

5-1-1980

## Constitutional Law

Douglas M. Kramer

Sheila A. Halpern

Florence T. Robbins

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Douglas M. Kramer, Sheila A. Halpern, and Florence T. Robbins, *Constitutional Law*, 34 U. Miami L. Rev. 597 (1980)

Available at: <https://repository.law.miami.edu/umlr/vol34/iss3/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Constitutional Law

DOUGLAS M. KRAMER,\* SHEILA A. HALPERN,\*\* AND FLORENCE T. ROBBINS\*\*\*

*The authors survey the recent developments in Florida constitutional law, focusing on the powers and duties of the three branches of state government. Their discussion includes an analysis of the recent constitutional amendment modifying the jurisdiction of the supreme court.*

I. INTRODUCTION .....	598
II. THE JUDICIARY .....	599
A. <i>The Courts</i> .....	599
B. <i>Rulemaking</i> .....	602
C. <i>Supreme Court Jurisdiction</i> .....	608
1. APPEAL OF RIGHT .....	610
2. DISCRETIONARY JURISDICTION UNDER SECTION 3(B)(3) .....	612
a. Decisions Expressly Declaring Valid a State Statute .....	613
b. Decisions Expressly Construing the State or Federal Constitution .....	613
c. Decisions Expressly Affecting a Class of Constitutional or State Officers .....	614
d. Decisions Expressly and Directly in Conflict .....	615
e. Interlocutory Orders .....	619
3. CERTIFICATION JURISDICTION .....	620
4. ORIGINAL JURISDICTION .....	622
a. Writ of Prohibition .....	623
b. Writ of Mandamus .....	624
5. DISCIPLINARY JURISDICTION .....	625
a. Discipline of Judges .....	625
b. Discipline of Attorneys .....	626
D. <i>District Court Jurisdiction</i> .....	628
E. <i>Circuit Court Jurisdiction</i> .....	632
III. THE LEGISLATURE .....	633
A. <i>Delegation of Power</i> .....	634
B. <i>One Subject, Expressed in Title</i> .....	636
C. <i>Special Laws</i> .....	637

---

\* Associate with the firm of Greenberg, Traurig, Hoffman, Lipoff, Quentel & Wolff, P.A., Miami, Florida; Former Research Assistant to Justice Arthur J. England, Jr., Supreme Court of Florida; Former Instructor, University of Miami School of Law; LL.M. (Taxation), J.D., University of Miami School of Law; B.A., Emory University; Former Member, *University of Miami Law Review*. Mr. Kramer declines to join in any commentary by his co-authors regarding the decisions of the supreme court considered during the period of his service as research assistant for the court (June 1977-July 1978).

\*\* Associate with the firm of Steel Hector & Davis, Miami, Florida; J.D., University of Miami School of Law; B.A., University of Pennsylvania; Member, *University of Miami Law Review*.

\*\*\* Associate with the firm of Greenberg, Traurig, Hoffman, Lipoff, Quentel & Wolff, P.A., Miami, Florida; J.D., University of Miami School of Law; B. Ed., University of Florida; Member, *University of Miami Law Review*.

IV.	THE EXECUTIVE .....	639
A.	<i>Executive Discretion</i> .....	639
B.	<i>Advisory Opinions</i> .....	640
C.	<i>Suspension of Officers</i> .....	641
D.	<i>Clemency Power</i> .....	642
E.	<i>Attorney General</i> .....	644
F.	<i>Game and Fresh Water Fish Commission</i> .....	644
V.	SEPARATION OF POWERS .....	646
A.	<i>Legislature v. Executive</i> .....	646
B.	<i>Legislature v. Judiciary</i> .....	647
C.	<i>Judiciary v. Executive</i> .....	649
D.	<i>Exceptions</i> .....	650
VI.	ETHICS IN GOVERNMENT .....	651
VII.	LOCAL GOVERNMENT .....	654
A.	<i>Counties</i> .....	654
B.	<i>Municipalities</i> .....	657
C.	<i>Consolidation and Transfer of Powers</i> .....	660
VIII.	TAXATION .....	662
A.	<i>The Taxing Power</i> .....	662
B.	<i>Exemptions from Taxation</i> .....	664
C.	<i>Just Valuation</i> .....	668
D.	<i>Agricultural Land</i> .....	669
E.	<i>Corporate Income Tax</i> .....	670
F.	<i>Bond Validation</i> .....	671
	1. REVENUE BONDS .....	671
	2. BONDS PLEDGING CREDIT .....	672
IX.	EMINENT DOMAIN .....	673
X.	HOMESTEAD EXEMPTION .....	677
XI.	COVERTURE .....	679

## I. INTRODUCTION

Among the most significant recent developments in Florida law is the adoption of various amendments to the state constitution. In 1976, the electorate approved the "Sunshine Amendment" to article II, calling for ethics in government.<sup>1</sup> The voters adopted two more amendments on March 11, 1980, modifying the jurisdiction of the Supreme Court of Florida under article V and increasing the homestead exemption from ad valorem taxation under article VII.<sup>2</sup> This survey examines those amendments and discusses governmental powers and duties, focusing on the three branches of state government in the context of the separation of powers and exploring the powers of local government. The discussion includes

---

1. For a discussion of the "Sunshine Amendment," see notes 372-90 and accompanying text *infra*.

2. For a discussion and the text of the amendment to article V modifying supreme court jurisdiction, see notes 70-156 and accompanying text *infra*. For a discussion of the homestead exemption amendment under article VII, see notes 488-90 and accompanying text *infra*.

cases decided in the period from 1975 through the spring of 1980. Individual rights under article I of the Florida Constitution lie outside the scope of this survey.

## II. THE JUDICIARY

### A. *The Courts*

Article V, section 1<sup>3</sup> of the Florida Constitution vests the judicial power in specified courts and prohibits the establishment of any other courts. The vesting clause is an express grant of power to the judiciary, while the establishment clause is an express limitation on the legislature.<sup>4</sup> The supreme court has interpreted the establishment clause to permit legislative creation of administrative commissions functioning as judicial tribunals and panels functioning as evidence-gathering bodies.

In *Scholastic Systems, Inc. v. LeLoup*,<sup>5</sup> the supreme court determined that the Industrial Relations Commission (IRC) was a judicial tribunal satisfying due process requirements in reviewing administrative hearings on workers' compensation. The court reached this determination by looking at the legislative intent in establishing the IRC and at the qualifications of the Commission members.<sup>6</sup> But the supreme court held that the IRC was not a court, for otherwise its creation by the legislature would violate the establishment clause of article V, section 1.<sup>7</sup> The fine distinction between a judicial tribunal for due process purposes and a court for establishment clause purposes is difficult to grasp and may be difficult to apply in other areas.<sup>8</sup>

---

3. The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. The legislature shall, by general law, divide the state into appellate court districts and judicial circuits following county lines. Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices.

FLA. CONST. art. V, § 1.

4. See notes 231-68 and accompanying text *infra*.

5. 307 So. 2d 166 (Fla. 1974).

6. *Id.* at 170-71.

7. Although the legislature may grant quasi-judicial power to commissions and administrative bodies, it may establish no courts other than those specified in art. V, § 1. See note 3 *supra*.

8. The *LeLoup* opinion can be read broadly to mean that any administrative body functioning as a court meets the requirements of due process and access to courts. It can also be read more narrowly to mean that only those commissions whose members must meet the qualifications for a circuit court judge are judicial tribunals. For analyses of the reach of

In *Simmons v. Faust*,<sup>9</sup> the supreme court relied on the establishment clause to hold that a medical mediation panel<sup>10</sup> was not a court. The decision of a circuit court judge, who had sat on the panel as a judicial referee and passed on the constitutionality of a statute, was therefore not an order of a trial court.<sup>11</sup> Because the panel had gathered evidence rather than determined legal rights, it had not performed an essentially judicial or quasi-judicial function.

*Simmons* is consistent with *LeLoup* in that the court applied the same threshold analysis; unless a body performs essential judicial functions, the issue of whether it is a court or merely a judicial tribunal is never reached.<sup>12</sup> Both cases also effectively limited the mandatory appellate jurisdiction of the supreme court. The *LeLoup* holding made review of the IRC exclusive but discretionary,<sup>13</sup> while the *Simmons* holding made review of a medical mediation panel available by common law certiorari in the proper district court.<sup>14</sup>

The legislature may expand the judicial system by creating ad-

the *LeLoup* case, see Keyfetz, *Workmen's Compensation, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 1333-34 (1978); Note, 29 U. MIAMI L. REV. 798 (1975).

The Florida Constitution employs the term "judicial tribunal" only in art. II, § 8(e), the "Sunshine Amendment," which prohibits legislators from representing clients before state agencies other than judicial tribunals. See notes 386-88 and accompanying text *infra*. For purposes of that section, an agency is not a judicial tribunal unless it possesses four basic judicial characteristics for predominantly all of its activities: adversary proceedings; an impartial group of decisionmakers; the power to issue and enforce final orders; and an identifiable standard of appellate review that tests for due process in the agency's decisional processes. *Myers v. Hawkins*, 362 So. 2d 926, 931 (Fla. 1978).

9. 358 So. 2d 1358 (Fla. 1978).

10. FLA. STAT. § 768.133(2) (1975). The act was recently declared unconstitutional in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980).

11. Prior to the 1980 amendment of the constitution, the order of a trial court passing on the validity of a statute evoked mandatory appellate review in the supreme court, but the order of a commission did not. FLA. CONST. art. V, § 3(b)(1) (1968) (amended 1980); see notes 90-92 and accompanying text *infra*.

12. 358 So. 2d at 1359.

13. 307 So. 2d at 168. Discretionary jurisdiction would have been invoked upon a showing that the IRC had departed from the essential requirements of the law, the standard applied in interlocutory petitions and in common law certiorari. The jurisdictional point in *LeLoup* is now merely academic, because the 1980 amendment eliminates supreme court review of statewide agencies other than utilities commissions. FLA. CONST. art. V, § 3(b)(2) (as amended 1980). The legislature abolished the IRC, effective October 1, 1979, and provided for appellate review of workers' compensation agency decisions in the District Court of Appeal, First District. 1979 Fla. Laws ch. 79-312, § 1 (amending 1979 Fla. Laws ch. 79-40, § 46).

14. 358 So. 2d at 1359. See generally Brummer, Morris & Rosen, *Extraordinary Writs: A Powerful Tool for the Florida Practitioner, 1978 Developments in Florida Law*, 33 U. MIAMI L. REV. 1045, 1060 (1979).

ditional courts of the types listed in the vesting clause<sup>15</sup> without violating the establishment clause, provided that the new courts are created in accordance with article V, section 9.<sup>16</sup> This section authorizes the supreme court to determine whether the number of judges or courts or both should be changed and to certify its findings to the legislature, which may accept the certified plan in whole or in part.<sup>17</sup> The court recently certified a plan for the creation of the District Court of Appeal, Fifth District,<sup>18</sup> which the legislature implemented in a modified form, raising a question of the interpretation of section 9 for the first time. In an advisory opinion to the governor,<sup>19</sup> the supreme court ruled that the judiciary and the legislature share the responsibility for creating new judicial positions and for redefining old ones, with each branch performing specific functions. The supreme court determines whether a need for change exists, and its recommendations serve as outer limits on the legislature. The legislative modifications of the 1979 proposal were, in effect, an acceptance of a part of the plan certified by the court.<sup>20</sup>

The powers of the judiciary are not limited to those expressed in the constitution, but include "inherent" powers necessary to the judicial function. In *Rose v. Palm Beach County*,<sup>21</sup> the supreme court defined as inherent "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists . . . ."<sup>22</sup> The court held in *Rose* that in a case involving a criminal defendant's fundamental right to a fair trial, the judiciary may use its inherent power to compel a county

---

15. FLA. CONST. art. V, § 1; see note 3 *supra*.

16. FLA. CONST. art. V, § 9.

17. The legislature may go beyond the certified plan to provide for a greater increase or decrease than proposed only upon the vote of a two-thirds majority. *Id.*

18. The plan suggested a redefinition of appellate districts and the creation of a new district court of appeal. The supreme court also discerned a need for ten circuit court judgeships, seven county court judgeships, and ten district appellate court judgeships. *In re Advisory Opinion to Governor, Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979).

19. *Id.* Three of the justices doubted whether the court should have exercised its discretionary jurisdiction, absent an adversarial context. *Id.* at 969-72; see notes 281-90 and accompanying text *infra*.

20. 374 So. 2d at 964-65. Although the increased number of judgeships beyond those recommended was not an acceptance "in part," it was nevertheless permissible because approved by a two-thirds majority of the legislature. See note 17 *supra*.

21. 361 So. 2d 135 (Fla. 1978).

22. *Id.* at 136 n.3 (quoting CARRIGAN, *INHERENT POWERS OF THE COURTS* 2 (1973)).

to make travel payments to defense witnesses in amounts greater than those set by statute.<sup>23</sup> Paradoxically, the court invoked the separation of powers doctrine<sup>24</sup> to justify this intrusion into the legislative power, noting that the judiciary cannot allow those who hold the purse strings to use financial pressure to control a coequal branch of government.<sup>25</sup> The judiciary is particularly sensitive to such pressure because one of its inherent functions is to protect individuals aggrieved by official actions of the other two branches. However justified the court may have been on these particular facts, the decision has disturbing implications. The expenditure of funds by the judiciary could upset the political balance achieved in the fiscal policy set by the legislature pursuant to its constitutional responsibilities.

### B. Rulemaking

Article V, section 2(a)<sup>26</sup> of the Florida Constitution provides that the supreme court shall be the exclusive rulemaker for practice and procedure in all courts. The legislature may repeal the rules adopted, but has no power to enact procedural rules.<sup>27</sup> The power of the court is exclusive to the extent that a rule is purely procedural,<sup>28</sup> while the legislative power embraces enactments of substantive law. If the legislature enacts a statute affecting the procedure in a court, the validity of the statute turns on whether it prescribes a right or duty and is, consequently, an enactment of

---

23. FLA. STAT. § 90.14 (1977) (current version at FLA. STAT. § 92.142 (1979)). The court also held that the right of an accused to compulsory process against witnesses is a fundamental right. 361 So. 2d at 137 n.4.

24. See notes 339-54 and accompanying text *infra*.

25. 361 So. 2d at 137 n.6.

26. The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

FLA. CONST. art. V, § 2(a).

27. See *In re Clarification of Fla. Rules of Practice & Procedure*, 281 So. 2d 204 (Fla. 1973).

28. "Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

substantive law.<sup>29</sup>

In a series of three tort cases dealing with the joinder of insurance companies, the supreme court established that unless the legislature is clearly granting or withholding a substantive right, an attempt to control by statute the point at which the insurer formally enters the lawsuit will be considered a procedural enactment unconstitutionally encroaching on the rulemaking authority of the court.<sup>30</sup> In *Carter v. Sparkman*,<sup>31</sup> a malpractice suit against both the treating physician and his insurer, the physician moved to dismiss on the basis that the Medical Malpractice Reform Act<sup>32</sup> required mediation of such claims prior to trial on the merits. The plaintiff attacked the provision of the Act proscribing reference at trial to insurance coverage or joinder of an insurer,<sup>33</sup> on the basis that the legislature had unconstitutionally enacted a rule of procedure. The court agreed, keying on the statutory term "reference," and decided that references made during a trial are a purely procedural matter concerning the conduct of proceedings.<sup>34</sup> The court recognized the wisdom of the legislative policy<sup>35</sup> and adopted the statute as a rule of procedure.<sup>36</sup>

*School Board v. Price*<sup>37</sup> involved a challenge to a statute which waived the sovereign immunity of a school board as a political sub-

---

29. See notes 339-46 and accompanying text *infra*.

30. The three decisions leave open the questions of whether the legislature may effect a total prohibition of joinder of the insurer which would result in dual trials, and whether the legislature may control the timing of joinder in a single lawsuit where the applicable statute evinces a clear intent to change existing substantive rights in actions not involving sovereign immunity.

31. 335 So. 2d 802 (Fla. 1976).

32. FLA. STAT. § 768.133 (1975) (recodified at FLA. STAT. § 768.44 (1979)). Section 768.44, which establishes the medical liability mediation panels, was recently declared unconstitutional in *Aladana v. Holub*, 381 So. 2d 231 (Fla. 1980).

33. FLA. STAT. § 768.134(1). The plaintiff also attacked the mediation requirement as an infringement of equal protection, due process, and access to courts. The court held that although the legislation reached the outer limits of constitutional tolerance in the burden placed on plaintiffs, it did not overstep those bounds. 335 So. 2d at 806.

34. 335 So. 2d at 806. The court may have overlooked the substantive effect of insurance coverage on jury determinations. If the legislature was concerned that a jury would be more inclined to find liability if it knew the defendant was insured, then the statute withholding such information would affect the substantive right of the plaintiff by decreasing the likelihood of recovery. Under such a rationale, the statute was more than a mere procedural tool. See *Lee & Mussetto, Insurance, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 765, 767-69 (1980).

35. The legislative policy was to stem the rising cost of malpractice insurance and ultimately benefit the consumer through increased availability of medical services at lower cost. 335 So. 2d at 806.

36. FLA. R. CIV. P. 1.450(e).

37. 362 So. 2d 1337 (Fla. 1978).



division and included the following proscription: "[N]o attempt shall be made in the trial of any action against a school board to suggest the existence of any insurance . . . ." <sup>38</sup> Relying on the *Carter* decision, the district court found this proscription unconstitutional. <sup>39</sup> The supreme court reversed, distinguishing *Carter* because in the present case the legislature had granted injured plaintiffs a right to sue which otherwise would have been barred by the doctrine of sovereign immunity. The insurance proscription was part and parcel of the substantive right as a condition to its exercise and, therefore, was within the legislative sphere. <sup>40</sup>

The third case in the series, *Markert v. Johnston*, <sup>41</sup> concerned a statute which disallowed joinder of the insurer in motor vehicle liability suits in one section, but in another section allowed joinder after the verdict was rendered. <sup>42</sup> The court struck down the statute because its plain language evinced a legislative intent to control only the timing of the joinder, merely a procedural step in the conduct of a single suit. <sup>43</sup> The court pointed out that the statute did not change the substantive right of direct action against an insurer, which the court had previously conferred <sup>44</sup> in recognition that the insurer is the real party in interest. Rather than changing the policy of that prior decision, the statute had merely specified the precise moment when the real party in interest would be recognized. As a timing mechanism, it was procedural rather than substantive and unconstitutionally encroached on the rulemaking authority of the court.

An attempt by the legislature to confer standing on a condominium association to bring a class action on behalf of its membership was also held to be an impermissible legislative crossing of the

---

38. FLA. STAT. § 230.23(9)(2) (1979).

39. 342 So. 2d 1039 (Fla. 4th DCA 1977).

40. The court expressly limited to its facts a prior contrary decision, *School Bd. v. Surrette*, 281 So. 2d 481 (Fla. 1973) (striking down a substantially equivalent statute). 362 So. 2d at 1340.

41. 367 So. 2d 1003 (Fla. 1978).

42. FLA. STAT. § 627.7262 (1977) (declared unconstitutional in *Markert v. Johnston*, 367 So. 2d 1003, 1006 (Fla. 1978)).

43. The legislative intent was apparently the same as that behind the statute struck down in *Carter*—to keep insurance information from the jury. Although the legislature could not proscribe "reference" to the insurer after *Carter*, the non-joinder statute would effect the same result. Unlike *Carter*, however, the *Markert* decision did not adopt the stricken statute as a rule of procedure. See 367 So. 2d at 1006 (Alderman, J., concurring specially).

44. See *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969). For an interesting contrary view, see *Aubry v. Larson*, 368 So. 2d 1289, 1289 (Fla. 1979) (Adkins, J., concurring specially).

line between substance and procedure in *Avila South Condominium Association v. Kappa Corp.*<sup>45</sup> The supreme court defined substantive law as "those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property."<sup>46</sup> The court viewed standing to sue not as a substantive right, but as a procedural means of getting the parties through the judicial process. Because the challenged statute<sup>47</sup> provided a practical means of resolving in a single suit the problems of common interest to unit owners, however, the court adopted the statute as a rule of procedure.<sup>48</sup>

In *Duval County School Board v. Florida Public Employees Relations Commission*,<sup>49</sup> the District Court of Appeal, First District, resolved a conflict between a rule<sup>50</sup> providing for an automatic stay of the effect of an administrative order under judicial review, and a statute<sup>51</sup> providing that judicial review would not stay the effect of unfair labor practice orders of the Public Employees Relations Commission (PERC). The court held the rule inapplicable to PERC administrative hearings charging a school board with unfair labor practices,<sup>52</sup> because the rule "was not written in contemplation that an administrative order of one State agency aggrieving another would one day be reviewable by petition for certiorari."<sup>53</sup> This result is contrary to the general rule that if a statute and a rule of court conflict with respect to matters of judicial procedure, the rule prevails.<sup>54</sup> The court did not address the issue of whether the statute was itself a procedural rule and there-

---

45. 347 So. 2d 599 (Fla. 1977).

46. *Id.* at 608. The court adopted its definition from a 1941 federal case, *Kellman v. Stolz*, 1 F.R.D. 726 (N.D. Iowa 1941). See *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

47. FLA. STAT. § 718.111(2) (Supp. 1976) (declared unconstitutional in *Avila S. Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1976)).

48. FLA. R. Civ. P. 1.220(b) (effective June 13, 1977). Although adoption of the rule makes the point moot, it is arguable that the substantive/procedural line was improperly drawn. Defects in individual units will often be too small for one person to seek judicial aid. Thus, by permitting the aggregation of claims through class action, the legislature granted a substantive right of access to courts.

49. 346 So. 2d 1087 (Fla. 1st DCA 1977).

50. FLA. R. APP. P. 9.310(b)(2).

51. FLA. STAT. §§ 120.68(3), 447.503 (1975) (amended 1979).

52. Application of the rule in this situation would have relieved the school board of its duty to bargain in good faith while the order was being judicially reviewed.

53. 346 So. 2d at 1088. A broad reading of the decision would support a challenge to any rule in conflict with a statute where the rule was established prior to a new mode of administrative procedure, using the argument that the rule did not contemplate this mode.

54. See *Bernhardt v. State*, 288 So. 2d 490 (Fla. 1974).

fore unconstitutional.<sup>55</sup>

Statutes that affect judicial access to information have been held constitutionally infirm as procedural rules. In *Gator Freightways, Inc. v. Mayo*,<sup>56</sup> the court held that a statute regulating administrative procedures of the Public Service Commission impermissibly determined which hearing records would be released to the court as part of the record on appeal. Determining the relevancy of evidence is a judicial rather than a legislative function. While *Gator Freightways* invalidated an attempt to withhold information from the judiciary, *Johnson v. State*<sup>57</sup> invalidated an attempt to impose information on the judiciary. In that case, the court invalidated a statute requiring a presentence investigation in felony cases, which conflicted with a rule of procedure permitting sentencing without investigation under specified circumstances.<sup>58</sup> The court reasoned that in adopting the rule, it had already determined that the matter was procedural; therefore, the statute was unconstitutional.<sup>59</sup>

Similarly, the court protected its access to information after a case has been decided, even when that access is subject to legislative regulation. In *Johnson v. State*,<sup>60</sup> the trial court denied a defendant's request to expunge the record of his arrest as provided by a statute<sup>61</sup> that the court found unconstitutional.<sup>62</sup> The su-

---

55. The statute determines when a stay will be automatic and when it will not, arguably an impermissible interference with the machinery of the court.

56. 328 So. 2d 444 (Fla. 1976).

57. 308 So. 2d 127 (Fla. 1st DCA 1975), *aff'd*, 346 So. 2d 66 (Fla. 1977); *see* notes 343-46 and accompanying text *infra*.

58. FLA. R. CRIM. P. 3.710.

59. *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975), in which the court upheld a statute directly conflicting with a rule, seems to contradict this analysis. Under *Johnson*, the existence of a rule would presuppose a determination that the area was procedural, an arguably circular approach. The statute upheld in *Benyard* provided that criminal sentences for offenses not charged in the same indictment must be served consecutively unless the court directs otherwise. FLA. STAT. § 921.16 (1973) (amended 1979). FLA. R. CRIM. P. 3.722 provided that sentences are concurrent unless the court directs otherwise. The court recognized that whether a sentence is concurrent or consecutive directly affects the length of time served and is therefore substantive. The court applied the statute retroactively to further the policy of uniformity in sentencing.

Whenever possible the court will read a statute in harmony with a rule. In *Swan v. State*, 322 So. 2d 485 (Fla. 1975), the court considered FLA. STAT. § 921.141(1) (1979), which provided that any relevant evidence may be presented to the court before sentencing in a capital case. The defendant contended that the statute repealed or amended FLA. R. CRIM. P. 3.710, which permitted a presentence investigation. The court held that the two were in harmony, both permitting a presentence investigation at the discretion of the court. The legislature could not amend a rule of court, and the court would not imply repeal.

60. 336 So. 2d 93 (Fla. 1976).

61. FLA. STAT. § 901.33 (1975) (declared unconstitutional in *Johnson v. State*, 336 So.

preme court held that the legislature had created a substantive right of expungement for certain persons, but that in dictating the manner in which the record would be expunged, it had infringed on the court's rulemaking power. The court declared that the proper procedure would be to seal the record, permitting access under judicial supervision.<sup>63</sup>

When the legislature enacted the new Florida Evidence Code,<sup>64</sup> the court foresaw similar constitutional challenges to portions of the Code as legislatively promulgated rules of practice and procedure. To forestall such litigation and the resulting confusion in applying the Evidence Code, the court temporarily adopted the Code's provisions to the extent they were procedural, under the rulemaking power of article V, section 2(a).<sup>65</sup>

The supreme court invoked its rulemaking power in 1978 to take jurisdiction of *Florida Bar v. Brumbaugh*,<sup>66</sup> a suit to enjoin a stenographer from the unauthorized practice of law.<sup>67</sup> The court adopted rules in this case to set the parameters within which a layman could provide information to other laymen regarding access to the judicial system in civil matters such as divorces, wills, and bankruptcies.<sup>68</sup> The court narrowly defined its regulations so

---

2d 93 (Fla. 1976)).

62. The trial court based its analysis on the inherent power and duty of the court to keep records of its proceedings, noting the possible need for the records in determining rights of people in the future. 336 So. 2d at 94.

63. This decision garnered a majority of only four to three, possibly because the stricken statute granted a new right which included destruction of the record. The dissent argued that the statute only minimally interfered with a ministerial function of the court and was permissible. *Id.* at 96 (Adkins, J., dissenting).

64. 1976 Fla. Laws ch. 76-237, as amended by 1977 Fla. Laws ch. 77-77, 77-174 & 1978 Fla. Laws ch. 78-361 (effective July 1, 1979).

65. *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979). The court invited the legal community to file specific objections and suggestions regarding the new rules during this temporary transitional stage.

66. 355 So. 2d 1186 (Fla. 1978).

67. Ms. Brumbaugh's case did not fall within the art. V, § 15 grant of exclusive jurisdiction to admit persons to the practice of law and to discipline those admitted because she neither sought nor had been granted admission. *But see Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979). Similarly, because this was an original case, it did not fall within the art. V, § 3 grant of appellate jurisdiction. The case represents an interesting, indeed unusual, means by which the court acquired subject matter jurisdiction. The authors know of only one other instance in which the jurisdiction of the supreme court arguably had been invoked by litigants pursuant to art. V, § 2(a). *See State v. Lott*, 286 So. 2d 565 (Fla. 1973), *cert. denied*, 417 U.S. 913 (1974). *But see State v. Lyons*, 293 So. 2d 391 (Fla. 2d DCA 1974).

68. The court outlined the following parameters:

Ms. Brumbaugh, and others in similar situations, may sell printed material purporting to explain legal practice and procedure to the public in general and she may sell sample legal forms . . . Further, we hold that it is not improper for

as not to place unnecessary restrictions on the civil rights of the persons affected, the first amendment rights to speak and print what one chooses, the right of self-representation, the right of privacy, and the right of access to courts.

Section 2(a) also provides that the supreme court shall make rules for the transfer of any proceeding to the court having proper jurisdiction when the jurisdiction of another court has been improvidently invoked. This mandate has been narrowly construed to mean that the appellant who timely files notice of appeal in the correct lower court, but invokes the jurisdiction of the wrong appellate court, may have his case transferred to the correct appellate court. On the other hand, the appellant who timely files a notice of appeal in the wrong court will have failed to take a step essential to confer jurisdiction on the appellate court, which will thus be without power to transfer the case.<sup>69</sup>

### C. *Supreme Court Jurisdiction*

On March 11, 1980, the Florida electorate adopted a constitutional amendment altering the jurisdiction of the supreme court and the district courts of appeal. Although future litigation will be necessary to determine the precise limits of the modified jurisdiction of the supreme court, the plain language of the amendment offers some guidance to its probable interpretation by the court:

(b) JURISDICTION—The supreme court:

(1) Shall hear appeals from final judgments of trial courts

---

Marilyn Brumbaugh to engage in a secretarial service, typing such forms for her clients, provided that she only copy the information given to her in writing by her clients. In addition, Ms. Brumbaugh may advertise her business activities of providing secretarial and notary services and selling legal forms and general printed information. However, Marilyn Brumbaugh must not, in conjunction with her business, engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms necessary for a dissolution proceeding. More specifically, Marilyn Brumbaugh may not make inquiries nor answer questions from her clients as to the particular forms which might be necessary, how best to fill out such forms, where to properly file such forms, and how to present necessary evidence at the court hearings. Our specific holding with regard to the dissolution of marriage also applies to other unauthorized legal assistance such as the preparation of wills or real estate transaction documents. While Marilyn Brumbaugh may legally sell forms in these areas, and type up instruments which have been completed by clients, she must not engage in personal legal assistance in conjunction with her business activities, including the correction of errors and omissions.

355 So. 2d at 1194.

69. *Southeast First Nat'l Bank v. Herin*, 357 So. 2d 716 (Fla. 1978). See also *Administrative Order*, 374 So. 2d 972, 973 (Fla. 1979).

imposing the death penalty and from orders of trial courts and decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution. initially and directly passing the validity of a state statute or a federal statute or treaty or construing a provision of the state or federal constitution.

(2) When provided by general law, shall hear appeals from final judgments and orders of trial courts imposing life imprisonment or final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review by certiorari any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that expressly and directly conflicts that is in direct conflict with a decision of another any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) ~~(4)~~ May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review and all writs necessary to the complete exercise of its jurisdiction.

(8) ~~(5)~~ May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) ~~(6)~~ May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

~~(7) Shall have the power of direct review of administrative action prescribed by general law.<sup>70</sup>~~

### 1. APPEAL OF RIGHT

The amendment does not change the mandatory jurisdiction of the supreme court to hear appeals from final judgments of trial courts imposing the death penalty.<sup>71</sup> Similarly unchanged is the appeal of right, when provided by general law, from final judgments of trial courts entered in proceedings for the validation of bonds or certificates of indebtedness.<sup>72</sup> On the other hand, the amendment eliminates direct appeal to the supreme court, when provided by general law, or orders of trial courts imposing life imprisonment.<sup>73</sup>

The amendment makes major reductions in appeals of right to the supreme court from orders and decisions "initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."<sup>74</sup> Trial court orders of this kind are no longer appealable directly to the supreme court.<sup>75</sup> Orders of the circuit court acting as a trial court are appealed to the appropriate district court.<sup>76</sup> District court decisions declaring invalid a state statute or a provision of the state constitution remain appealable by right to the supreme court.<sup>77</sup> In contrast, review of district court decisions expressly declaring a state statute valid or expressly construing a provision of

70. FLA. CONST. art. V, § 3(b) (as amended 1980). Words in ~~struck-through~~ type are deletions from existing law; words in underscored italic type are additions.

71. *Id.* § 3(b)(1).

72. *Id.* § 3(b)(2).

73. *Id.* (1968). Because no enabling legislation was ever enacted under this former provision, the amendment made no practical reduction in jurisdiction of appeals of life sentences.

74. *Id.* § 3(b)(1) (1968).

75. *Id.* (as amended 1980). This change reduces the opportunity for attorneys to raise a statutory challenge in order to ensure direct appeal to the supreme court from a trial court.

76. See notes 197-200 and accompanying text *infra*.

77. FLA. CONST. art. V, § 3(b)(1) (as amended 1980). It should be noted that the amendment virtually eliminates supreme court review of county court orders which pass upon the validity of statutes or constitutional provisions. Final appellate review of such orders typically lies in the circuit courts, from which supreme court review is unavailable. See England, Hunter & Williams, *An Analysis of the 1980 Jurisdictional Amendment*, 54 FLA. B.J. 406, 409 (1980); notes 226-27 and accompanying text *infra*.

the state or federal constitution is now within the discretionary jurisdiction of the supreme court.<sup>78</sup> This dichotomy indicates that the supreme court will be primarily concerned with decisions that disrupt legislative enactments and consistency of statutory interpretation throughout the state.<sup>79</sup>

The restriction of appeal of right to cases in which the district court declares invalid a state statute or constitutional provision raises the issue of the vitality of the "inherency doctrine."<sup>80</sup> Under this judicially created doctrine, the failure of a lower court to rule explicitly on the validity of a statute would not prevent the supreme court from assuming jurisdiction under former section 3(b)(1). If a decision on the validity of the statute was necessary to a determination of the cause, the supreme court would base its jurisdiction on the lower court's having "inherently" passed on the statute's validity. Just as an appeal of right to the supreme court could be raised by an inherent "initial and direct passing" on statutory validity before the amendment, an appeal could now be raised by an inherent "declaration of statutory invalidity."<sup>81</sup>

---

78. FLA. CONST. art. V, § 3(b)(3) (as amended 1980); see notes 90-92 and accompanying text *infra*.

Decisions involving federal statutes, formerly appealable of right, are mentioned nowhere in amended § 3(b). Presumably, review would be available if the decision qualified for discretionary certification jurisdiction. See note 156 and accompanying text *infra*.

79. It is arguable, however, that district court decisions upholding a statute are more likely to be in derogation of individual rights than decisions invalidating a statute. To the extent that appeal of right to the supreme court is available only for the latter, those individual rights may have been subordinated to an institutional concern for precedential consistency in statutory interpretation.

On the other hand, litigants in either case will have had their appeal as of right in the district court of appeal. Further review by the supreme court in its supervisory role may be compelling only where the impact of a statutory invalidation reaches beyond the immediate litigants.

80. See *Faust v. State*, 354 So. 2d 866 (Fla. 1978); *Demko's Gold Coast Trailer Park, Inc. v. Palm Beach County*, 218 So. 2d 745, 746 (Fla. 1969); *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439, 442 (Fla. 1959).

81. The argument for continued application of the inherency doctrine is persuasive because in areas in which the framers of the amendment wanted an explicit statement, they added the word "expressly." See FLA. CONST. art. V, § 3(b)(3) (as amended 1980); FLA. R. APP. P. 9.030(a)(2)(A)(ii) (as amended 1980) and accompanying committee notes, *promulgated in In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1371 (Fla. 1980); England, Hunter & Williams, *supra* note 77, at 409. Furthermore, the grant of a right of appeal instead of discretionary appeal indicates that the framers intended to encourage review in the area of statutory invalidity. In any event, the potential confusion and inconsistency, engendered by the perception that a particular statute is invalid in only one district, would warrant supreme court review.

On the other hand, it is arguable that a narrow reading of "declaring" to require an explicit statement of invalidity would be more consistent with the general tenor of the amendment, which curtails supreme court jurisdiction.



The amendment eliminates the power of direct review of administrative action prescribed by general law,<sup>82</sup> but provides for mandatory direct review, pursuant to enabling legislation, of actions of "statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service."<sup>83</sup> Under the former provision, the supreme court announced in *Smith Terminal Warehouse Co. v. Bevis*<sup>84</sup> that its function in reviewing a decision of an administrative body is to determine if the decision departs from the essential requirements of law and if the agency based its conclusions on substantial, competent evidence. Whether this standard will apply to review of the Public Service Commission under the new section 3(b)(2) is uncertain.

## 2. DISCRETIONARY JURISDICTION UNDER SECTION 3(B)(3)

The words "by certiorari" have been stricken from section 3(b)(3), thereby abolishing constitutional certiorari jurisdiction in the Supreme Court of Florida.<sup>85</sup> The new provision retains discretionary review of decisional conflict and creates discretionary review in some areas formerly reviewed by direct appeal.<sup>86</sup>

The word "expressly" is a conspicuous addition to the section. In the past, the justices of the supreme court have voiced their concern with the unnecessary expenditure of judicial energies needed to search a record for evidence that the jurisdiction of the court was properly invoked.<sup>87</sup> The amendment apparently requires a written opinion in which the jurisdictional basis for review is evident.<sup>88</sup> Such a requirement shifts from the supreme court to the district courts of appeal the ultimate responsibility of screening district court decisions for review. This shift creates an opportunity for district courts to shelter their decisions from review by

---

82. FLA. CONST. art. V, § 3(b)(7) (1968).

83. *Id.* § 3(b)(2) (as amended 1980). This section apparently applies only to the Public Service Commission.

84. 312 So. 2d 721 (Fla. 1975).

85. FLA. CONST. art. V, § 3(b)(3) (as amended 1980); see FLA. R. APP. P. 9.030(a)(2) (as amended 1980) and accompanying committee notes, promulgated in *In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1371 (Fla. 1980).

86. FLA. CONST. art. V, § 3(b)(3) (as amended 1980); see note 70 and accompanying text *supra*.

87. *E.g.*, Address by the Justices of the Supreme Court of Florida, University of Miami School of Law (Feb. 25, 1980).

88. If the opinion of the district court must expressly state the basis of jurisdiction, the amendment has apparently changed the focus of review from the decision of the district court to its opinion, a result which opposes the plain language of the constitution, even as amended.

issuing a per curiam affirmance or reversal, or by carefully drafting an opinion that avoids expressing a potential jurisdictional basis.<sup>89</sup>

#### a. Decisions Expressly Declaring Valid a State Statute

The Supreme Court of Florida “[m]ay review any decision of a district court of appeal that expressly declares valid a state statute.”<sup>90</sup> Express validation will require not only a written opinion but also an explicit statement upholding the statute in that opinion. The amendment removes decisions validating a state statute from the mandatory jurisdiction of the supreme court<sup>91</sup> and adds the word “expressly” to modify “declare.” These changes indicate that the framers of the amendment considered this category of decisions in less urgent need of immediate supreme court review. For this reason, the inherency doctrine will no longer be applied to find validation.<sup>92</sup>

#### b. Decisions Expressly Construing the State or Federal Constitution

In order to “construe” a constitution for purposes of establishing appellate jurisdiction in the supreme court under the 1968 constitution,<sup>93</sup> a lower court had to “explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision” in question.<sup>94</sup> Had this standard been enforced strictly, the insertion of the word “expressly” in the amended section<sup>95</sup> would add unnecessary surplusage, creating no change in the previous law of constitutional construction. But, in *Potwin v. Keller*,<sup>96</sup> the supreme court found a “construction” of the Constitution of the United States in a district court per curiam

---

89. The authors do not suggest that district courts are anxious to foreclose review of their decisions, but that an opportunity is now available which did not exist before the change. The supreme court may have the opportunity to counteract any abuse by interpreting the word “expressly” to include per curiam opinions citing other cases as part of the decision. See notes 124-29 and accompanying text *infra*. But see England, Hunter & Williams, *supra* note 77, at 411.

90. FLA. CONST. art. V, § 3(b)(3) (as amended 1980).

91. See notes 74-79 and accompanying text *supra*.

92. For a discussion of the inherency doctrine, see notes 80-81 and accompanying text *supra*.

93. FLA. CONST. art. V, § 3(b)(1) (1968).

94. *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958).

95. FLA. CONST. art. V, § 3(b)(3) (as amended 1980) provides that the supreme court “[m]ay review any decision of a district court of appeal . . . that expressly construes a provision of the state or federal constitution.” See notes 74-79 and accompanying text *supra*.

96. 313 So. 2d 703 (Fla. 1975).

opinion that cited cases but made no analysis.<sup>97</sup> Although the cases cited had construed the Constitution, the district court opinion did not explain the meaning of the provisions, but simply applied the previously established case law to the facts before the court. The continued vitality of *Potwin* is doubtful, in view of the new requirement that constitutional constructions be express.<sup>98</sup>

### c. Decisions Expressly Affecting a Class of Constitutional or State Officers

Section 3(b)(3) as amended preserves discretionary supreme court jurisdiction of any district court decision that "expressly affects a class of constitutional or state officers."<sup>99</sup> The addition of the word "expressly" connotes that the district court must at least have written an opinion, but whether that opinion must state that the rule of the case affects a class of officers is not clear. As Justice England noted in *Shevin v. Cenville Communities, Inc.*,<sup>100</sup> this form of review has been narrowly construed "to stem the erosion of finality in the district courts"<sup>101</sup> and will not ordinarily arise if the decision below affects only one agency of the state.<sup>102</sup> On the other hand, in *Taylor v. Tampa Electric Co.*,<sup>103</sup> the supreme court heard an appeal from a district court decision that interpreted an amended state statute<sup>104</sup> to permit clerks of the circuit courts to exact a commission on certain disbursements to defendants in eminent domain proceedings. The court accepted jurisdiction because the constitution establishes the office of circuit court clerk<sup>105</sup> and because the decision affected the clerks as a class.

### d. Decisions Expressly and Directly in Conflict

The purpose of discretionary conflict jurisdiction is to allow the supreme court to set uniform rules of law for statewide appli-

---

97. 299 So. 2d 149 (Fla. 3d DCA 1974).

98. If *Potwin* were to remain good law, it would not be difficult to invoke the discretionary jurisdiction of the supreme court.

99. FLA. CONST. art. V, § 3(b)(3) (as amended 1980).

100. 338 So. 2d 1281 (Fla. 1976).

101. *Id.* at 1282 (England, J., concurring).

102. In *Cenville Communities*, the decision of the district court affected a single agency; had the decision impinged on the enforcement powers of state attorneys as a class, however, the supreme court might have had jurisdiction. *Id.* at 1283.

103. 356 So. 2d 260 (Fla. 1978).

104. FLA. STAT. § 74.051(3) (1979).

105. FLA. CONST. art. V, § 16.

cation by the lower courts.<sup>106</sup> Conflict jurisdiction arises only when there is a "real and embarrassing conflict of opinion and authority"<sup>107</sup> between a district court and the supreme court or among the district courts. Amended section 3(b)(3) requires that the decision expressly and directly conflict with a decision of "another" district court of appeal rather than "any" district court of appeal. Prior to the amendment, conflict jurisdiction could be raised by conflicting decisions within the same district.<sup>108</sup>

Conflict jurisdiction may be invoked in two principal ways.<sup>109</sup> First, the district court might announce a rule of law that conflicts with one previously announced by another district court or the supreme court.<sup>110</sup> Only if the conflicting rule is necessary to the district court decision, however, will the supreme court find conflict jurisdiction.<sup>111</sup> Second, the district court might apply a consistent rule of law to produce a result that conflicts with a previous case involving substantially similar controlling facts.<sup>112</sup> Once the supreme court finds a conflict of either type invoking its jurisdiction, the court may proceed to hear the entire case on its merits and

---

106. See *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958). The role of the supreme court is to assure statewide uniformity of decision among the district courts, which are courts of last resort rather than intermediaries between the trial court and the supreme court. See *Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co.*, 334 So. 2d 585, 586 (Fla. 1976) (England, J., concurring). For a discussion of district court jurisdiction, see notes 197-221 and accompanying text *infra*.

107. *Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc.*, 336 So. 2d 1145, 1147 (Fla. 1976).

108. See, e.g., *Bowen v. Willard*, 340 So. 2d 110 (Fla. 1976). The court promulgated FLA. R. APP. P. 9.331, providing for en banc district court review of intradistrict conflicts. *In re* Rule 9.331, 377 So. 2d 700 (Fla. 1979).

109. See *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960); *Florida Power & Light Co. v. Bell*, 113 So. 2d 697 (Fla. 1959).

110. Prior to the amendment, conflict certiorari could also be invoked where a district court reached its decision by reevaluating evidence and substituting its own judgment for that of the trier of fact. This violation of the generally accepted scope of appellate review was held to raise a conflict with prior decisional law, even where the district court did not expressly announce a conflicting rule of law. See *Helman v. Seaboard Coast Line R.R.*, 349 So. 2d 1187 (Fla. 1977). Under the amendment, however, a district court decision reached in a manner contrary to generally accepted rules of law may not qualify as the "express" and direct conflict now required for invoking supreme court jurisdiction. See notes 87-89 and accompanying text *supra*. Such decisions may now be unreviewable unless the requirements for a writ of mandamus can be satisfied. See *Brummer, Morris & Rosen, supra* note 14, at 1046; notes 166-71 and accompanying text *infra*.

111. *Nieman v. Nieman*, 312 So. 2d 733 (Fla. 1975). When the conflicting language is mere obiter dicta, the writ will be discharged. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976). *Contra*, *Twomey v. Clausohm*, 234 So. 2d 338 (Fla. 1970).

112. *Mancini v. State*, 312 So. 2d 732 (Fla. 1975). The supreme court will not find conflict jurisdiction where the facts support the district court decision, even though the supreme court might have reached a different result on those facts. *Id.*

decide any points passed upon by the district court.<sup>113</sup>

The application of the principles of conflict jurisdiction to a decision in which the district court majority declines to write an opinion has generated considerable debate among the justices of the supreme court. In considering the extent to which the court should examine such decisions for conflict, the justices have voiced the practical concerns of judicial economy and caseload burden as well as more fundamental issues regarding the role of the supreme court as harmonizer of the decisions of the appellate courts of last resort, the district courts.<sup>114</sup>

In 1965 the supreme court concluded in *Foley v. Weaver Drugs, Inc.*<sup>115</sup> that its conflict certiorari jurisdiction embraced judgments of district courts that were affirmed per curiam without opinion, where an examination of the "record proper"<sup>116</sup> revealed that the legal effect of the affirmance created a conflict with a decision of the supreme court or another district court of appeal. In *Foley* the court reversed its previous position that it would not review per curiam affirmances for conflict except when a restricted examination revealed that "a conflict had arisen with resulting injustice to the immediate litigant."<sup>117</sup>

Ten years later, in *AB CTC v. Morejon*,<sup>118</sup> in which a per curiam affirmance could have been based on either of two longarm statutes,<sup>119</sup> the supreme court found that it had jurisdiction, because the affirmance conflicted with one of two prior decisions re-

---

113. See, e.g., *Bould v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977).

114. Address by the Justices of the Supreme Court of Florida, University of Miami School of Law (Feb. 25, 1980). Although the cases discussed in this section demonstrate that a majority of the court declined to limit judicially the scope of review of per curiam decisions, six of the seven justices favored the constitutional amendment limiting the conflict jurisdiction of the court, with only Justice Adkins opposed.

The principles expressed with respect to per curiam affirmances would apply as well to per curiam reversals, but the district courts rarely produce this type of decision.

115. 177 So. 2d 221 (Fla. 1965).

116. The *Foley* court defined "record proper" as "the written record of the proceedings in the court under review except the report of the testimony." *Id.* at 223.

117. *Lake v. Lake*, 103 So. 2d 639, 643 (Fla. 1958). The *Foley* court found that because of this exception, the *Lake* rule had not diminished its caseload of per curiam affirmances. In practice, the only distinction between a decision supported by a written opinion and a per curiam affirmance without an opinion was whether the supreme court examined the opinion or the "record proper" for conflict. 177 So. 2d at 223. Absent a distinction in legal effect, the court reasoned that the former should not be given more "verity" by denying conflict review to the latter. *Id.* at 224.

118. 324 So. 2d 625 (Fla. 1976).

119. FLA. STAT. § 48.181 (1979); *Id.* § 48.182 (repealed 1973). On an interlocutory appeal, the district court had affirmed per curiam the denial of a foreign defendant's motion to dismiss for lack of jurisdiction. 324 So. 2d at 626.

ardless of which statute the district court relied on. In an opinion by Justice Adkins, the majority found this conflict by examining affidavits, depositions, and trial testimony from a prior lawsuit that the second trial court had ordered incorporated into the present record.<sup>120</sup> Justice England objected to this expanded view of the "record proper" and called for a reevaluation of *Foley*, arguing that the court was improvidently exercising its discretionary jurisdiction in cases requiring neither harmonization nor clarification.<sup>121</sup>

The amendment ostensibly eliminates the "record proper" aspect of the conflict jurisdiction controversy by requiring that the conflict be express as well as direct.<sup>122</sup> It is unlikely that this change requires the district court to state explicitly that its decision conflicts with a decision of another district or of the supreme court. Such a declaration would be tantamount to a certification of direct conflict under new section 3(b)(4)<sup>123</sup> and would make that section surplusage. Therefore, the amendment apparently requires only that conflict be evident on the face of the decision. Absent a written opinion by a district court, no express conflict appears as a basis for supreme court jurisdiction.<sup>124</sup>

A per curiam affirmance without a written majority opinion, but accompanied by a dissenting or concurring opinion, presents a question of constitutional interpretation: May the accompanying concurrence or dissent raise a per curiam decision to the level of "express" conflict required for jurisdiction under amended section 3(b)(3)? Even prior to the *Foley* case, the supreme court had concluded in *Huguley v. Hall*<sup>125</sup> that a dissenting opinion to a per curiam majority decision rendered without opinion could provide the basis for conflict certiorari jurisdiction.<sup>126</sup> In *David v. State*,<sup>127</sup> a recent case decided before ratification of the amendment, the supreme court announced that "[t]his dissenting opinion may be re-

---

120. 324 So. 2d at 626.

121. *Id.* at 628-30 (England, J., dissenting).

122. FLA. CONST. art. V, § 3(b)(3). See FLA. R. APP. P. 9.030(a)(2)(A)(IV) (as amended 1980) and accompanying committee notes, promulgated in *In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370, 1371 (Fla. 1980).

123. See notes 143-47 and accompanying text *infra*.

124. See generally England, Hunter & Williams, *supra* note 77.

125. 157 So. 2d 417 (Fla. 1963).

126. See, e.g., *Commerce Nat'l Bank v. Safeco Ins. Co. of America*, 284 So. 2d 205 (Fla. 1973); *Autrey v. Carroll*, 240 So. 2d 474 (Fla. 1970). *Contra*, *Golden Loaf Bakery, Inc. v. Chas. W. Rex Constr. Co.*, 334 So. 2d 585 (Fla. 1976) (England, J., concurring).

127. 369 So. 2d 943 (Fla. 1979).

sorted to in determining whether or not a conflict exists."<sup>128</sup>

Because the amendment abolishes examination of the record proper under the *Foley* doctrine,<sup>129</sup> this superficial resort to a dissenting opinion to establish conflict jurisdiction is no longer viable. Subsequent to the amendment, the supreme court directly addressed this issue in *Jenkins v. State*,<sup>130</sup> holding that "the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the *decision* of the district court of appeal."<sup>131</sup> In a per curiam decision, regardless of any concurring or dissenting opinions, the single word "affirmed" does not "expressly" conflict with other decisions.<sup>132</sup>

When a per curiam decision affirms and cites a case, however, the citation arguably could serve to express the conflict if the supreme court were willing to read the per curiam decision as incorporating by reference the opinion of the cited case.<sup>133</sup> More explicit than a citation alone is a per curiam affirmance "on the authority of" or "adopting" a cited case.<sup>134</sup> In both instances, however, the utility of the cited case as an express statement may be limited where it stands for more than one proposition, for it may be impossible to discern the basis on which the per curiam decision rests.<sup>135</sup>

---

128. *Id.* at 944. Although the conflict in *David* was with a decision within the same district, the 1980 amendment restored the original requirement of conflict with a decision of another district. See note 108 and accompanying text *supra*.

129. See notes 115-17 and accompanying text *supra*.

130. 385 So. 2d 1356 (Fla. 1980). Although *Jenkins* sought review of a putative conflict expressed in a dissenting opinion, the supreme court also addressed its analysis to concurring opinions.

131. *Id.* at 1359 (emphasis in original). The majority also quoted a previous opinion by Justice Adkins: "It is conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." *Id.* (quoting *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970)) (emphasis in original). Justice Adkins alone dissented from the *Jenkins* decision. *Id.* at 1363.

132. *Id.* at 1359. The court defined "express" to include "to represent in words" and "to give expression to." *Id.*

133. This procedure would preserve judicial economy for the reviewing court to the same extent as if the district court had transcribed the reasoning and rule of law of the cited case into its opinion, and the district court would save time by using citation as judicial shorthand. Rather than examining voluminous portions of a record proper, the supreme court need read only the opinion of a second case. On the other hand, it may be unclear whether the district court relied on the rule of law, the reasoning, or the substantial similarity of facts governing the outcome of the cited case.

134. The district court may consciously choose this form for expressing greater reliance upon an authority than it expresses in a citation alone; or the difference may be stylistic only.

135. See *England, Hunter & Williams, supra* note 77, at 411.

The supreme court recently rejected this incorporation approach in *Dodi Publishing Co. v. Editorial America, S.A.*,<sup>136</sup> refusing to reexamine the opinion of a prior case cited for authority in a per curiam affirmance "to determine if the contents of that cited case now conflict with other appellate decisions."<sup>137</sup> In accordance with *Dodi Publishing*, the court also refused in *Robles Del Mar, Inc. v. Town of Indian River Shores*<sup>138</sup> to review a putative conflict when the per curiam affirmance cited only a decision filed the same day in a companion case. Similarly, the supreme court found that no direct conflict expressly appeared in a district court order dismissing an interlocutory appeal, citing a case, and noting the "[t]he petitioners contend this order conflicts with other Florida appellate decisions and with decisions of the Supreme Court itself."<sup>139</sup> These postamendment cases imply that the supreme court intends that nothing short of a written majority opinion will suffice to raise the express and direct conflict necessary for discretionary conflict jurisdiction of a district court decision under amended section 3(b)(3).

#### e. Interlocutory Orders

Prior to the amendment, section 3(b)(3) provided for discretionary supreme court review by certiorari of interlocutory orders passing upon matters that upon final judgment would be directly appealable to the supreme court.<sup>140</sup> If the court granted certiorari, it reviewed only that portion of the order which raised jurisdiction.<sup>141</sup> The deletion of this provision in 1980, however, does not necessarily foreclose all interlocutory review. Under new section 3(b)(5), the district court may certify for discretionary supreme court review "any order" of a trial court which meets the stringent requirements of that section.<sup>142</sup> Those standards for certification jurisdiction do not require, as did former section 3(b)(3), that the interlocutory order pass upon a matter directly appealable upon final judgment to the supreme court.

---

136. 385 So. 2d 1369 (Fla. 1980).

137. *Id.* at 1369.

138. 385 So. 2d 1371 (Fla. 1980).

139. *Pena v. Tampa Fed. Sav. & Loan Ass'n*, 385 So. 2d 1370 (Fla. 1980).

140. FLA. CONST. art. V, § 3(b)(3) (1968); see *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13 (Fla. 1974).

141. *Sunspan Eng'r & Constr. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975).

142. FLA. CONST. art. V, § 3(b)(5) (as amended 1980); see notes 146 & 155 and accompanying text *infra*.



## 3. CERTIFICATION JURISDICTION

Under former section 3(b)(3), the supreme court had discretionary jurisdiction to review by certiorari any district court decision passing upon a question certified by the district court to be "of great public interest."<sup>143</sup> This discretionary jurisdiction over certified questions survives in amended section 3(b)(4), under which the district courts of appeal are empowered to certify for supreme court review both questions "of great public importance"<sup>144</sup> and direct conflicts with decisions of other district courts.<sup>145</sup> Under new section 3(b)(5), the district courts may also certify for supreme court review the orders and judgments of trial courts which meet certain requirements.<sup>146</sup> Finally, new section 3(b)(6) constitutionalizes the statute and the rule of appellate procedure providing for certification of questions of Florida law to the Supreme Court of Florida by the United States Supreme Court or Courts of Appeals.<sup>147</sup>

The supreme court now has certification jurisdiction over questions of great public "importance," formerly termed questions of great public "interest," but the change is not substantive. Rather, it reflects the pattern already developed through the exer-

---

143. FLA. CONST. art. V, § 3(b)(3) (1968).

144. *Id.* § 3(b)(4) (as amended 1980) provides that the supreme court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."

145. This new conflict certification provision parallels the "express and direct" conflict jurisdiction of amended § 3(b)(3), except that certification by the district court dispenses with the issue of whether the conflict is "express." See notes 122-38 and accompanying text *supra*. Although both forms of conflict jurisdiction are discretionary with the supreme court, the exercise of that discretion is more likely in cases of conflict certified by the district court than conflict asserted by a party.

Section 3(b)(4) makes no parallel provision for certification of conflict with supreme court decisions, which are binding on the district courts. Absent such a provision, a district court seeking to invite reconsideration of an established doctrine must follow the supreme court precedent and certify a question of great public importance rather than defy the precedent and certify a conflict. See *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

146. FLA. CONST. art. V, § 3(b)(5) (as amended 1980) provides that the supreme court: [m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

147. *Id.* § 3(b)(6) provides that the supreme court "[m]ay review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida." As a constitutional statement of the previous practice under FLA. STAT. § 25.031 (1979) and FLA. R. APP. P. 9.510, the amendment does not change the law in this area.

cise of the discretionary jurisdiction of the court. In short, although many questions may be interesting to the public, only a few are important enough to require a decision by the supreme court. In *Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace*,<sup>148</sup> the court listed three factors which together met the great public interest requirement: "the issue involved in this case has statewide significance, important intergovernmental consequences, and no clear precedent in this jurisdiction."<sup>149</sup> In *Lawrence v. Florida East Coast Railway*,<sup>150</sup> the court entertained the certified question of whether special verdict interrogatories must be submitted to the jury on comparative negligence issues when requested by a party.<sup>151</sup> Although the holding of the case applied prospectively and therefore had no effect on the verdict below, the tenor of the question necessarily affected a broad class of cases not then before the court.

In strictly construing its certified question jurisdiction under former section 3(b)(3), the supreme court required that the certifying district court must itself have passed upon the issue.<sup>152</sup> The petitioner's view of the import of the question was of no consequence.<sup>153</sup> Although the petitioner's view is probably equally insignificant after the amendment, the certifying district court no longer need pass upon the question. In the alternative, the district court in which an appeal is pending may certify a trial court order or judgment directly to the supreme court without deciding the issue. The district court must certify, first, that the question is either of great public importance or will have a great effect on the proper administration of justice throughout the state, and second, that the question requires immediate resolution by the supreme court.<sup>154</sup> These stringent requirements suggest that a narrow inter-

---

148. 332 So. 2d 610 (Fla. 1976).

149. *Id.* at 612. The question was to what extent are state agencies immune from municipal zoning ordinances. The supreme court accepted the balancing test adopted by the district court which required the agency to seek local approval for non-conforming land use. *Id.*

150. 346 So. 2d 1012 (Fla. 1977).

151. The supreme court held that special verdicts are required in all jury trials involving comparative negligence. In nonjury trials, the court is required to make findings on the record equivalent to a special verdict. *Id.* at 1017.

152. *Revitz v. Baya*, 355 So. 2d 1170 (Fla. 1977).

153. *Bullard v. Wainwright*, 313 So. 2d 653 (Fla. 1975).

154. FLA. CONST. art. V, § 3(b)(5) (as amended 1980); FLA. R. APP. P. 9.125, promulgated in *In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1384 (Fla. 1980). The *Hillsborough Association* case, which listed "statewide significance" and "important governmental consequences" as factors in discerning a great public interest

pretation of certification jurisdiction may continue after the amendment.

But a broader interpretation of this jurisdiction is in order if the expansion of certification to include new areas is viewed as a counterbalance to the reductions made by the amendment in other areas of supreme court jurisdiction. The new provision for district court certification of trial court decisions corresponds to the deletions from section 3(b) of direct trial court review.<sup>155</sup> Lower court constructions of federal statutes, eliminated from supreme court review by the amendment, may now be appealable only through the certification process, if at all.<sup>156</sup> Rather than restricting certification, the specific requirements of amended section 3(b)(5) should be read simply as guidelines for the screening of the supreme court's potential caseload, a task being shifted to the district courts through the expansion of certification jurisdiction and the corresponding reductions elsewhere.

#### 4. ORIGINAL JURISDICTION

Under section 3(b), the supreme court has original jurisdiction to issue writs of prohibition, mandamus, quo warranto, habeas corpus, "and all writs necessary to the complete exercise of its jurisdiction."<sup>157</sup> The amendment renumbers the subsections providing for writs of mandamus, quo warranto, and habeas corpus, but

---

under former § 3(b)(3), will probably be a leading authority in the early interpretations of the alternative standard in new § 3(b)(5), requiring "great effect on the proper administration of justice throughout the state." See notes 148 & 149 and accompanying text *supra*.

155. FLA. CONST. art. V, § 3(b)(1) (as amended 1980). The amendment eliminates supreme court jurisdiction of trial court orders passing on the validity of statutes or constitutional provisions under § 3(b)(1), trial court sentences of life imprisonment under § 3(b)(2), and trial court interlocutory orders passing upon matters appealable on final judgment to the supreme court under § 3(b)(3). See notes 71-76 and accompanying text *supra*.

156. *Id.* § 3(b)(1) (1968). Although the amendment reclassifies decisions construing the federal constitution from mandatory to discretionary supreme court jurisdiction, it eliminates any mention of decisions passing on the validity of federal statutes or treaties. See notes 74-78 and accompanying text *supra*. Certification jurisdiction might be available if the district court interpretation of the federal statute or treaty raised a question of great public importance or directly conflicted with a decision of another district court under § 3(b)(4). Similarly, a trial court interpretation of the statute or treaty might raise questions qualifying for certification by the district court under § 3(b)(5). A third possibility would be an express and direct conflict with another district court's construction of the federal statute, invoking discretionary review under § 3(b)(3) without certification by the district court.

157. FLA. CONST. art. V, § 3(b)(7) (as amended 1980). The court must first have independent jurisdictional grounds, however, before it may exercise the all writs power, which is limited to ancillary relief. See *Shevin v. Public Service Comm'n*, 333 So. 2d 9, 12 (Fla. 1976).

For a discussion of these extraordinary writs and their availability in the Florida courts, see Brummer, Morris & Rosen, *supra* note 14.

the constitutional wording remains unchanged.<sup>158</sup> The amendment eliminates the jurisdiction of the supreme court to issue writs of certiorari to commissions established by general law having state-wide jurisdiction.<sup>159</sup> This change, together with the deletion of the words "by certiorari" from the discretionary jurisdiction provisions of section 3(b)(3), apparently leaves the supreme court without express certiorari jurisdiction.<sup>160</sup>

#### a. Writs of Prohibition

The supreme court may issue writs of prohibition to prevent a lower court from exceeding its jurisdiction.<sup>161</sup> The amendment expands this power by eliminating the requirement that such writs issue only "in causes within the jurisdiction of the supreme court to review."<sup>162</sup> The court now has supervisory powers over all lower court cases.<sup>163</sup> On the other hand, the supreme court no longer has discretionary jurisdiction to issue writs of prohibition to commissions.<sup>164</sup> This change is consistent with shifting to the district courts the jurisdiction to review almost all commission and admin-

---

158. The mandamus and quo warranto provisions were moved from § 3(b)(5) to § 3(b)(8), while the habeas corpus provision in § 3(b)(6) became § 3(b)(9).

159. FLA. CONST. art. V, § 3(b)(3) (1968).

160. *Id.* (as amended 1980). Unlike the district courts and circuit courts, the supreme court lacks authority to grant common law certiorari relief. See *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. 1964). For a discussion of the "by certiorari" deletion and its impact on discretionary jurisdiction, see England, Hunter & Williams, *supra* note 77, at 411.

161. Prior to the amendment, FLA. CONST. art. V, § 3(b)(4) (1968) provided that the supreme court "[m]ay issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review." See Brummer, Morris & Rosen, *supra* note 14, at 1049.

162. FLA. CONST. art. V, § 3(b)(4) (1968). The amendment deletes the phrase "and commissions in causes within the jurisdiction of the supreme court to review." *Id.* § 3(b)(7) (as amended 1980).

163. The supreme court appeared to be moving toward the same broad prohibition jurisdiction as mandated by the constitutional amendment. In *State ex rel. Sarasota County v. Boyer*, 360 So. 2d 388 (Fla. 1978), the court held that its "prohibition jurisdiction [is] invoked properly where there has been shown our *potential* to review a pending proceeding upon its conclusion." *Id.* at 392 (emphasis added). The court found without merit the claim that its prohibition power could be exercised only where there would be an appeal of right under § 3(b)(1). The court explained:

We will not adopt such a severely restricted view of our power of prohibition. We have not done so in practice in the past. If prohibition is to remain a preventive remedy, to adopt such a construction would leave us with no prohibition power whatsoever, and, therefore, would make the constitutional provision meaningless.

*Id.* at 391.

164. See notes 161 & 162 *supra*.

istrative agency decisions.<sup>165</sup>

b. Writs of Mandamus

The supreme court may exercise its mandamus power to command the performance of a preexisting ministerial duty.<sup>166</sup> This extraordinary measure may be invoked only if no other adequate remedy exists.<sup>167</sup> Thus, the court will deny the writ to a party who fails to file seasonably for appellate review and awaits the expiration of the filing period to seek mandamus, which has no such time constraints.<sup>168</sup>

Mandamus may be used by the executive department to expedite a challenge to the constitutionality of a statute. In *Division of Bond Finance v. Smathers*,<sup>169</sup> Governor Askew requested that the supreme court command the Secretary of State to expunge an allegedly unconstitutional legislative proviso from a general appropriations bill.<sup>170</sup> The court accepted jurisdiction and granted the writ of mandamus, using the following standard: writs will issue "where the functions of government will be adversely affected without an immediate determination."<sup>171</sup> The circumstances of *Smathers* met that standard because the state was under a contractual time constraint with respect to a land purchase to be made from funds allotted in the questioned appropriations bill. The court issued the writ of mandamus and commanded the Secretary to expunge the proviso, which was found unconstitutional.

---

165. Although enabling legislation pursuant to amended § 3(b)(2) will make certain actions of utilities agencies directly appealable to the supreme court, the court literally has no prohibition power over the commissions subject to this appellate jurisdiction. Yet the court may issue writs of mandamus to state agencies under § 3(b)(8), leading to the incongruity that the supreme court can order a state agency action but cannot prevent it. Because the court would already have jurisdiction under § 3(b)(2), it is arguable that the all writs clause could be invoked to prohibit agency action in circumstances requiring expeditious relief. See note 157 *supra*; Brummer, Morris & Rosen, *supra* note 14, at 1058.

166. *State ex rel. Evans v. Chappel*, 308 So. 2d 1 (Fla. 1975). FLA. CONST. art. V, § 3(b)(8) (as amended 1980) provides that the supreme court "[m]ay issue writs of mandamus and quo warranto to state officers and state agencies."

167. See Brummer, Morris & Rosen, *supra* note 14, at 1046-49.

168. *Shevin v. Public Serv. Comm'n*, 333 So. 2d 9 (Fla. 1976).

169. 337 So. 2d 805 (Fla. 1976).

170. In the alternative, if the proviso were deemed constitutional, Governor Askew requested a finding that his veto of the proviso was valid. FLA. CONST. art. III, § 8(a) provides that the governor may not veto a restriction or qualification to an appropriation without also vetoing the appropriation.

171. 337 So. 2d at 807 (affirming the standard set in *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971)).

## 5. DISCIPLINARY JURISDICTION

### a. Discipline of Judges

The supreme court has original jurisdiction to discipline or remove from office a justice or judge, upon recommendation of two-thirds of the members of the Judicial Qualifications Commission.<sup>172</sup> By petition, the party recommended for removal may challenge the Commission's findings of fact and its recommendations before the supreme court.<sup>173</sup> The findings of the Commission are of persuasive force and are given great weight by the court. The ultimate power and responsibility for making the determination, however, rest in the court, not in the Commission.<sup>174</sup>

The Commission must make a clear and convincing showing to meet the standard of proof necessary for an adverse finding.<sup>175</sup> In *In re Inquiry Concerning a Judge*,<sup>176</sup> the court established that a judge may be removed from office for conduct unbecoming a member of the judiciary where such conduct is "proved by evidence of an accumulation of small and ostensibly innocuous incidents which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary."<sup>177</sup> In this case, the behavior of the judge reflected a pattern of decisionmaking based on his personal concepts of right and wrong without due regard for the law. He challenged the recommendation for removal on the ground that the Commission had not proved any corrupt motive. He asserted, and the record reflected, that he had been guided in every instance by sincere concern for the parties before him. The court recognized this response as a valid defense notwithstanding the amendment to section 12(f), which specifically declares that malafides, scienter, or moral turpitude is no longer a

---

172. FLA. CONST. art. V, § 12(f).

173. *In re Inquiry Concerning a Judge*, 357 So. 2d 172 (Fla. 1978).

174. *In re LaMotte*, 341 So. 2d 513 (Fla. 1977). Similarly, the Commission is empowered to adopt rules governing its proceedings, but these rules, or any part thereof, may be repealed by the supreme court, if five justices concur, or by the legislature. FLA. CONST. art. V, § 12(d). The rulemaking authority is limited to proceedings within the Commission and does not extend to the procedures of appellate review in the court. The court repealed a Commission rule which prescribed the timing and manner for filing petitions for review of Commission actions before the supreme court. *In re Rules of Fla. Judicial Qualifications Comm'n*, 364 So. 2d 471 (Fla. 1978).

175. 341 So. 2d at 516. This standard is greater than a "preponderance of the evidence" but less than "beyond a reasonable doubt."

176. 357 So. 2d 172 (Fla. 1978).

177. *Id.* at 177 (quoting *In re Kelly*, 238 So. 2d 565 (Fla. 1970)).

requirement for removal.<sup>178</sup> Because the behavior complained of took place before the constitution was amended, the new standards did not apply to him.<sup>179</sup>

The standard of ethical behavior for judges is higher than that of attorneys, because judges are representatives of the judicial process and any departures from a high standard of behavior reflect adversely upon the judicial system and erode public confidence in the judiciary.<sup>180</sup> Although the court will discipline judges for lesser offenses, it will mete out the extreme discipline of removal only if a judge has "intentionally committed serious and grievous wrongs of a clearly unredeeming nature."<sup>181</sup>

### b. Discipline of Attorneys

The supreme court has constitutional jurisdiction, under article V, section 15, to regulate the admission of attorneys to the bar and to discipline attorneys.<sup>182</sup> The court delegates to the Florida Bar the task of screening grievances, gathering facts, and recommending disciplinary measures.<sup>183</sup> In this capacity, the bar acts as an "arm of the court," and the scope of its authority is measured by the reach of the jurisdiction of the court.<sup>184</sup> The bar's jurisdiction is exclusive from the time the bar finds probable cause for discipline<sup>185</sup> and continues through the final determination.<sup>186</sup>

The regulation of the practice of law is comprehensive. By overseeing the admissions to the bar, the court may prevent the unauthorized practice of law.<sup>187</sup> With the influx of Latin Americans

---

178. FLA. CONST. art. V, § 12(f).

179. 357 So. 2d at 180-81.

180. 341 So. 2d at 517-18.

181. *Id.* at 518. This statement appears to read scienter and malafides back into the disciplinary provision of the constitution, at least where removal is recommended.

182. FLA. CONST. art. V, § 15 provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

*See generally* England, *In Defense of Regulation by the Supreme Court*, 54 FLA. B.J. 254 (1980).

183. FLA. BAR INTEGR. RULE, art. XI.

184. Florida Bar v. McCain, 330 So. 2d 712, 714 (Fla. 1976).

185. Ordinarily, the court does not entertain interlocutory questions in disciplinary proceedings. Where an attack on the finding of probable cause was couched in language challenging the jurisdiction of the Board of Governors, however, it was analogized to a writ of prohibition, and the court accepted the interlocutory appeal. *Id.* at 713-14; *see* notes 161-65 and accompanying text *supra*.

186. Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978) (resulting in disbarment).

187. *Cf.* note 67 and accompanying text *supra* (prevention of unauthorized practice of law through the rulemaking power of the court).

into Florida, the court has authorized the bar to use the grievance procedure to police the practice of law by Latin American notaries public.<sup>188</sup>

Attorneys are subject to discipline not only for misconduct in legal dealings with clients but also for deceit, dishonesty, or misrepresentation in matters of private business. The bar disciplines such behavior by an attorney because it reflects upon his ability to practice law.<sup>189</sup> Moreover, although the court has exclusive disciplinary jurisdiction under section 15, the legislature may make certain attorney conduct criminal, if found to be inimical to the public welfare. In *Pace v. State*,<sup>190</sup> the court found that a statute outlawing direct or indirect solicitation of business by attorneys lay within the police power of the state because the banned activity represented a social evil encompassing unethical behavior.<sup>191</sup>

The constitution and the rules do not state whether the bar or the Judicial Qualifications Commission is the proper body to consider discipline of a former judge for conduct alleged to have occurred while on the bench. In *Florida Bar v. McCain*,<sup>192</sup> a former justice of the supreme court and district court judge challenged the power of the bar to discipline him as an attorney. The court rejected his challenge because, upon resignation as a judge, he had "automatically resume[d] his status as an attorney at law subject to be disciplined under the Integration Rule" of the Florida Bar.<sup>193</sup>

The exclusivity of the power of the court to regulate attorney discipline under section 15 occasionally raises interesting issues about the separation of powers. In an advisory opinion requested by the Florida Bar,<sup>194</sup> the supreme court held that officials of the bar serving the court in an administrative or supervisory capacity were not state officers or employees subject to the Financial Disclo-

---

188. *Florida Bar v. Borges-Caignet*, 321 So. 2d 550 (Fla. 1975).

189. *Florida Bar v. Davis*, 373 So. 2d 683 (Fla. 1979).

190. 368 So. 2d 340 (Fla. 1979).

191. *Id.* at 345. The court also found the first amendment challenge to the statute without merit, distinguishing recent United States Supreme Court decisions, including *Bates v. State Bar*, 433 U.S. 350 (1977). The *Pace* decision appears to represent the outer reaches of the legislative power to regulate the practice of law, an area which the constitution reposes exclusively in the supreme court.

192. 330 So. 2d 712 (Fla. 1976). This case of first impression elicited five written opinions (the majority, two concurring and two dissenting).

193. *Id.* at 716 (referring to article XI of the Integration Rule of the Florida Bar, by which the Supreme Court of Florida has delegated certain disciplinary functions to the Bar).

194. *In re Florida Bar*, 316 So. 2d 45 (Fla. 1975); see note 373 and accompanying text *infra*.



sure Law.<sup>195</sup> Similarly, a grant of transactional immunity by the executive branch to an attorney who agreed to testify in a criminal case did not extend to disciplinary proceedings before the Florida Bar, for such immunity may be obtained solely by application to the supreme court.<sup>196</sup>

#### D. District Court Jurisdiction

The district courts of appeal have residuary jurisdiction<sup>197</sup> of all appeals not directly appealable to the supreme court under article V, section 3, or to a circuit court<sup>198</sup> under article V, section 5. By reducing the jurisdiction of the supreme court in several areas, the constitutional amendment expands the role of the district courts.<sup>199</sup> Trial court orders of the circuit courts that pass on the validity of a state or federal statute, formerly within the mandatory jurisdiction of the supreme court, are now appealable only to the district courts.<sup>200</sup> Similarly, the district courts now re-

195. FLA. STAT. § 112.3145 (1979). The Financial Disclosure Law requires "[e]ach state or local officer and each specified employee," as defined, to file an annual "statement of financial interests," disclosing certain sources of income, ownership of real property, debts, gifts received, and the identity of the donors.

Based on a similar rationale, the court invalidated 1977 Fla. Laws ch. 77-63 as applied to the Florida Board of Bar Examiners. This statute required state agencies, including the Board, to modify examinations which they administered, allowing deaf and blind applicants to compete more equitably. An agent or employee intentionally violating the statute could be fined a maximum of \$500 for a second degree misdemeanor. *In re Florida Bd. of Bar Examiners*, 353 So. 2d 98 (Fla. 1977).

196. *Ciravolo v. Florida Bar*, 361 So. 2d 121 (Fla. 1978); see notes 357-61 and accompanying text *infra*. Cf. *State v. Brodski*, 369 So. 2d 366 (Fla. 3d DCA 1979) (law students treated as if attorneys).

197. District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

FLA. CONST. art. V, § 4(b)(1).

198. Review of circuit court appellate decisions by the district court is discretionary under common law certiorari, rather than mandatory pursuant to its jurisdiction over appeals as a matter of right. To warrant certiorari, the writ must allege that the circuit court exceeded its jurisdiction or otherwise departed from the essential requirements of the law. The district court may not reevaluate or reweigh the evidence, but may examine the record to determine if the ruling below was based on competent and sufficient evidence. Mere error by the circuit court will not sustain an argument that the court exceeded its jurisdiction or departed from the essential requirements of law. *Grandin Lake Shores Ass'n, Inc. v. Underwood*, 351 So. 2d 1131 (Fla. 1st DCA 1977); see *Brummer, Morris & Rosen, supra* note 14, at 1060.

199. See notes 71-84 and accompanying text *supra*.

200. FLA. CONST. art. V, § 3(b)(1) (1968). County trial court orders passing on statutory validity are reviewed by the circuit courts, from which an appeal to the supreme court no

view the actions of commissions having statewide jurisdiction, other than those governing utilities.<sup>201</sup>

The amendment gives district court decisions a greater measure of finality, because many such decisions formerly appealable to the supreme court as a matter of right are now either within the discretionary review of the supreme court or not reviewable at all. The supreme court may choose to review a district court decision that expressly declares a state statute valid.<sup>202</sup> A district court, however, may foreclose such review by rendering a decision on appeal without writing an opinion.<sup>203</sup>

The precedential value of district court decisions may differ, depending on the court applying the decision. It has been held, for example, that circuit courts are bound equally by all district court decisions, regardless of whether the circuit court lies within the same appellate district.<sup>204</sup> Because the district courts are courts of last resort, except for the narrow category of cases raising mandatory supreme court jurisdiction,<sup>205</sup> their decisions should have the same precedential value in the hierarchy of decisional law as those of the supreme court. On the other hand, the decisions of district courts are merely persuasive to other district courts, because they are of equal status and because the supreme court has jurisdiction to resolve conflicting decisions.<sup>206</sup> In the event of an interdistrict conflict, the decision of a particular district court on that issue is binding upon any trial court within its appellate district.<sup>207</sup>

The district courts have original jurisdiction to hear extraordinary writs.<sup>208</sup> With respect to habeas corpus, the district courts share concurrent jurisdiction with the supreme court and the circuit courts.<sup>209</sup> Concurrent jurisdiction, however, does not give a petitioner three bites at the apple. Once any one of these courts has

---

longer lies. See notes 226-27 and accompanying text *infra*.

201. See notes 82-84 and accompanying text *supra*.

202. FLA. CONST. art. V, § 3(b)(3) (as amended 1980).

203. See note 89 *supra*.

204. *State v. Hayes*, 333 So. 2d 51 (Fla. 4th DCA 1976). "[A] circuit court wheresoever situated in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district." *Id.* at 52.

205. See notes 71-73 and accompanying text *supra*.

206. See notes 106-39 and accompanying text *supra*.

207. 333 So. 2d 51. The court certified the question of hierarchy of precedent to the supreme court.

208. FLA. CONST. art. V, § 4(b)(3). See generally *Brummer, Morris & Rosen, supra* note 14.

209. FLA. CONST. art. V, §§ 3(b)(9), 4(b)(3), 5(b).

denied the writ, the doctrine of *res judicata* prevents him from bringing subsequent petitions upon the same subject matter.<sup>210</sup>

The district courts have the power to issue a writ of prohibition to prevent a lower court from acting in excess of its jurisdiction.<sup>211</sup> One district court of appeal has extended this power to situations in which the circuit court should have exercised judicial restraint and declined to accept equity jurisdiction. In *State ex rel. Department of General Services v. Willis*,<sup>212</sup> the District Court of Appeal, First District, considered whether the circuit court had the power to grant injunctive relief against a state agency for alleged injuries to a group of general contractors who had not availed themselves of administrative remedies provided by the state Administrative Procedure Act.<sup>213</sup> After concluding that the Act "did not directly or indirectly authorize circuit court proceedings to enjoin administrative action,"<sup>214</sup> the court considered whether, notwithstanding the Act, injunctive relief incidental to the constitutional powers of the judiciary was available. The district court held that "collateral review" of agency action, by virtue of the constitutional power of the circuit courts to issue injunctions and writs, was not subject to the same legislative restrictions as "direct review."<sup>215</sup> But because the Act offered an array of remedies for administrative error which were judicially reviewable, the court found that no extraordinary need for equitable intervention had been shown,<sup>216</sup> and granted the writ of prohibition against circuit court

---

210. *Florida Parole & Probation Comm'n v. Baker*, 346 So. 2d 340 (Fla. 2d DCA 1977). The petitioner may, however, appeal a lower court denial of the writ to a reviewing court under its appellate jurisdiction.

211. FLA. CONST. art. V, § 4(b)(3).

212. 344 So. 2d 580 (Fla. 1st DCA 1977).

213. *Id.* at 583-84. The Administrative Procedure Act, FLA. STAT. §§ 120.50-.73 (1970) (as amended 1975), provides a comprehensive statutory plan for the resolution of administrative problems.

214. 344 So. 2d at 588-89. The court considered what judicial relief had been available by statute before the Act was passed in 1974, which of those remedies the Act was intended to replace, and which remedies were restored by the 1975 amendment to the Act. *Id.* at 585.

215. *Id.* at 589. The legislature must define by general law the power of direct review of administrative action in the circuit court. FLA. CONST. art. V, § 5(b).

The injunctive power of the circuit court, however, remained subject to judicial restraint under the two doctrines of primary jurisdiction and exhaustion of remedies. "The one counsels judicial abstention when claims otherwise cognizable in the courts have been placed within the special competence of an administrative body; the other, when available administrative remedies would serve as well as judicial ones." 344 So. 2d at 589.

216. The court gave a laundry list of claims for which judicial interference might be warranted:

Does the complaint of the respondent contractors demonstrate some compelling reason why the Administrative Procedure Act does not avail them in their griev-

jurisdiction.<sup>217</sup>

A different administrative review question was raised in *4245 Corp. v. Division of Beverage*.<sup>218</sup> The First District held that even if a proposed rule has been neither adopted nor enforced against the petitioner, the order of a hearing officer upholding the validity of the rule in a special "rule challenge" proceeding before the Division of Administrative Hearings<sup>219</sup> constitutes a final agency action raising district court appellate jurisdiction.<sup>220</sup> The court chided the Division of Beverage for opposing judicial review, pointing out that acceptance of the Division's argument would also preclude review of a ruling adverse to the Division, requiring withdrawal of any proposed rule found wholly or partly invalid.<sup>221</sup>

### E. Circuit Court Jurisdiction

The circuit courts of the state are superior courts of general jurisdiction. As a general rule, "nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly outside of

ance against the Department, and why the circuit court must therefore intervene? We think it does not. No lack of general authority in the Department is suggested; nor is it shown, if that is the case, that the Act has no remedy for it. No illegal conduct by the Department is shown; nor, if that is the case, that the Act cannot remedy the illegality. No departmental ignorance of the law, the facts or the public good is shown; nor, if any of that is the case, that the Act provides no remedy for it. No claim is made the Department ignores or refuses to recognize relators' substantial interests, or refuses to afford a hearing, or otherwise refuses to recognize that relators' grievance is cognizable administratively. The respondent contractors have made no showing that remedies available under the Act are inadequate.

344 So. 2d at 591.

217. "The determination of whether the circumstances of a particular controversy warrant judicial intervention, then, is ultimately one of policy rather than power . . ." *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978) (discussing *Willis*). See also *Department of Revenue v. Amrep Corp.*, 358 So. 2d 1343 (Fla. 1978). For a discussion and criticism of the approach taken by the supreme court in these two cases, see Swan, *Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law*, 33 U. MIAMI L. REV. 527 (1979).

218. 348 So. 2d 934 (Fla. 1st DCA 1977).

219. FLA. STAT. § 120.54(4) (1979). This section of the Administrative Procedure Act provides for challenge to a proposed rule before a hearing officer as "an invalid exercise of delegated legislative authority."

220. The court listed three occasions for appellate challenge to a rule: after an administrative hearing officer has found a prospective rule valid, after the agency adopts the rule, and after enforcement proceedings by an agency have determined the substantial interests of a party. 348 So. 2d at 934.

221. FLA. STAT. § 120.54(4)(c) (1979).

and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto."<sup>222</sup> Because this jurisdiction is so broad, one who seeks a writ of prohibition from a supervisory appellate court<sup>223</sup> faces difficulties in establishing that a circuit court is about to act outside its jurisdiction.<sup>224</sup>

The circuit courts have been categorized into divisions for administrative efficiency, although each retains its constitutional and statutory power to hear all general jurisdiction cases. When a case that comes before a particular division of the circuit court would be heard more effectively in a different division, the proper procedure is to request a transfer through the chief judge of the circuit, rather than to challenge the jurisdiction of the court.<sup>225</sup>

Article V, section 5(b) of the Florida Constitution vests the circuit courts with appellate jurisdiction, when provided by general law.<sup>226</sup> The Florida Statutes define this jurisdiction to include cases

---

222. *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977) (quoting *State ex rel. B.F. Goodrich Co. v. Trammell*, 140 Fla. 500, 504, 192 So. 175, 177 (1939)).

A challenge to the subject matter jurisdiction of the trial court may be raised for the first time on appeal in a collateral attack upon the judgment. Lack of subject matter jurisdiction is a fundamental error, and a judgment rendered without it is void. *Waters v. State*, 354 So. 2d 1277 (Fla. 2d DCA 1978); *DiCapaio v. State*, 352 So. 2d 79 (Fla. 4th DCA), *cert. denied*, 353 So. 2d 679 (1977).

223. See *Brummer, Morris & Rosen, supra* note 14, at 1050; notes 161-65 and accompanying text *supra*.

224. In *English v. McCrary*, 348 So. 2d 293 (Fla. 1977), a newspaper reporter petitioned the district court for a writ of prohibition to compel the chancellor of the circuit court to reopen a marriage dissolution hearing that the chancellor had closed to the public and press. The district court denied the writ and the supreme court affirmed, holding that because the chancellor had jurisdiction to exercise his discretion and close the hearing, prohibition would not lie. A charge of abuse of discretion is suited to a writ of error, not of prohibition.

Justices England and Sundberg dissented because the reporter, not being a party to the action, would not have access to the courts through a writ of error. Denial of the writ of prohibition effectively precluded the press from challenging the closing of the proceedings. *Id.* at 299. By promulgating FLA. R. APP. P. 9.100(d), the court has dealt with the problem described by the dissenters.

225. *Guardianship of Bentley*, 342 So. 2d 1045 (Fla. 4th DCA 1977).

226. The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals, when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

FLA. CONST. art. V, § 5(b).

In *Board of County Comm'rs v. Casa Dev. Ltd.*, 332 So. 2d 651 (Fla. 2d DCA 1976), the question arose whether a special law rather than a general law could confer appellate jurisdiction on a circuit court. The court determined that only a general law could do so, because both the text and the spirit of article V contemplated a uniform statewide court system.

arising in county courts, except when an appeal may be taken to the supreme court.<sup>227</sup> The circuit courts may also issue writs of certiorari<sup>228</sup> to review rulings of commissions and boards acting in a quasi-judicial capacity.<sup>229</sup> Jurisdiction for this certiorari review derives not from statutory authorization but from the constitutional grant of circuit court power to issue writs. This grant is interpreted to encompass common law certiorari, which is separate and distinct from the statutory certiorari also provided for in section 5(b).<sup>230</sup>

### III. THE LEGISLATURE

The lawmaking power of the state is vested in the legislature,<sup>231</sup> which has broad discretion to determine the public interest and may pass laws under its police power protecting health, morals, comfort, and the general welfare.<sup>232</sup> The legislature may adopt provisions of federal statutes and administrative rules in effect at the time of legislation, but may not adopt any such act or rule in advance of its actual passage.<sup>233</sup> To be a valid exercise of the police power of the state, legislation must apply to the general public rather than to a specific group.<sup>234</sup> When an act potentially

---

227. FLA. STAT. § 26.012 (1979). See also *Jaramillo v. City of Homestead*, 322 So. 2d 496 (Fla. 1975), holding that where a municipality adopts a state statute as a municipal ordinance, a finding by the trial court that the local law is unconstitutional is an invalidation of a municipal ordinance with review available in the circuit court, not an invalidation of a state statute with review available in the supreme court.

The 1980 amendment to § 3(b)(1) moots the *Jaramillo* holding, however, because no direct appeal to the supreme court now lies from trial court invalidations of state statutes. Furthermore, supreme court review of appellate decisions passing on statutory validity now lies only from the district courts, and not from the circuit courts. Thus, a county court invalidation of a state statute affirmed on appeal by the circuit court would be final and unreviewable by the supreme court, absent exercise of the district court's discretionary certiorari jurisdiction. See *England, Hunter & Williams*, *supra* note 77, at 409; note 198 *supra*.

228. Circuit court certiorari may be interlocutory where petitioner does not have an adequate remedy if he waits to appeal a final judgment. *Tampa v. Ippolito*, 360 So. 2d 1316, 1317 n.2 (Fla. 2d DCA 1978).

229. The standard of review is limited, however, to a determination that the acts of the commission or board were arbitrary, capricious, confiscatory, or violative of constitutional guarantees. 332 So. 2d at 654.

230. *G-W Dev. Corp. v. Village of N. Palm Beach Zoning Bd. of Adjustment*, 317 So. 2d 829 (Fla. 4th DCA 1975).

231. FLA. CONST. art. III, § 1.

232. *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13, 18 (Fla. 1974).

233. *Brazil v. Division of Admin., State Dep't of Trans.*, 347 So. 2d 755, 757-58 (Fla. 1st DCA 1977).

234. *United Gas Pipe Line Co. v. Bevis*, 336 So. 2d 560, 564 (Fla. 1976) (citing *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949)).

benefits one limited class at the expense of another, the public welfare must be weighed against the rights being affected.<sup>235</sup>

### A. Delegation of Power

The lawmaking power may not be delegated to an administrative agency.<sup>236</sup> The power to enact a law, to declare what the law is, or to apply the law with unrestricted discretion may not be delegated.<sup>237</sup> Statutes giving the police power of the state to an administrative agency must provide clear and specific objective guidelines to prevent the agency from exercising unbridled discretion.<sup>238</sup> Opportunity for partiality in enforcing or applying a statute indicates that the legislature was both lax and inexact in delegating its power.<sup>239</sup>

In *High Ridge Management Corp. v. State*,<sup>240</sup> operators of licensed South Florida nursing homes successfully challenged the Omnibus Nursing Home Reform Act of 1976,<sup>241</sup> which purported to establish five categories for rating nursing home facilities. The level of state vendor payments was made dependent on these ratings. Because no objective guidelines for rating were established in the Act, the section creating the ratings was declared unconstitutional under article III, section 1, as an unlawful delegation of legislative authority. Similarly, the supreme court in *Harrington & Co. v. Tampa Port Authority*<sup>242</sup> held unconstitutional a statute au-

235. In *United Gas Pipe Line Co.*, the supreme court invalidated 1973 Fla. Laws ch. 73-289, which had given the Public Service Commission limited jurisdiction to investigate allegations initiated by industrial purchasers of energy from an authorized company that "the rates and charges of the company are either discriminatory or unreasonably high." 336 So. 2d at 562. The statute had also granted the commission the right to regulate those prices notwithstanding the exemption of this class of energy sales from the jurisdiction of the Public Service Commission in FLA. STAT. § 366.02 (1973). Regardless of the announced public purpose of preventing discriminatory or unreasonably high prices to the public, the supreme court held that the legislature cannot authorize some price ceilings upon consumer initiative without regulating the rest of the industry. Although repeal of the exemption from regulation would be constitutionally permissible, selective regulation at the expense of private contractual rights is an abuse of legislative power.

236. *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 924 (Fla. 1978). For a discussion of delegations invalidated under the separation of powers doctrine of article II, § 3, see notes 326-36 and accompanying text *infra*.

237. *Florida State Bd. of Architecture v. Wasserman*, 377 So. 2d 653, 655 (Fla. 1979).

238. *High Ridge Management Corp. v. State*, 354 So. 2d 377, 380 (Fla. 1977).

239. *Harrington & Co. v. Tampa Port Auth.*, 358 So. 2d 168, 170 (Fla. 1978).

240. 354 So. 2d 377 (Fla. 1977).

241. FLA. STAT. § 400.23 (Supp. 1976) (held unconstitutional in *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla. 1977)).

242. 358 So. 2d 168 (Fla. 1978).

thorizing licensing of stevedores by the Port Authority, since the only language limiting the agency's decision was "as it may deem necessary, having due regard to the business of the port and harbor."<sup>243</sup>

A statute designed to accomplish a public purpose may expressly authorize designated officials or agencies to enact rules and regulations to make the statute effective.<sup>244</sup> The basic limitation on this power is that these rules and regulations must be proper and necessary to the exercise of the agency's power and performance in carrying out a clearly stated legislative objective.<sup>245</sup> In *Florida State Board of Architecture v. Wasserman*,<sup>246</sup> the court considered a challenged statute which listed no explicit standards to guide the State Board of Architecture in determining whether an applicant "had training which shall be found by the board to be fully equivalent to [a] degree [from a school or college of architecture]."<sup>247</sup> The supreme court upheld the statute, finding that the legislature intended that widely recognized academic standards of professional schools of architecture be the measure for evaluating an applicant's training.

### B. *One Subject, Expressed in Title*

In the exercise of its vested power, the legislature must enact laws that "embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."<sup>248</sup> In *State v. Lee*,<sup>249</sup> the supreme court held that a law which dealt

---

243. FLA. STAT. § 310.28 (1973) (held unconstitutional in *Harrington & Co. v. Tampa Port Auth.*, 358 So. 2d 168 (Fla. 1978)).

244. *Florida Canners Ass'n v. State Dep't of Citrus*, 371 So. 2d 503, 512 (Fla. 2d DCA 1979).

245. *Id.* In *Florida Canners Ass'n*, the District Court of Appeal, Second District, held that the delegation of rulemaking authority to the Department of Citrus, which adopted a rule requiring a declaration of state origin on grapefruit products packaged in retail containers in Florida, was not an unlawful delegation of legislative power, as long as the rule was necessary for the accomplishment of the legislative purpose.

246. 377 So. 2d 653 (Fla. 1979). The court also said that if a statute is reasonably susceptible of two interpretations, only one of which would render it valid, the court must adopt that view. *Id.* at 656.

See also *Dunnigan v. State*, 364 So. 2d 1217 (Fla. 1978) (holding FLA. STAT. § 812.014 (1977) constitutional). Although the statute which listed certain specific theft violations included "[o]ther conduct similar in nature," the court held that the specific enumerations provided sufficient standards for guiding prosecutorial or judicial discretion. 364 So. 2d at 1218.

247. FLA. STAT. § 467.08(1)(b)(5) (1977) (repealed 1979).

248. FLA. CONST. art. III, § 6.

249. 356 So. 2d 276 (Fla. 1978).



comprehensively with automobile insurance rates and included aspects of tort litigation arising primarily from automobile negligence did not embrace more than one subject. The court explained that "the subject of the law is that which is expressed in the title," which may be as broad as the legislature decides, as long as the matters included in it have a "natural and logical connection."<sup>250</sup> Justice Sundberg argued in dissent that the law violated the purpose for which he perceived the constitutional provision had been adopted, the prevention of "logrolling"<sup>251</sup> and combinations of unrelated provisions and incongruous subjects, not specified in the title, which might escape attention and win unknowing approval in the legislature.

In *State v. McDonald*<sup>252</sup> the court upheld a statute that decriminalized traffic violations and simultaneously created a criminal penalty for refusing to sign a traffic citation. The supreme court asserted that a law does not embrace more than one subject if the title is sufficiently broad to connect it with the subject matter of the enactment.<sup>253</sup>

Essentially, the purpose of the requirement that legislation embrace only one subject, expressed in the title, is both to provide fair notice to the legislature, for knowledgeable lawgiving,<sup>254</sup> and to offer the average person a reasonable chance to foresee that his or her interests might be affected.<sup>255</sup> The title must be broad enough to include all matters contained in the body of the legislation, but it need not index every detail of the contents.<sup>256</sup> The title must not, however, mislead the legislature or the public about the scope of the law.<sup>257</sup>

### C. *Special Laws*

Similar concerns<sup>258</sup> underlie article III, section 10, which pro-

250. *Id.* at 282 (citations omitted).

251. "Logrolling" is the unacceptable practice of attaching unwanted and uncorrelated provisions to favored legislation to force a legislator to choose between either voting for the desired legislation with the undesired amendments or voting against desired legislation to kill the amendments.

252. 357 So. 2d 405 (Fla. 1978).

253. *Id.* at 407. See also *Smith v. City of St. Petersburg*, 302 So. 2d 756 (Fla. 1974).

254. *Smathers v. Smith*, 338 So. 2d 825, 828 (Fla. 1976).

255. *North Ridge Gen. Hosp. v. City of Oakland Park*, 374 So. 2d 461, 464 (Fla. 1979).

256. *Id.*; *Spooner v. Askew*, 345 So. 2d 1055, 1058 n.14 (Fla. 1976).

257. *Ison v. Zimmerman*, 372 So. 2d 431, 435 (Fla. 1979) (scope represents the common meaning, not technical refinements); *Finn v. Finn*, 312 So. 2d 726, 730 (Fla. 1975) (title must not mislead or be so construed as to avert inquiry as to provisions).

258. In *North Ridge Gen. Hosp. v. City of Oakland Park*, 374 So. 2d 461 (Fla. 1979),

vides that the legislature may not pass special laws unless notice of intention to seek their enactment has been published as provided by general law. Such notice is unnecessary if the special law is to become effective only upon approval by the voters of the area affected.<sup>259</sup>

A special law is a statute relating to particular persons, things, or subjects of a class.<sup>260</sup> It may also be a local law.<sup>261</sup> A law not universal in application is not necessarily a special law if the classifications created by the legislature are reasonable, are based upon proper differences inherent in or peculiar to the class, and are uniformly applied to all persons in the same situation.<sup>262</sup>

Certain special laws and general laws of local application<sup>263</sup> are prohibited.<sup>264</sup> Those prohibitions recently litigated include special

the supreme court upheld the constitutionality of a special law annexing the property of the hospital to the city of Oakland Park. Although neither the notice nor the title specifically identified the property to be annexed, the court held that the subject of annexation of property to the city was sufficient to notify the hospital that its property, which was contiguous to municipal boundaries, might be included in the proposed annexation. The purpose of publication of notice of intention is to provide reasonable notice to persons whose interests may be directly affected by the proposed legislation. *Id.* at 464.

259. FLA. CONST. art. III, § 10.

260. *City of Pompano Beach v. Lewis*, 368 So. 2d 1298, 1301 (Fla. 1979).

261. FLA. CONST. art. X, § 12(g). A local law affects only one municipality or appropriates funds of a given locality. 368 So. 2d at 1301.

262. *Cesary v. Second Nat'l Bank*, 369 So. 2d 917, 920-21 (Fla. 1979). The court in *Cesary* held that two statutes creating exceptions to the Florida usury law for savings banks and Morris Plan banks were not special laws and did not violate article III, § 11(a)(9), which prohibits special laws pertaining to "fixing of interest rates on private contracts."

A statute which classifies judges' salaries by county population, but applies equally to all counties, is not a special law, *Lewis v. Mathis*, 345 So. 2d 1066, 1068 (Fla. 1977), and the classification is reasonably related to the subject of the law. *Id.*; FLA. CONST. art. III, § 11(a)(21)(b).

263. A general law of local application is a law using a method of classification that makes the law applicable to particular localities only. *City of Miami Beach v. Frankel*, 363 So. 2d 555, 558 (Fla. 1978).

264. FLA. CONST. art. III, § 11 provides:

Prohibited special laws.—

(a) There shall be no special law or general law of local application pertaining to:

(1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies;

(2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability;

(3) rules of evidence in any court;

(4) punishment for crimes;

(5) petit juries, including compensation of jurors, except establishment of jury commissions;

(6) change of civil or criminal venue;

laws pertaining to elections,<sup>265</sup> jurisdiction or duties of officers,<sup>266</sup> assessment or collection of taxes for state or county purposes,<sup>267</sup> and disposal of public property, including any interest therein, for private purposes.<sup>268</sup>

(7) conditions precedent to bringing any civil or criminal proceedings, or limitations of time therefor;

(8) refund of money legally paid or remission of fines, penalties or forfeitures;

(9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts;

(10) disposal of public property, including any interest therein, for private purposes;

(11) vacation of roads;

(12) private incorporation or grant of privilege to a private corporation;

(13) effectuation of invalid deeds, wills or other instruments, or change in the law of descent;

(14) change of name of any person;

(15) divorce;

(16) legitimation or adoption of persons;

(17) relief of minors from legal disabilities;

(18) transfer of any property interest of persons under legal disabilities or of estates of decedents;

(19) hunting or fresh water fishing;

(20) regulation of occupations which are regulated by a state agency; or

(21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

(b) In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

265. FLA. CONST. art. III, § 11(a)(1). Where the filing fee for an election of a school board member was measured by a percentage of the salary to be paid, and a statute reduced the salary of board members, any effect on election "is so incidental and tenuous as not to be cognizable by the prohibition." *School Bd. of Escambia County v. State*, 353 So. 2d 834, 839 (Fla. 1977).

266. FLA. CONST. art. III, § 11(a)(1). Only when the purpose of the special act is to usurp the jurisdiction or duties of officers is the statute unconstitutional. If the act has a valid purpose and only incidentally affects such duties, it is constitutional. *Pinellas County Planning Council v. Smith*, 360 So. 2d 371, 374-75 (Fla. 1978) (upholding creation of county-wide land use plan where each municipality held planning power for its own area). *Accord*, *Furnams v. Santa Rosa Island Auth.*, 377 So. 2d 983 (Fla. 1st DCA 1979).

A statute creating civil service for deputy sheriffs does not unconstitutionally restrict the duties of the sheriff, although it may prevent his termination of the deputies' services. *Ison v. Zimmerman*, 372 So. 2d 431 (Fla. 1979).

Section 11(a)(1) provides an exception for local government agencies. A sheriff is considered an agency for the purpose of this exception. *Escambia County Sheriff's Dep't v. Florida Police Benevolent Ass'n*, 376 So. 2d 435 (Fla. 1st DCA 1979).

267. FLA. CONST. art. III, § 11(a)(2). *See Wernle v. Bellemead Dev. Corp.*, 308 So. 2d 97 (Fla. 1975) (statutes cancelling tax certificates not special laws regulating assessment or collection of taxes).

268. FLA. CONST. art. III, § 11(a)(10). In *Furnams v. Santa Rosa Island Auth.*, 377 So. 2d 983 (Fla. 1st DCA 1979), the court held that a statute authorizing the "Authority" to

#### IV. THE EXECUTIVE

##### A. *Executive Discretion*

Executive power vests in the governor, who must see that the laws are faithfully executed.<sup>269</sup> If he thinks the ends of justice will be served, the governor may assign any state attorney to discharge the appropriate duties in any circuit of the state.<sup>270</sup>

The Department of Criminal Law Enforcement Act of 1974<sup>271</sup> authorizes the governor by written order to empower the Division of Criminal Investigation to investigate violations of the criminal laws of the state, bear arms, make arrests, and secure, serve, and execute search and arrest warrants.<sup>272</sup> In *Thompson v. State*,<sup>273</sup> the executive order<sup>274</sup> authorizing the investigation of violations of criminal laws and official misconduct was challenged because no rules had been promulgated delineating the procedures necessary to conduct such investigations. The supreme court held that no preliminary regulations are necessary, since the governor is free to act in the "normal, constitutional way."<sup>275</sup> The court also rejected a separation of powers argument,<sup>276</sup> because the Act gave the executive no more discretion than that already conferred by the constitution. The Act merely assisted the governor in marshalling resources to carry out the executive function of law enforcement.<sup>277</sup>

##### B. *Advisory Opinions*

The governor may request an advisory opinion from the supreme court, interpreting the constitution on any question affecting his executive powers and duties.<sup>278</sup> The governor used this power to determine whether he was authorized to fill a vacancy in

lease island property owned by Escambia County did not violate § 11(a)(10). Although the lease was for private development, the anticipated recreational, residential, and business uses were deemed to be in the public interest and, therefore, in compliance with the deed vesting title in the county. *Id.* at 987.

269. FLA. CONST. art. IV, § 1(a).

270. *Austin v. Christina*, 310 So. 2d 289, 292 (Fla. 1975); see FLA. STAT. § 27.14 (1979).

271. FLA. STAT. §§ 943.01-465 (1979).

272. *Id.* § 943.04(2)(a) (1979).

273. 342 So. 2d 52 (Fla. 1976).

274. Exec. Order No. 74-38, cited in 342 So. 2d at 54.

275. 342 So. 2d at 55.

276. Appellant claimed that the statute delegated legislative power by giving unlimited discretion to the governor. *Id.*; see notes 355-61 and accompanying text *infra*.

277. 342 So. 2d at 55.

278. FLA. CONST. art. IV, § 1(c).

the tax collector's office of a home rule charter county.<sup>279</sup> The supreme court held that although article VIII, section 1(d) provides that county officers may be selected by means other than election when provided by county charter, this provision does not address the filling of vacancies. Article IV, section 1(f) controls, authorizing the governor to fill the vacancy.<sup>280</sup>

The question of the governor's authority to fill vacancies also arose in connection with the creation of judicial vacancies.<sup>281</sup> Pursuant to article V, section 9 of the Florida Constitution, the supreme court had certified to the legislature the need for increasing the number of judges and for redefining appellate districts.<sup>282</sup> In response, the legislature enacted a bill which altered the recommendations of the supreme court,<sup>283</sup> and the governor sought the opinion of the court on whether the legislation constitutionally created judicial vacancies that would permit gubernatorial appointments.<sup>284</sup> Although four justices of the supreme court<sup>285</sup> determined that this request came properly within the purview of article IV, section 1(c) as directly affecting the governor's duty, three justices<sup>286</sup> argued that the court should decline to answer the governor's request. Chief Justice England and Justice Hatchett viewed the issue as the questionable constitutionality of the statute and asserted that the court could declare legislative acts invalid only in proceedings in which both sides of the issue have been carefully framed and presented.<sup>287</sup> Not only was the advisory opinion nonadversarial, but the governor had neither suggested any basis for questioning the statute nor argued his position on the issues.<sup>288</sup> Justice Sundberg emphasized the necessity of a proper

---

279. *In re Advisory Opinion to the Governor*, Request of Feb. 25, 1975, 313 So. 2d 717 (Fla. 1975). See the discussion of home rule in text accompanying note 438 *infra*.

280. *Id.* at 721. FLA. CONST. art. IV, § 1(f) provides:

When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

281. *In re Advisory Opinion to the Governor*, Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).

282. See notes 15-20 and accompanying text *supra*.

283. 374 So. 2d at 961.

284. *Id.* at 962. FLA. CONST. art. V, § 11 confers on the governor the duty of filling vacancies in judicial office.

285. Adkins, Boyd, Overton, Alderman, JJ.

286. England, Hatchett, Sundberg, JJ.

287. 374 So. 2d at 970.

288. *Id.*

regard for separation of powers among the coordinate branches of government and agreed with the other dissenting justices that the court must not indiscriminately pass upon the constitutional validity of executive or legislative acts through an advisory opinion.<sup>289</sup> Despite the "extreme importance and urgency"<sup>290</sup> of the question of the validity of the legislation, three of the seven justices opined that an advisory opinion does not provide a proper vehicle for determining the constitutionality of a legislative enactment.

### C. Suspension of Officers

The governor has the power in appropriate circumstances to suspend state, county, and municipal officers.<sup>291</sup> In *In re Advisory Opinion to the Governor, Request of July 12, 1976*,<sup>292</sup> the governor sought clarification of his power to suspend the mayor of the Consolidated City of Jacksonville, who had been indicted by the grand jury for commission of a felony and two misdemeanors. The question turned on whether the mayor was to be treated as a county officer<sup>293</sup> or as a municipal officer.<sup>294</sup> The supreme court answered that the governor had power to remove the mayor only as a county officer, and only if a constitutional ground for removal existed. The court examined the Jacksonville charter,<sup>295</sup> determining that the

289. *Id.* at 972. See notes 339-71 and accompanying text *infra*.

290. *Id.* at 967 (Boyd, J., concurring).

291. FLA. CONST. art. IV, § 7(a), (c).

Once the governor has issued a suspension order, the correct standard of review to test its legal sufficiency is whether it contains facts that bear a reasonable relation to the charge. *Bass v. Askew*, 342 So. 2d 145, 146 (Fla. 1st DCA 1977).

292. 336 So. 2d 97 (Fla. 1976).

293. FLA. CONST. art. IV, § 7(a) provides:

By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

(Emphasis added.)

294. FLA. CONST. art. IV, § 7(c) provides: "By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter" (emphasis added). *But see Johnson v. Johansen*, 338 So. 2d 1300 (Fla. 1st DCA 1976) (city council has power to remove its president in accordance with procedure established by ordinance enacted after proscribed conduct occurred).

295. FLA. STAT. § 112.49 (1979).

mayor of consolidated Jacksonville had "the powers and duties of a county officer"<sup>296</sup> and should be treated as such for the purpose of suspension.<sup>297</sup>

#### D. Clemency Power

The clemency power, vested exclusively in the executive branch,<sup>298</sup> flows from the constitution and not from any legislation.<sup>299</sup> Should the legislature attempt to exercise or control any part of the pardoning power, it would violate separation of powers,<sup>300</sup> since the executive has unrestricted discretion in exercising his power.<sup>301</sup> For this reason, the procedures mandated in the Florida Administrative Procedure Act<sup>302</sup> are explicitly inapplicable to the exercise of any gubernatorial power "derived" from the Florida Constitution.<sup>303</sup> Certain grants of pardon by the governor require "the approval of three members of the cabinet."<sup>304</sup> Although the Act does not expressly exempt these cabinet actions, the supreme court has opined that they too are beyond its scope.<sup>305</sup>

The prohibition against encroachment on the executive branch also extends to the judiciary. In *Sullivan v. Askew*,<sup>306</sup> three persons convicted of capital felonies and sentenced to death alleged that

296. 336 So. 2d at 99.

297. *Id.* Because the legislature has the power to create, alter, or abolish municipalities, FLA. CONST. art. VIII, § 2(a), it also has the power to define a municipality and a county for suspension purposes. *Id.*

298. FLA. CONST. art. IV, § 8 provides:

(a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

(b) In cases of treason the governor may grant reprieves until adjournment of the regular session of the legislature convening next after the conviction, at which session the legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

299. *Sullivan v. Askew*, 348 So. 2d 312, 314 (Fla. 1977).

300. FLA. CONST. art. II, § 3; see notes 326-71 and accompanying text *infra*.

301. 348 So. 2d at 315-16.

302. FLA. STAT. §§ 120.50-.73 (1979).

303. *Id.* § 120.52(1)(a) (1979).

304. FLA. CONST. art. IV, § 8(a).

305. *In re Advisory Opinion of the Governor, In re Administrative Procedure Act, Executive Clemency*, 334 So. 2d 561 (Fla. 1976). Justice England concurred with the majority only insofar as the opinion dealt with the constitutional powers of the governor, but found the advisory opinion concerning the cabinet members to be unauthorized. *Id.* at 563.

306. 348 So. 2d 312 (Fla. 1977).

the executive, in considering requests for clemency, had not met minimal due process standards, which would include "a fair and impartial tribunal, the right to be heard in person and by counsel, and written standards or guidelines setting forth factors to be considered in granting clemency."<sup>307</sup> The supreme court held that the complaint failed to state a cause of action, reasoning that the clemency powers are totally discretionary with the executive and that the procedures adopted were in accord with the specific constitutional grant, not "imposing constitutionally objectionable conditions."<sup>308</sup>

The determination of maximum and minimum sentences for violations of the law is a legislative function.<sup>309</sup> The creation of a minimum sentence is not a legislative encroachment on executive authority,<sup>310</sup> but is the exercise of a power expressly reserved to the legislature in the creation of the Parole and Probation Commission.<sup>311</sup> It does not usurp parole authority, a function of the executive. If a sentence imposed is within the limitations set by the legislature, the court has no jurisdiction to interfere, but reevaluation of a sentence may be requested of the governor under article IV, section 8.<sup>312</sup>

### E. Attorney General

The attorney general is the chief legal officer of the state.<sup>313</sup> In

307. *Id.* at 313.

308. *Id.* at 316. But Justice England, concurring, distinguished the "traditional" pardon power of the executive, exercised without consultation or official procedure for whomever and however the executive wishes, from the death sentence review process, which operates in the same way as any other administrative process in Florida, requiring hearings, an informal evidentiary proceeding, reports, and a public explanation of the decision, all within specific time frames. *Id.* at 318. Once the executive creates agency procedures purporting to establish minimum due process, the clemency power is no longer exclusively constitutionally derived and the judiciary may review the process for fundamental fairness. In this case, however, Justice England concluded that the proper standard had been met.

309. *Dorminey v. State*, 314 So. 2d 134, 136 (Fla. 1975).

310. *Id.*; *Owens v. State*, 316 So. 2d 537, 538 (Fla. 1975).

311. FLA. STAT. § 947.16(1) (1979); FLA. CONST. art. IV, § 8(c) provides:

There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

This section creates a legislative power in the article dealing with the executive. It is a functional placement of powers similar to the conferring of executive powers in article V, § 11 (judicial article) and article III, § 8 (legislative article). See 316 So. 2d at 538 n.4.

312. *Banks v. State*, 342 So. 2d 469, 470 (Fla. 1976).

313. FLA. CONST. art. IV, § 4(c).



*Shevin v. Exxon Corp.*,<sup>314</sup> the State of Florida, through the attorney general, had commenced an antitrust action in federal court against seventeen major oil companies. One of the preliminary questions raised by the companies was the right of the attorney general to bring an action under federal law without authorization from the agencies, departments, and political subdivisions to which the damages actually accrued.<sup>315</sup> The Fifth Circuit refused to certify the question to the Supreme Court of Florida, finding sufficient Florida law upon which to draw. The court held that not only is the attorney general a constitutional officer, but he has common law as well as statutory powers.<sup>316</sup> Included among his common law powers is the duty to "prosecute all actions necessary for the protection and defense of the property and the revenue of the state."<sup>317</sup> The court equated the institution of an action with the prosecution of it,<sup>318</sup> and found that this power was not limited to actions in quo warranto or under state law. The statutory delegation of specific portions of the litigation power to state attorneys did not abrogate the attorney general's common law powers in other types of litigation. "[T]hose powers still obtain in the absence of express legislative provision to the contrary."<sup>319</sup>

#### F. *Game and Fresh Water Fish Commission*

The Game and Fresh Water Fish Commission was created by article IV, section 9, of the Florida Constitution to "exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."<sup>320</sup> Reserved to the legisla-

---

314. 526 F.2d 266 (5th Cir. 1976).

315. *Id.* at 267.

316. *Id.* at 269.

317. *Id.* at 271 (quoting *Landis v. Kress*, 115 Fla. 189, 200, 155 So. 823, 827 (1934)).

318. 526 F.2d at 270 n.16.

319. *Id.* at 273.

320. FLA. CONST. art. IV, § 9, as amended in 1974, provides:

There shall be a game and fresh water fish commission, composed of five members appointed by the governor subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute. The legislature may enact laws in aid of the commission, not inconsistent with this section. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from such license fees shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water

ture is the power to enact laws determining license fees for hunting and fishing, penalties for violating Commission regulations, laws in aid of the Commission, and provisions for the exercise of executive power by the Commission in the area of planning, budgeting, personnel management, and purchasing.<sup>321</sup> In *Department of Natural Resources v. Game and Fresh Water Fish Commission*,<sup>322</sup> the Commission challenged a statute which transferred to the Department of Natural Resources the authority to review, supervise, and approve the Commission's exercise of executive power in the area of budgeting.<sup>323</sup> The Supreme Court of Florida found that statute unconstitutional because it totally undermined the constitutional grant of executive power to the Commission.<sup>324</sup> Where a statute ostensibly conflicts with the Commission's authority under article IV, section 9, but is supported by another article of the constitution, the two sections must be read together to determine the validity of the law.<sup>325</sup>

## V. SEPARATION OF POWERS

The Florida Constitution is more explicit in its prohibition of delegation than is the Constitution of the United States or those of many other states. Not only does article II, section 3 expressly limit the authority of one branch to exercise any powers pertaining to either of the other branches,<sup>326</sup> but this provision continuously

---

aquatic life.

321. *Id.*

322. 342 So. 2d 495 (Fla. 1977).

323. 1975 Fla. Laws ch. 75-22, § 17 (amending FLA. STAT. § 20.25(17) (1973)).

324. 342 So. 2d at 497. The court reserved the question of whether the legislature may not pass any law diminishing the Commission's budgetary autonomy. *Id.*

325. In *Askew v. Game and Fresh Water Fish Comm'n*, 336 So. 2d 556 (Fla. 1976), the supreme court upheld several statutes that collectively allowed the Department of Natural Resources, without obtaining a permit from the Commission, to introduce fish in Florida waters to control aquatic weeds. The court examined not only former article IV, § 9, which confers all "non-judicial powers of the state" on the commission, but also article II, § 7, which declares state environmental policy: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." If the statutes were invalidated, the legislature would have no power to carry out the policy announced in article II, § 7. Therefore, the court construed the two sections together to uphold the statutes. *Id.* at 560.

326. FLA. CONST. art. II, § 3 provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

and consistently has been strictly construed.<sup>327</sup>

### A. Legislature v. Executive

The legislature, elected by the people and representing their interests, must establish fundamental policy decisions in the law and create standards and guidelines sufficiently specific to help direct the agency in its execution of the powers delegated.<sup>328</sup> Delegation without standards enforceable by the judiciary against an agency violates separation of powers because it effectively places the lawmaking power in the hands of the executive. In *Florida Home Builders Association v. Division of Labor*,<sup>329</sup> the supreme court invalidated section 446.071 of the Florida Statutes. The statute assigned to the agency the duty to accept or reject applications for an apprenticeship program according to "need." Because no standards or policies for ascertaining "need" existed either in this law or in other statutes dealing with apprenticeship, the courts would be unable to determine if the agency was implementing legislative intent, or unconstitutionally exercising the lawmaking power.<sup>330</sup>

In response to the constitutional expression of state policy to conserve and protect the natural resources and scenic beauty of the state,<sup>331</sup> the legislature passed the "Florida Environmental Land and Water Management Act."<sup>332</sup> The enactment empowered the Division of State Planning to recommend areas of critical state concern to the governor and the cabinet, who act as the Administration Commission.<sup>333</sup> In *Askew v. Cross Keys Waterways*,<sup>334</sup> the supreme court held that the determination of which geographical

327. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978). Although other states have limiting provisions similar to article II, § 3, some have abandoned a strict delegation doctrine in favor of the federally followed view enunciated by Professor Kenneth Culp Davis of the University of Chicago College of Law. This view, representing the modern trend in administrative law, shifts the emphasis from legislatively imposed standards for administrative action to procedural safeguards in the administrative process itself. *Id.* at 922, 924; see K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 2.04, at 30 (1976).

328. 372 So. 2d at 925.

329. 367 So. 2d 219 (Fla. 1979).

330. *Id.* at 220. For a discussion of cases invalidating statutes under the delegation doctrine of article III, § 1, see notes 236-45 and accompanying text *supra*.

331. FLA. CONST. art. II, § 7; see note 325 *supra*.

332. 1972 Fla. Laws ch. 72-317 (codified at FLA. STAT. §§ 380.012-.10 (Supp. 1972)).

333. FLA. STAT. § 380.05(1)(a) (1977) (held unconstitutional in *Askew v. Cross Keys Waterways*, 372 So. 2d 913 (Fla. 1978)). The defective section was amended in 1979 to provide for legislative review of agency recommendations, based on more specific criteria. 1979 Fla. Laws ch. 79-73, § 4.

334. 372 So. 2d 913 (Fla. 1978).

areas and resources need the greatest protection is a basic policy decision and, therefore, is a legislative task that cannot be delegated to the Commission, despite criteria enumerated in the statute to guide the decision.<sup>335</sup> Because the criteria failed to document legislative priorities among competing factors and resources for preservation, the Act was unconstitutional.<sup>336</sup>

The Government in the Sunshine Law<sup>337</sup> mandates that meetings of boards, commissions, and agencies of state and local governments be open to the public. In *Kanner v. Frumpkes*,<sup>338</sup> the District Court of Appeal, Third District, determined that this mandate does not apply to the Judicial Nominating Commission. The function of the Commission in screening judicial applicants is an inherently executive function that may not be limited by legislative act.

### B. Legislature v. Judiciary

In the same way that the principle of the separation of powers forbids the legislature to delegate its powers to another branch, the principle precludes the legislature from enacting statutes that encroach on powers committed to another branch. The supreme court invalidated a provision of the medical mediation statute<sup>339</sup> which stated that after mediation a trial on the merits would be conducted without "reference" to insurance.<sup>340</sup> "References" were held to be purely procedural and, therefore, within the constitutional power of the supreme court to adopt rules for practice and procedure in all courts.<sup>341</sup> The court, however, recognized the wisdom of the policy expressed in the statute and adopted the substance of the unconstitutional section as a rule of procedure.<sup>342</sup>

---

335. *Id.* at 919.

336. *Id.* The court held that the doctrine of nondelegation under article II, section 3 required rejection of the Davis view of administrative law. *Id.* at 924-25; see note 327 *supra*.

337. FLA. STAT. § 286.011 (1979).

338. 353 So. 2d 196 (Fla. 3d DCA 1977).

339. 1975 Fla. Laws ch. 75-9, § 5 (codified, as amended, at FLA. STAT. §§ 768.44, .47 (1979)) (held unconstitutional in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980)).

340. *Carter v. Sparkman*, 335 So.2d 802, 806 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

341. FLA. CONST. art. V, § 2(a). See *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978) (invalidating statute that had regulated joinder of motor vehicle liability insurers, as an unconstitutional encroachment on the rulemaking power); see notes 30-44 and accompanying text *supra*.

342. 335 So. 2d at 806. FLA. R. CIV. P. 1.450(e) provides: "In any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, to insurance coverage, or to the joinder of an insurer as co-defendant in the suit."

If the subject matter of a proposal is substantive, the legislature may act on it. In *Johnson v. State*,<sup>343</sup> the District Court of Appeal, First District, rejected the argument that presentence investigation is substantive, because the supreme court, in promulgating Florida Rule of Criminal Procedure 3.710,<sup>344</sup> had already determined that it was procedural. For that reason a statute<sup>345</sup> requiring presentence reports in conflict with the rule, which granted discretion concerning such reports, violated the separation of powers. "A rule of procedure promulgated and adopted by the Supreme Court of Florida cannot be amended or superseded by an act of legislature."<sup>346</sup>

The court cannot usurp the legislative function. In *Brown v. State*,<sup>347</sup> the supreme court refused, on separation of powers grounds, to give a limiting construction to a statute outlawing open profanity,<sup>348</sup> since no such limited legislative intent could be found in the language of the statute. The statute, therefore, was declared unconstitutional as punishing pure speech.<sup>349</sup>

In seeming opposition to strict interpretations of the separation of powers is the doctrine of inherent powers. The answer to a certified question in *Rose v. Palm Beach County*<sup>350</sup> determined that a trial court has inherent power<sup>351</sup> to order that indigent witnesses be paid in advance for traveling and lodging expenses in excess of the statutory maximum to ensure a criminal defendant a fair trial.<sup>352</sup> The court held that where fundamental rights are at issue, the judiciary cannot abdicate its responsibility and defer to

---

343. 308 So. 2d 127 (Fla. 1st DCA 1975), *aff'd*, 346 So. 2d 66 (Fla. 1977) (per curiam); see notes 57-59 and accompanying text *supra*.

344. "In all cases in which the court has discretion as to what sentence may be imposed, the court *may* refer the case to the probation and parole commission for investigation and recommendation" (emphasis added).

345. FLA. STAT. § 921.231 (1975).

346. 308 So. 2d at 129. The legislature, however, has the power to make rules of procedure promulgated by the supreme court applicable to administrative proceedings. *State Dep't of Highway Safety v. State Career Serv. Comm'n*, 322 So. 2d 64 (Fla. 1st DCA 1975).

347. 358 So. 2d 16 (Fla. 1978).

348. FLA. STAT. § 847.04 (1975).

349. 358 So. 2d at 21. By narrowly construing the statute to accord with the first amendment, the court could have saved the statute.

350. 361 So. 2d 135 (Fla. 1978).

351. See notes 21-26 and accompanying text *supra*.

352. The petition for an order compelling higher payment was granted by the trial judge, after a successful motion for change of venue in a criminal prosecution had required state and defense witnesses, many of them indigent, to travel approximately 300 miles. 361 So. 2d at 136.

legislative decisions.<sup>353</sup> Finding inherent power to be derived from and essential to the separation of powers and judicial independence, the court interpreted its inherent powers as a corollary of, rather than in derogation of, separation of powers.<sup>354</sup>

### C. *Judiciary v. Executive*

In *Sullivan v. Askew*,<sup>355</sup> convicted felons who had been sentenced to death challenged clemency proceedings as being violative of due process. The supreme court held that it would violate the separation of powers for the court to examine the pardon power, since it exists solely at the unrestricted and unlimited discretion of the governor.<sup>356</sup>

In a decision important for attorneys, *Ciravolo v. Florida Bar*,<sup>357</sup> the supreme court clarified a confused series of cases and held that a grant of transactional immunity by an assistant state attorney to an attorney who agreed to testify in a criminal case does not extend to disciplinary proceedings by the Florida Bar. The immunity statute expressly immunizes the party from any "penalty or forfeiture,"<sup>358</sup> which would seem to include disciplinary proceedings by a professional organization. The court, however, held the immunity from Florida Bar proceedings ineffective, on the basis that the regulation of admission and discipline of attorneys falls exclusively within the jurisdiction of the supreme court,<sup>359</sup> and other branches have no power to act in this area.<sup>360</sup> Disciplinary immunity is obtained solely by application to the supreme court, whose decisions to grant immunity are determined by whether the greater good of society will thereby be served.<sup>361</sup>

---

353. 361 So. 2d at 137.

354. *Id.*

355. 348 So. 2d 312 (Fla.), *cert. denied*, 434 U.S. 878 (1977); see notes 306-08 and accompanying text *supra*.

356. Justice England concurred but asserted that where the procedure established operates in the same way as other administrative processes, it is the job of the judiciary to see that due process requirements are met. 348 So. 2d at 318. He concurred after finding that the procedure used complied with due process.

357. 361 So. 2d 121 (Fla. 1978).

358. FLA. STAT. § 914.04 (1979).

359. FLA. CONST. art. V, § 15. See notes 182-86 and accompanying text *supra*.

360. *In re Florida Bar*, 316 So. 2d 45 (Fla. 1975); see note 373 *infra*.

361. 361 So. 2d at 125. The court did not apply the holding to the petitioners before the court on the basis that they had relied on the broad language in *Lurie v. Florida State Bd. of Dentistry*, 288 So. 2d 223 (Fla. 1973), in which the court made explicit reference to attorney disciplinary proceedings as being within the grant of immunity. The court, in the instant case, limited the application of *Lurie* to areas other than the discipline of attorneys.

### D. Exceptions

Separation of powers, however, is not absolute.<sup>362</sup> The division of governmental powers is intended for practical purposes, and not every governmental activity belongs exclusively to one branch.<sup>363</sup> The Uniform Disposition of Traffic Infractions Act,<sup>364</sup> which established an informal hearing process for considering minor traffic infractions, was upheld in *State v. Johnson*.<sup>365</sup> The supreme court stated that the duties placed upon the judge in conducting a traffic hearing, while including investigative as well as judicial activity, are essentially administrative and not violative of separation of powers.<sup>366</sup>

In *Department of Environmental Regulation v. Leon County*,<sup>367</sup> petitioners contended that the power of a hearing officer of the Division of Administrative Hearings to determine the constitutionality of proposed rules in furtherance of administrative rulemaking was an unconstitutional delegation of legislative power and an exercise of judicial power. The District Court of Appeal, First District, reiterated its holding in *State Department of Administration v. Stevens*<sup>368</sup> that the legislature may legally vest quasi-judicial power in a hearing officer under chapter 120 of the Florida Statutes.<sup>369</sup> This power includes the determination of "whether or not a *proposed* rule violates the Florida Constitution if adopted, such determination being subject to judicial review."<sup>370</sup> Once the rule is passed, its constitutionality is a question for the courts alone. The First District also denied petitioner's contention that the statute permitting a hearing officer to declare certain rules void unlawfully vested in that officer the legislative power to make rules for all agencies. The court found that the legislature had merely established a check on the rulemaking authority of other agencies in a specialized agency to assure compliance with author-

---

362. *State v. Johnson*, 345 So. 2d 1069, 1071 (Fla. 1977).

363. *Id.*

364. FLA. STAT. §§ 318.11-.22 (1979).

365. 345 So. 2d 1069 (Fla. 1977).

366. *Id.* at 1071.

367. 344 So. 2d 297 (Fla. 1st DCA 1977). See also *Florida Educ. Ass'n v. Public Employees Relations Comm'n*, 346 So. 2d 551 (Fla. 1st DCA 1977).

368. 344 So. 2d 290 (Fla. 1st DCA 1977).

369. Florida Administrative Procedure Act, FLA. STAT. §§ 120.52(14), .56, .68 (1979).

370. 344 So. 2d at 298 (emphasis in original). In *4245 Corp. v. Division of Beverage*, 348 So. 2d 934 (Fla. 1st DCA 1977), the court held that judicial review of a ruling on a proposed rule by the Division of Administrative Hearings does not violate FLA. CONST. art. II, § 3, but balances the legislative grant of power to the agency. See notes 218-21 and accompanying text *supra*.

ity granted by the legislature.<sup>371</sup>

## VI. ETHICS IN GOVERNMENT

Following several political scandals in Florida in the seventies,<sup>372</sup> certain officials, employees, and candidates for office were required to file statements of their financial interests, which statements became "public records."<sup>373</sup> No specific dollar amount was required. A successful drive to amend the constitution by popular initiative<sup>374</sup> resulted in passage of the "Sunshine Amendment" in 1976, seeking to ensure ethics in government and placing stricter controls on conflicts of interests. The amendment is now article II, section 8 of the Florida Constitution. It requires "full and public disclosure of financial interests," showing net worth and identifying each asset and liability in excess of \$1,000 together with the most recent income tax return or a sworn statement specifying each separate source and amount of income exceeding \$1,000.<sup>375</sup>

In *Plante v. Gonzalez*,<sup>376</sup> the United States Court of Appeals, Fifth Circuit, upheld the amendment in a federal constitutional challenge. Five state senators claimed that personal financial disclosure violated their rights to privacy.<sup>377</sup> The court held that

371. 344 So. 2d at 299.

372. Florida's Controllor, Treasurer, and Superintendent of Education were indicted for selling their influence. A legislative committee recommended that one state supreme court justice be impeached for similar activities. A second justice resigned under fire. A third supreme court justice was reprimanded by the state body supervising judicial conduct. N.Y. Times, April 27, 1975, at 35, col. 1. In 1976, U.S. Representative Robert L. F. Sikes was reprimanded by the House of Representatives because as Chairman of the House Appropriations subcommittee on military construction he had helped pass legislation and secured government decisions from which he benefited financially. United States Senator Edward Gurney was acquitted of federal charges stemming from alleged influence peddling. N.Y. Times, July 12, 1974, at 10, col. 1; October 28, 1976, at 19, col. 1. *Plante v. Gonzalez*, 575 F.2d 1119, 1122 n.3 (5th Cir. 1978).

373. FLA. STAT. § 112.3145 (1979) (originally enacted as 1974 Fla. Laws ch. 74-177, § 5). In *In re Florida Bar*, 316 So. 2d 45 (Fla. 1975), the supreme court ruled that this law did not apply to judicial officers. Candidates for judicial positions must meet legislative requirements, but members of the bar as judicial officers are amenable only to supreme court regulation. The standards for disclosure enunciated in the Canons of Ethics differ from those of the statute. *Id.* at 46, 47; see notes 194-95 and accompanying text *supra*.

374. FLA. CONST. art. XI, § 3.

375. FLA. CONST. art. II, § 8(a), (h)(1). Although the filing date established is July 1 of each year, the supreme court construed that date as applying only to office holders. Candidates for elective office must file disclosure statements before or at the time they qualify. Failure to file a disclosure statement constitutes a defect in the candidate's filing papers. *Plante v. Smathers*, 372 So. 2d 933 (Fla. 1979).

376. 575 F.2d 1119 (5th Cir. 1978).

377. "Americans have a constitutional right to privacy. The right springs from several



financial privacy does not lie within the individual autonomy branch of the constitutional right of privacy,<sup>378</sup> and that financial disclosure did not violate the public officials' right to confidentiality.<sup>379</sup>

The Florida Commission of Ethics, an independent commission, was created and authorized to investigate and make public reports on complaints concerning breach of the public trust.<sup>380</sup> The supreme court concluded that this authority includes the power to file with the secretary of state or to publicly distribute a report stating the Commission's conclusions concerning an alleged breach of trust by a state legislator.<sup>381</sup> Such a report may not be transmitted to the president of the senate in an effort to initiate disciplinary action against a senator,<sup>382</sup> and it is not binding on the legislature,<sup>383</sup> which has the exclusive power to discipline its members.<sup>384</sup>

Although the disclosure requirement has gained the most publicity, the "Sunshine Amendment" also attempted to provide means to ensure ethical government. Under the amendment, any public officer or employee convicted of a felony involving a breach of public trust is subject to forfeiture of pension or public retirement rights "as may be provided by law."<sup>385</sup>

Article II, section 8(e) attempts to prevent influence peddling.

of the Bill of Rights amendments, and is incorporated in the due process protected by the fourteenth amendment." *Id.* at 1127 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

378. In *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977), the United States Supreme Court characterized privacy as having two strands: "the individual interest in avoiding disclosure of personal matters" (confidentiality—an external strand) and the "interest in independence in making certain kinds of important decisions" (autonomy—an internal strand).

379. The court balanced the senators' financial privacy against the state interest in disclosure, including the public's right to know, creation of confidence in officials, deterrence of corruption and conflict of interest, and aid in finding and prosecuting officials who have violated the law. 575 F.2d at 1134. Since the officials had chosen to run for office, their expectations of privacy are necessarily limited. The court found that the state interests outweighed those of the senators.

380. FLA. CONST. art. II, § 8(f), (h)(3). In *Isley v. Askew*, 358 So. 2d 32, 34 (Fla. 1st DCA 1978), the court held that this provision incorporated the appointment procedure enunciated in FLA. STAT. § 112.320 (1975) for members of the commission.

381. Florida Comm'n on Ethics v. Plante, 369 So. 2d 332 (Fla. 1979); see FLA. STAT. § 112.324 (1979) (enabling legislation does not delegate the right to advise disciplinary action against legislators although giving broad powers against other officers).

382. 369 So. 2d at 335.

383. *Id.* at 337.

384. FLA. CONST. art. III, § 4(d); see FLA. STAT. § 112.322 (1979).

385. FLA. CONST. art. II, § 8(d); see *Williams v. Smith*, 360 So. 2d 417 (Fla. 1978) (provision not self-executing; legislature must implement). At the end of 1979 there was still no enabling statute authorizing such forfeiture.

Members of the legislature are prohibited from personally representing another person or entity for compensation during their terms of office before any state agency other than judicial tribunals.<sup>386</sup> The appropriate test for determining whether an agency has judicial characteristics, for purposes of equating it with a judicial tribunal, is the "predominant characteristics" test.<sup>387</sup> The agency itself is not to apply the test; rather, the court is.<sup>388</sup>

In accordance with the goal of ethics in government, the constitution mandates the adoption of a code of ethics for public officers and employees.<sup>389</sup> The legislature has enacted the Code of Ethics embodied in part III of chapter 112 of the Florida Statutes.<sup>390</sup>

## VII. LOCAL GOVERNMENT

### A. Counties

The constitution establishes counties as the subdivisions of the state.<sup>391</sup> This status carries with it the sovereign immunity of the state unless the legislature provides otherwise by general law.<sup>392</sup> Any monies paid to satisfy a judgment against a county will come from the state treasury, because "[u]nlike a municipality, a county has no corporate fund or other proprietary holding."<sup>393</sup>

---

386. FLA. CONST. art. II, § 8(e). This section also prohibits all statewide elected officers, as well as members of the legislature, from representing "another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office."

387. *Myers v. Hawkins*, 362 So. 2d 926, 931-32 (Fla. 1978). The test would eliminate those agencies, such as the Public Service Commission, which possess judicial characteristics for only some, rather than virtually all, their activities. *Id.* at 931.

388. 362 So. 2d at 929.

389. FLA. CONST. art. III, § 18.

390. 1967 Fla. Laws ch. 67-469 (codified at FLA. STAT. §§ 112.311-.326 (1979)). For two cases holding sections of the statute unconstitutionally vague, see *State v. Rou*, 366 So. 2d 385 (Fla. 1978) (the phrase "special privileges or exemptions" affords no guidance); *D'Alemberte v. Anderson*, 349 So. 2d 164 (Fla. 1977) (holding unconstitutionally vague the clause: "that would cause a reasonably prudent person to be influenced in the discharge of official duties").

See also *In re Florida Bar*, 316 So. 2d 45 (Fla. 1975) (Ethics Code not applicable to judicial officers), discussed in note 373 *supra*.

391. FLA. CONST. art. VIII, § 1(a).

392. *Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978) (no authority for money judgment against county because of prior dual taxation); see note 484 *infra*. See also *Circuit Court v. Department of Natural Resources*, 339 So. 2d 1113 (Fla. 1976) (sovereign immunity applies to state agencies except as waived by constitution or statute).

393. 339 So. 2d at 1115-16.

County government may be established by charter<sup>394</sup> or by act of the legislature.<sup>395</sup> Non-charter counties have only such power as provided by general or special law.<sup>396</sup> In *Townley v. Marion County*,<sup>397</sup> the Board of Commissioners of a non-charter county enacted an ordinance whereby previous zoning regulations, promulgated pursuant to special acts of the legislature, were subsequently extended from specifically limited unincorporated areas to the entire unincorporated area of Marion County. Although given the zoning power by general law,<sup>398</sup> the county had failed to follow the statutory mechanism provided for the adoption of zoning regulations.<sup>399</sup> The ordinance was therefore invalid because it was inconsistent with the grant of power under the general law.<sup>400</sup>

When a county becomes a charter county,<sup>401</sup> it has all the powers of local self-government and may enact county ordinances not inconsistent with general law.<sup>402</sup> This power includes the power to establish municipal services districts and to levy ad valorem taxes in that district.<sup>403</sup>

No county, however, may tax property located within municipalities for services that the county rendered "exclusively" for the benefit of property or residents in unincorporated areas.<sup>404</sup> In *Als-*

394. FLA. CONST. art. VIII, § 1(c).

395. *Id.* § 1(a).

396. Compare FLA. CONST. art. VIII, § 1(f) with FLA. CONST. art. VIII, § 1(g). Although non-charter counties have *only* such powers of self-government as expressly provided by the state legislature in general or special laws, charter counties possess *all* powers of local self-government not inconsistent with general legislative enactments or with special laws that have been approved by the electorate.

397. 343 So. 2d 1312 (Fla. 1st DCA 1977), *cert. denied*, 354 So. 2d 982 (Fla. 1978).

398. FLA. STAT. § 125.01(1)(h) (1979) provides that to the extent not inconsistent with general or special law, the power to carry on county government includes the power to "[e]stablish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public."

399. FLA. STAT. § 163.165 (1979) provides minimum requirements for exercising the general grant of zoning power, such as a comprehensive general plan and provisions for annual review.

400. The court opined that the two general statutes were "supplemental and in addition to" such other zoning powers as might be exercised by a charter county or pursuant to a special law. 343 So. 2d at 1313-14. In contrast, by acting inconsistently with the terms of the general grant, Marion County was without power to adopt the ordinance.

401. FLA. CONST. art. VIII, § 1(c) provides: "Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose."

402. *Id.* § 1(g); see note 396 *supra*.

403. *Hudson Pulp & Paper Corp. v. County of Volusia*, 348 So. 2d 44, 44-45 (Fla. 1st DCA 1977); see notes 477-87 and accompanying text *infra*.

404. FLA. CONST. art. VIII, § 1(h).

*dorf v. Broward County*,<sup>405</sup> the supreme court held that this provision of the constitution is self-executing. The court rejected a literal reading of the word "exclusively"<sup>406</sup> as eliminating all meaning from the provision, because every expenditure may have some miniscule effect on municipal residents.<sup>407</sup> Despite the effect on the fiscal stability of a large metropolitan county, property within a municipality cannot be taxed for expenditures of "no real or substantial benefit to municipal residents."<sup>408</sup>

Yet this provision limits only the power of the county to levy and collect property taxes.<sup>409</sup> The supreme court has suggested that counties may use revenues not derived from property taxes for the benefit of unincorporated areas alone, despite any imbalance in benefits received that might be created.<sup>410</sup> Franchise fees paid by a utility to a county for the grant of a franchise are not taxes and hence are not subject to the prohibition.<sup>411</sup> If a county has improperly taxed the property of a municipality, the legislature may enact laws that offer the municipality relief. Although such relief may not take the form of a money judgment assessed for prior years' violations,<sup>412</sup> the court may provide relief to be enforced against the counties in the future.<sup>413</sup> Of course, a county may regulate certain municipal services in matters affecting the whole county.<sup>414</sup> The state anticipates more efficient management of municipal systems on a metropolitan basis.

In general, the power to regulate occupations and businesses by franchise is an attribute of state sovereignty that a county may not attempt to exercise without state enabling legislation. In *Cable-Vision, Inc. v. Freeman*,<sup>415</sup> a non-charter county gave Cable-Vision an exclusive franchise for television reception in the area. The legislature then ratified only the right to a nonexclusive

---

405. 333 So. 2d 457 (Fla. 1976).

406. *Id.* at 460.

407. *Id.* at 459 n.8.

408. *Id.* at 460.

409. *Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 146 (Fla. 1978).

410. *Id.* at 148. The court said that the legislature must determine if any such imbalance must be corrected.

411. *City of Hialeah Gardens v. Dade County*, 348 So. 2d 1174, 1180 (Fla. 3d DCA 1977), *appeal dismissed*, 359 So. 2d 1212 (Fla. 1978), *cited in* 365 So. 2d at 146.

412. 365 So. 2d at 147.

413. *Id.* See FLA. STAT. § 125.01(6) (1979).

414. *City of North Miami Beach v. Metropolitan Dade County*, 317 So. 2d 110 (Fla. 3d DCA 1975) (municipal water plants).

415. 324 So. 2d 149, 152 (Fla. 3d DCA 1975), *appeal dismissed*, 336 So. 2d 1180 (Fla. 1976), *appeal dismissed*, 429 U.S. 1032 (1977) (no substantial federal question).

franchise. When the county later issued a franchise to a second company providing an alternative means of television transmission in the area, the court upheld the second franchise as a valid exercise of county power as provided by statute.<sup>416</sup> The attempt by the county to create an exclusive franchise without legislative authorization was *ultra vires*.<sup>417</sup>

The governing body of each county, unless otherwise provided in the county charter, shall be a board of five commissioners.<sup>418</sup> After each decennial census the board must divide the county into districts "as nearly equal in population as practicable," and one commissioner residing in each district is to be elected by the electors of the county.<sup>419</sup> In *Flagler County Board of Commissioners v. Likins*,<sup>420</sup> electors sought reapportionment of county districts, claiming inequality in population and challenging the statute which provided for boundary changes only in odd number years.<sup>421</sup> The court found that because county commissioners run at large, they represent all electors, although one lives in each district. Therefore, no fourteenth amendment violation existed. Furthermore, the supreme court held that it was reasonable for the board to redistrict only every two years, unless the apportionment plan discriminated against a particular group, by minimizing or eliminating voting strength by race or political party.

The state constitution requires the "just valuation" of property for taxation purposes.<sup>422</sup> This requirement is violated if tax assessments are greater than one hundred percent of the fair market value of the property or are unequally or improperly determined with respect to similar property in the same county.<sup>423</sup> But different assessments for adjacent similar properties in different

---

416. FLA. STAT. § 125.01(1)(f) (1979) gives the county power to provide "recreational and cultural facilities and programs." Subsection (1)(w) dictates that any programs must be in the common interest of the people of the county. The court in *Cable-Vision* held that a valid county purpose was served in providing alternative means of television reception, since the franchise granted to Cable-Vision did not result in adequate transmission to the citizens of the area.

417. 324 So. 2d at 152.

418. FLA. CONST. art. VIII, § 1(e); see notes 291-97 and accompanying text *supra*, discussing the governor's power to suspend a county officer under FLA. CONST. art. IV, § 7.

419. FLA. CONST. art. VIII, § 1(e).

420. 337 So. 2d 801 (Fla. 1976).

421. FLA. STAT. § 124.01(3) (1979).

422. FLA. CONST. art. VII, § 4 provides: "By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation . . . ."

423. *Straughn v. GAC Properties, Inc.*, 360 So. 2d 385, 386 (Fla. 1978); see notes 508-14 and accompanying text *infra*.

counties are permissible, and the court will not compel the Department of Revenue, which supervises statewide valuation standards, to equalize rates.<sup>424</sup> The primary responsibility for performing assessment functions rests with county officers, and each county has its own property appraiser.<sup>425</sup>

### B. Municipalities

Municipalities have governmental, corporate, and proprietary powers to aid in conducting municipal government.<sup>426</sup> Zoning is one of these powers. In *Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace*,<sup>427</sup> the supreme court determined that state agencies must seek local approval for a nonconforming use of municipal property, except where a specific legislative directive requires such a use in the particular area. Because the zoning power of municipalities derives from the constitution,<sup>428</sup> the state agency could not claim sovereign immunity.<sup>429</sup> The local zoning authority must apply a balancing test, weighing

---

424. *Id.* at 387.

425. FLA. CONST. art. VIII, § 1(d); see 360 So. 2d at 387 (citing *Spooner v. Askew*, 345 So. 2d 1055, 1059-60 (Fla. 1976)).

426. FLA. CONST. art. VIII, § 2(b) provides: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective."

427. 332 So. 2d 610 (Fla. 1976).

428. FLA. CONST. art. VIII, § 2(b), as implemented by the Municipal Home Rule Powers Act, FLA. STAT. § 166.021(3), (4) (1979).

429. *But see Dickinson v. City of Tallahassee*, 325 So. 2d 1 (Fla. 1975), holding that the state is immune from a local utility tax. Justice England, who also authored *Hillsborough*, asserted in *Dickinson* that "the principle of immunity is not constitutionally dependent." *Id.* at 3 n.6. The immunity from taxation arises from compelling policy considerations for the fiscal stability of the state and the desire for intergovernmental consistency. *Id.* at 4. Only when this immunity is expressly waived may the state be taxed by its municipalities. See note 505 and accompanying text *infra*.

The supreme court in *Hillsborough* attempted to distinguish *Dickinson* on the basis of the constitutional provision in article VII, § 9(a), requiring a legislative enactment before a municipality may levy taxes other than ad valorem taxes, as opposed to the constitutional delegation of municipal zoning power in article VIII, § 2(b). 332 So. 2d at 612-13.

Although municipal regulation would cost the state money, the policy underlying immunity from taxation is not applicable to zoning. The ability of the state to exclude itself from rational objectives for municipal land use would destroy uniformity and thwart effective performance of regulatory functions granted to municipalities in the constitution. While encouraging intergovernmental cooperation and reduction of litigation, the *Hillsborough* decision offers the state the opportunity to maintain a nonconforming use after proving that the public interest in its favor outweighs the interests in the zoning regulation. *Id.* at 612 n.3. Furthermore, the state may exempt itself through legislation from local zoning ordinances. *Id.* at 613 n.5.

the public interests favoring the nonconforming use against those opposing such a use.<sup>430</sup>

The standard for judicial review of zoning decisions of the local authority is whether the existing zoning classification is arbitrary, unreasonable, or confiscatory.<sup>431</sup> The test is whether the reasonableness of the existing classification is "fairly debatable."<sup>432</sup> To zone or rezone is the function not of the court, but of the local authority.<sup>433</sup>

Another municipal power is the power to issue revenue bonds. Municipalities may issue bonds to finance projects, if the bonds are related to the exercise of a valid municipal purpose.<sup>434</sup>

Although the ultimate power to annex an unincorporated area to a municipality resides in the legislature, municipalities may annex unincorporated territory if the legislature so provides by general or special law.<sup>435</sup> The legislature may annex without an affirmative vote of the property owners, but a referendum is required if the municipality initiates the annexation.<sup>436</sup> Property located in another county may not be annexed without express statutory authority.<sup>437</sup>

Changing the boundaries of a municipality by annexation lies within the autonomy granted to Dade County in the home rule charter provision of the constitution.<sup>438</sup> In *City of Sweetwater v.*

430. *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 579 (Fla. 2d DCA 1975) (opinion adopted by the supreme court, 332 So. 2d at 612).

431. *Broward County v. Capeletti Bros.*, 375 So. 2d 313, 315 (Fla. 4th DCA 1979) (citing *Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478 (Fla. 4th DCA 1975)). The Fourth District refused to find a zoning ordinance confiscatory because the property owners were denied a reasonable use of the property in question. A zoning ordinance becomes confiscatory only when "all reasonable uses are prohibited." 375 So. 2d at 315 (emphasis in original).

432. 375 So. 2d at 316. Although the zoning board and the division of planning had both recommended approval, the county commission denied the owner's petition for rezoning. The court stated that this difference of opinion merely indicated that the issue was "fairly debatable" and refused to substitute its judgment for that of the Commission.

433. *Id.* See also *Alachua County v. Reddick*, 368 So. 2d 653 (Fla. 1st DCA 1979); *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So. 2d 1082 (Fla. 1978).

434. *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978) (includes "double-advance" refunding bonds). FLA. STAT. § 166.121 (1979) authorizes the issuance of bonds by municipalities.

435. FLA. CONST. art. VIII, § 2(c).

436. FLA. STAT. § 171.0413 (1979), cited in *North Ridge Gen. Hosp., Inc. v. City of Oakland Park*, 374 So. 2d 461, 465 (Fla. 1979) (special law); see note 255 and accompanying text *supra*.

437. *McGeary v. Dade County*, 342 So. 2d 549, 550 (Fla. 3d DCA 1977); see FLA. STAT. § 171.045 (1979).

438. FLA. CONST. art. VIII, § 6(e) (incorporating FLA. CONST. art. VIII, § 11(1)(c) (1885)) provides that the electors of Dade County have the power to adopt a home rule charter

*Dade County*,<sup>439</sup> the city by ordinance annexed five acres of land in the county, following the prescribed statutory method.<sup>440</sup> The Third District declared the attempted annexation invalid despite compliance with the statute. Under the constitution, the method provided in the Dade County Home Rule Charter is exclusive,<sup>441</sup> irrespective of state law providing a different procedure.<sup>442</sup>

No governmental power, once provided by law, may be contracted away by a municipality.<sup>443</sup> In *City of Safety Harbor v. City of Clearwater*,<sup>444</sup> three cities in Pinellas County entered into a service area agreement concerning three separate unincorporated areas. Each city agreed to consider only one of the areas for establishing future municipal services and to discourage "future plans or requests for annexation of any lands contained in the areas designated . . . for service by the other municipalities."<sup>445</sup> The District Court of Appeal, Second District, held the agreement void to the extent that it impaired the exercise of each municipality's governmental power of annexation.<sup>446</sup> Although recognizing the desirability of intergovernmental cooperation, the court asserted that the elected representatives of the people and their successors must not be limited in their governmental policies and decisions.<sup>447</sup> In *Lykes Brothers, Inc. v. City of Plant City*,<sup>448</sup> a municipality agreed not to annex or tax the property of a nonpublic corporation, in exchange for the corporation's locating its plant on city-owned land. The supreme court held the contract ultra vires and void in the absence of specific legislative authorization.<sup>449</sup>

The Municipal Home Rule Powers Act<sup>450</sup> implements the broad powers granted to municipalities by the constitution and at-

which "may change the boundaries of, merge, consolidate, and abolish and may provide a method for changing boundaries of, merging, consolidating and abolishing from time to time all municipal corporations."

439. 343 So. 2d 953 (Fla. 3d DCA 1977).

440. FLA. STAT. § 171.16 (repealed 1974).

441. FLA. CONST. art. VIII, § 6(e) (sets forth and validates the Metropolitan Dade County Home Rule Charter).

442. 343 So. 2d at 954.

443. *City of Safety Harbor v. City of Clearwater*, 330 So. 2d 840, 841 (Fla. 2d DCA 1976); see *Lykes Bros., Inc. v. City of Plant City*, 354 So. 2d 878, 879 (Fla. 1978) (taxing power).

444. 330 So. 2d 840 (Fla. 2d DCA 1976).

445. *Id.* at 841.

446. *Id.* at 842.

447. *Id.*

448. 354 So. 2d 878 (Fla. 1978).

449. *Id.* at 880.

450. FLA. STAT. § 166.021(4) (1979).



tempts to remove any limitations on the exercise of self government other than powers expressly prohibited. On the basis of this statute, the District Court of Appeal, Fourth District, in *Tweed v. City of Cape Canaveral*,<sup>451</sup> receded from its holding in *City of Riviera Beach v. Witt*,<sup>452</sup> and held that city councils may enter into employment contracts with persons performing governmental functions<sup>453</sup> for a length of time extending beyond the term of the council members.<sup>454</sup> The court acknowledged the possibility of "caretaker government,"<sup>455</sup> but asserted that either the legislature could change the laws, or other remedies would control abuse. The overriding concern of the court was the need to create job security to help cities obtain the best people and the best performance in government jobs.<sup>456</sup>

### C. Consolidation and Transfer of Powers

The governments of a county and one or more municipalities located therein may consolidate.<sup>457</sup> Furthermore, article VIII, section 4 provides that:

[b]y law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.<sup>458</sup>

In *Sarasota County v. Town of Longboat Key*,<sup>459</sup> four cities challenged a county ordinance which transferred the governmental functions of air and water pollution control, parks and recreation, roads and bridges, planning and zoning, and police protection from the cities to Sarasota County. The supreme court held that such a proposed transfer did not constitute a consolidation within the

---

451. 373 So. 2d 408 (Fla. 4th DCA 1979).

452. 286 So. 2d 574 (Fla. 4th DCA 1973).

453. In this case the police chief had been fired by the city council prior to the expiration of his contract.

454. 373 So. 2d at 410.

455. An abusive council could create long-term contracts with several governmental employees and leave subsequent councils with no power beyond overseeing the government, while the employees under contract continued to run the bureaucracy.

456. 373 So. 2d at 410.

457. FLA. CONST. art. VIII, § 3.

458. FLA. CONST. art. VIII, § 4.

459. 355 So. 2d 1197 (Fla. 1978).

meaning of article VIII, section 3; this provision would apply only if one or more of the underlying governments disappeared or was merged into a surviving government.<sup>460</sup> The court concluded, however, that article VIII, section 4 applied both to charter and to non-charter counties, and that although broad powers are given to charter governments in section 1(g), these powers do not override section 4.<sup>461</sup> The transfer of governmental powers requires compliance with the specifics of that section. Municipal powers cannot be transferred by county resolution, but must be initiated by law or resolution of *each* of the governments affected. This holding alleviates the concerns of the cities that municipalities could be effectively abolished if a county could propose a transfer of municipal powers to itself, subject only to countywide voter approval without the separate approval of the voters of the municipality affected.<sup>462</sup>

Article VIII, section 6(e) retains the special powers of self government given to Dade County under its home rule charter.<sup>463</sup> Not only does Dade operate as a county, but where "not inconsistent with the powers of existing municipalities or general law,"<sup>464</sup> it may exercise all the powers of municipalities. In *Dade County v. Nuzum*,<sup>465</sup> the county petitioned the supreme court for a writ of mandamus to direct the appropriate state officials to pay the county a municipal share of beverage license taxes collected in the unincorporated areas of the county. The applicable statute<sup>466</sup> provided that counties receive twenty-four percent of the revenue collected within their borders and that incorporated municipalities receive thirty-eight percent. The supreme court held that the Metropolitan Dade County government is an incorporated municipality with respect to the unincorporated areas, by virtue of the home rule charter.<sup>467</sup>

Under the home rule amendment, Dade County may not enact an ordinance in conflict with the constitution or any general law.<sup>468</sup>

---

460. *Id.* at 1199-1200.

461. *Id.* at 1201. The constitution provides that the home rule charter of Dade County may create a method by which any power or function of a municipal corporation may be transferred to the Board of County Commissioners of Dade County. FLA. CONST. art. VIII, § 6(e) (incorporating FLA. CONST. art. VIII, § 11 (1)(d) (1885)).

462. 355 So. 2d at 1199.

463. FLA. CONST. art. VIII, § 6(e) (incorporating FLA. CONST. art. VIII, § 11 (1885)).

464. FLA. CONST. art. VIII, § 6(f).

465. 372 So. 2d 441 (Fla. 1979).

466. FLA. STAT. § 561.342 (1979).

467. 372 So. 2d at 444. The court declined to require retrospective payment of the taxes owed, but granted relief prospectively.

468. FLA. CONST. art. VIII, § 6(e) (incorporating FLA. CONST. art. VIII, § 11(5) (1885)).

In *Scavella v. Fernandez*,<sup>469</sup> a Dade County ordinance required that a tort claimant give written notice of his claim to the appropriate agency or municipality within sixty days from the date of the alleged injury or damages, to maintain a tort suit against the county. Section 768.28(6) of the Florida Statutes,<sup>470</sup> which waives sovereign immunity in tort actions, specifically allows three years for notice of the claim from the date the claim accrues. The county argued that in order for provisions to be in conflict, compliance with one must require violation of the other. The District Court of Appeal, Third District, nevertheless invalidated the county ordinance as conflicting with general law.<sup>471</sup>

## VIII. TAXATION

### A. *The Taxing Power*

The Florida Constitution divides the power to tax among the state, counties, school districts, municipalities, and special districts.<sup>472</sup> All forms of taxation are preempted by the state except ad valorem taxes on real estate or tangible personal property,<sup>473</sup> which are reserved to the political subdivisions listed above.<sup>474</sup> Because of these constitutional limitations on the taxing power, whether property is classified as real property and what body has the power to make the classification are important questions. In *Williams v. Jones*,<sup>475</sup> the supreme court held that the legislature has the power to classify a leasehold on real property as real rather than intangible property. In exercising that power, the legislature decided to enable the political subdivisions, rather than the state, to raise revenues from the leaseholders who use the services supplied at the local level.<sup>476</sup>

The extent to which a political subdivision may tax is limited by the millage rates set forth in article VII, section 9(b). In general, local taxes not in excess of ten mills each may be levied for

---

469. 371 So. 2d 535 (Fla. 3d DCA 1979).

470. FLA. STAT. § 768.28 (1979).

471. 371 So. 2d at 536.

472. FLA. CONST. art. VII, §§ 1, 9.

473. *Id.* § 1(a).

474. *Id.* § 9 provides the authority for local units to tax, as well as the prohibition against any ad valorem tax on intangible personal property. The legislature may, by general law, permit other forms of local taxation in addition to the ad valorem tax on real and tangible personal property.

475. 326 So. 2d 425, 431-32 (Fla. 1975), *appeal dismissed*, 429 U.S. 803 (1976).

476. *Id.* Appellants asserted that their leases were intangible personal property, subject only to state taxation at rates lower than those imposed by the subdivision on real property.

county, municipal, or school purposes without voter approval. These levies may exceed ten mills only with voter approval. Millage rates for special taxing districts also require voter approval.<sup>477</sup> When the legislature authorized counties to create "municipal service taxing units,"<sup>478</sup> their formation without voter approval was challenged in *Gallant v. Stephens*<sup>479</sup> on the basis that they were "special districts."<sup>480</sup> Section 9(b) specifically permits the legislature to authorize a county to tax for municipal services that it, rather than a municipality, supplies to unincorporated areas.<sup>481</sup> The supreme court distinguished the authorization for municipal service taxing units from that for special taxing districts.<sup>482</sup> The result is that a county may tax up to ten mills for county services and, in addition, up to ten mills for municipal services without voter approval in unincorporated areas that comprise municipal service taxing units.<sup>483</sup>

These provisions of the constitution and the Florida Statutes evidence a plan whereby the recipients of services finance only those services they receive. The municipal service taxing units tax unincorporated areas for services provided within area boundaries. Similarly, municipalities that opt to have municipal services provided by the county are taxed only for the services they receive, and not for those received by the unincorporated areas. A municipality is not required to fund services of no real or substantial benefit to it, but of benefit only to an unincorporated area.<sup>484</sup>

Because a municipality may not impose taxes other than ad valorem real and tangible personal property taxes unless authorized by general law,<sup>485</sup> administrative charges<sup>486</sup> made by a municipi-

---

477. See generally *Gallant v. Stephens*, 358 So. 2d 536 (Fla. 1978); *Tucker v. Underdown*, 356 So. 2d 251 (Fla. 1978).

478. FLA. STAT. §§ 125.01(1)(g)-(r) (1979).

479. 358 So. 2d 536 (Fla. 1978).

480. *Id.* at 539.

481. FLA. CONST. art. VII, § 9(b) provides: "A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes."

482. 358 So. 2d at 539-40.

483. In *Tucker v. Underdown*, 356 So. 2d 251 (Fla. 1978), the court held that the municipal service taxing units may compose the entire unincorporated area of a county or only a portion thereof.

484. See *Sarasota County v. Town of Longboat Key*, 353 So. 2d 569 (Fla. 2d DCA 1977), *modified*, 375 So. 2d 847 (Fla. 1979). A municipality may be charged only for "municipal services" and then only for those municipal services which provide a real or substantial benefit to the municipality. 353 So. 2d at 572. See also *Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1979); notes 404-11 and accompanying text *supra*.

485. *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314, 317 (Fla. 1976),

pality may be challenged as an unauthorized form of taxation in the guise of fees, unless the city can show that the fee is related to the cost of administration. The amount of the fee must be related to the cost of implementing the regulation that justifies collecting the fee.<sup>487</sup>

### B. Exemptions from Taxation

In addition to ratifying the amendment regarding supreme court jurisdiction,<sup>488</sup> the electors of Florida approved on March 11, 1980, a constitutional amendment that increases the tax exemptions for homesteads<sup>489</sup> under article VII, section 6, as follows:

#### Section 6. Homestead exemptions.—

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entirety, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable

---

*cert. denied*, 444 U.S. 867 (1979).

486. Administrative charges include, for example, building permit fees and connection fees for water and sewer service.

487. 329 So. 2d at 317-21. In this case, the fees charged were less than the costs of connection to the existing water and sewer systems and were used to expand the systems to meet future needs. The charges therefore did not constitute the taxation of consumers for purposes extraneous to the authorizing regulation. The ordinances which imposed these "impact fees," however, were defective because they did not spell out necessary restrictions on the use of the fees collected. *Id.* at 321-22. The case was remanded to the trial court, which determined that those who paid fees under protest were entitled to a refund. The District Court of Appeals, Second District, reversed, holding that because the city had the authority to charge the fees initially and subsequently revised the statutes to limit the use of the funds, those who paid fees were not entitled to refunds. *City of Dunedin v. Contractors & Builders Ass'n*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 370 So. 2d 458 (Fla. 1979).

488. See notes 70-156 and accompanying text *supra*.

489. For a discussion of other homestead provisions, see notes 571-80 and accompanying text *infra*.

to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which his interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled.

(d) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on school district levies. Such ad valorem tax relief shall be in the form and amount established by general law.<sup>490</sup>

The amendment to section 6(c) mandates that the legislature by general law increase the homestead exemption with respect to school district levies from five thousand to twenty-five thousand dollars. The exemption from other levies remains at the previous five thousand dollar level specified in section 6(a), although the legislature in its discretion may increase that amount to ten thousand dollars for aged or disabled owners.

New section 6(d) authorizes the legislature to provide relief from school district levies to resident renters. If enacted, such tax relief could benefit lessees holding "net leases," who would otherwise be obligated to pay the ad valorem taxes on the full assessed value of the property if the lessor-owner did not file for the homestead exemption. Under the amendment, the legislature may devise a mechanism whereby the lessee may apply for the exemption directly without relying on the owner to do so.

Even though a political subdivision may have validly exercised its taxing power, a party may nevertheless challenge the application of the tax to him, on the ground that he is exempt. The constitution exempts from taxation all municipally owned property used exclusively for a municipal or public purpose.<sup>491</sup> A private

---

490. FLA. CONST. art. VII, § 6. Words in underscored italic type are additions to the existing law.

491. FLA. CONST. art. VII, § 3(a) provides:

All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to

party who leases property from a governmental body is not presumed to be serving a governmental or public purpose.<sup>492</sup> Rather, the use of the leased property determines whether it is exempt from taxation.<sup>493</sup> When Broward County imposed a tangible personal property tax on the production company managing Parker Playhouse, a theater leased from the city of Fort Lauderdale, the production company claimed tax exempt status.<sup>494</sup> In determining whether this particular use served a public purpose, the district court in *MacCabee Investments, Inc. v. Markham*<sup>495</sup> evaluated "the primary and predominant nature and object of the function" performed.<sup>496</sup> The district court concluded that a facility owned by the municipality and used primarily for legitimate theater productions and for the performing arts served a public function. The supreme court reversed,<sup>497</sup> based on its holding in *Volusia County v. Daytona Beach Racing & Recreational Facilities District*<sup>498</sup> that a business operating for a profit serves a proprietary rather than a public function.<sup>499</sup>

The constitution permits the legislature to enact general laws to exempt property from taxation if it is used predominantly for educational, literary, scientific, religious, or charitable purposes.<sup>500</sup> In 1976, the legislature passed a special law regarding leases from the Santa Rosa Island Authority affected by the *Williams v. Jones*

---

the taxing unit in which the property is located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

492. In *Williams v. Jones*, 326 So. 2d 425 (Fla. 1975), *appeal dismissed*, 429 U.S. 803 (1976), lessees claimed they were exempt from ad valorem taxation because their commercial establishments, located on property leased from a government body, constituted a public purpose or function. The court rejected their claim, pointing out that these establishments were primarily proprietary and profitmaking rather than governmental. *Id.* at 433.

493. In *City of Sarasota v. Mikos*, 374 So. 2d 458, 460 (Fla. 1979), the court held that "vacant land held by a municipality is presumed to be in use for a public purpose if it is not actually in use for a private purpose on tax assessment day." Such vacant land is therefore exempt from taxation under FLA. CONST. art. VII, § 3(a), which does not by its terms require legislative implementation and is therefore self-executing.

494. *MacCabee Inv., Inc. v. Markham*, 311 So. 2d 718 (Fla. 4th DCA 1975), *rev'd*, 343 So. 2d 16 (Fla. 1977).

495. 311 So. 2d 718 (Fla. 4th DCA 1975).

496. *Id.* at 722.

497. *Markham v. MacCabee Inv., Inc.*, 343 So. 2d 16 (Fla. 1977).

498. 341 So. 2d 498 (Fla. 1976), *appeal dismissed*, 434 U.S. 804 (1977) (for lack of substantial federal question); 355 So. 2d 175 (Fla. 1st DCA 1978) (affirming trial court decision that a renewed claim of exemption had already been decided by the supreme court).

499. This analysis casts doubt on the continuing validity of *City of Tampa v. Walden*, 323 So. 2d 58 (Fla. 2d DCA 1975), which upheld an exemption for leased municipal property operated as profitmaking concession areas within or adjacent to a public park.

500. FLA. CONST. art. VII, § 3(a).

decision,<sup>501</sup> reducing future yearly rentals by the amount of ad valorem taxes for county and school purposes paid during the preceding year. In *Archer v. Marshall*,<sup>502</sup> the supreme court found that the special law granted a tax exemption unauthorized by the constitution,<sup>503</sup> and that “[i]t is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others.”<sup>504</sup>

The state may claim sovereign immunity from taxation by a political subdivision. In *Dickinson v. City of Tallahassee*,<sup>505</sup> a city ordinance imposed a utility tax on the state, its agencies and departments, while specifically exempting the federal government and churches.<sup>506</sup> The state successfully argued that it was immune rather than exempt from the tax, because the constitution did not waive the immunity of the state by merely providing for possible exemptions from taxation. An exemption presupposes a power to tax that has been waived, whereas an immunity signifies absence of the power. The constitution in article VII, section 9 vests municipalities with the taxing power, but does not by implication authorize taxation of the sovereign state.<sup>507</sup>

### C. *Just Valuation*

The constitution mandates that there be a “just valuation of all property for ad valorem taxation . . .”<sup>508</sup> The courts have interpreted the just valuation clause to mean that property may not be assessed at more than one hundred percent of its fair market value, nor may assessments be unequally or improperly determined in relation to other properties within the same county.<sup>509</sup> The con-

---

501. See 326 So. 2d 425 (Fla. 1975); note 475 and accompanying text *supra*.

502. 355 So. 2d 781 (Fla. 1978).

503. *Id.* at 784. See also *Sun Oil Co. v. Fisher*, 370 So. 2d 413 (Fla. 1st DCA 1979).

504. 355 So. 2d at 784 (citing *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973)). The legislature also attempted to exempt these leaseholders in additional special acts providing for repayment to the leaseholders of an amount equal to ad valorem taxes paid. The court found these indirect exemptions invalid in *Am Fi Inv. Corp. v. Kinney*, 360 So. 2d 415 (Fla. 1978).

The District Court of Appeal, Third District, recently held that a taxpayer has standing to challenge the grant of an exemption without showing special injury to himself where he asserts that the taxing or spending authority exceeded a specific limitation imposed by the United States or Florida Constitutions. *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979).

505. 325 So. 2d 1 (Fla. 1975).

506. *Id.* at 2.

507. *Id.* at 3-4; see note 429 *supra*.

508. FLA. CONST. art. VII, § 4.

509. See, e.g., *Straughn v. GAC Properties, Inc.*, 360 So. 2d 385, 386 (Fla. 1978).



stitution does not require intercounty uniformity, and variations between adjacent counties are not a basis for lowering tax assessments.<sup>510</sup> The mandate for just valuation derives from the constitution, but the requirement for statewide uniformity derives from a statute<sup>511</sup> and is a goal rather than a right.<sup>512</sup> This rule was pointedly reaffirmed recently in *Straughn v. GAC Properties, Inc.*<sup>513</sup> GAC owned a large tract of land on both sides of a county line. One county assessed the property at \$300 per lot; the other, at \$560 per lot. The court held that as long as the higher assessment was properly determined in relation to other properties within the county and did not exceed one hundred percent of the fair market value, GAC had no cause of action for equalization of the assessments.<sup>514</sup>

An issue of excessive valuation arose in *Department of Revenue v. Morganwoods Greentree, Inc.*<sup>515</sup> The property assessor had separately evaluated each individually owned townhouse in a development, as well as the common areas, including the parking and recreational areas held in fee by Tampa Villas South, Incorporated. If the assessor, in valuing the individual units, had taken into account the value of the common areas to each unit owner, then the total assessment against the unit owners plus the assessment against the common areas owner would have exceeded the total value of the property because the common areas would have been taxed twice. The court ordered a careful reassessment, according to the following test: if parcels of property are entwined with each other, "the total valuation of the entire project must be just valuation, no more, no less."<sup>516</sup>

---

510. *Id.*; *Spooner v. Askew*, 345 So. 2d 1055 (Fla. 1976).

511. FLA. STAT. § 195.0012 (1979).

512. 345 So. 2d at 1059.

513. 360 So. 2d 385 (Fla. 1978).

514. *Id.* at 386-87.

515. 341 So. 2d 756 (Fla. 1976).

516. *Id.* at 759. In *ITT Community Dev. Corp. v. Seay*, 347 So. 2d 1024 (Fla. 1977), the court struck down FLA. STAT. § 194.042 (1975) (repealed 1979), a legislative attempt to determine the fair market value of taxable property, as a violation of the just valuation clause. The legislative scheme enabled a landowner to contest the assessment of his property by offering it for sale at a public auction and establishing a "fair market value" below the assessed value. Fair market value is the price a purchaser willing but not obliged to buy would pay a seller willing but not obliged to sell. Because the seller could forfeit his cash deposit in this "quasi-forced" sale to the bidder and keep his property, neither buyer nor seller met the "willing but not obliged" definition; thus, fair market value was not established.

For a statement of the general rules of valuation, see *Calder Race Course, Inc. v. Overstreet*, 363 So. 2d 631 (Fla. 3d DCA 1978).

### D. Agricultural Land

The constitution authorizes but does not require the legislature to grant special tax treatment to agricultural land.<sup>517</sup> In other words, the constitutional provision is neither self-executing nor mandatory, but discretionary with the legislature.<sup>518</sup> In classifying land as agricultural, the legislature must determine the criteria to be used and dictate the preference the land will receive. After classification, the constitution requires that the property appraiser assess the land based on statutory guidelines, including the character or use of the land.<sup>519</sup> The legislature has generally chosen to classify land on the basis of use, but is not constitutionally required to do so.

In *Bass v. General Development Corp.*,<sup>520</sup> a taxpayer challenged the validity of a statute which created an irrebuttable presumption that land for which the owner had recorded a subdivision plat was not agricultural.<sup>521</sup> The landowner charged that there was no rational relation between platting and refraining from using land for commercial agricultural purposes<sup>522</sup>—a due process challenge. Although the legislature chose “use” as the criterion for classifying and for special tax treatment without expressly defining that term, the courts have interpreted it as limited to actual present use rather than intended future use.<sup>523</sup> The court held that although platting indicated a nonagricultural future use, there was no rational relationship between platting and the present nonagricultural use of land; the statute was therefore constitutionally defective. Had the statute permitted the property owner to rebut the presumption of present nonagricultural use, the statute would have been constitutional.<sup>524</sup>

---

517. FLA. CONST. art. VII, § 4(a); *Straughn v. Tuck*, 354 So. 2d 368 (Fla. 1977). The legislature could, for example, require assessment at less than one hundred percent of fair market value.

518. 354 So. 2d at 370. The legislature has exercised that discretion through the Greenbelt Law, FLA. STAT. § 193.461 (1979). Land is classified as agricultural if it has a bona fide agricultural use. The commercial nature of the enterprise is a factor considered in determining whether land should be classified as agricultural for tax purposes, although it need not be commercially profitable. 354 So. 2d at 370.

519. *See Bass v. General Dev. Corp.*, 374 So. 2d 479 (Fla. 1979).

520. *Id.*

521. FLA. STAT. § 193.461(4)(a)(4) (1979).

522. 374 So. 2d at 482; *see note 518 supra*.

523. 374 So. 2d at 483.

524. *Id.* at 484-85. The court also discussed an equal protection argument inherent in the singling out of one group of property owners.

### E. Corporate Income Tax

In 1971 the constitution was amended to permit the imposition of a tax on the income of other than natural persons.<sup>525</sup> The legislature implemented this provision by enacting the Florida Income Tax Code,<sup>526</sup> which imposes tax on capital gains realized from the appreciation of property over its adjusted basis upon the sale or disposition of that property.

In *Department of Revenue v. Leadership Housing, Inc.*,<sup>527</sup> a taxpayer asserted that although its property had appreciated in value before the constitutional amendment, the appreciation could not be taxed because it was earned before the legislature had power to tax it. The supreme court determined that appreciation in value is not income until it is "realized."<sup>528</sup> Realization is not growth or increment in value in the capital investment, but a gain or profit derived from the property and severed from it.<sup>529</sup> The court rejected the taxpayer's argument that preamendment appreciation was immunized from income taxation by the earlier constitutional prohibition in effect from 1924 to 1971.<sup>530</sup>

The supreme court applied a realization analysis in *S.R.G. Corp. v. Department of Revenue*<sup>531</sup> to the question of whether income realized in a year prior to the constitutional amendment, but recognized on a taxpayer's federal income tax return after the enactment of the amendment and enabling legislation, is taxable. In *S.R.G.*, a taxpayer deferred recognition of gain on condemned property under federal income tax laws until the sale or disposition of the replacement property, which resulted in recognition of gain subsequent to the enactment of state taxation of income.<sup>532</sup> Because the statute deems income "to be created for Florida income tax purposes at such time as said income is realized for federal income tax purposes,"<sup>533</sup> the gain derived from the original prop-

---

525. FLA. CONST. art. VII, § 5(b).

526. 1972 Fla. Laws ch. 71-984 (current version at FLA. STAT. §§ 220.01-69 (1979)).

527. 343 So. 2d 611 (Fla.), cert. denied, 434 U.S. 805 (1977).

528. *Id.* at 614.

529. *Id.* This definition follows federal income tax law on realization established in *Eisner v. Macomber*, 252 U.S. 189 (1920). Most authorities, however, cast aside the *Eisner* definition years ago. See, e.g., B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 7.70 (4th ed. 1979).

530. FLA. CONST. art. IX, § 11 (1924) provided that "[n]o tax . . . upon the income of residents or citizens of this State shall be levied by the State of Florida, or under its authority . . . ."

531. 365 So. 2d 687 (Fla. 1978).

532. See I.R.C. § 1033.

533. FLA. STAT. § 220.02(4)(a) (1979).

erty was realized upon condemnation, before enactment of the statute and therefore immune from taxation.<sup>534</sup>

## F. Bond Validation

### 1. REVENUE BONDS

In *Wald v. Sarasota County Health Facilities Authority*,<sup>535</sup> the supreme court derived from earlier decisional law a two-prong test for interpreting the power of governmental bodies to issue revenue bonds for capital improvements to facilities named or similar to those named in article VII, section 10(c).<sup>536</sup> The test inquires, first, whether the bonds contemplate a pledge of state or county credit, and second, whether the project serves a paramount public purpose.<sup>537</sup> The court found that neither the state nor a county had made a pledge of full faith and credit to the bondholders, who were to be paid solely from hospital revenues. Hospitals, like educational facilities, serve a paramount public purpose, meeting the second prong of the validity test. Judicial inquiry into the public nature of the facility was unnecessary because the legislature had determined by statute that the project was in the public interest. The only possible ground for challenge, which plaintiff had failed to establish, was that the legislative determination was "so clearly wrong as to be beyond the power of the Legislature."<sup>538</sup>

### 2. BONDS PLEDGING CREDIT

The constitution requires approval of the electors before a local government may borrow money to be repaid from ad valorem

---

534. The Florida income tax laws borrow from federal tax laws by using federal realization concepts and by calculating "net income" for state tax purposes from "taxable income" on the taxpayer's federal return. Although gain is included in federal taxable income only upon *recognition*, the timing of which may be deferred as in *S.R.G.*, the Florida statute and cases treat the *realization* concept as a timing device. For an analysis of the realization and recognition problems inherent in this unorthodox Florida approach, see Ullman & Zeiner, *The Realization Doctrine in Florida Corporate Income Taxation: A History and an Analysis Since S.R.G., 1978 Developments in Florida Law*, 33 U. MIAMI L. REV. 1329 (1979).

535. 360 So. 2d 763 (Fla. 1978).

536. FLA. CONST. art. VII, § 10 (c) creates a presumption of public purpose underlying those capital projects named therein. See *Nohrr v. Brevard County Educ. Facilities Auth.*, 243 So. 2d 304 (Fla. 1971) (finding educational facilities permissible subjects for governmental bonds). Other proposed capital projects are not foreclosed from public revenue bond financing if they are not named in § 10(c), but the public purpose of such a project must be tested by standards provided in prior case decisions. *Id.* at 308-09.

537. 360 So. 2d at 769.

538. *Id.* at 770.

tax revenues.<sup>539</sup> This requirement does not apply to pledges of funds from other sources,<sup>540</sup> even though the pledge may result in an increase in ad valorem taxes to make up the deficiency in funds available for operating expenses.<sup>541</sup> In *State v. Sarasota County*,<sup>542</sup> a county sought validation of bonds for capital improvements located within a special taxing district. The court noted that the formation of a special district or a municipal special taxing unit did not limit financing of improvements within the unit to taxes raised by the unit; rather, the county could provide for payment under its general financing authority.<sup>543</sup> Since the bonds pledged revenues of the proposed water system as well as franchise fees derived from Florida Power and Light Company, they were not bonds requiring approval of the electors.

Although the courts ultimately decide whether a bonding measure chosen by a taxing unit to finance a capital project is proper, only an extremely limited standard of review applies to a municipality's issuance of refunding revenue bonds not payable by ad valorem taxes. In *State v. City of Sunrise*,<sup>544</sup> the city proposed a novel method of funding by issuing "double advance refunding" bonds.<sup>545</sup> The court upheld the power of the municipality to issue these bonds,<sup>546</sup> but noted that the power had to be authorized by the constitutional bonding limitations of article VII, section 12(b), if the municipality were issuing bonds payable from ad valorem taxes. In that case, the bonds would have to meet the "lower net average interest cost" requirement.<sup>547</sup> Since these bonds were payable from sources other than ad valorem taxes, there were no constitutional or statutory limitations on the power of issuance, other than that the bonds serve a valid municipal purpose.<sup>548</sup>

---

539. FLA. CONST. art. VII, § 12.

540. Such sources include cigarette taxes or revenue sharing trust funds.

541. *State v. Alachua County*, 335 So. 2d 554, 558 (Fla. 1976).

542. 372 So. 2d 1115 (Fla. 1979).

543. *Id.* at 1117. For a discussion of limitations on municipal service taxing units, see notes 477-84 and accompanying text *supra*.

544. 354 So. 2d 1206 (Fla. 1978).

545. With advance refunding bonds, a municipality borrows money to repay the principal and interest on bonds previously issued; with double advance refunding bonds, it borrows to repay the principal and interest on advance refunding bonds. *Id.* at 1207-09.

546. FLA. CONST. art. VIII, § 2 and FLA. STAT. § 166.111 (1979) provide the necessary municipal powers. 354 So. 2d at 1208.

547. 354 So. 2d at 1209.

548. *Id.* The "municipal purposes" requirement is also provided by the constitutional home rule powers grant of FLA. CONST. art. VIII, § 2. See notes 426-34 and accompanying text *supra*.

## IX. EMINENT DOMAIN

Article X, section 6 of the Florida Constitution provides that no private property shall be taken except for a public purpose, and with full compensation paid to each property owner. The full compensation phrase has been tested in several ways. In *Division of Administration v. Grant Motor Co.*,<sup>549</sup> the question certified to the district court was whether appraisers' fees and attorneys' costs incurred by a property owner in an administrative appeal of an ancillary proceeding were recoverable as part of the eminent domain proceeding. Although limited by statute<sup>550</sup> to costs incurred in circuit court, the complainant argued that the constitutional guarantee of full payment was self-executing and, therefore, there was no need for enabling legislation to justify an award for costs of administrative appeals. The court held that neither the constitution nor any statute entitled the complainant to compensation for expenses incurred in the agency appeal. Because the petitioner was seeking to recover an intangible expense<sup>551</sup> on the merits on his agency appeal, and because the supreme court has held that the constitutional guaranty of full compensation does not include intangible expenses,<sup>552</sup> this case can be read narrowly to hold that intangible expenses incurred in an administrative action collateral to an eminent domain proceeding are not recoverable as constitutionally mandated full compensation.

When a condemnee appeals an award, the question arises whether "full compensation" entitles him to receive interest on the award while the appeal is pending. Although several courts grant interest if the appeal is successful, there is no constitutional right to interest if the appeal is unsuccessful. The full amount of the judgment is available to the condemnee when it is deposited in the court after final judgment, and his election to appeal does not affect his right to withdraw the money.<sup>553</sup>

The phrase "full compensation" is interpreted to mean that the landowner must receive an actual payment representing the

---

549. 345 So. 2d 843 (Fla. 2d DCA 1977).

550. FLA. STAT. § 73.091 (1979).

551. The owner was seeking compensation under 42 U.S.C. § 4622(c) (1971) for payment equal to average net earnings in lieu of moving expenses.

552. *Jamesson v. Downtown Dev. Auth.*, 322 So. 2d 510 (Fla. 1975). Intangibles include items such as loss of profits. These items are not recoverable, because they are not "property." *Id.* at 511. Although intangibles are not recoverable, the value of tangible property which is either real or personal may be recovered, because the constitution does not distinguish between the two. *Flatt v. City of Brooksville*, 368 So. 2d 631 (Fla. 2d DCA 1979).

553. *Behm v. Division of Administration*, 366 So. 2d 828 (Fla. 4th DCA 1979).

full value of his property, undiminished by any incidental procedural expenses. If a utility company initiates a "quick taking,"<sup>554</sup> for example, the clerk of the court, who holds the money placed on deposit by the utility, is authorized to exact a commission. The clerk may not take this commission from the final award disbursed to the property owner, but must take it from the funds remaining on deposit before their return to the utility.<sup>555</sup>

The usual measure of damages in an eminent domain proceeding is the fair market value of the property.<sup>556</sup> But if a special use of the property enhances its value, and it is unlikely that the property will be used differently in the future, the "value in use" concept may apply. This concept recognizes that the special use of property may make it distinct from similar property on the market.<sup>557</sup>

In *Dade County v. Still*,<sup>558</sup> the District Court of Appeal, Third District, upheld the exclusion of evidence that would have affected the jury's valuation of condemned property. In 1931, Dade County had published an ordinance declaring an intent to take property if street widening became necessary, but the property owner received no compensation at that time, even though the ordinance reduced the value of his property. In 1977, the county argued in condemnation proceedings that the jury should consider the existence of the ordinance in fixing compensation for the property. The court excluded the evidence, holding that the owner would be denied full compensation for the reduction in value if the jury considered the ordinance as a basis for determining "a price less than that which would have existed without the declaration of future taking."<sup>559</sup>

The power of government to exercise eminent domain is grounded in the concept that the government seeks private property for a necessary public purpose. It is the public nature of the need coupled with the necessity for the specific piece of property that constitutes the justification for the taking.<sup>560</sup> The public pur-

---

554. FLA. STAT. § 74.051(2) (1979) permits the utility to take immediate possession by placing a sum of money double the value of its estimate on the worth of the property on deposit with the clerk of the circuit court.

555. *Taylor v. Tampa Elec. Co.*, 356 So. 2d 260 (Fla. 1978); see note 103 and accompanying text *supra*.

556. *Division of Administration v. West Palm Beach Garden Club*, 352 So. 2d 1177 (Fla. 4th DCA 1977).

557. *Id.* at 1179-80.

558. 370 So. 2d 64 (Fla. 3d DCA), *aff'd*, 377 So. 2d 689 (Fla. 1979).

559. *Id.* at 66.

560. *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So. 2d 1151, 1155 (Fla. 3d DCA 1978).

pose is not lost because there is some private use incidental to the public taking, such as the private operation of a concession stand in a public park, provided the purpose of the taking is predominantly public.<sup>561</sup>

Before there can be a taking that requires compensation, there must be a property right in the landowner.<sup>562</sup> The right of access to one's land, for example, is a property right. Therefore, when the public body has properly determined that a street should be vacated, the property owner may be entitled to compensation for the resulting loss of access. To enforce payment for this loss, the landowner must demonstrate that he has suffered a special damage not shared by the general public; mere inconvenience will not suffice. Where the owner's right of access is impaired beyond mere inconvenience, however, as when the remaining access roads to the property are limited in some manner,<sup>563</sup> he may be entitled to special damages. Generally, though, mere impairment of access, without a taking of some part of the landowner's property, is not compensable.<sup>564</sup>

Because a governmental body need not actually enter the owner's land to affect his property rights, a claimant may be entitled to compensation if he can prove that government has indirectly deprived him of the use and enjoyment of what is his. In *Jupiter Inlet Corp. v. Village of Tequesta*,<sup>565</sup> a municipality drew its water supply from a shallow water aquifer. The withdrawal of water caused salt water intrusion into the portion of the aquifer which lay under the property owner's land, making his portion of the aquifer unusable for potable water. The district court held that the shallow aquifer was a form of private property, the beneficial use of which could not be divested without full compensation.<sup>566</sup> The supreme court reversed the district court and set out the rules of law to govern water rights in inverse condemnation proceedings, focusing on the use of the land.<sup>567</sup> In this case, the land was developed to its highest and best use as a condominium. The damage suffered by the owners was merely consequential in that it did not

---

561. *Id.*

562. *Pinellas County v. Austin*, 323 So. 2d 6 (Fla. 2d DCA 1975). The theory of inverse condemnation is used to force local government to pay for the lost property right.

563. The remaining road was not suitable for heavy vehicular traffic. *Id.* at 9.

564. See *Weir v. Palm Beach County*, 85 So. 2d 865 (Fla. 1956).

565. 349 So. 2d 216 (Fla. 4th DCA 1977), *rev'd*, 371 So. 2d 663 (Fla. 1979).

566. *Id.* at 217.

567. *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979).



impair the major use of the land.<sup>568</sup> The court analogized rights in water to those in wild animals. Unless the party has taken possession of the water, his rights are subject to the rights of another into whose property the water has flowed and who has begun to use the water in a reasonable manner.<sup>569</sup> Had Jupiter Inlet undertaken a project to draw out and supply the water to the condominium owners prior to the municipal project, the corporation would have perfected its right to use the water, which would have been compensable. But this unexercised "right to use" is not a private property right contemplated by the constitution.<sup>570</sup>

### X. HOMESTEAD EXEMPTION

The Florida Constitution protects the head of a family from creditors who want to levy against the debtor's home.<sup>571</sup> With a few exceptions,<sup>572</sup> the constitution prohibits the forced sale of the homestead under process of any court.

Although the constitution imposes some limits on how a spouse may devise, alienate, or encumber the homestead, it does not explicitly address the case of a partition filed pursuant to a divorce where the decree made no disposition of the home. In *Tullis v. Tullis*,<sup>573</sup> the ex-husband maintained possession of the home formerly held by the spouses as tenants by the entireties. Because both parties agreed that the property was indivisible, and the divorce court had not given the right of exclusive possession to either, the court held that the ex-spouse could obtain beneficial enjoyment of her one-half undivided share as tenant in common through partition.<sup>574</sup>

---

568. *Id.* at 669-70.

569. A reasonable manner of use must involve neither negligence nor an intentional invasion. *Id.* at 666-69.

570. *Id.* at 670. This set of facts involved competing rights to use of the property. Competing rights are to be determined with reference to the Water Resources Act, FLA. STAT. § 373.012-.197 (1979).

The court also affirmed the reasoning of *Thompson v. Nassau County*, 343 So. 2d 965 (Fla. 1st DCA 1977), in which a cause of action for inverse condemnation was upheld where a governmental actor changed the contours of the land so as to create a permanent overflow of water onto neighboring land, which as a result could no longer be used for residential purposes.

571. FLA. CONST. art. X, § 4.

572. The exceptions include: taxes and assessments, obligations contracted for the purchase, improvement, or repair of the homestead, or labor contracted for, to be performed on the realty. FLA. CONST. art. X, § 4(a).

573. 360 So. 2d 375 (Fla. 1978).

574. *Id.* at 377. This is the narrowest reading of the holding, but the language of the court is much broader. It appears to apply to any tenants in common if the forced sale is

To benefit from the homestead exemption, a debtor must establish the homestead character of his property as of the time the lien attaches.<sup>575</sup> In Florida, a cooperative apartment, unlike a condominium,<sup>576</sup> does not qualify as a homestead for purposes of limitations on devise. In reaching this conclusion in *In re Estate of Wartels*,<sup>577</sup> the court distinguished ownership of a condominium from that of a cooperative, pointing out that a cooperative involves ownership of shares in a corporation joined with a lease of the premises. The significance of this distinction is that the constitution does not prevent a unit owner in a cooperative from devising the unit to another even though he is survived by a spouse.<sup>578</sup> The court saw no conflict between this decision and one which permitted a cooperative unit owner to take advantage of the homestead taxation exemption,<sup>579</sup> because the former was a constitutional construction and the latter was a statutory construction.<sup>580</sup>

Although a homeowner may not devise the homestead to his spouse if there are minor children,<sup>581</sup> the homestead can pass to a spouse by operation of law if the couple held their home as tenants by the entirety.<sup>582</sup> Property held by the entirety may also be deeded from one spouse to the other if both join in the execution of the deed.<sup>583</sup>

At least one court has engrafted an additional restriction on the alienation of homestead property, which prevents the transfer of such property during the holder's lifetime for less than "appropriate consideration."<sup>584</sup> The policy behind this rule is to protect the rights of those to whom the property would pass upon the death of the owner by assuring that the owner's estate would bene-

---

necessary to protect the beneficial enjoyment of the owners in common to the extent of their interests in the property.

575. *Avila S. Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599, 605 (Fla. 1977).

576. In *Avila*, the court left open the possibility of the condominium being protected from creditors as a homestead. The court dismissed the complaint based on that theory, with leave to amend by adding a statement justifying the treatment of a condominium as a homestead. See also *Gersten v. Bessemer*, 352 So. 2d 68 (Fla. 4th DCA 1977), certifying to the supreme court, as a question of great public interest, what essential factors must be present in the pleadings to establish the homestead nature of the property when a developer is seeking to foreclose on property due to nonpayment on a recreational lease.

577. 357 So. 2d 708 (Fla. 1978).

578. *Id.*

579. *Ammerman v. Markham*, 222 So. 2d 423 (Fla. 1969).

580. FLA. STAT. § 196.041 (1979).

581. FLA. CONST. art. X, § 4(c).

582. *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976).

583. *Id.*; *Jameson v. Jameson*, 369 So. 2d 436 (Fla. 3d DCA 1979).

584. *Ostrander v. Swisher Foundation, Inc.*, 373 So. 2d 398, 399 (Fla. 1st DCA 1979).

fit from the transfer.<sup>585</sup> The rule does not prevent a gratuitous transfer in which, for example, the homestead is donated to a charitable organization, resulting in a tax reduction to the grantor. The tax savings is considered a benefit to the grantor's estate, constituting "appropriate consideration" for the transfer of the homestead.<sup>586</sup>

Homestead property subject to devise<sup>587</sup> need not be singled out in a specific bequest, but may be included in the residuary clause of a will.<sup>588</sup>

The constitution protects the homestead owned by the "head of a family." In order for one to head a family, there must be a family unit. In *Zimmerman v. Gardner*,<sup>589</sup> a debtor-homeowner maintained a home for herself, for the aunt of her former husband, and from time to time, for an adult son. The court found that the son's occasional presence was irrelevant and that the existence of a family unit rested on the relationship between the homeowner and her aunt. As the homeowner had no legal obligation to provide the aunt with a home, the relationship was terminable at will. The court held that there was no family unit and no homestead exemption, permitting the judgment creditor to reach the home in satisfaction of the debt.

## XI. COVERTURE

The 1968 Florida Constitution abolished the distinction in property rights between husbands and wives.<sup>590</sup> Subsequently, the supreme court ruled in *Ball v. Ball*<sup>591</sup> that in a dissolution of marriage, property held as a tenancy by the entirety will convert to a tenancy in common by operation of law. The court declared that the former legal presumptions of ownership based upon sex were unnecessary and without force.<sup>592</sup> The court reasoned that because each spouse has equal property rights under the constitution, each should share equally in the property, unless one could establish a special equity in the property based upon his or her extraordinary

---

585. *Id.* (citing *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925)).

586. 373 So. 2d at 399.

587. FLA. CONST. art. X, § 4(c) provides that homestead property may be devised to the owner's spouse if there are no minor children.

588. *Estate of Murphy*, 340 So. 2d 107 (Fla. 1976).

589. 355 So. 2d 157 (Fla. 4th DCA 1978).

590. FLA. CONST. art. X, § 5.

591. 335 So. 2d 5 (Fla. 1976).

592. *Id.* at 8.

contribution toward its acquisition. Under those circumstances, the court may grant ownership to that party consistent with the special equity. The special equity theory may be rebutted, however, by a showing that the spouse raising it intended to make a gift to the other spouse when the tenancy was established.<sup>593</sup>

Despite abolishing the distinction in property rights between sexes, the constitution provides an exception to that general rule: the legislature may establish and regulate dower or curtesy.<sup>594</sup> Through this medium the legislature may provide for differing treatment of widows and widowers, so long as the treatment rests on some reasonable distinction having a fair and substantial relation to the legislative objective.<sup>595</sup>

The constitutional provision, however, does not appear to change the common law duty of a husband to support his wife. In *Fieldhouse v. Public Health Trust*,<sup>596</sup> the trial court permitted a direct action against a husband for the debts of his wife. On appeal, the husband argued that the Married Women's Property Act<sup>597</sup> was discriminatory and therefore violated the constitution. The supreme court found the constitutional challenge without merit, reasoning that since the statute neither created a duty in the husband nor relieved one in the wife, it was not discriminatory.<sup>598</sup>

---

593. *Id.* at 7. *But see* *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (abolishing application of "special equity" doctrine to marital property rights). For a discussion of the impact of the *Canakaris* case, see the forthcoming casenote in 34 U. MIAMI L. REV. \_\_\_\_ (Sept. 1980).

594. FLA. CONST. art. X, § 5.

595. *In re Estate of Rincon*, 327 So. 2d 224 (Fla. 1976) (disparity between economic capabilities is a reasonable basis for distinction).

596. 374 So. 2d 476 (Fla. 1979).

597. FLA. STAT. § 708.10 (1979). The Act provides that married women shall have the same rights to own property, make contracts, and sue or be sued as unmarried women have. It further provides that the Act shall not be construed as relieving a husband from any duty to support his wife.

598. 374 So. 2d at 478.