety, morals and general welfare of all citizens of the city.

First, the court stated that the police power objective, aided by use of the eminent domain power, must be utilized for a "public purpose." Such a public purpose exists when the police power is used to clear slum areas and construct low-rental public housing thereon, or when it is used to condemn slum areas and provide thereafter for private development. In either instance the 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 purpose of this law, therefore, was stated to be a "public" one.

The court, without actually deciding that it was necessary to do so, went on to discuss whether it was also necessary to find that the eminent domain power is used in aid of a "public use" as well as a "public purpose." Certainly, the court indicated, ownership of a cleared slum area which remains in public hands, with public housing constructed thereon, even though the eminent domain power was used to obtain the property, is a "public use" of the property. No constitutional difference was seen in an urban renewal law. The court indicated that even though incidental benefits will enure to private individuals or corporations under an urban renewal law if slum clearance is the dominant or primary purpose of the enactment, and redevelopment (by private enterprise) of the cleared property is the subordinate purpose linked to the primary purpose by the necessity of preventing the recurrence of the slum condition, the plan of slum clearance and redevelopment may be said to be for a public use.

Under the definition<sup>138</sup> given to the words "public use," the Florida

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138. "A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property

courts will have a great deal of discretion in determining what is and what is not a "public use." However, with such urban renewal laws the court did establish two important requirements: (1) testimony by the local government in the trial court must indicate that "slum" clearance is very necessary and is the purpose or objective of the entire project; (2) the evidence should also demonstrate that the major purpose of the slum clearance and redevelopment is for the public benefit, as opposed to private benefit.<sup>139</sup>

Insofar as the *Adams* opinion is concerned, the court definitely overruled *Adams* to the extent that that decision dealt with "a slum" area not shown to be reasonably necessary to take under the power of eminent domain to conserve the public health, safety, morals or general welfare. However, insofar as a "blighted" area is concerned, the *Adams* opinion apparently is still good law. In opinion context, a "blighted" area would seem to be one which local government believes could be used in a more efficient or economical manner.<sup>140</sup>

Recently the First District Court of Appeal,<sup>141</sup> accepted part of the test for "public purpose" in the *Grubstein* case. Property owners sued to obtain a way of necessity across a railroad right of way to reach a highway under Florida Statutes, chapter 704.<sup>142</sup> Among other constitutional arguments the railroad's position was that chapter 704 did not serve a public purpose as distinguished from a simple "public benefit." The district court

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appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain." *Id.* at 749, the court quoting from *Boyd v. C. L. Ritter Lumber Co.*, 119 Va. 348, 370, 89 S.E. 273, 279 (1916).

139. This is particularly emphasized in Justice Thornal's concurring opinion. The justice distinguishes the two cases this way: "*Adams* dealt with a specific, limited project which, admittedly, involved the condemnation of a relatively small area of land for immediate re-sale to private enterprise for the development of commercial establishments. It appeared to be an exploitation of governmental power for the benefit of selected individuals. Unlike the instant case, *Adams* did not involve extensive legislative and judicial findings of the existence of slum areas and the contemplated reconversion of those areas into low-cost residential properties." *Id.* at 752.

140. Florida, therefore, is slowly moving into line with its brother states on the public purpose or use doctrine. See *Cannata v. City of New York*, 11 N.Y.2d 210, 227 N.Y.S.2d 903 (1962).

141. *Stein v. Darby*, 126 So.2d 313 (Fla. App.) (Mason, Assoc. J., dissenting), cert. denied, 134 So.2d 232 (Fla. 1961). At issue were FLA. CONST. art. XVI, § 29 (eminent domain); FLA. CONST. DECL. OF RIGHTS §§ 1 (equal protection?), 12 (substantive due process); U.S. CONST. amend. XIV (substantive due process).

142. Which in part reads as follows: "Based on public policy . . . a statutory way of necessity . . . exists when any land . . . outside any municipality which is being used or desired to be used . . . shall be shut off or hemmed in by lands . . . of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public road or private road." FLA. STAT. § 704.01(2) (1961). FLA. STAT. § 704.04 (1961) authorizes compensation as follows: "When the owner or owners of such lands across which a statutory way of necessity . . . is claimed . . . objects or refuses to permit the use of such way . . . until he receives compensation therefor, then either party or the board of county commissioners of such county may file suit in the circuit court . . . in order to determine if the claim for said easement exists, and the amount of compensation to which said party is entitled for use of such easement."

easily found a public purpose in the state's public policy which is favorable to full utilization of natural resources and which is against the possible loss of utility in the case of landlocked property. An earlier decision<sup>143</sup> had invalidated a somewhat similar act on the basis that it did not provide for compensation to the owner across whose land the easement would fall. The present statute obviated this constitutional obstacle. Citing the *Grubstein* case language, the district court stated that an incidental private benefit is not determinative of the validity of a government act if the ultimate objective is a proper public use or purpose.

## VII. HEALTH<sup>144</sup>

The Florida Supreme Court traditionally has permitted the legislature a wide range of discretion, under substantive due process standards, in testing regulations whose basis is the public health.<sup>145</sup> And this has been the pattern of decision even when the legislative purpose has driven beyond the health objective and has sought to interfere with the so-called free market.<sup>146</sup>

A 1960<sup>147</sup> decision again<sup>148</sup> tested the breadth of the legislative police power over the milk industry. In this decision, the court determined that the Florida Milk Commission has the power to require distributors and producer-distributors to accept any part of the milk produced and delivered to them by their producers, including milk which the distributors and producer-distributors neither need nor want. Further, the Commission may require the various distributors to pay for the milk at minimum prices fixed by the Commission. The court noted that "the evils that prompted such exercise of the police power were the 'unhealthful, unfair, unjust, destructive . . . trade practice,' which had grown up and 'been carried on in the production, sale and distribution of milk' . . . imperiling the constant supply of pure and wholesome milk."<sup>149</sup> Therefore, price-fixing, with at least a nominal relation to public health, is valid in Florida.

Strangely, with reference to a statute<sup>150</sup> whose basis in health was perhaps even more secure than the price-fixing authority of the Milk Com-

143. *South Dade Farms v. B. & L. Farms Co.*, 62 So.2d 350 (Fla. 1952).

144. See generally Brown, *Police Power-Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866 (1929).

145. See, e.g., *Moore v. Draper*, 57 So.2d 648 (Fla. 1952).

146. E.g., *Shiver v. Lee*, 89 So.2d 318, 321 (Fla. 1956) (to provide for an orderly price structure for the milk industry).

147. *Borden Co. v. Odham*, 121 So.2d 625 (Fla. 1959) (Thomas, J., dissenting) (on rehearing, Thomas, J., adhering to his original dissent and Terrell, J., adhering to the original opinion). At issue were FLA. CONST. DECL. OF RIGHTS § 12 and U.S. CONST. amend. XIV (substantive due process); U.S. CONST. art I, § 8 (interstate commerce clause). Accord, *Foremost Dairies v. Odham*, 121 So.2d 636 (Fla. 1959); see *Public Utilities; The Influence of Nebbia v. People on State Regulation*, 27 Ky. L.J. 323 (1939).

148. See note 146 *supra*.

149. 121 So.2d at 632.

150. FLA. STAT. § 465.18(1) (1961).

mission, the court invalidated.<sup>151</sup> The requirement of the statute was that one who operates a retail drug store must have a licensed pharmacist in constant supervision of the store while it is open for general business or while drugs and medical supplies are being compounded or dispensed. The court admitted the interest in public health of regulating compounding, dispensing, or selling of drugs and medical supplies, which are potentially harmful or dangerous to an uninformed or incautious user. Such activity should only be done under supervision of a licensed pharmacist. However, the court noted that the requirement of supervision by a licensed pharmacist had, by the statute, been extended to cover all the operations of a drug store, including those which are unrelated by their nature to the preparation and sale of controlled drugs and medicines. To the court, it was necessary for the state to demonstrate the necessity for this supervision over the innocent or innocuous facets of the drug store's business. The state's argument apparently was that this inclusion was necessary in order to secure efficient enforcement of the act.

The court reversed the presumption of validity in stating that "the limitation [substantive due process] is such that the police power may *only* be used so as to interfere with the God-given and constitutionally protected right of the individual to pursue a lawful business . . . where the public interest demands [it]."<sup>152</sup> The court went so far as to state that "the interference with or sacrifice of the private rights must be necessary, *i. e.*, must be essential, to the reasonable accomplishment of the desired goal."<sup>153</sup> The court could understand how it would be more "convenient" to ensure that all controlled drugs and medical supplies are prepared and dispensed only by licensed pharmacists, by requiring that the entire drug store be supervised by a pharmacist. But the court did not find that it was "necessary." It did not appear that the other operations of a modern drug store were so "interrelated and entwined with that part of its business which relates to the preparation and sale of controlled drugs . . . as to make it necessary to impose the requirement of supervision . . . in order to obtain reasonably successful enforcement of the prime purpose [of the law]."<sup>154</sup>

#### VIII. SAFETY<sup>155</sup>

Police power regulations dealing with public safety requirements nor-

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151. *State v. Leone*, 118 So.2d 781 (Fla. 1960) (Thornal, J., concurring only in the judgment). Undoubtedly at issue, although not cited by the court, was FLA. CONST. DECL. OF RIGHTS § 12 (substantive due process) and, for some reason, U.S. CONST. amend. XIV (privileges and immunities clause).

152. *Id.* at 784.

153. *Id.* at 784-85.

154. *Id.* at 785.

155. Regulations, having a basis in public safety, normally are validated under substantive due process standards. See, *e.g.*, *Goldblatt v. Town of Hempstead*, N.Y., 82 Sup. Ct. 987 (1962).

mally have easy constitutional sailing over the substantive due process reef.<sup>156</sup>

In *Tamiami Trail Tours, Inc. v. City of Orlando*,<sup>157</sup> common carriers sued to enjoin the operation of an ordinance<sup>158</sup> which required the carriers to obtain permits from the city in order to utilize the city's loading zones. Certain areas on the streets were designated by the city as "loading zones" for the loading and unloading of freight vehicles. The plaintiffs had not obtained the permits, but were using loading zones. The preamble to the ordinance described the police power objective behind the ordinance in the following words: "Whereas, the loading and unloading of freight from trucks constitutes a traffic hazard and impedes the orderly flow of traffic on or about the streets of Orlando . . . it is the desire of the city . . . to establish . . . zones for the elimination of said traffic hazards and to expedite the loading and unloading of freight . . . the City Council . . . after due investigation . . . has found . . . that the establishment of such loading and unloading zones will eliminate said traffic hazards . . . ." The Second District Court of Appeal easily determined that the basis of the traffic ordinance was safety and the ordinance well within the police power.<sup>159</sup>

A very interesting case of first impression<sup>160</sup> involved a Florida statute which requires that each licensee have his operator's license in his immediate possession at all times when operating a motor vehicle. The licensee must display it upon demand of an officer. Municipal police officers were operating road blocks for the purpose of checking automobile driver's licenses. Each driver was directed to proceed in a line of traffic and then was requested to exhibit his state driver's license. The plaintiff's substantive due process argument was that the police power of the state was not broad enough to validate this restriction on his use of the highways. Not too surprisingly, in view of the police power safety purpose behind the regulation, the court validated this regulatory activity of police officers. Testimony of police officers indicated that road blocks are the only practical method to determine whether or not drivers, whose licenses have been suspended or

156. Sometimes the Florida Supreme Court falls from constitutional grace. See, e.g., *Loftin v. City of Miami*, 53 So.2d 654 (Fla. 1951). Generally the Florida Supreme Court validates safety regulations; e.g., *Smith v. Gainesville*, 93 So.2d 105 (Fla. 1957).

157. 113 So.2d 723 (Fla. App. 1959), *quashed*, 120 So.2d 170 (Fla. 1960). It is difficult to determine, from the district court opinion, whether federal or Florida constitutional substantive due process is involved. In the supreme court opinion the court did not disturb the safety police power language of the lower court.

158. Orlando, Fla., Ordinance On Freight Loading Zone Permits.

159. Also involved in the case was whether or not the permit fee was a tax. The district court overcame this obstacle by determining that the fee did not have a revenue purpose. It was on this issue that the Florida Supreme Court disagreed; see note 157 *supra*.

160. *City of Miami v. Aronovitz*, 114 So.2d 784 (Fla. 1959). At issue were U.S. CONST. amends IV (search and seizure provision), V (provision unclear), XIV (probably substantive due process); FLA. CONST. DECL. OF RIGHTS §§ 1 (provision unclear), 22 (search and seizure provision). The opinion is very difficult to analyze.

revoked, are driving cars on the public highways. The decision is in line with many others<sup>161</sup> validating police power regulations over the use of the highways and streets of our state. The court did note that this particular regulatory effect did not have a very injurious impact upon the use of the highways by the plaintiff.<sup>162</sup>

#### IX. MORALS<sup>163</sup>

The Third District Court of Appeal<sup>164</sup> followed earlier Florida decisions in validating an ordinance<sup>165</sup> which prohibits females employed in drinking establishments from accepting drinks paid for by the customers. The court noted the frequency of immoral acts in connection with the operation of drinking establishments brought about by the mingling and fraternizing by the female employees and entertainers with the patrons. The test utilized by the court was typical: " ' whether it [the ordinance] has a rational relation to the public health, morals, safety or general welfare and is reasonably designed to correct a condition adversely affecting the public good. . . . ' " <sup>166</sup>

Of similar nature was *City of Miami Beach v. State*.<sup>167</sup> A mandamus proceeding was brought against the city to require it to issue a liquor license or permit to the relator to sell alcoholic beverages at the relator's restaurant. The city had made provision for licenses at restaurants meeting certain requirements, but refused a license to relator because its restaurant was in a zoning district in which provision was made for liquor licenses only in charter clubs and hotels of a certain capacity. Utilizing the presumption of

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161. E.g., *Thornhill v. Kirkman*, 62 So.2d 740 (Fla. 1953).

162. 114 So.2d at 787. In *Moore v. Thompson*, 126 So.2d 543 (Fla. 1961), one justification of the state to support the reasonableness of the newest Sunday closing law, as applied to automobile sales, was the inability of a purchaser to obtain a license tag on Sundays. The rationale was that Sunday sales encourage dealers to conspire with customers to permit the illegal use of the dealer tag or encourage the buyer of the vehicle to operate it on the public highways without a proper license tag in violation of the law. Further, that many safety requirements for the operation of motor vehicles have been enacted by state law and city ordinances, and city enforcement officers are not generally working on those days. Also, it was argued that mechanics are seldom on duty Sundays and legal holidays to check defective parts on a car. Unscrupulous dealers are thereby enabled to dispose of unsafe vehicles to unsuspecting buyers with a minimum chance of being apprehended. The court, reversing the usual presumption of validity, simply judicially noticed facts at variance with the legislatively found facts. The equal protection clauses were also in issue in the case.

163. See Hetherington, *State Economic Regulation and Substantive Due Process*, 53 Nw. U.L. REV. 226, 232 (1958) (liquor industry).

164. *City of Miami v. Jimenez*, 130 So.2d 109 (Fla. App. 1961). It is difficult to determine from the opinion what constitutional arguments are involved; however, it is the judgment of the writers that substantive due process, under the Florida Constitution, was argued and decided.

165. MIAMI, FLA., CODE § 4-10 (1957).

166. 130 So.2d at 111, the court quoting from *City of Miami v. Kayfetz*, 92 So.2d 798, 801 (Fla. 1957).

167. 129 So.2d 696 (Fla. App. 1961). Although it was not cited by the court, FLA. CONST. DECL. OF RIGHTS § 12 (substantive due process) was probably in issue.

validity, the court upheld the challenged action of the city. Apparently, evidence was not entered in the trial court to sustain the relator's claim on unreasonableness and arbitrariness in connection with the city's refusal to license.<sup>168</sup>

In *Moore v. Thompson*<sup>169</sup> the court invalidated a law which prohibited the sale or exchange of new or used motor vehicles on Sunday.<sup>170</sup> In the act's preamble the legislature made various findings of fact as to the necessity for the exercise of the state police power in the statute. One legislative finding was that all offices are closed on Sunday, which would be open on other days, to buyers to determine whether or not they are being sold vehicles with clouded titles. The court flatly determined that " ' *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.* ' " <sup>171</sup>

The court insisted upon free competition as a "yardstick" standard. It would seem from reading of the opinion that any regulation which has the tendency to prohibit a business activity will have the presumption of validity thrown against it. For example, in the court's treatment of its judicially noticed facts, it stated that "this Court is presumed to know what everybody knows—and, it is known by everybody that the described offices are also closed on most Saturdays, holidays not designated and between late afternoon and early morning of the next day."<sup>172</sup> The court could simply not see where the thing dealt with, or the method of dealing readily adapts itself to the perpetration upon the public of deception or fraudulent imposition. The court flatly found that the regulatory aspects of the statute were so arbitrary and unreasonable as to condemn it on its face. The fact that a majority of courts in the United States have gone the other way on this subject did not deter the court in its judgment.<sup>173</sup>

## X. MISCELLANEOUS

Among the legislative findings of fact in the preamble of the Sunday

168. As written by the court, the opinion might be classified better under equal protection.

169. 126 So.2d 543 (Fla. 1961). It is difficult to state whether substantive due process or equal protection is the basis of the opinion.

170. Fla. Laws 1959, ch. 59-295.

171. 126 So.2d at 549-50, the court quoting from *Seagrams Distillers Corp. v. Ben Greene, Inc.*, 54 So.2d 235, 236 (Fla. 1951). *Miles Laboratories, Inc. v. Eckerd*, 73 So.2d 680 (Fla. 1954), was cited in connection with the court's treatment of legislative findings of fact. Generally, the law runs the other way; see Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 18-19 (1924).

172. 126 So.2d at 550.

173. See *Sunday Laws*, 25 SO. CAL. L. REV. 131 (1951), on this general subject.



closing law, tested in *Moore v. Thompson*,<sup>174</sup> were the following. "(2) . . . it is the policy of our laws to encourage the obtaining of public liability insurance by all automobile owners . . . and such insurance cannot readily be obtained on [Sundays]. . . . (6) Sales of motor vehicles on [Sundays] . . . result in increased costs to buyers for the reason that if only one (1) or two (2) dealers operate on Sundays . . . they gain a little extra business from other dealers who, for self-preservation, will be forced to engage in sales on the same days with resultant increased overhead costs, dissatisfied employees and higher automobile prices. . . . (7) . . . polls taken in Florida [indicate] that more than ninety (90%) per cent of the new and used automobile dealers are opposed to the sale of motor vehicles on Sundays . . . ." <sup>175</sup> None of these legislative findings of fact were adequate for the supreme court, which invalidated the law by taking judicial notice of contrary findings of fact. A healthy dislike for regulations affecting private enterprise seemed to be the basis of the opinion. The court simply found that the law was "unreasonable."

## PROCEDURAL DUE PROCESS<sup>176</sup>

### I. ADMINISTRATIVE LAW<sup>177</sup>

The supreme court, in *Foremost Dairies v. Odham*,<sup>178</sup> apparently drew a distinction between the rule-making power of Florida agencies and their order-making power, insofar as procedural due process requirements are concerned. The court stated that "when the Commission has established a general rule or when the Commission has complied with the statute [providing for reasonable notice and hearing], it is not essential that a hearing be held to support every order it [the Commission] promulgates."<sup>179</sup> Normally, procedural due process requires full notice and hearing when the order-making power of an agency is exercised; with reference to certain types of regulations the same procedures are necessary.<sup>180</sup>

### A. Hearing

In a 1960 case<sup>181</sup> the court undertook to solve the problem which arises where no "ground rules" are prescribed by the agency for conducting a hearing (here incident to a price fixing order). The statute did not re-

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174. 126 So.2d 543 (Fla. 1961).

175. Fla. Laws 1959, ch. 59-295, at 1006.

176. Criminal and civil court procedural niceties have been transferred to other articles in this *Survey*.

177. See FORKOSCH, ADMINISTRATIVE LAW 28-29 (1956).

178. 121 So.2d 636 (Fla. 1959).

179. *Id.* at 639. However, this language is weakened by the fact that the court found that the appellants in the case had reasonable notice and a full opportunity to be heard.

180. Compare *Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441 (1915) with 150 East 47th St. Corp. v. Creedon, 162 F.2d 206 (Emer. Ct. App. 1947).

181. *National Dairy Prods. Corp. v. Odham*, 121 So.2d 640 (Fla. 1959).

quire any particular rules for conducting hearings;<sup>182</sup> however, it did require reasonable notice and an opportunity to be heard. A notice of the public hearing was given and the hearing was held; the appellant was represented but did not offer testimony or raise any objection to the evidence which was offered. Appellant argued that there were no procedural rules adopted by the agency for the hearing and that the procedure followed made it impossible to provide a sufficient record for judicial review.

The answer by the court was short. "[H]earings by administrative boards are not required to be conducted with all the dignity and decorum with which judicial hearings are conducted. Certainly, they should be orderly and conducted in a manner to impress the public that an honest effort is being made to get at the truth . . . ."<sup>183</sup> The fact that the immaterial evidence was offered did not seem to be harmful.

In *Jones v. Board of Control*,<sup>184</sup> a former faculty member of the University of Florida sued for breach of contract by the Board of Control, which had terminated his employment on the ground that he had breached a rule of the Board in filing as a candidate for circuit judge. The contract between the parties was evidenced by a document designated "notice of contract for academic staff." This document included the provisions of the Constitution of the University of Florida as well as the rules promulgated by the Board. Article XV, section 5, of the Constitution of the University of Florida provides as follows:

Dismissal of a member of the Academic staff . . . may not be effected except for serious cause and on the basis of written and specific charges . . . . In answer to such charges the faculty member shall have a hearing before a committee of the faculty appointed by the President. Opportunity shall be given the accused to challenge for cause the appointment of any faculty member . . . . At this hearing and at any hearings of its own that the Board . . . may wish to conduct, the defendant shall be allowed the benefit of counsel . . . . Except in cases of flagrant offense, dismissal shall not become effective until at least sixty days after action by the Board of Control. In case of flagrant offense the President may suspend a member of the academic staff from performance of his duties and, after an expeditious hearing, recommend immediate dismissal to the Board . . . . When the dismissal is ordered in such cases by the Board of Control it shall be effective at once.

The professor insisted that he was denied administrative procedural due process because of the failure of the university to meet the specific

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182. FLA. STAT. § 501.06 (1961).

183. 121 So.2d at 642.

184. 131 So.2d 713 (Fla. 1961).

requirements of article XV, section 5. The professor argued that whether or not his actions were characterized "serious cause" or "flagrant offense" the university did not follow the procedures in article XV, section 5, because he was dismissed before any hearings were held at all.

The Florida Supreme Court quickly overcame this obstacle by treating the professor's admitted violation of the Board's rule as a breach of contract. The apparent meaning was that, since the professor breached the contract, the university did not have to follow the procedural requirements of article XV, section 5.<sup>185</sup> The significance of the decision is that the court has seriously weakened the procedural rights of public employees hired by the state under term contracts.<sup>186</sup>

### B. *Time of Hearing*

An action was brought by a taxpayer against the county collector of taxes to enjoin the collection on the ground that assessments of the taxpayer's property were illegal.<sup>187</sup> A statute provided that no assessment should be held invalid unless suit is instituted within sixty days from the time the assessment becomes final. The problem was whether the taxpayer was prohibited from instituting suit until the assessment became final, even though he had exhausted all of his administrative remedies prior to the date on which the assessment became final. The court construed the doctrine of exhaustion of administrative remedies so that a party will not be required to take "vain and useless steps in the expenditure of the administrative remedy in order to perfect the right to seek judicial redress."<sup>188</sup> The court then construed the statute to avoid the constitutional problem entirely.

### C. *Notice*<sup>189</sup>

The First District Court of Appeal undertook the problem of notice requirements under procedural due process.<sup>190</sup> A statute provided that be-

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185. An argument can be made that this is dubious under federal law. See *Shelley v. Kraemer*, 334 U.S. 1 (1948), under which one can argue that state court enforcement of contract law is state action for purposes of the U.S. CONST. amend. XIV. See also *Slochower v. Board of Educ.* 350 U.S. 551 (1956).

186. Florida law has generally given public employees the benefits of procedural due process; see, e.g., *Laney v. Holbrook*, 8 So.2d 465 (Fla. 1942). Procedural due process requires that agencies follow procedural rules embedded in Florida law. A federal case with a constitutional air about it is *Greene v. McElroy*, 360 U.S. 474 (1959). See also *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

187. *Chatlos v. Overstreet*, 124 So.2d 1 (Fla. 1960). At issue were FLA. CONST. DECL. OF RIGHTS § 4 (courts are open statement) and § 12 (procedural due process). § 12 was not specifically cited.

188. *Id.* at 3.

189. See, for both notice and hearing requisities, Forkosch, *ADMINISTRATIVE LAW* 54-77 (1956).

190. *Crone v. Peebles*, 124 So.2d 876 (Fla. App. 1960) (Sturgis, J., concurring with opinion), *cert. denied*, 129 So.2d 140 (Fla. 1961). Procedural due process may have been in issue. If not, the case may only involve statutory construction.

fore the Director of the State Beverage Department could revoke or suspend the license of any licensee he should give the licensee a written statement of the cause of revocation or suspension of the license. In this case, the notice was signed by an attorney for the Department, rather than by the Director. The court required that notice of the charge had to be made by the specifically authorized competent authority.<sup>191</sup>

#### D. Hearing Examiners

A real estate broker sought review of a final order of the Florida Real Estate Commission suspending his license.<sup>192</sup> Pursuant to statute,<sup>193</sup> an examiner was appointed to take testimony upon the issues made by the information and the petitioner's answer. The testimony was taken, transcribed and returned to the Commission. A hearing was held by the Commission, briefs submitted, and thereafter, the final order suspending petitioner's license was entered by the Commission.

The broker argued a denial of procedural due process because: (1) an examiner heard and reported the evidence; (2) the examiner failed to prepare and submit a report of findings of fact and conclusions of law to the Commission; and (3) the Commission entered its order without having heard the testimony or having had the benefit of the examiner's report. However, the statute required the examiner to receive the evidence and objections thereto and transcribe it and report the testimony to the Commission. This was done. The petitioner had full opportunity to be heard, notice, and the right to cross examine and to present testimony. Also the proceedings were conducted in an atmosphere which was not prejudicial. The court believed that procedural due process requirements had been observed.<sup>194</sup>

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191. However, the court believed that the Director, by proceeding with the hearing, had adopted as his own the charges contained in the notice as well as the notice itself. Also, since the licensee had failed to make timely objection, he was deemed to have waived the procedural defect.

192. *Jonas v. Florida Real Estate Comm'n*, 123 So.2d 264 (Fla. App. 1960). At issue, although not cited specifically by the court, was FLA. CONST. DECL. OF RIGHTS § 12 (administrative procedural due process).

193. FLA. STAT. § 475.27 (1961).

194. A waiver of the procedural due process argument was also noted. *Moore v. Florida Real Estate Comm'n*, 121 So.2d 196 (Fla. App. 1960) (at issue may have been procedural due process; or the case may simply relate a statutory construction point), involved a somewhat analogous problem. By statute (*supra* note 193) an examiner for the Florida Real Estate Commission has to receive the evidence offered, together with the objections thereto, and report the evidence and objections to the Commission. In this particular license revocation proceeding, the broker was not represented by an attorney at the time of the taking of the evidence before the examiner. Apparently there were instances in which the broker accepted objections of the attorney for the Commission as rulings against testimony the broker wished to enter. However, the court found that there was no reversible error because the broker was afforded opportunity to offer "any and all evidence." The court did note, however, the duty of "quasi-judicial" bodies to afford a "fair and complete hearing to those accused," as well as to conduct the proceedings so that the record affirmatively shows that the hearing meets all the requirements of law.

### E. Compulsory Process

In 1960, the First District Court of Appeal flatly declared under Florida administrative procedural due process that in a "quasi judicial proceeding" due process is denied when a referee denies the right to compulsory attendance of witnesses to a party.<sup>195</sup> In the case the petitioner sought review of an order of the Florida Industrial Commission which had denied unemployment compensation benefits. Florida law authorized the Commission and its referees to issue subpoenas to compel the attendance of witnesses and production of books. Prior to the taking of testimony at the hearing before the referee, the petitioner requested the referee to issue a witness subpoena. Petitioner's witness would have testified as to whether or not he was guilty of misconduct connected with his work. They were fellow employees who "ordinarily would be very reluctant to testify voluntarily against the interest of their employer."<sup>196</sup> Under these circumstances the district court required the right to compulsory process.

## II. CLARITY<sup>197</sup>

Under federal and Florida constitutional law<sup>198</sup> procedural due process requires that legislative law be written in clear enough style and form that a reasonable man will know whether or not he is in violation of it.

### A. Civil Law

In *Cramp v. Board of Public Instruction*,<sup>199</sup> a Florida schoolteacher contended that the following statutory oath was unconstitutional:

I, . . . , a citizen of the State of Florida . . . do hereby solemnly swear or affirm that I will support the Constitution . . . ; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government . . . by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government . . . .<sup>200</sup>

Under Florida law this oath must be filed with the employing governmental agency prior to the approval of any salary voucher and any person

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The court did require that examiners appointed pursuant to the statute should announce, and make the announcement a part of the record, in all cases where the broker is not represented by counsel, that the examiner will receive all evidence offered and will record it together with any objections to it.

195. *Drogaris v. Martine's, Inc.*, 118 So.2d 95 (Fla. App. 1960). At issue was FLA. CONST. DECL. OF RIGHTS § 12 (administrative procedural due process).

196. *Id.* at 97.

197. See Collins, *Unconstitutional Uncertainty*, 40 CORNELL L. Q. 195 (1955) (a fine article).

198. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q. 158, 179 (1954).

199. 125 So.2d 554 (Fla. 1960).

200. FLA. STAT. § 876.05 (1961).

will be discharged who refuses to subscribe to the oath. The Florida court wisely required scienter or knowledge in the oath-taker. The court also construed the word "lend" in the oath to mean "lent." On review by the Supreme Court, the Florida court's approach was found to be invalid.<sup>201</sup> In essence, the Supreme Court sharply disagreed with the position of the Florida court that "there could be no doubt in the minds of anyone who can read English as to the requirements of the statute and the effect of a failure to comply."<sup>202</sup> Those who take the oath must swear that they have not, in the past, knowingly lent their "aid," or "support," or "advice," or "counsel," or "influence" to the Communist Party. To the Supreme Court, a perjury prosecution could plague the oath-taker who simply voted for a candidate supported by the Party. The oath words were held constitutionally vague.

### B. Criminal Law

Typical Florida court language, defining clarity requirements of procedural due process in criminal law is as follows: "[The law] . . . must be sufficiently explicit in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of the offense with reasonable certainty, and make known to those to whom it applies what conduct on their part will render them liable for its penalties. . . . [or] . . . statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices satisfies due process."<sup>203</sup>

Fairly typical of the problems arising in procedural due process and clarity was *State v. Barone*.<sup>204</sup> In this case defendants were prosecuted under Florida Statutes, sections 828.21 and 828.19. Section 828.21(1) states:

Any person who shall commit any act, which causes or tends to cause, or encourage any person under the age of eighteen years to

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201. *Cramp v. Board of Public Instruction*, 82 Sup. Ct. 275, 280-81 (1961). The issue was whether Florida could compel public servants to swear that they had ever knowingly lent their aid, support, advice, counsel, or influence to the Communist Party. The Supreme Court neatly dissected the Florida court's position by drawing from the statutory words a galaxy of meanings.

202. 125 So.2d at 558.

203. *City of St. Petersburg v. Calbeck*, 114 So.2d 316, 320 (Fla. App. 1959). In this case a St. Petersburg ordinance forbade "disorderly conduct." The court apparently was satisfied by the common law definition of disorderly conduct, for example, that disorderly conduct generally means some act which tends to breach the peace. It is obviously impossible in an ordinance of this type to itemize all of the acts which would constitute disorderly conduct. The question as to whether a particular act is disorderly conduct depends on the facts in the particular case, and in the determination of this question not "only the nature of the particular action should be considered but also the time and place of its occurrence as well as all surrounding circumstances." *Id.* at 319.

204. 124 So.2d 490 (Fla. 1960). At issue were FLA. CONST. art. III, § 1 (legislative power-delegation); FLA. CONST. DECL. OF RIGHTS § 11 (notice), § 12 (due process-clarity); and U.S. CONST. amend. XIV (due process-clarity).

become a delinquent or dependent child, as defined under the laws of Florida, or which act contributes thereto, or any person who shall by act . . . induce or endeavor to induce any such person . . . to become or to remain a dependent or delinquent child, as defined under the laws of the state, shall be guilty of a misdemeanor.

Section 828.19 reads as follows: "In all cases where any child shall be a dependent or delinquent child, as defined under the laws of Florida, any person or persons who shall by any act encourage, cause, or contribute to the dependency or delinquency of such child . . . shall be guilty . . ."

In neither section is the meaning of "delinquent child" defined. Elsewhere, however, in the Florida Statutes "delinquent child" is defined as a child who "commits a violation of law, regardless of where the violation occurred; or is incorrigible; or is a persistent truant from school; or who is beyond the control of the child's parent . . . or who associates with criminals, reputed criminals, or vicious or immoral persons . . . ." <sup>205</sup>

While the legislature did not specifically define the words "delinquent child" in the criminal statute, the court held the statute clear, under procedural due process, by reference to a civil statute which does define the words. The fact that the legislature in the criminal statutes did not specifically incorporate the definition in the civil statute by reference did not inhibit the court.

In *State v. Hooten*,<sup>206</sup> the district court resorted to Florida civil law decisions to aid it in interpreting a criminal law. Florida Statutes, section 839.07, reads as follows:

It is unlawful for any . . . officer of this state . . . to bid or enter into, or be in any way interested in, a contract for the working of any public road or street, the construction or building of any bridge, the erecting or building of any house, or for the performance of any other public work in which the said officer was a party to the letting, and any person upon conviction thereof shall be punished . . . .

The circuit court ruled that this section contained no language prohibiting the sale of land by a public official to the unit of government which he served. Therefore, the question was whether the sale by a county commissioner to the county of land in which the commissioner had an interest, the land to be used for the performance of a public work, constituted a criminal offense. The district court's authority in answering this question came from *civil* cases which had construed and applied the section with

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205. FLA. STAT. § 39.01(11) (1961).

206. 122 So.2d 336 (Fla. App. 1960). At issue, although not specifically cited, was FLA. CONST. DECL. OF RIGHTS § 12 (due process-clarity).

reference to land purchases. According to these cases, sale by a public official of land which he owns to the agency, of which he is an official, falls within the prohibitory provisions of the statute. It was held that the statute, as construed, conveyed a definite warning as to proscribed conduct, when measured by "common understanding and practices." Therefore, "public work" in the criminal statute, includes public activities which are not "spelled out" in the statute. The words, according to the district court, were meant by the legislature to comprehend a "variety of public works activities in which a public officer might seek to utilize his office for private gain."<sup>207</sup>

### III. PRESUMPTIONS<sup>208</sup>

In *City of Coral Gables v. Brasher*,<sup>209</sup> the court took up statutory presumptions. The suit was for declaratory decree to entitle the plaintiff to a pension from the city for a disability suffered in the line of duty. A law stated that any "condition or impairment of health of . . . police officers . . . caused by tuberculosis, hypertension, heart disease or hardening of the arteries, resulting in . . . disability shall be presumed to have been suffered in line of duty unless the contrary be shown by competent evidence . . . ."<sup>210</sup> The plaintiff desired a pension based upon a disability, incurred in the line of duty, because of a heart condition. The city took the position that the plaintiff was not entitled to the presumption created by the statute. Since the statute provided that the presumption could be overcome by competent evidence (*i.e.*, was not "absolute"), the court held that the statute created no more than a *prima facie* presumption which may be overcome by testimony. A "conclusive presumption" would have been invalid as well as one which embodied no "rational connection between the fact proven or to be proven and the ultimate fact presumed." Due process was not denied.

### EQUAL PROTECTION<sup>211</sup>

The equal protection provision of the Florida Constitution would

207. *Id.* at 340. *Tracey v. State*, 130 So.2d 605 (Fla. 1961), also involved a clarity problem. The defendant had been convicted for violating obscenity statutes. The court noted that in addition to the words "immoral, degrading, sadistic and masochistic" the statutes described the prohibited matter with the words "obscene, lewd, lascivious, filthy, and indecent," which were approved in the case of *Roth v. United States*, 354 U.S. 476 (1957). Further, that the information under which the defendant was charged used only the descriptive words approved in *Roth*. This eliminated the clarity issue for the Florida court.

208. See generally Morgan, *Federal Constitutional Limitations Upon Presumptions Created By State Legislation*, in *HARVARD LEGAL ESSAYS* 323 (1934).

209. 120 So.2d 5 (Fla. 1960). At issue were U.S. CONST. amend. XIV (equal protection and procedural due process) and FLA. CONST. DECL. OF RIGHTS §§ 1, 12 (same).

210. FLA. STAT. § 185.34 (1961).

211. The position of the Supreme Court in dealing with economic legislation under the Equal Protection Clause, is well stated in *ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE* 154-55 (1948).



seem to be in the Declaration of Rights, section 1, which states that: "All men are equal before the law . . . ." In manipulating this clause Florida courts approach the review of legislative classification problems in quite similar fashion to their review of the legislative police power under substantive due process. In both situations the courts demand a "reasonable" basis for the legislative judgment. Here, as with substantive due process problems, the presumption of legislative validity at times is not followed by Florida courts.

Probably no legislation enjoys a classification, under which the law applies to all people under every circumstance imaginable. Therefore, since some legislative classifications are valid, and since some are invalid, the problem for the attorney and the legislator is to determine the rationale which seems attractive to the Florida courts.<sup>212</sup>

#### I. RACIAL OR RELIGIOUS PROBLEMS<sup>213</sup>

*Harris v. Sunset Islands Property Owners*<sup>214</sup> presented the only non-economic issue under equal protection during the *Survey* years. The defendants purchased a lot in a subdivision. At the time of purchase there were on record certain restrictive covenants affecting the property's sale and occupancy. Among these were the following:

'Ownership. No lot . . . shall be sold . . . to anyone not a member in good standing of Sunset Islands Property Owners . . . . Provided, however, that nothing in this covenant contained shall prevent any corporation, a majority of the stock in which is owned by members in good standing of Sunset Island Property Owners, Inc., from owning or leasing any such property.

'Occupancy. No lot . . . shall be used or occupied by anyone not a member in good standing of Sunset Islands Property Owners, Inc.'<sup>215</sup>

When the defendants purchased, the by-laws of the corporation provided that no member of the corporation "would, prior to the year 1966, sell or lease any property in the subdivision to any person 'not of the Caucasian race, or who is not a Gentile, or who has been convicted of a felony . . . .'"<sup>216</sup> The by-laws also stated that "'the only ground upon

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212. At times no rationale seems apparent; see Alloway, *Florida Constitutional Law*, 14 U. MIAMI L. REV. 501, 512-15 (1960) (a rough year for the legislature under equal protection).

213. Compare, e.g., *Martin v. Walton*, 82 Sup. Ct. 1 (1961) (a non "civil rights" decision under equal protection) with, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (a "civil rights" decision under equal protection).

214. 116 So.2d 622 (Fla. 1959). At issue, perhaps, was only U.S. CONST. amend. XIV (equal protection).

215. *Id.* at 623.

216. *Ibid.*

which an owner or lessee of property on said Islands may be denied membership in this corporation shall be that the applicant is not a Gentile or is not of the Caucasian race or has been convicted of a felony.'"<sup>217</sup>

When the defendant, a Jew, purchased the property the recorded restriction required that he be a member of the corporation. The membership application blank contained an excerpt from the by-laws. However, he constructed an expensive home on the island and assumed occupancy. The corporation filed suit to compel him to vacate, alleging that he was not a member of the corporation. Prior to filing of the complaint the by-laws had been amended by elimination of the references to Caucasians, Gentiles and felons. In lieu thereof, a substitution was made that "the qualifications for membership . . . shall be that a member be of good moral character . . . an owner or lessee, or one who proposes to become an owner or lessee, of property on Sunset Islands . . .'"<sup>218</sup> Pending the suit the defendant, pleading himself to be of good moral character, applied for membership and was rejected.

Defendant argued that the restriction requiring membership in the corporation, supplemented by the by-laws requiring a member to be a Caucasian or Gentile, denied him the equal protection of the law.

According to the Florida Supreme Court, the 25-year restrictive covenant had the effect of prohibiting purchase or occupancy of the land by a Jew. Following *Shelley v. Kraemer*,<sup>219</sup> the court believed that an order to enforce the restrictive covenant would amount to state action under the Fourteenth Amendment.

The court cautioned that it was not holding the requirement of membership in the corporation, and the limiting of membership to people of good moral character, a prohibited restraint on alienation. Required membership "untainted by religious exclusions might in another setting be perfectly legitimate."

## II. OTHER PROBLEMS IN EQUAL PROTECTION<sup>220</sup>

### A. *Taxes and Fees*

At issue in *State v. City of Pensacola*<sup>221</sup> was the constitutionality of a statute granting exemption from taxation to the City of Pensacola. The state alleged that there were some forty municipal corporations engaged in the sale and distribution of electricity and natural gas. With the

217. *Ibid.*

218. *Ibid.*

219. 334 U.S. 1 (1948).

220. See notes 211, 213 *supra*.

221. 126 So.2d 566 (Fla. 1961) (O'Connell, J., concurring specially). At issue were U.S. CONST. amend. XIV and FLA. CONST. DECL. OF RIGHTS § 1 (equal protection).

exception of Pensacola all other cities had to pay a state tax upon gross receipts of public service corporations. The court granted a vigorous presumption of validity in favor of the power of the legislature to select subjects of taxation and to provide for exemptions from taxation, under the equal protection clauses.<sup>222</sup> Further, the court correctly stated that the equal protection inhibitions do not constitute a restraint upon the state in the control of its own municipalities. The statutory gift to Pensacola was, therefore, valid.

Insofar as tax assessment is concerned the Florida rule may be otherwise. In *Cassady v. Consolidated Naval Stores Co.*,<sup>223</sup> the supreme court invalidated a statute providing for separate assessment and taxation of mineral rights "when owned in fee simple separately from the ownership of the surface of the land." If a return was not made by the owner of the sub-surface rights, a duty was imposed upon the tax assessor to assess such rights. However, this separate assessment was only required when the owner of a record interest in the land filed a written request for it. The court took the position that if property owned by one person is assessed for taxation while property of other persons, having the same classification and subject under the law to be assessed for taxes, is not, then the failure of an assessing officer to include the latter's property in the assessment roll operates as denial of equal protection of the law. In view of the possibilities of conspiracy between owners of various interests in land, the decision is attractive.<sup>224</sup>

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222. In line with Supreme Court decisions; see, e.g., *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

223. 119 So.2d 35 (Fla. 1960). It is difficult to determine which constitution is in issue.

224. *Accord*, *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946). One more decision, *Segal v. Simpson*, 121 So.2d 790 (Fla. 1960), involved a tax or fee and the federal equal protection inhibition. At issue was section 561.34(13)(a) of Florida Statutes, which laid a license fee of \$25.00 a day upon any person operating a "commercial establishment catering to the public by offering . . . live entertainment" and who permitted "consumption of alcoholic beverages on the premises" while not holding a beverage license permitting such consumption. The case involved, of course, the so-called "bottle clubs." The decision is difficult to classify; it could be classified under substantive due process or equal protection. At any rate, the Florida Supreme Court believes that these fees totaling "approximately ten times the license requirements of an ordinary bar-restaurant in the same locality" illustrated a "sharp discrimination." In fact, the statute imposed on one class of "drink-permitting establishments fees up to \$7,825 for a year's operation," but the statute failed to include "other establishments similar in all respects except that they do not offer live entertainment."

The court believed that this contrast in treatment indicated a policy of "exclusion rather than regulation" of a less favored class of business. Further, that a business cannot be prohibited under the power to license when it is "not *per se* dangerous, immoral or contrary to well established public policy." This last language would seem to be related to substantive due process requirements.

The court is not accurate in its evaluation of Fourteenth Amendment necessities. See Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229, 388 (1938).

## B. Zoning

*Sunad, Inc. v. City of Sarasota*<sup>225</sup> typifies the equal protection problem in certain areas of zoning. The petitioner was engaged in the business of building and leasing to advertisers billboards of three hundred square feet. The petitioner alleged that the dimensions of the billboards were standard throughout the United States, making possible the preparation of posters at reduced cost. The city enacted an ordinance limiting the size of the signs in business and industrial districts, putting them in two classifications: "point of sale" and "non-point of sale." In the first class, wall signs were authorized to be any size. In the second class, wall signs were limited to three hundred square feet, all other signs to one hundred eighty square feet. The object of the ordinance was aesthetic values.

The court read the ordinance so that "at the point of sale the wall sign could be of any size desired, but all other signs could be but 180 square feet, while at another place a wall sign could be only 300 square feet and roof and other signs only 180 square feet."<sup>226</sup> While not discounting the aesthetic rationale, the court determined for itself whether or not the ordinance was "unreasonable and discriminatory." The court simply refused to validate an ordinance under which "a wall sign 300 square feet in size at non-point of sale would not offend [aesthetic values] while a sign of the same size on one of petitioner's billboards would."<sup>227</sup> To the court, the ordinance was not designed to preserve a "pattern calculated to protect" the city's beauty.<sup>228</sup>

In one opinion<sup>229</sup> the District Court of Appeal for the Third District applied the "fairly debatable" rule to an equal protection problem in zoning. That is, when an ordinance may be said to be fairly debatable as to its necessity and reasonableness, the court will not substitute its judgment for that of the zoning authorities, and invalidate. The case related to an ordinance restricting the height of buildings, as applied to the plaintiff's property. The district court found there was no evidence that the application of the zoning ordinance to plaintiff's property was "particular or peculiar in any way to that property or distinguished from other property covered by the same provision of the ordinance of which complaint is made." The record did reveal a great deal of testimony as to whether the ordinance in question was wise or unwise. The court held that the fairly debatable rule controlled and validated.

225. 122 So.2d 611 (Fla. 1960). *But c.f.* *Railway Express Agency v. New York*, 336 U.S. 106 (1949). It is difficult to determine whether substantive due process or equal protection is the basis for the decision in the principal case.

226. *Id.* at 614.

227. *Ibid.*

228. This decision disagreed with the Second District Court of Appeal in *City of Sarasota v. Sunad, Inc.*, 114 So.2d 377 (Fla. App. 1959), which granted the ordinance a healthy presumption of validity under *City of Miami v. Kayfetz*, 92 So.2d 798 (Fla. 1957).

229. *Town of Bay Harbor Islands v. Burk*, 114 So.2d 225 (Fla. App. 1959).

### C. Sunday Laws

In 1960, the authors stated that it would appear impossible for the legislature to enact a valid Sunday law.<sup>230</sup> In 1961, the supreme court underlined the accuracy of this prognostication.<sup>231</sup> At issue was the constitutionality of a blue law which made it unlawful for any person or firm to engage in the business of buying, selling, trading or exchanging new or used cars, "on the first day of the week, commonly called Sunday, or on legal holidays . . . ."<sup>232</sup>

In the preamble to the act, the legislature made various findings of fact as to the necessity for this exercise of the state's police power. For example, the legislature found the following "facts": (1) the business of selling automobiles is "a distinct type of business different from all other businesses"; (2) if "unscrupulous" dealers can dispose of vehicles on the forbidden days they can dispose of vehicles with clouded titles and make "fast deals" in view of the fact that government offices are closed; (3) it is the policy of Florida to encourage the obtaining of public liability insurance by automobile owners and that such insurance cannot be readily obtained on these days; (4) a purchaser cannot obtain a license tag on Sunday or holidays; this encourages the dealer to conspire with the customer to permit the illegal use of a dealer tag, and so on; (5) state and city enforcement offices are not open; therefore, cars cannot be inspected on the day on which they are purchased; (6) mechanics are not on duty to check defective parts of the car; (7) sales of cars on these days result in increased cost to buyers because if only a few dealers operate they gain a little extra business from other dealers who, for self-preservation are forced to engage in sales on the same days with resultant increased overhead costs.

Again, the Florida Supreme Court stated that it is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all. Further, the court admitted that legislative findings of fact are presumed to be correct, but stated that they are not binding upon the courts under all conditions. Courts will abide by such legislative findings unless they are clearly erroneous, arbitrary, or wholly unwarranted. The court then determined that the legislative findings of fact in the preamble to this blue law were "obviously contrary to proven and firmly established truths of which Courts may take judicial notice." And this, notwithstanding the fact that constitutional law elsewhere has gone the other way on similar facts.<sup>233</sup>

The dissenting justices, Terrell and Roberts, pointed out that the

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230. See Alloway, *Florida Constitutional Law*, 14 U. MIAMI L. REV. 501, 514 (1960).

231. *Moore v. Thompson*, 126 So.2d 543 (Fla. 1961).

232. Fla. Laws 1959, ch. 59-295.

233. E.g., see *McGowan v. Maryland*, 366 U.S. 420 (1961).

presumption of validity means in essence, "that all doubts as to the constitutionality are to be resolved by the courts in favor of the validity of the statute." The justices easily found that there were "valid and substantial" reasons for the restraint imposed in this blue law upon the automobile business. Further, in his separate dissenting opinion, Justice Terrell strongly indicated that the members of his court should never invalidate statutes "because they do not square with our political, economic, social or other peculiar views."

#### D. Professional Requirements

In *State ex rel. Israel v. Canova*,<sup>234</sup> an applicant to be a pharmacist was denied permission to take the examination by the Florida Board of Pharmacy. The statute required that to be eligible for examination applicants had to be graduates of an accredited four-year college of pharmacy.<sup>235</sup> However, the statute excepted those pharmacists already licensed. The plaintiff had obtained a professional degree upon completion of a two-year training course of study in another state and had been licensed in that state since 1925. At issue, of course, was the validity under equal protection of this "grandfather clause." The court again reiterated its test that a legislative classification must have some "just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the the subject regulated, and should not be merely arbitrary . . . ." <sup>236</sup> Further, unlike its approach in *Moore v. Thompson*,<sup>237</sup> the court admitted that it had nothing to do with the "expediency or wisdom of the standard of qualification fixed, nor with the tests adopted for ascertaining the same." The legislative theory was that those individuals already registered had proven an evidence of skill and competency equivalent to a diploma from college in Florida. The fact that plaintiff had exhibited skill elsewhere did not suffice to make the law, as applied to him, "arbitrary." Further, all who entered the profession after passage of the statute are subject to the same conditions.<sup>238</sup>

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234. 123 So.2d 672 (Fla. 1960), *appeal dismissed*, 365 U.S. 608 (1961). At issue were U.S. CONST. amend. XIV (equal protection and privileges and immunities clause) and the FLA. CONST. DECL. OF RIGHTS § 12 (probably substantive due process). *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) is in accord with the principal case.

235. FLA. STAT. § 465.071(b) (1961).

236. 123 So.2d at 673, the court quoting from *Eslin v. Collins*, 108 So.2d 889, 891 (Fla. 1959).

237. Note 231 *supra*.

238. Various equal protection arguments were also made in the following cases: *State v. Dade County*, 127 So.2d 881 (Fla. 1961); *City of Coral Gables v. Brasher*, 120 So.2d 5 (Fla. 1960); and *State v. Cochran*, 114 So.2d 797 (Fla. 1959).

One recent Florida equal protection decision reached the Supreme Court. *Hoyt v. Florida*, 82 Sup. Ct. 159 (1961) (validation of Florida's statute authorizing women volunteers for jury duty).

## LEGISLATION AND THE CONSTITUTION

## I. ARTICLE III, SECTION 16

This section of our constitution states that "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such case the act as revised or section, or subsection of a section . . . as amended, shall be reenacted and published . . . ."

The court has recognized several objects behind this provision in our constitution: (1) to prevent the practice of stating two unrelated matters in one bill ("log rolling"); (2) to prevent surprise or fraud by notice in the title; (3) to apprise the people of the legislation's subject so that they may have an opportunity to be heard.<sup>239</sup>

In *State v. Graessle*,<sup>240</sup> at issue was the validity of an act,<sup>241</sup> the title to which was as follows:

An Act amending chapter 33, Florida Statutes, by providing for abolishing the civil courts of record in all counties of this state having a population of not less than three hundred thousand . . . inhabitants as determined by the latest . . . census, and not having home rule under the constitution . . . .

This law amended an earlier one<sup>242</sup> which had established civil courts of record and which had provided that its provisions did not apply to the civil court of record of Duval County, which had been established by other statutes. The amendment abolished the civil court of record in all counties having population of not less than 300,000 and not having home rule. The effect of the amendatory act, if valid, would be to also abolish the civil court of record of Duval County. The court found the title inadequate under article III, section 16. There was nothing in the title of the amendatory act to place either the members of the legislature or the people on notice that it abolished the civil court of record of Duval County. This was because the act which was sought to be amended stated that it did not apply to the Duval County court. The legislative mistake was the failure to give notice, in the title of the amending act, that this particular county court was to be abolished.

In another case,<sup>243</sup> the court cast doubt upon the validity of an act<sup>244</sup>

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239. See *State ex rel. Flink v. Canova*, 94 So.2d 181 (Fla. 1957).

240. 114 So.2d 681 (Fla. 1959) (Thornal, J., concurring specially; O'Connell, J., concurring; and Terrell, J., dissenting).

241. Fla. Laws 1959, ch. 59-516.

242. FLA. STAT. § 33.01 (1957).

243. *Segal v. Simpson*, 121 So.2d 790 (Fla. 1960). The court did not actually decide this point.

244. Fla. Laws 1959, ch. 59-316.

with the following title: "An Act relating to the administration of the alcoholic beverage law; amending Sections 561.17, 561.18, 561.27 and 561.34 Florida Statutes; setting an effective date." The act itself stated that any person operating an establishment, catering to the public by offering live entertainment, which shall "permit consumption of alcoholic beverages on the premises and does not hold a valid beverage license . . . permitting [such] consumption . . . shall pay a license fee of twenty-five (\$25.00) dollars per day . . . in addition to any other license fees now required by law." While refraining from deciding whether or not the title of the act was valid under article III, section 16, the court did state that it was "impelled to observe that it approaches dangerously a form that might, upon scrutiny, result in a declaration that it offends against [this constitutional requirement]."<sup>245</sup>

## II. ARTICLE III, SECTION 20

This section states: "The Legislature shall not pass special or local laws in any of the following . . . cases: . . . regulating the jurisdiction and duties of any class of officers . . . regulating the fees of officers of the State and County . . ."

The court has validated, any number of times, "population" acts applicable to counties having stated populations, when the court believed that the classification of the act had a reasonable relationship to its subject matter and purpose.<sup>246</sup> In such a context, the court has generally characterized the act as a "general law." This test indicates that the court will determine for itself whether or not there is a rational basis for applying an act to a county of a particular population.

Failure to pass the "test" simply means that the court classifies the population act, relating to a subject which under section 20 must be regulated by a "general" law, as a "special or local" law.

Typical of the recent cases was one in which a 1957 statute,<sup>247</sup> establishing salary scales for county sheriffs, was held to be a forbidden "local" law.<sup>248</sup> The statute provided forty different population categories, ranging from "0 - 3445" (which included four counties) to "400,001 - and up" (Dade County). The population categories were fairly complex; for example, Putnam County fell in the category of "23,501 - 23,650" and its sheriff's salary was fixed at 7500 dollars. To further complicate the law, some eighteen counties were excepted from the act's application under fourteen more population categories; for example, the act did not apply

<sup>245</sup> 121 So.2d at 793.

<sup>246</sup> *E.g.*, *Greene v. Gray*, 87 So.2d 504 (Fla. 1956) (the statute can apply to only one local government and survive).

<sup>247</sup> Fla. Laws 1957, ch. 57-368.

<sup>248</sup> *Shelton v. Reeder*, 121 So.2d 145 (Fla. 1960) (article III, § 21 at issue also).



to Liberty County ("Not less than 3000 nor more than 3300"). The intent of the legislature was to abolish the fee system of compensation by a general law establishing a comprehensive salary scale for the sheriffs under the act. If the law be a "general" one, it was valid under section 20; if a "special or local" law, it was invalid. To invalidate a law as not "general" in nature, it is necessary for the law's antagonist to prove that the population categories are "arbitrary," in the sense that there is no "reasonable basis" for the law's application to one population category and not to another. A law may be "general" even if it only applies to a single local government if there is some sensible rationale for such limited application. The court found the law invalid for a variety of reasons.<sup>249</sup> The most significant factor would seem to be that of the salary scales. Santa Rosa's (category "18,501 - 20,000") sheriff received 11,000 dollars while Broward's (category "80,001 - 100,000") sheriff received only 10,500 dollars. Further, if certain counties grew in population, hence moved into a new category, their sheriff's salaries would be *reduced*. The legislative intent appeared to be to "bless" certain sheriffs with salary "privileges" unrelated to the complexity of their office work. The court invalidated the law by characterizing it as a "local law passed under the guise of a general act."

### III. ARTICLE III, SECTION 21

This section states:

In all cases enumerated in the preceding Section [Section 20], all laws shall be general and of uniform operation . . . but in all cases not enumerated [in Section 20] . . . the Legislature may pass special or local laws . . . PROVIDED that no local or special bill shall be passed . . . unless notice of intention to apply therefor shall have been published in the manner provided . . . . PROVIDED, however, no publication of any such law shall be required hereunder when such law contains a provision to the effect that the same shall not become operative . . . until ratified or approved at a referendum election . . . in the territory affected . . . .

A statute may be invalid under both sections 20 and 21. Section 20 requires the legislature to not pass special or local laws on any of the subjects enumerated. Therefore, if the court determines that a statute is not a general law, and it is on a subject listed under section 20, the statute is invalid. Under section 21 all laws must be general and of uniform application, if on a subject enumerated in section 20, but on subjects not so enumerated the legislature may pass local laws, provided that the notice or referendum requirements of section 21 are met. A statute may neces-

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249. For example, eighteen of the state's sixty-seven counties were excluded from the act's operation by "narrow population brackets" equivalent to "specifically naming" the counties.

sarily be required to be characterized as a general law, under section 21, if no notice of publication is given nor any referendum called for in the statute. On the other hand, under section 20 the court may characterize the statute as a local or special law on a prohibited subject matter.

*Shelton v. Reeder*,<sup>250</sup> discussed in the preceding section, exemplifies this dilemma. Under section 21, since neither referendum nor notice was required by the statute, the court was forced to treat the law as a general law. Then, under section 20, the court found that the law was not a general law, but a local one. Apparently, the law was in violation of both sections 20 and 21 of article III.

### FALLS FROM CONSTITUTIONAL GRACE

As early as 1954<sup>251</sup> it was suggested that at times Florida courts were not utilizing judicial self-restraint in their decisions. Further, that the hard-won presumptions of legislative correctness and validity are valuable since so much of constitutional law is relatively a subjective area reflecting the judge's personality, economic philosophy and background.<sup>252</sup>

In a modern state the police power, restricted under substantive due process to problems of health, safety and morals, is a poor thing. Refusal to grant constitutional security to legislative classifications, under the vague judicial test of the equal protection inhibitions, creates a parallel barrier to modern legislative efforts. Finally, it can be said with some degree of certainty that judicial manipulation of the "public purpose" doctrine, creating yet another wall against social legislation, needlessly cripples Florida legislative endeavors to solve Florida's problems. The judges and justices of our Florida courts, who without doubt favorably view state, as opposed to federal, solutions to Florida's problems, apparently lay the groundwork for substantial federal law entrée, when they inhibit our own legislature's program.<sup>253</sup> To illustrate some of the preceding thoughts, let us look at three decisions of Florida courts during the present *Survey* period.

*Moore v. Thompson*<sup>254</sup> is an impressive example. From the flow of

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250. Note 248 *supra*.

251. See Alloway, *Florida Constitutional Law*, 8 *MIAMI L. Q.* 158, 175 (1954).

252. See Ribble, *Some Aspects of Judicial Self-Restraint*, 26 *VA. L. REV.* 981 (1940) (a review of a change in judicial attitudes).

253. Resistance of judges to a modern role for labor led to the national labor acts, and the county poor house is now generally replaced by national bureaucracy and expenditure. Other examples—roads, anti-trust and so on—can be multiplied almost endlessly. A review of state and federal court antipathy to modern social legislation can be found in Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909).

After all, the national government *has* the constitutional power to insist on a uniform day of rest, that drug stores be monitored by licensed pharmacists or that localities with sluggish economies be brought in line with more fortunate areas. The authors, however, believe that a local solution is preferable.

254. 126 So.2d 543 (Fla. 1961).

constitutional decisions of our Florida courts, dealing with blue laws, one can easily state that it simply is not possible to write a constitutional blue law in this state. This is an accurate statement, taken from the standpoint of the substantive due process limitation or from that of equal protection. What more can the legislature do? Legislative findings of fact were portrayed in the last statute. Our blue laws have not been particularly "unreasonable" or "arbitrary," since courts in the United States, elsewhere, have generally validated similar acts.

Similar in import is *State v. Leone*.<sup>255</sup> Here, too, the promised presumption of validity had only theoretical value. Here, instead of equal protection and utilizing a standard of the "reasonableness" of the classification created by the legislature, the court used substantive due process to strike down a statute. The statutory requirement that retail drug establishments be under the supervision of a licensed pharmacist does not on its face, at least to these laymen, look "unreasonable." Clever arguments of counsel for business can always be drawn. It is the purpose of the presumption of validity to overcome such "clever" arguments, unless the regulation be clearly "arbitrary" (for example, perhaps, requiring a doctor to supervise drug stores).

Let us examine the language of the supreme court in this case: "The limitation [substantive due process] is such that the police power may *only* be used so as to interfere with the God-given and constitutionally protected right of the individual to pursue a lawful business . . . where the public interest demands that the rights of the individual, or class, give way in favor of the public generally." More of this: "To exercise this power [police power] to the detriment of the individual or class, it must first be clear that the purpose to be served is not merely desirable but one which will so benefit the public as to justify interference with or destruction of private rights." And again: "[T]he interference with or sacrifice of the private rights must be necessary, *i.e.* must be essential, to the reasonable accomplishment of the desired goal." Perhaps the final blow, and the authors are still quoting, was this language: "If there is a choice of ways in which government can reasonably obtain a valid goal necessary to the public interest, it must elect that course which will infringe the least upon the rights of the individual."<sup>256</sup> The language, in this case, is something of an unusual combination of Bentham, Spencer, Smith and, perhaps, others. It is reminiscent of language in opinions of the United States Supreme Court<sup>257</sup> at the turn of the century and for some time thereafter. It is not language which grants life to the presumption of validity.

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255. 118 So.2d 781 (Fla. 1960).

256. *Id.* at 784-85.

257. See TWISS, *LAWYERS AND THE CONSTITUTION* (1942) (a fascinating little book on the relationship between philosophy, briefs and opinions).

The third decision in our chamber of relics is *State v. Suwannee County Dev. Authority*.<sup>258</sup> The requirement of Florida constitutional law that the state, counties and cities spend, tax, borrow and so on within the "public purpose" is particularly invidious. The abstraction, "public purpose," enjoys the same possibilities of personal discretion, from the point of view of the deciding judges, as the words "reasonable" or "arbitrary," the tests for compliance with substantive due process and equal protection in Florida.

The public purpose doctrine had its inception relatively early in constitutional law in the United States.<sup>259</sup> It is generally passé in modern constitutional law. Why should not a county be able to sell bonds, the proceeds from the sale to be used to lure industry for the county's economic development? One needs only to read the dissent of Justice Terrell to understand the necessity of such economic programs. It might be instructive to quote from Justice Terrell's dissenting opinion:

Casual reading of [the law] . . . discloses that its dominant purpose was to restore the depleted economy and general welfare of Suwannee County . . . . It is appropriate to point out that at the turn of the century, the economy of Suwannee County was flourishing. It had good farming lands that produced stable crops and a large amount of Sea Island cotton. It had other lands that produced pine and hardwood timber.

Much of the land that produced the pine forests is now what is generally known as 'cut-over lands,' grown up in scrub pine and scrub oak . . . . [T]he economy of the county is so depleted that the young people grow up, leave for other parts to reside and better their condition and many of the farming class and other workers seek employment miles from home to supplement their subsistence. On the whole the population has shown a gradual decrease at each succeeding census, all of which presents a very discouraging economic picture.

With the proceeds of the certificates, appellee [county] hopes to remove some of the gloom from this picture. . . .<sup>260</sup>

It is difficult to be sanguine about such decisions, but, from time to time, our supreme court does shift a particular constitutional barrier to state development. Lawyers' briefs may be of advantage in this connection. A demonstration that courts elsewhere have generally taken a position inconsistent with that of the Florida court may have a dramatic effect

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258. 122 So.2d 190 (Fla. 1960).

259. See MOTT, *DUE PROCESS OF LAW* 434-537 (1926) (development of the varieties of "public purpose").

260. 122 So.2d at 196.

upon the justices.<sup>261</sup> Ingenuity in designing brief arguments may also be efficacious. For example, some of the constitutional issues the court decides have remarkable economic side effects.<sup>262</sup> The court is a Florida institution and information of this nature should be very useful to its members.

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261. *Grubstein v. Urban Renewal Agency*, 115 So.2d 745 (Fla. 1959), exemplifies this very well.

262. *State v. Suwannee County Dev. Authority*, *supra* note 258, exemplifies this. See *Miami Herald*, Aug. 20, 1962, § B, p. 1, col. 6: "The Council on Economic Development was told Sunday that Florida's industry-hungry communities should be allowed to use public money to attract new plants. . . . Florida is at a disadvantage because of the financial inducements provided by governmental bodies in nearby states . . . and a 'judicious use' of local subsidies is required to meet the competition. . . . Alabama, Mississippi, Georgia and South Carolina all have laws permitting general obligation or revenue bonds to build industrial facilities, Pennsylvania and New York offer both state and local aid. All this adds up to stiff competition for Florida and makes firms hesitant to move to Florida if they can serve its markets from their present locations. A danger in the lack of local government assistance to economic development . . . is the movement toward federal financial aid to fill the gap, which usually carries with it loss of local control."