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Constitutional Law

Clifford C. Alloway
University of Miami School of Law

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CONSTITUTIONAL LAW¹

CLIFFORD C. ALLOWAY*

INTRODUCTION

The juridical activity in recent Florida constitutional law is once again startling—for the Supreme Court of Florida decided a multitude of cases, in the past two years, involving our state constitution. There are, perhaps, several factors which explain this total: (1) The Florida Constitution is quite long,² very diversified in subject³ and poorly written;⁴ (2) our constitution is definitely antiquated;⁵ and (3) the Florida Supreme Court, dedicated to reviewing practices which died in the United States Supreme Court many years ago,⁶ attempts a grandiose judicial activity.

The language added to the constitution by amendment was not significant during this period;⁷ the general recent growth in our constitutional law must, then, be found in the many decisions—which decisions were the result of unplanned controversies, factual conclusions of scattered judges and lay juries, generally vague and ambiguous constitutional language and the personalities of the justices of our state Supreme Court. The organization of this paper is not particularly unique—the decisions easily fitted into the plan utilized.

*Associate Professor, Faculty Advisor, Law School Publications, University of Miami School of Law.

1. Volumes 66 through 80, Southern Reporter, second series. This article is merely a *survey*. Former *Survey* statements, still apropos, are incorporated since the *Survey* is a continuous affair.

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

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

4. Read the beautiful language (comparatively) in the much earlier federal constitution.

5. Obviously Florida before 1900 was extraordinarily different, in a social and economic sense, from 1954 Florida. See Dauer and Howard, *The Florida Constitution of 1885—A Critique*, 8 U. FLA. L. REV. 1 (1955), which generally treats our constitutional difficulties.

6. One cannot imagine today, for example, the Supreme Court deciding *Coppage v. Kansas*, 236 U.S. 1 (1915).

7. A number of constitutional amendments will be offered to the electorate Nov. 6, 1956. Included are the following: (1) a general revision of FLA. CONST. Art. V, which may go a long way to modernize the administration of justice in Florida. The Judicial Council's recommended intermediate appellate courts undoubtedly will eliminate many of the present Supreme Court's problems. Justice Barn's *Survey* article on appellate procedure deals with the proposed Art. V. (2) Art. VIII, § 11, the long awaited panacea for Dade County-Miami governmental problems—a home rule amendment for Dade County. (3) Art. III, § 2, an amendment dealing with the legislative session times, and the convening thereof. (4) Art. VII, a controversial apportionment-of-the-legislature amendment. (5) Art. XVI, an amendment to permit legislative civil service systems. These proposed amendments were published by the Secretary of State.

The constitution was amended as follows: (1) Art. III, §§ 2, 4 in 1954. (2) Art. III, § 28, in 1954. Additions were as follows: (1) Art. V, §§ 16 B, 39 A. (2) Art. VIII, §§ 10A, 22.

The approach of the writer to decisional constitutional law is realistic and modern in the sense that: (1) judges are assumed as necessarily creating law⁸ in the typical constitutional interpretation problem and (2) government economic policy determination is assumed as the parliamentary prerogative⁹ under separation of powers in representative democracy.

SEPARATION OF POWERS

The body of the classic separation of powers tradition is still warm in Florida.¹⁰ This is an interesting example of certain static qualities in Florida constitutional law. It is difficult to imagine a state supreme court, in recent times, placing language¹¹ in a decision that "under our form of government—the Executive, the Legislative and the Judicial—no one of them have the right to invade the sphere of operation of . . . the other." This assumes, of course, that only legislatures "make" the law, courts "interpret" the law and only executives "execute" the law. With a mountain of legal writings in the twentieth century maintaining that judges "make" an appreciable portion of our law, that executives have to "interpret" to enforce the law and "make" law by enforcement policies, and that administrative agencies the world over handle, with equal ease, all the traditional governmental powers, it is discouraging to find that the issue, at least in the formal sense, has not quietly been laid to rest in Florida. This section will be divided, as are the Florida cases, into the traditional power fields.

(1) *Judicial Power*

Judicial Question.—The judicial power of the Florida courts only extends to *judicial questions*; so what is a judicial question? This terminology is defined by reference to the *type* of parties in suit, the interest the parties demonstrate in the suit subject matter, the immediacy of the situa-

8. In the first place the constitutional language would generally permit a *choice* if any real interpretation is necessary, *i.e.*, substantive economic due process means a "reasonable" regulation of property. What is "reasonable" is judicial legislation of necessity; see Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 550 (1948).

9. Compare CAHN, *SUPREME COURT AND SUPREME LAW* (1954) (the tone of much of which calls for judicial review by policy determination) with Bickle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 *HARV. L. REV.* 6 (1924) (indicating that the real problem in economic policy determination by courts is that the judicial technique for factual determination of the "reasonableness" of a law, is appallingly inadequate). Popular judicial economic philosophy may not be cognizant of vast shifts in the socio-economic structure; for an example of a recent interesting economic thesis see BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954). See note 22, *supra*.

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

11. *White v. Johnson*, 59 So.2d 532, 534 (Fla. 1952). For a more recent statement of the same kind, see Mr. Chief Justice Roberts, concurring in part and dissenting in part, *Miami Beach v. Lachman*, 71 So.2d 148, 153 (Fla. 1953) ("The Judicial power is to interpret the law and not to make law"). See *State v. Gray*, 74 So.2d 114, 125 (Fla. 1954) (Mathews, J., dissenting to opinion and concurring to order).

tion and the public interest therein, and perhaps more.¹² Dramatic, and recent, definitive decisions here dealt with various attempts to clarify the constitutional waters muddied by the aftermath of Governor McCarty's untimely death. *State v. Gray*,¹³ in 1953, for example, was an original suit by a citizen taxpayer for mandamus directing the Secretary of State to show cause why he should not expunge from the records the names of certain candidates for governor. The Court permitted suit on the theory that the position of a candidate for governor under the election laws carries the "apparent sanction" of the state. The fear of apparent legalization of fund raising and that the legal questions were "novel" and "of immense public interest," motivated the decision; a judicial question had been presented. A similar case,¹⁴ testing by mandamus the candidacy of Acting Governor Johns, reached a like result in 1954. In *Bryant v. Gray*¹⁵ the petitioner sought a declaration whether, if he sought election in 1954 for the deceased Governor's unexpired term, he might seek reelection in 1956. He did not definitely allege he would ever be a candidate. The Secretary of State and two defendant announced candidates denied any interest in the subject matter. The timing of the suit, that "no present right is involved," that "his question is hypothetical and is too remote," and that there must be a present "bona fide dispute" were the court declared factors presenting a non-judicial question. In these mandamus decisions, testing public office legal concerns, public interest and the present sharpness of interest dispute were of import. The latter received emphasis in a number of varied actions under differing phraseology—such as actual "dispute" with parties of "antagonistic interests."¹⁶ Prematureness in filing of suit and inadequacy of defense representation have partially blocked attainment of the judicial question plateau.¹⁷ The Court required a "special interest in the subject" in *Florida State Racing Commission v. Broward County Kennel Club*.¹⁸ There the plaintiff winter

12. Such as the action—i.e., declaratory or mandamus.

13. 69 So.2d 187, 190-191 (Fla. 1953); see an unusual article in the field, Ritter, *The Florida Supreme Court and the Gubernatorial Election*, 7 U. OF FLA. L. REV. 35 (1954).

14. *State v. Gray*, 74 So.2d 114 (Fla. 1954). Mr. Justice Hobson, concurring at page 119, worried over the use of the judicial power for other than "extraordinary" cases, the lack of interest of the relator, and that the election was not involved, only the primary (the timing of the action, then).

15. 70 So.2d 581 (Fla. 1954).

16. *Brautigam v. MacVicar*, 73 So.2d 863-866 (Fla. 1954). Suit for declaration of contract validity where contract parties, the city and county port authority, all desired validation. See *Sarasota-Fruitville Drainage Dist. v. Certain Lands, etc.*, 80 So.2d 335, 336 (Fla. 1955) and *Riviere v. Orlando Parking Commission*, 74 So.2d 694, 696 (Fla. 1954).

17. *Brautigam v. MacVicar*, 73 So.2d 863-866 (Fla. 1954); see note 16 *supra*. Here the prematurity of suit probably would be corrected by an ultimate bond issue validation under the contract. The Attorney General, as representative of all citizens, was disallowed as defendant since the statute required allegations of unconstitutionality to permit that officer to defend. See *Bessemer Properties v. Opa-locka*, 74 So.2d 296 (Fla. 1954).

18. 77 So.2d 783, 784 (Fla. 1955) (taxpayer failed, too). See *Plan Mills, Inc. v. Panama City*, 78 So.2d 561 (Fla. 1955), for a somewhat different result on economic emphasis.

track sued to test the validity of a summer dog track's racing permit; the Court weakened economic competition as an "interest" factor.

The Court again limited declaratory suits by judicial question requirements,¹⁹ placed administrative rulings outside the judicial question oasis²⁰ and refused to permit a "ministerial officer, charged with the duty of administering a legislative enactment," the privilege of testing the "enactment."²¹

Generally.—Study of judicial power in the United States is fascinating.²² There have been periods in our legal history when our judiciary has expanded greatly its office, at times overshadowing the supposedly "equal" executive and legislature. The courts have ravaged legislation from behind a wall of judicial supremacy. There are some vestiges of that judicial pedestal in our Florida legal scene. The area is multi-faceted, running from who has a justiciable interest to political and judicial questions, judicial restraint, judicial attitudes toward law-making, and the general question of judicial power against a background of expanding legislative power. The possible expansion or contraction, in any, is inevitably felt in all.

The Supreme Court has not changed position recently in its restraint as a conscious law making body²³—refusing to utilize Florida Constitution, Declaration of Rights, Section 4, as a power grant to judicially legislate.²⁴

Related herewith is the relationship between the judicial and legislative powers, in a sense not consciously articulated. Both cannot remain at a legal high-tide mark. In several cases the Court appropriately weakened its review powers over legislative action; *Adams v. Miami Beach Hotel Ass'n*.²⁵ perhaps best exemplifies this constitutional rapport. In *Adams* the Court validated a law requiring innkeeper advertisements to detail certain information. The legislature was given a wide police power in the "social legislation" field unless "some specific provision of organic law is transgressed." A healthy presumption in favor of legislative enactments was announced; "it is for the legislature and not the courts to determine what is unnecessary, unreasonable, arbitrary and capricious." And a "legislative finding that . . . a requirement is in the public interest concludes the matter."

19. See *North Shore Bank v. Surfside*, 72 So.2d 659 (Fla. 1954).

20. *Lambert v. State*, 77 So.2d 869, 871 (Fla. 1955).

21. *Barr v. Watts*, 70 So.2d 347, 350 (Fla. 1954) (unless he "will be injured in his person, property, or rights").

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

23. Alloway, *Florida Constitutional Law*, 8 *MIAMI L.Q.* 161 (1954).

24. See *Slatcoff v. Dezen*, 76 So.2d 792, 794 (Fla. 1954) (FLA. CONST. D. R., § 4, provides that "all courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, . . . and right and justice shall be administered without sale, denial or delay.").

25. See 77 So.2d 465 (Fla. 1955).

However, as this writer pointed out in the 1953 *Survey*,²⁶ the constitutionality of legislative police power extension generally depends on whether the court determines the particular law is "reasonable". In this connection a statement to the effect that courts, operating under such vague abstractions, decide in a literal sea of relative subjectivity, was appropos. Presently an examination of just one decision, *Miles Laboratories v. Eckerd*²⁷ is illuminating. The suit attempted to enforce the state fair trade law. The Court admitted that other state courts have authorized these laws but rejected the Florida legislative attempt "on constitutional grounds," a conclusion following rejection of the "underlying theory and the economic facts" behind the law's passage. The legislative "finding of fact," generally thought in the United States to be close to judicial unimpeachability, fell to the Court's findings of fact by judicial notice. As Justice Hobson, concurring, put it, legislative findings of fact will only stand where "fairly debatable" and not "obviously contrary to proven and firmly established truths."²⁸ *Definitely*, in Florida, the legislative police power is restricted by the judicial power, which in turn is dependent upon the prevailing economic philosophy of the Supreme Court.²⁹

The relationship between Florida courts and administrative boards should be somewhat similar to that of the judicial-legislative power relation since both are legislatively authorized and must depend, finally, upon the inroads of judicial power into the legislative power. Strangely, this actually works out—the emphasis on administrative correctness during court review, based on the inexperience of the court in the premises, varies just about as unevenly as does the general reach of legislative police power. On occasion, in zoning cases, the Court apparently strengthened the presumption of correctness in favor of the zoning board;³⁰ other decisions indicated slight regard for the same presumption.³¹ These cases, once again, were simply factually inspired conclusions under a "reasonable" abstraction standard; the ordinance was valid if reasonably related to health, safety and so on. The Court's review of workmen's compensation orders generally respected the commission's findings.³² Probably one safe generalization is that the Court strengthens review of administrative action when the administrative procedures fail to meet due process standards.³³ Another is that the strength of the police power over the subject matter in the administrative process partially determines, in reverse ratio, the strength of court review

26. Alloway, *Florida Constitutional Law*, 8 *MIAMI L.Q.* 162 (1954).

27. See 73 So.2d 680 (Fla. 1954).

28. *Id.* at 682.

29. See, e.g., *Clearwater v. Caldwell*, 75 So.2d 765, 766-769 (Fla. 1954).

30. See *Miami Beach v. Lachman*, 71 So.2d 148 (Fla. 1953).

31. See *Miami Beach v. Stearns*, 77 So.2d 626 (Fla. 1955).

32. E.g., *Stuyvesant Corp. v. Waterhouse*, 74 So.2d 554, 556 (Fla. 1954); *Four Branches v. Pechsner*, 73 So.2d 222, 224 (Fla. 1954).

33. Compare *Tamiami Trail Tours v. Carter*, 80 So.2d 322, 324 (Fla. 1954) with *Seaboard Air Line R.R. v. Gay*, 74 So.2d 569, 572 (Fla. 1954).

thereof.³⁴ The Court admirably has prevented lower court mandamus from exercising, directly, legislative authorized discretion³⁵ of the agency or officer.

The judicial power was defined in several decisions. In *Barr v. Watts*³⁶ the "inherent" power of the judiciary to regulate bar admission was referred to; in *In re McRae's Estate*³⁷ an inherent power in the Court to make procedural rules for constitutional lower courts was not found. In one case³⁸ the Court reflected on its constitutional "power to issue writs of certiorari." In yet another case³⁹ the Court determined that still existent with the integrated bar rule procedures, was "a summary jurisdiction to deal with" the administration of attorney practice before the courts. The use, wherever possible, of the comprehensive, and procedurally safer, bar discipline procedures was advocated. In *Lee v. Bauer*⁴⁰ the judicial power to summarily discipline an attorney, without hearing, for failure to comply with a pre-trial conference order to attend in person, failed. This was not "such a case" as warranted such imperfect procedures. *Slatcoff v. Dezen*⁴¹ described the chancellor's powers to refer a case to a master, over party objection. The decision interestingly portrays how much judicial power may be so delegated and the circumstances permitting delegation.⁴²

How broad is the Florida judicial power? What is the impact on the political powers of the executive and the legislature? Certainly it is that the federal judicial power—with constitutionally expanded executive and legislative functions, development of the so-called political question and effective judicial self-restraint—is less powerful. A federal court would be

34. E.g., *State v. Florida State Improvement Comm'n*, 75 So.2d 1, 3 (Fla. 1954).

35. *Singletary v. State*, 69 So.2d 794, 798 (Fla. 1954). See also, *Hunter v. Solomon*, 75 So.2d 803, 807 (Fla. 1954).

36. 70 So.2d 347, 349 (Fla. 1954); *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954).

37. 73 So.2d 818, 819 (Fla. 1954).

38. *Wilson v. McCoy Mfg. Co.*, 69 So.2d 659, 662 (Fla. 1954).

39. *State v. Giblin*, 73 So.2d 851, 852 (Fla. 1954).

40. 72 So.2d 792, 793 (Fla. 1954).

41. See 74 So.2d 59 (Fla. 1954) (references for limited purposes, permissible; broader reference may be prohibited by objection; presumption of master correctness, strong; no complete delegation possible).

42. Also, in *Ryon v. Shaw*, 77 So.2d 455, 457 (Fla. 1955) (libel action and grand jury) and *Robertson v. Industrial Ins. Comm'n*, 75 So.2d 198, 199 (Fla. 1954) (agency hearing words privileged as hearing "quasi-judicial in nature"), the Court dealt with judicial power and libel and slander causes.

Note:

There were a number of miscellaneous decisions involving the courts and constitution. (1) *State v. Saperstein*, 67 So.2d 911, 912 (Fla. 1953) (writ of prohibition proper to test jurisdiction of court acting under unconstitutional law); (2) *Cone v. Cone*, 68 So.2d 886, 887 (Fla. 1953) (trial courts without authority to evade appellate court mandate); (3) *State v. Amidon*, 68 So.2d 403, 404 (Fla. 1953) (forfeiture of money not ancillary to criminal court jurisdiction); (4) *Seaboard Air Line R.R. v. Gay*, 68 So.2d 591, 593 (Fla. 1953): FLA. CONST. Art. V, § 11 states the circuit courts have "exclusive jurisdiction . . . in all cases involving the legality of any tax, assessment, or toll . . ." Issue was Supreme Court's jurisdiction to entertain original assault on an assessment order. Held that appellate jurisdiction of the Court could not by-pass § 11. The validity of a tax or assessment was incidental question here; (5) *Droit v.*

unlikely, in the year 1955 to crush the police power to the extent demonstrated in *Miles Laboratories v. Eckerd*.⁴³ The disturbing element on the Florida judicial scene, to this writer, was the judicial innocence which masterfully manipulated the various judicial techniques—"substantial evidence," "fairly debatable," "clear and present danger," "reasonable relation"—to frustrate legislative-executive activity, while proclaiming the "duty" of courts only to invalidate in cases where the unconstitutionality is "clear."⁴⁴ A denial, then, that judges must "legislate" in even *slightly difficult* constitutional issues, is unrealistic, for the abstraction inevitably appealed to solves nothing without a human policy value judgment.⁴⁵ And to state that the impact of judicial power on civil and political rights may be just as severe as the legislative power is not overstatement.⁴⁶

(II.) Legislative Power

The Court stated in 1952 that "under our State Constitution it is not necessary that the constitution contain specific grants of power to the Legislature For example, had there been absolutely nothing in the Constitution . . . the Legislature would have been all-powerful." Then the Court nullified this grant of power to the legislature by adopting Cooley's famous doctrine of *implied constitutional restrictions*.⁴⁷ The federal courts develop implied powers and the Florida courts develop implied limitations. In the 1953 *Brooks v. Pan American Loan Co.* decision,⁴⁸ the court stated that "greater power is vested in the judiciary" than in the legislature, an

State, 71 So.2d 259 (Fla. 1954) (FLA. CONST. Art. V, § 21 states that statutory changes relating to justice districts "shall be submitted to the people . . . by referendum at the next ensuing general election); (6) *Ritter v. Bentley*, 78 So.2d 573 (Fla. 1955) (Justice Drew, dissenting at page 577, argued that a provision of supersedeas bond securing payment of attorney's fees was violative of some constitutional right.); (7) *All Florida Surety Co. v. Coker*, 79 So.2d 762, 764 (Fla. 1955) (construed FLA. CONST. Art. V, § 5 to prohibit trial court from dismissing an appeal, after notice of appeal filed in the Court); (8) *State v. Carbonelli*, 80 So.2d 913, 914 (Fla. 1955) (a judicial office in Florida may require a set term of office and no discretionary removal power); (9) *Young v. State*, 69 So.2d 761, 762 (Fla. 1954); *Williams v. State*, 69 So.2d 766, 767 (Fla. 1954) (Supreme Court review when misdemeanors and felonies charged in different counts of same information); see also, *Pleger v. State*, 68 So.2d 371 (Fla. 1953) (FLA. CONST. Art. V, § 11 gives the Circuit Court appellate jurisdiction of criminal court misdemeanor trials. Appeal on misdemeanor is proper where solicitor dismissed as to felony).

43. 73 So.2d 680 (Fla. 1954).

44. See, e.g., *Miami Beach v. Lachman*, 71 So.2d 148, 150 (Fla. 1953); see also *Adood v. Jacksonville*, 80 So.2d 443, 445 (Fla. 1955) (Court bowed to legislative intent in interpretation of laws. Yet legislative debates, etc., are not published in Florida).

45. A recent statement is SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 208-210 (1954).

46. See, e.g., *State v. Lewis*, 80 So.2d 685 (1955) (possible freedom of speech, press issue) and *Shelly v. Brewer*, 68 So.2d 573 (Fla. 1953) (Court characterizes a dispute between two factions of political party as creating judicial question; not unattractive decision on facts, yet a definite entrance by judiciary into political processes). The use of the temporary injunction in labor-management disputes is, of course, the classic example. The amazing judicial blows dealt Miami Beach hotel labor organization, in 1955, make the example more than classic; see note 160, *infra*.

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

48. 65 So.2d 481, 482 (Fla. 1953).

interesting constitutional thesis. In 1955, the Florida Court pleaded⁴⁹ that the legislature was to be given a wide police power unless "some specific provision of the organic law is transgressed" while standing on the "fundamental principle that our State Constitution is a limitation upon, rather than a grant of, power."⁵⁰ The decisional language rationalizing the various judicial approaches to curb legislative power means little; examination of the judicially validated laws alone has meaning.

Delegation of legislative power—Delegation validity is generally included with separation of powers problems since the concept of unconstitutionality here depends on a true separation. Delegation of legislative power as an argument is probably passé in the federal system⁵¹ and is not spectacularly strong in Florida. Subject matters judicially authorized a large police power regulation were within the charmed circle of broad legislative power delegation. For example, the determinations by boards of road and bridge locations, under the safety police power, had easy riding. The Court stated that when "the legislature enacts a law complete in itself to accomplish a general purpose it may authorize . . . designated officials to promulgate rules . . . to effectuate the purpose . . ."⁵² *Florida Livestock Board v. Gladden*⁵³ carried a valid delegation, for Florida, quite far. The Court allowed the Board to postpone the effective date of a law regulating diseased animals without direct legislative authority.

Where a city ordinance regulating building permit issuance so that "no operation shall be carried on which is injurious . . . by reason of the objectionable emissions of cinders, dust, dirt, fumes . . . vapor, vibration, or similar substances or conditions" was applied to deny use of property to a gasoline filling station, the Court called for an "intelligible principle" so that the law be fixed "with such certainty that they not be left to the whim or caprice of the administrative agency."⁵⁴ The decision apparently would restrict the "intelligible principle" to common law nuisance definitions; this might, of course, hold administrative law to what was objectionable in the time of Elizabeth I.

49. *Adams v. Miami Beach Hotel Ass'n*, 77 So.2d 465, 468 (Fla. 1955).

50. *Board of Pub. Ed. v. Wright*, 76 So.2d 863, 864 (Fla. 1955).

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

52. *State v. Florida Turnpike Authority*, 80 So.2d 337, 346 (Fla. 1955); *Pirman v. Florida State Improvement Comm'n*, 78 So.2d 718, 719 (Fla. 1955) (same).

53. 76 So.2d 291 (Fla. 1954) (attractive case on facts since the law was incomplete, in operative sense, until board's rules clarified); *State v. Dee*, 77 So.2d 768, 769 (Fla. 1955) (similar in approach).

54. *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544, 547 (Fla. 1954) (due process uncertainty a factor, too). *Miami v. Board of Pub. Inst.*, 72 So.2d 901, 903 (Fla. 1954), is similar in approach. Perhaps explainable because of the detailed constitutional structure embracing the public school property field.

The permissably large grant of legislative power to municipalities, known well at common law,⁵⁵ is still uncertain as to scope in Florida.⁵⁶

With the definite exception of weak police power regulative subject matters the Florida Court's attitude toward the administrative board with delegated powers was quite modern; "it may be that too much authority is given to a particular administrative board, but that is for the Legislature to determine"⁵⁷

(III) Executive Power

Essentially, the de facto judicial power reach defines, by inroad or exit, the de facto executive power operative field.⁵⁸

Governor—The constitutional position of the state chief executive recently received relatively heavy decisional play. *State v. Gray*,⁵⁹ in 1953, defined Florida Constitution Article IV, Section 19, reading, "In case of the impeachment of the Governor, his removal from office, death . . . the powers and duties . . . shall devolve upon the President of the Senate for the residue of the term But should there be a general election for members of the Legislature during such vacancy, an election for Governor . . . shall be had" The Court read this election phraseology literally, indicating also that *only* the "power and duties," not the office of Governor, devolve upon the Senate President.

The 1954 *State v. Gray*⁶⁰ determined the effect of Florida Constitution, Article III, Section 5, reading "no Senator . . . shall during the time for which he was elected, be appointed, or elected to any civil office under the Constitution that has been created, or the emoluments, whereof shall have been increased during such time." Former Senate President, then Acting Governor, Johns, was apparently restricted to completing the deceased Governor's term since the 1953 Legislature had appropriated a \$3000 governor's salary increase. The Court determined to regard Section 5 through the eyes of the constitutional framers, took judicial notice of the post-Civil War office purchase outrages and concluded that since Acting

55. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q. 165 (1954).

56. Compare *Hialeah v. Hill*, 79 So.2d 658 (Fla. 1955) and *State v. North Miami*, 73 So.2d 899 (Fla. 1954).

57. *Webb v. Hill*, 75 So.2d 596, 605 (1954). Note: The Court dealt slightly with legislative power, more or less out of a police power context. For example, in *Barr v. Watts*, 70 So.2d 347, 349 (Fla. 1954) a concurrent power, with the judiciary, over bar admission was suggested and in *In re McRae's estate*, 73 So.2d 818, 819 (Fla. 1954), by implication the Court indicated legislative power to deal with rules of procedure for lower constitutional courts.

58. E.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

59. 69 So.2d 187, 191-194 (Fla. 1953); see also Advisory Opinion to Acting Governor Johns, 67 So.2d 413 (Fla. 1953) ("you are authorized to designate yourself as Acting Governor." Also, FLA. CONST. Art. IV, § 24 permitted Acting Governor to adopt certain signatures of deceased Governor).

60. 74 So.2d 114, 117-119 (Fla. 1954).

Governor Johns would have to submit his candidacy to the people, his case was outside of the "spirit" of Section 5.⁶¹

Boards and Agencies—A number of administrative law concepts were deliberated during the *Survey* period. The Supreme Court held that administrative regulations had the force of statute law;⁶² board members could resist cross-examination concerning the basis of their decision;⁶³ mandamus could not be used to direct an agency to exercise discretion in a certain manner;⁶⁴ defamatory words published in a hearing not "merely administrative" but "quasi-judicial in nature" were privileged;⁶⁵ and that a hearing officer's position was "somewhat analogous to that of a chancellor" while the full commission "occupies a position . . . similar to that of an appellate court."⁶⁶ Unfortunately, in these decisions the Court *still* uses timeworn antiques such as "purely administrative" powers and "quasi-judicial body;" the decisions have an old world air.⁶⁷

The Florida Railroad and Public Utilities Commission, being constitutionally inspired, was stated⁶⁸ to deal with "judicial power" but strangely could not "delegate" that power; only officers elected, or governor appointed, could "exercise" what is a restricted *constitutional* judicial power. Certainly in a modern state it is an anachronism to refer to a constitutional grant of power to permit what now are traditional agency functions. The power of the State Board of Pardons was held not to include ordering paroles.⁶⁹

The Court interpreted miscellaneous constitutional language, related to the executive and administrative,⁷⁰ and again disallowed a "ministerial

61. That no one could have foreseen the Governor's untimely death was a factor, too. Court distinguished *Fraser v. Gay*, 28 So.2d 901 (Fla. 1947), on theory that there the increase was not temporary and the submission of Johns' case to people, here. Justice Drew, concurring at p. 123, wanted to recede from the *Fraser* decision and permit the "Gomez Clause" (a law legislatively attempting to save legislators from Section 5 operation by lifting, as to their offices such salary increases.) to save Johns. Justice Mathews, dissenting to opinion and concurring to order, at p. 125, thought that state budget board's attempt to eliminate the legislative salary increase was invalid since under FLA. CONST. Art. IV, § 29 the governor's salary can only be changed by the legislature. That "Gomez Clause" is invalid under separation of powers principle and Art. III § 5. He, and Justice Terrell, dissenting, agreed the *Fraser* case controlled here. Justice Mathews also interpreted Art. IV, § 29 as restricting the legislative method to increase governor's salary to a technique, here not used.

62. See *Florida Livestock Board v. Gladden*, 76 So.2d 291 (Fla. 1954).

63. *Seaboard Air Line R.R. v. Gay*, 74 So.2d 569 (Fla. 1954).

64. *Hunter v. Solomon*, 75 So.2d 803, 807 (Fla. 1954). See *Singletary v. State*, 69 So.2d 794 (Fla. 1954).

65. *Robertson v. Industrial Comm'n*, 75 So.2d 198, 199 (Fla. 1954).

66. *Four Branches v. Oechsner*, 73 So.2d 222, 224 (Fla. 1954) (wisely strengthening the hearing officer, similar to APA attempt).

67. See *Wilson v. McCoy Mfg. Co.*, 69 So.2d 659 (Fla. 1954) (review of Industrial Commission order was described).

68. *Tamiami Trail Tours v. Carter*, 80 So.2d 322, 324-327 (Fla. 1954).

69. *Beal v. Mayo*, 70 So.2d 367, 368 (Fla. 1954).

70. The importance of these decisions could be overemphasized. (1) *Blackburn v. Brorheim*, 70 So.2d 293 (1954). FLA. CONST. Art. III, § 27 states that "the Legislature shall provide for the election by the people or appointment by the governor of all state and county officers not otherwise provided for by the Constitution, and fix by law their duties and compensation." Issue was validity of civil service regulation of deputy

officer, charged with the duty of administering a legislative enactment" from raising the question of its constitutionality, unless personally "injured."⁷¹

(IV) Conclusion

The separation of powers doctrine in Florida depends for its strength upon the quantitative restraint the Florida Supreme Court exercises in maintaining its judicial power. The power to review legislative and administrative action can become a frankenstein of judicial power.⁷² Substantive due process, procedural due process and separation of powers are but tools, in a final sense, with which courts employ the judicial power to, at times, drastically limit action by the perhaps more representative governmental departments.⁷³

SUBSTANTIVE DUE PROCESS—THE POLICE POWER⁷⁴

The denial to government of the power to take or regulate life or property is a concern of substantive due process—the disagreement is not over the procedure to take but over the validity of the very taking.⁷⁵ The Supreme Court of Florida apparently does not distinguish between substantive due process and the state police power.⁷⁶ Probably the court views the substantive due process as directly related to the constitutionally valid

sheriffs. Court held deputy sheriffs "officers" provided for in Constitution; that election or governor appointment not necessary to create a § 27 "office", which means "a delegation of a portion of the sovereign power;" that deputy sheriffs are a "class of officers" under Art. III, § 20 prohibition of special or local legislation regulating the "jurisdiction and duties of any class of officers except municipal." (2) *Wagner v. Gray*, 74 So.2d 489 (Fla. 1954). FLA. CONST. Art. XVI, § 8: "a plurality of votes given at an election of officers . . ." was held to refer only to the final election, not primaries. (3) *Graham v. Board of Pub. Inst.* 76 So.2d 874-876 (Fla. 1955). Board member's statutory compensation eliminated by law leaving only expense money. Plaintiff could only be removed for cause under FLA. CONST. Art. IV, § 15. Legislature, under FLA. CONST. Art. III, § 27, regulates officers not otherwise provided for in constitution. Court stated that only the drastic lowering of a "constitutional" officer's salary would be invalid. Legislature given plenary power over non-constitutional officers. (4) *State v. Florida Turnpike Auth.*, 80 So.2d 337 (Fla. 1955). Interpretation of Art. III, § 27 *supra*, "appointment" by governor not to mean "designated." Also FLA. CONST. Art. XVI, § 15, prohibiting anyone from holding "more than one office" not violated by Turnpike Authority membership by State Road Department official—on theory that both positions functionally related and a new office not created but only allied duties for Road Department official.

71. *Barr v. Watts*, 70 So.2d 347, 350 (Fla. 1954).

72. See note 22 *supra*.

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

74. For recent survey of American due process of law, see WOOD, *DUE PROCESS OF LAW*, 1932-949 (1951); Brockelbank, *Role of Due Process in American Law*, 39 CORN. L.Q. 561 (1954).

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

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

breadth of the police power.⁷⁷ At least in theory⁷⁸ the state constitution acts as a limitation on the generally broad state police power, and the limitation is to be strictly construed.

The federal government, on the other hand, is theoretically one of constitutionally delegated powers, which powers are to be strictly construed. In fact,⁷⁹ the past course of state and federal constitutional law has been very different. The federal powers have been immensely broadened by a Supreme Court which, until only recently, cooperated with state supreme courts in drastically limiting the state police power.⁸⁰ This severe constitutional corset placed on state governmental power may well explain the heavy pressure on the federal government to assume activities once thought of as local in nature.⁸¹

It is convenient to break down the general state police power into the various subject matters which seem in Florida to have the police power thrown around them.⁸²

(I.) *Regulation of Businesses Affected with a Public Interest*

The Florida Supreme Court, unfortunately, is wedded to terminology which has generally lost its effectiveness elsewhere. The traditional view was that the police power was only broad enough to regulate a "business affected with a public interest." The modern industrial state and its attendant problems have cracked this concept—a valiant protector of private contract and private property.⁸³ The present Florida Supreme Court is dedicated, theoretically, to a weakened power to review (which mirrors judicial power, generally) the state police power by establishment of an equally strengthened presumption of correctness of legislative exercise

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

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

79. *Ibid.*

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

81. Examples are legion: such as social security, labor relations and education. Witness the demolition of the old "local" "intrastate" area sacred from the Federal interstate commerce powers, e.g., *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The Florida police power and the federal power were in slight recent conflict; this is dealt with here as easily as any other place. In *Perez v. Trifiletti*, 74 So.2d 100 (Fla. 1954), the issue was whether the Taft-Hartley Act pre-empted the field of violence in labor disputes, to exclude the state police power; of course, the court held not. In *Olan Milk, Inc. v. Panama City*, 78 So.2d 561 (Fla. 1955), the Court invalidated a municipal tax with a discriminatory effect on interstate commerce (higher tax on foreign corporation agents). *Tatum v. Hallandale*, 71 So.2d 495 (Fla. 1954) was suit by aircraft operator to enjoin city ordinance licensing flights to advertise. Operator complied with all state and federal rules. Court did not attempt to determine precisely the federal pre-emption, but, under test of "local" subject matter and lack of federal interest therein, validated.

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

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

of the police power.⁸⁴ If this presumption of correctness means anything, then the terminology "public interest" carries with it all businesses, and a heavy burden has to be carried by him who would show otherwise.

The Court stated in 1955,⁸⁵ that the "legislature may prescribe the qualifications of persons authorized to engage in any trade or occupation affected with a public interest" as long as such regulations are not "unreasonable." This approach to police power validity, under a "public interest" limitation paralyzes the general presumption of police power validity. This terminology perhaps strengthens the legislative hand only when the subject matter is one classically "public"⁸⁶ in nature or one traditionally regulated at common law.⁸⁷ When such conditions were met the Supreme Court⁸⁸ easily located the "business" properly "affected with a public interest" and wrote appealingly of a wide police power for "social legislation;" that "it is for the legislature and not the courts" to determine what is "unnecessary, unreasonable . . . and capricious."

(II) Zoning⁸⁹

The modern approach⁹⁰ to zoning and planning demonstrates a judicial awareness that cities necessitate planned growth. The whole subject is treated by the courts as expert in nature. Courts are not such experts. This requires a strong zoning board presumption of correctness. The Florida Supreme Court decisions were not consistent. *Miami Beach v. 8301 Collins Avenue*⁹¹ indicated a lack of judicial awareness of these fundamentals. Therein the Court simply determined the unreasonableness of the city zoning plan and invalidated; the presumption seemed at that point to desert the zoning forces. *Miami Beach v. Silver*⁹² demonstrated the more functional judicial attitude. The burden was placed on the complaining citizen to show the unreasonableness of excluding professional offices in designated districts. The general police power to zone and plan was referred to by the Court. The zoning ordinance survived under the statement that the "burden of one who attacks such an ordinance has been called an extraordinary one." Further, a "person . . . must allege and thereafter prove such facts as to make it appear the statute is invalid."

84. E.g., *Adams v. Miami Beach Hotel Ass'n*, 77 So.2d 465, 468 (Fla. 1955); *Smith v. Ervin*, 64 So.2d 166, 169 (Fla. 1953).

85. *Lambert v. State*, 77 So.2d 869, 871 (Fla. 1955).

86. See *Belcher v. Florida Power & Light Co.*, 74 So.2d 56 (Fla. 1954) (legislature could "clothe public service corporation" with condemnation power).

87. See *Adam v. Miami Beach Hotel Ass'n*, 77 So.2d 465 (Fla. 1955) (at common law—inns; here—hotels, motels and so on).

88. *Id.* at p. 467-468.

89. One could argue over inclusion of zoning powers.

90. E.g., Comment, *Municipal Zoning Law in Connecticut*, 35 CONN. B.J. 162 (1951). See Johnson, *Constitutional Law and Community Planning*, 20 LAW AND CONT. PROB. 199 (1955).

91. 77 So.2d 428, 430 (Fla. 1954) (equal protection case, also); see also, *Miami Beach v. Stearns*, 77 So.2d 626 (Fla. 1955).

92. 67 So.2d 646, 647 (Fla. 1953); But cf., *Chamofree Corp. v. Miami Beach*, 76 So.2d 665, 670 (Fla. 1954) ("such restrictions must find their basis in the safety, health, morals." Possible equal protection case.)

A decision correctly demonstrating the zoning constitutional fact procedure was *Miami Beach v. Lackman*.⁹³ The question was the reasonableness of an ordinance limiting quite valuable property to single family residences. The announced appellate standard was whether the owner's proof left the evidentiary picture "not fairly debatable." An impressive array of witnesses supporting both parties appeared before the trial court (realtors, appraisers, city planners, economists, and so on.) The city's evidence indicated a traffic safety basis for the ordinance. That basis was determined reasonable by the Supreme Court. That the proof was sharply contradictory saved the city under the "not fairly debatable" test.

The occasional conflict between private property and a zoning agency over the possible court-enforced use of the eminent domain procedure was recently resolved in the 1954 *Miami v. Romer* case.⁹⁴ An owner of property fronting on a street claimed that a city ordinance, unrelated to the police power, and which required no building closer than 25 feet to the center of the street, was invalid. He argued that the city should have condemned his property and compensated him. The Court ordered the case to the lower court to determine the police power reasonableness of the set-back.

Zoning power follows the general police power, of which it can be considered a part, in that if the zoning ordinance is not proven "unreasonable", it is validated.⁹⁵ This judicial attitude toward the zoning power in Florida obviously should accommodate all but the very unreasonable property regulations and restrictions. Such was not the case in the *Survey* years. In *Phillips Petroleum Company v. Anderson*⁹⁶ the Florida Court apparently obviated any restrictive zoning possibility in the "dust, dirt, fumes, gas, odor, noise . . . vibration, or similar substances or conditions" sense, which possibility was unrelated to common law nuisance definitions. *Lippon v. Miami Beach*⁹⁷ actually stated that the zoning power could not be used to "resist the natural operation of economic laws," an unusually frank judicial imposition of a particular economic philosophy.⁹⁸ Finally, in *Miami v. Hollis*⁹⁹ the Court perhaps operated upon the "fairly debat-

93. 71 So.2d 148 (Fla. 1953) *appeal dismissed*, 348 U.S. 906, 1954. (second basis was possible economic injury by more hotels to existing hotels). *Miami v. Ross*, 76 So.2d 152 (Fla. 1954), initially permitted the city time to develop an area-wide zoning plan, under city admitted facts, similar to Lachman's argument, since plaintiff showed no special hardship. On rehearing, lower court's order to city to rezone was upheld.

94. 73 So.2d 285 (Fla. 1954). *Ocean Villa Apartments v. Fort Lauderdale*, 70 So.2d 901, 902 (Fla. 1954), stated that if the set-back had effect of completely depriving owner of the only reasonable beneficial use of the property, it was invalid.

95. *Miami Beach v. Silver*, 67 So.2d 646, 647 (Fla. 1953).

96. 74 So.2d 544, 548 (Fla. 1954).

97. 68 So.2d 827, 829 (Fla. 1953). *Beck v. Littlefield*, 68 So.2d 889, 890 (Fla. 1953), was more satisfactory on facts. There the Court indicated that indefinite prohibition to build on property would be invalid. In the *Lippon* case, *supra*, restriction on property to lessen economic challenge to existing economic structure was frowned upon. Why, in a county of over 500,000 persons, may not the various municipalities do more than aesthetic planning?

98. Spencer, anyone?

99. 77 So.2d 834, 836 (Fla. 1955).

able" test to its death. There the court appointed master found the evidence state was beyond "debate"; the Supreme Court found the evidence state "sufficient to justify" the master and chancellor; and the "burden" was then upon the appellant to show reversible error. Interesting possibilities?

(III) *Spending and Disposing*¹⁰⁰

*Harwell v. Sheffield*¹⁰¹ referred to the state spending power in the weak phraseology that (at least when public education was concerned) the state could "place any reasonable condition" upon the "availability" of state funds. Recent decisions went far in crippling the state spending and disposing powers. *Clearwater v. Caldwell*¹⁰² was illustrative in approach. The city attempted to lease city property for 50 years to a private, profit seeking, citizen. The court's response was swift and deadly: "It may be argued that it is desirable for the City . . . to enter into the real estate business and lease its property for hotels, drug stores Such a change in policy may well threaten the entire free enterprise system Why not extend it to . . . collective farms under the system of Communism?" The Court definitely restricted the police power exercise to a "public purpose," which apparently means a property disposal of small consequence or one closely related to basic municipal function.¹⁰³

In the 1954 *Survey* this writer suggested that the decisions showed expenditures were valid for "play" but not to enable local government to build for the future. *Sunny Isles Fishing Pier v. Dade County*,¹⁰⁴ a validation of a 30-year property lease leading to private construction and operation of a resort fishing pier, makes re-writing the suggestion possible in 1956. The "public purpose" was in the lease advantages to the resort, and the small activity involved. As in 1954 it was stated that the local government itself could have run the pier.¹⁰⁵ Here again the Court emphasized the "private enterprise" philosophy requirement, yet necessarily¹⁰⁶ left the local government a way out, which was the antithesis thereof.

The Court required state funds to be spent for a state purpose, fortunately liberally defining state purpose.¹⁰⁷ School fund expenditure, a constitutional mystery,¹⁰⁸ received some recent court attention.

100. The Court at times distinguishes these powers.

101. 77 So.2d 439, 441 (Fla. 1955).

102. 75 So.2d 765 (Fla. 1954) (probably most of constitutional talk was dictum).

103. The sale of cigars, candy and so on in a court house by lease arrangement to a blind man, perhaps.

104. 79 So.2d 667 (Fla. 1955).

105. Without charge the Court stated; this would be an unlikely requirement.

106. In view of the common law on the subject?

107. *State v. Tampa*, 72 So.2d 371, 373 (Fla. 1954) (FLA. CONST. Art. III, § 20; public health is not necessarily local in nature).

108. Just read the Florida constitutional structure guarding school funds, property, financing and so on! In *Board of Pub. Inst. v. Wright*, 76 So.2d 863 (Fla. 1955) recovery on school bonds included interest after maturity and on interest coupons. Justice Mathews, dissenting, at page 778, stated Art. XII § 8 set up a "sacred fund"

(IV) *Borrowing and Pledging*¹⁰⁹

This general constitutional situation is dealt with in another part of the article. Quickly, the Florida Court required that the government borrow money in view of a pre-determined expenditure for a "public purpose." This abstraction standard operated to discipline government borrowing, bringing it within the Court's economic philosophic line. *State v. Miami*¹¹⁰ demonstrated this. There the court determined, by reaching into the scope of traditional common law endeavors, that an international trade mart, analogous to the common law supported public market, was a proper "public purpose."

The 1952 *State v. North Miami*¹¹¹ decision on "public purpose" was neatly sidestepped by the Court in 1954.¹¹² The problem was validation of city revenue certificates to finance warehouse construction for eventual lease to the Orange Bowl Committee to store floats and so on. The *North Miami* case involved leasing a manufacturing plant to private industry. The distinguishing factors were that *here* there was a non-profit organization, a direct relation between the city's "major industry, tourism" and the project, and all the Committee would receive from the affair was "personal satisfactions and spiritual values" of public service. Perhaps the Court failed to take cognizance of North Miami's size; North Miami citizenry would probably receive a great deal more from a long range manufacturing project than Miami from neat parade floats, yearly displayed.

Also decided were cases dealing with long term local borrowing arrangements¹¹³ and investment of state license tax monies in local bond issues.¹¹⁴

The definite possibility¹¹⁵ of an illegal "public purpose" in bonds to build a segregated school system, after *Brown v. Board of Education*,¹¹⁶ did not deter the bond legalization.

not permitting this recovery. *Miami v. Board of Pub. Inst.*, 72 So.2d 901, 904 (Fla. 1954) decided Board could not discharge from school funds assessment lien for abutting public improvements. In discussion, the constitutional school fund practices under Art. XII, §§ 9, 10, 17 were covered. *Madison v. Board of Pub. Inst.* 72 So.2d 913 (Fla. 1954), limited school property use to a school purpose, permitting Board to close a street over school property under Art. XII, § 13.

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

110. 76 So.2d 294, 297 (Fla. 1954).

111. 59 So.2d 779 (Fla. 1952). Here government borrowing and spending was invalidated—for purchase of land and construction of a plant, to rent to private industry.

112. *State v. Miami*, 72 So.2d 655 (Fla. 1954).

113. *State v. County of Flagler*, 77 So.2d 765, 766 (Fla. 1955). Here the county issued bonds to improve a state road in county under agreement with State Road Department. Under agreement Department leased road for 30 year life of bonds and pledged rent of certain uncommitted gasoline tax funds. Held: that issuance not so disproportionate to county taxable property assessed valuation to invalidate—since primary funds for servicing bonds estimated as adequate.

114. *State v. State Board of Ed.*, 67 So.2d 627 (Fla. 1953) (Court interpreted FLA. CONST. Art. XII, § 18).

115. *Board of Pub. Inst. v. State*, 75 So.2d 832 (Fla. 1954) (See Justice Mathews' dissent).

116. 347 U.S. 483 (1954).

(V) Taxation¹¹⁷

The Florida tax power strength tolerated by the judiciary did not mirror a clear picture. The Court in 1954¹¹⁸ discussed the "great power of taxation" and in the same year permitted a procedurally weak notice to survive in a tax suit.¹¹⁹ In *State v. Florida State Racing Commission*¹²⁰ the Court described a tax as an involuntary payment in permitting certain race track profits to be spent for charity and education; whether the definition was intended in a constitutional sense is impossible to state.

In *Volusia County Kennel Club v. Haggard*¹²¹ the power to tax dog race tracks according to the amount of daily gross receipts was broadly denied. The Court distinguished the tax and spending powers so that a "good purpose" for expenditure failed to support the tax power. On the theory the legislature had legitimized track gambling, the Court refused the traditional great police power over gambling, based on regulation of morals. The tax power had to do more than the mundane business of gaining revenue; it had to be utilized to "further regulation of the business" taxed. This distinguished the tax and general police powers by necessitation of some police power regulation *allied* with revenue raising. Apparently a tax must be differentiated in application on some basis other than income size. On a rehearing¹²² the Court may have held the tax a prohibited income tax, permitted a possible out for legislative tax writers by a privilege tax based on privilege worth, and refused use of the tax device to aid the general police power necessities.

In *State v. County of Flagler*¹²³ the Court stated that "an involvement of the county's taxing power for a 30-year period might well be held" unreasonable if that tax were likely to become primarily obligated for bond servicing. Levying an ad valorem tax to service a bridge used in, but not owned by, a road district was authorized.¹²⁴ In *Armstrong v. State*¹²⁵

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

118. *Shavers v. Duval*, 73 So.2d 684, 692 (Fla. 1954) (Court suggested this power could regulate contracts to the "impairment" state).

119. *Mullin v. Polk*, 76 So.2d 282, 284 (Fla. 1954) (suit to quiet title for delinquent taxes).

120. 70 So.2d 375, 379-380 (Fla. 1953) (This more or less took care of a tax non-public purpose argument. Court apparently validated under FLA. CONST. Art. IX, § 2).

121. 73 So.2d 884, 886-887 (Fla. 1954) (Court held tax not an income tax, under Art. IX, § 11; federal constitutional equal protection was interpreted, with equal protection in Florida, as requiring conclusion). See Laws of Fla. c. 29694 (1955) and Laws of Fla. c. 29751 (1955).

122. *Id.* at 895-890.

123. 77 So.2d 765, 766 (Fla. 1955) (primary obligation to pay from funds accruing to Road Department under FLA. CONST. Art. IX, § 16. The Court did look askance at the disproportionate bonded indebtedness to the county's assessed valuation of taxable property. However, here the primary funds obligated appeared ample).

124. *State v. Florida State Improvement Comm'n*, 75 So.2d 1, 3 (Fla. 1954).

125. 69 So.2d 319, 320 (Fla. 1954) (Art. VIII, § 6; duties of tax assessor were discussed; difficult to determine decision basis—statutory or constitutional).

it was held that a tax equalization board could not reduce, in blanket fashion, all assessments of property in the county when no particularized assessment complaint had been heard. The decision also stated that under Florida Constitution, Article IX, Section 1 (State tax principles) and Florida Constitution, Article IX, Section 5 (county tax principles),¹²⁶ state taxation must be uniform throughout the state, and county taxation throughout the county.

Florida Constitution Article XVI, Section 16,¹²⁷ and Article XII, Section 17¹²⁸ were also interpreted.

(VI) *Eminent Domain* ¹²⁹

The great governmental power of eminent domain was broadly characterized in *Shavers v. Duval*.¹³⁰ In the *Shavers* case the immediate issue was whether the mortgagee was entitled to the entire principal mortgage amount with interest to date and the future interest amount agreed paid to the mortgage maturity date. The problem then was that of the impact of eminent domain on the non-impairment of contract obligation principle. The Court treated eminent domain not as a power "granted to the State" but one "reserved as an attribute of sovereignty."¹³¹ Procedural due process and just compensation were stated as the only eminent domain limits,¹³² and private contracts should be made in view of this constitutional situation; in effect, this subjected non-impairment of contract obligations to eminent domain when utilized for a "public use" or "public purpose" and, the court stated, the general police power when utilized "reasonably." This sharply distinguished the police and eminent domain powers.¹³³

126. *Id.* at p. 321: within the taxing area the method of assessment must be equal and uniform; if so, no equalization of assessments justified. *Smithers v. North St. Lucie River Drainage Dist.*, 73 So.2d 235 (Fla. 1954) authorized under Art. IX, § 1, a differentiation of lands to equalize the tax impact. This section was stated not to apply to special assessments, only ad valorem taxes. Perhaps the federal constitution was also involved in case.

127. *Gautier v. Biscayne Shores Imp. Corp.*, 68 So.2d 386, 388 (Fla. 1953), where the owner, a corporation for profit, leased property for educational usage by military academy under nominal rental. Held: test was "the character of purpose for which the property . . . used" to determine tax exemption.

128. *Board of Pub. Inst. v. Wright*, 76 So.2d 863, 865 (Fla. 1955), interpreting Art. XII, § 17 stating the tax "shall not be applied to any purpose other than the payment of the principal and interest." Issue: whether interest upon coupons after maturity possible? Held: Authorized to pay.

129. The great power might well be considered separately from the general police power. The convenience in not so doing rests upon the fact that substantive and procedural due process apparently reach into both, and the eminent domain action is generally *in aid* of some facet of the general welfare. A good general article on eminent domain is Kratovil and Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

130. 73 So.2d 684, 689-92 (Fla. 1954) (Court failed to distinguish between federal and state law.)

131. The old federal foreign relations power argument in essence.

132. FLA. CONST. D. R., § 12 and Art. XVI, § 29.

133. See also, *Watts v. Duval County*, 75 So.2d 316 (Fla. 1954). The mortgage contract prohibited anticipatory mortgage payments; the lower court paid mortgagee the principal, and interest limited to suit commencement. Arguments against such

The court in an emotive statement in *Clearwater v. Caldwell*¹³⁴ apparently restricted the police powers relating to expenditures or property disposals to a "purpose" designed not to "threaten" the "free enterprise system" (the case involved simply a long term municipal property lease to private enterprise). *State v. North Miami*¹³⁵ and *Adam v. Housing Authority*¹³⁶ were declared apropos to the *Clearwater* rationale. These were fairly recent cases, limiting sharply the state police power reach. In *State v. North Miami*, the powers to spend and of eminent domain were, in effect, equated, but neither was held sufficient to authorize expenditures to purchase land, construct an aluminum plant thereon and thereafter to rent the project to a private industry. Spending for a "public utility" or a "public service" would be proper. The old police power regulation terminology raised its ugly head again.

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

condemnation payment grounded on both constitutions; due process, equal protection and contract obligation impairment. Court failed to distinguish. Justice Thomas, dissenting at p. 319, suggested a jury should determine present discount value of mortgage. Justice Mathews, writing opinion, suggested *Shavers* case, *supra*, controlled; he permitted lower court two possibilities for mortgagee; receive out of award the principal due with unpaid interest to distribution date, or release of mortgage lien against award, award payment to mortgagor and action possibly against mortgage on notes. Justice Sebring, dissenting at p. 323, argued *Shavers* was different and followed Justice Thomas.

134. 75 So.2d 765, 767-68 (Fla. 1954); see note 102 *supra*.

135. 59 So.2d 779, 787 (Fla. 1952).

136. 60 So.2d 663, 665 (Fla. 1952).

Synthesizing these decisions would seem to lead to a conclusion that whether the eminent domain power is allied with, or distinguished from, the spending and disposing powers or the general state police power, the court's economic philosophy—under such an abstraction as “public use” or “purpose”—may well cripple any seriously attempted experimental social legislation¹³⁷ utilizing the eminent domain device.

(VII) *The Police Power, Generally*¹³⁸

Health.—This traditionally regulated subject received slight judicial attention. In *Florida Livestock v. Gladden*,¹³⁹ an act permitting destruction of diseased animals, without compensation and under certain conditions, was interpreted without a constitutional breath of judicial doubt.

Safety.—A number of decisions demonstrated the strength of the safety police power. In *Southern Bell Telephone & Telegraph Company v. State*¹⁴⁰ the court, in validating an act forcing utility relocation of facilities to accommodate a new highway, declared that highways provide “one of the clearest fields for the exercise of the police power.” The validity of licensing of aircraft flights over a city to advertise by sign and sound was more or less assumed—with a safety basis—in *Tatum v. Hallandale*.¹⁴¹ *Perez v. Trifiletti*¹⁴² treated the police power in violent labor-management disputes much the same way. In *State v. Kelly*¹⁴³ the Court probably validated state legislation on criminal communism by treating answers, possibly dangerous to questioned witnesses, as privileged under the privilege against self-incrimination. The Court wrote of the link-in-the-chain-of-evidence theory and judicially noticed that Communist activities were in the “clear and present danger” stage, authorizing severe governmental regulation.

Morals.—The police power related to morals went through, this writer is sure, a shattering experience. In *Volusia County Kennel Club v.*

137. *Ibid.*

138. This breakdown probably reflects the distinctions of the Court, expressed or not. Such emphasis on subject to validate should not be necessary if the Court's professed limitations on judicial review of police power mean much. See notes 4,5,6 *supra*.

139. See 76 So.2d 291 (Fla. 1954).

140. 75 So.2d 796, 799 (Fla. 1954) (at utility's expense, too); *Webb v. Hill*, 75 So.2d 596, 598 (Fla. 1954) (same, dictum); *State v. Florida State Improvement Comm'n*, 75 So.2d 1, 3 (Fla. 1954) (same, dictum). See *Riviere v. Orlando Parking Comm'n*, 74 So.2d 694, 696 (Fla. 1954) (Court stated “committed” to authorizing off-street parking as an exercise of police power); *Pirman v. Florida State Improvement Comm'n*, 78 So.2d 718, 719 (Fla. 1955) (no constitutional provision requires pre-determined road or bridge location).

141. See 71 So.2d 495 (Fla. 1954).

142. See 74 So.2d 100 (Fla. 1954).

143. See 76 So.2d 798 (Fla. 1954) (certainly an indirect validation. Both constitutions involved.) Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 MICH. L. REV. 407 (1955) is interesting in this connection.

*Haggard*¹⁴⁴ the Court decided, from several legislative statements, that the race track racket is now the race track business; that the "noxious odor" no longer registers in the morals police power nostrils. The race track "business" being presently like any other "business" in Florida, the legality of regulation thereon will depend on the usual "public purpose", "reasonable" roadblocks, police power regulation of Florida business seems to meet. The immediate problem before the Supreme Court was a dog track race tax based on daily track gross receipts. The Court distinguished the tax and spending powers,¹⁴⁵ while apparently equating the tax and general police powers by insistence that the tracks are just ordinary "business." Another unusual development was insistence on use of the tax power in connection with "regulation." While it is true, for example, that the federal tax power presently has a wide police power thrown about it, this has never been treated by the United States Supreme Court as absolutely necessary.¹⁴⁶

In relation to protection of the "public against loss from fraudulent or unscrupulous practices in commercial and financial transactions, particularly where the thing dealt with, or the method of dealing with it, adopts itself to . . . fraudulent impositions on the public," the Court located ample police power to permit regulation of hotel advertising.¹⁴⁷

Reasonable limitation of the police power regulation of liquor licenses, regarding due process procedural revocation, was obtained in *Kline v. State Beverage Department*.¹⁴⁸ Formal recognition of property qualities in such licenses, at least for procedural purposes, should stabilize the judicial and administrative outlook toward a business presently well established as part of the Florida's social and economic scene.

Generally—*Miles Laboratories v. Eckerd*¹⁴⁹ again staged the economic philosophy of the Supreme Court, attendant to review of legislation regulating private property and contract in a sense not traditional in the state; traditional, that is, such as legislation requiring fire escapes or setting public utility rates, and so on. At issue again was the Florida fair trade agreements law.¹⁵⁰ The Court blocked any possible property or contract regulation except during an "economic emergency"¹⁵¹ and insisted on

144. 73 So.2d 884, 886 (Fla. 1954) (petition for rehearing at p. 895. Court refused police power, connected with taxation, to restrict the financial and political power of the tracks); the Court, at p. 886, required the tax power to do more than just get revenue; further "regulation" of the tracks was necessary. The Court involved the federal constitution also.

145. The court has, in effect, limited the tax power by prohibiting spending of taxes for a non "public purpose"; see *State v. Florida State Racing Comm.*, 70 So.2d 375, 380 (Fla. 1953) (FLA. CONST. Art. IX, § 2).

146. See *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937) (federal taxation validity approaches a political question).

147. *Adams v. Miami Beach Hotel Assn.*, 77 So.2d 465, 467 (Fla. 1955).

148. 77 So.2d 872, 874 (Fla. 1955).

149. 73 So.2d 680-682 (Fla. 1954), noted, 9 MIAMI L.Q. 234 (1954).

150. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q. 174 (1954).

151. This validation language is antique, certainly.

"free competition" concepts in police power regulation. The Court's frankness about economic subjectivity in substantive due process was admirable. The legislature, in effect, was directed that no regulation of this nature was possible. The Court brushed aside legislative factual findings of necessity in Justice Hobson's words¹⁵² as "obviously contrary to proven . . . truths of which courts may take judicial notice." Thus the Court easily won the battle of constitutional facts. For emphasis, one might compare *Adams v. Miami Beach Hotel Association*¹⁵³ where a severe regulation of hotel advertising was approved—under the "business affected with a public interest" and traditional common law power over fraud abstractions—with the legislature given a wide power over "social legislation," the question of regulation reasonableness left to the legislature and a legislative factual finding restricted independent judicial notice.

The power of the legislature over municipalities was stated to be plenary,¹⁵⁴ with the possible exception of municipal regulations of property which would pain the court if the legislature attempted the same directly.¹⁵⁵ A similar plenary legislative power was authorized over the establishment, abolishment and compensation of certain state offices.¹⁵⁶ Legislative control over entrance to "certain professions in the state" was referred to in several cases.¹⁵⁷ The position of the Florida Court on legislative election regulation was somewhat inconsistent.¹⁵⁸ The legality of legislation retroactively affecting private contracts was generally denied on the differentiated constitutional grounds of impairment of contract and lack of police power (substantive due process).¹⁵⁹

152. Concurring at p. 682.

153. 77 So.2d 465, 467-68 (Fla. 1955).

154. *North Shore Bank v. Surfside*, 72 So.2d 659, 662 (Fla. 1954) (FLA. CONST. Art. VIII, § 8). See *Florida Power & Light Co. v. Miami*, 72 So.2d 270, 272 (Fla. 1954), where the city attempted to invalidate an act exclusively authorizing commission to set rates of local utility. A galaxy of constitutional arguments failed the city.

155. See *Clearwater v. Caldwell*, 75 So.2d 765 (Fla. 1954), wherein the court dealt with city lease of property to private party—a governmental activity the Court dislikes, see note 102 *supra*. A presumption against finding legislative authorization for city was maintained and a "municipal" as well as a state "public" purpose was required. Difficult to determine if case is statutory or constitutional in basis.

156. *Graham v. Board of Public Inst.*, 76 So.2d 874, 876 (Fla. 1955) (FLA. CONST. Art. III, § 27).

157. *State v. Dec*, 77 So.2d 768, 769 (Fla. 1955); *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954).

158. *Wagner v. Gray*, 74 So.2d 89, 90 (Fla. 1954) (here "inherent power" was referred to: "election of officers", in Art. XVI, § 8, did not apply to primary so a plurality is unnecessary). *Erwin v. Richardson*, 70 So.2d 585, 587 (Fla. 1954) (here the "right" to vote was emphasized; that the legislature could not "unduly limit." An act attempted to nominate county commissioners by district rather than county at large. See FLA. CONST. Art. III, § 26; Art. VIII, § 5); see *Singletary v. State*, 69 So.2d 794 (Fla. 1954) for a fine description of judicially controlled county commissioner district reapportionment under FLA. CONST. Art. VIII, § 5.

159. In these cases both federal and state constitutional arguments were used; although rarely distinguished. The same is true for the substantive due process and contract impairment principle.

Contract Impairment: In *Shavers v. Duval*, 73 So.2d 684 (Fla. 1954) the problem was the eminent domain impact on the contract impairment restriction, on how to compensate a mortgagee. See notes 130, 131, 132 *supra*. That private contracts are

(VIII) *Conclusion*

The state police power is not presently at the strength one would expect in a modern non-agrarian state. The Florida Supreme Court's distaste for analysis is probably one reason. From the cases it is impossible to determine if there is one general police power or a number of powers tenuously related to some vague general police power. The court's uneasy use of the legislative presumption of correctness adds to the haze. The general power of government was as uncertain, perhaps, in the human "rights" area, as in the property "rights" area.¹⁶⁰ Since a valid police power exertion, in the last analysis, must not be "unreasonable" and since that test almost directly will mirror the justices' personal tastes and distastes, it is not "unreasonable" to state that incorrect usage of presumptions in the police power field results in a vast increase in judicial power.¹⁶¹

made in view of eminent domain powers decided the case. The impairment principle was subjected, in dictum, to the police and tax powers. *Watts v. Duval*, 75 So.2d 316 (Fla. 1954) was similar. Due process and contract impairment not distinguished. In *State v. Coral Gables*, 72 So.2d 48, 49 (Fla. 1954), in which the city had pledged its anticipated cigarette tax funds collected under a state law, the Court stated that such a law could not be modified or repealed to impair a contract to service bonds. *Baughmam v. Aetna Casualty & Surety Co.*, 78 So.2d 694 (Fla. 1955), stated that a lawyer's compensation contract was subject to a then existing law permitting court to determine fee. *Biltmore Village v. Royal*, 71 So.2d 727 (Fla. 1954), involved a law, cancelling all reverter provisions in deeds in effect over 21 years, which the Court invalidated under contract impairment and due process. In *Yaffee v. International Co.*, 80 So.2d 910 (Fla. 1955) at issue was validity of repeal of law disallowing usury defense to corporations, which repeal followed the contract sued upon. Held an impairment under both constitutions. Court restated the substantive-procedural terminology.

160. For convenience to readers here are collected several of the more important decisions in the power of the state v. constitutional "civil rights" field. Labor freedom of speech is exhaustively developed (from a conservative standpoint) in the *Labor Law Survey* article in this issue, see the comment, *Labor Relations, Free Speech for Whom?* 10 *MIAMI L.Q.* 37 (1955). A representative decision was *Sax Enterprise v. Hotel Employers Union Local No. 255*, 80 So.2d 602-605 (Fla. 1955) in which the Court affirmed its "unlawful purpose" test in this sensitive social field. Apparently, picketing is for an unlawful purpose and beyond the pale of freedom of speech unless the union has established that the employees have chosen it their representative, the employer has been informed of the object of the picket line and afforded an opportunity to negotiate, and the pickets do not give out false information. Of course, in Florida there seems to be no legal machinery to enforce a representative election so it is quite possible that unless the United States Supreme Court rides to the rescue there is no effective labor freedom of speech in a Florida picket line, formed to organize. An interesting article is Price, *Picketing—a Legal Cinderella*, 7 *U. of FLA. L. REV.* 143 (1954).

Other judicial restrictions on speech include *Huie v. Lewis*, 71 So.2d 498, 499 (Fla. 1954) (possibly press, too) in which the circuit court denied petitioner entrance to interview a defendant in a murder trial to prepare a story for magazines and newspapers. The presumption against the governmental regulation of the speech area certainly was not evident in the case, the court stating that petitioner "shows no other interest in the case. He is not an attorney . . . for the prisoner and he is not related to her . . ." *State v. Lewis*, 80 So.2d 685, 686 (Fla. 1955) applied the "clear and present danger test" to validate a contempt commitment of petitioner for attempting to influence a court "agent." On the facts the decision was sound, except for the fact that the same judge whose character was assaulted by the words tried the charge. Also validated was a legislative regulation on hotel advertising, see note 147 *supra*. Once again the decision, on the facts, was attractive (fraud possibilities were curbed).

161. See, generally, Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909); Brockelbank, *Role of Due Process in American Constitutional Law*, 39 *CORNELL. L.Q.* 561 (1954).

PROCEDURAL DUE PROCESS

(I) *Administrative Due Process*¹⁶²

The interaction between substantive (police power) due process and procedural due process is quite interesting. The cases illustrate that the state police power strength definitely relates to the strength of procedural due process.¹⁶³

There were several administrative cases in which the regulated individual received no hearing. In 1954, the Court¹⁶⁴ held in a case in which a master foreman's license was revoked without notice or hearing by a city board of plumbing examiners that under the particular facts no hearing was necessary. In the peculiar state of the pleading the then ex-plumber admitted never being lawfully initially entitled to receive the license; in effect he requested that the Court order the city board to issue the license, subsequently having a hearing to determine the legality of the license revocation. The Court stated that under these circumstances a notice and hearing was not necessary before revocation, although a city ordinance required notice and hearing. Certainly, under facts showing no admission that the initial licensing was illegal, a notice and hearing should be required. In *State v. Carbonelli*¹⁶⁵ the Court required no hearing when a village judge was removed from office under a charter permitting such action by the council at any time and without cause. The decision was sustained on the theory that the judge had no "right." The use of the "privilege-right" terminology is unfortunate since it generally conceals the real basis of the decision—there obviously being some reason why the situation is characterized as one or the other. However, on the facts, the decision was defensible since civil service requirements were absent.¹⁶⁶

In *Kline v. State Beverage Department of Florida*,¹⁶⁷ the Court surprisingly¹⁶⁸ required notice and hearing before revocation of a liquor license, on the theory that such a license had sufficient property qualities about it, at least for procedural due process purposes. The Court also apparently desired a statement of reasons for the revocation. Perhaps the decision announces a new restrictive Court policy over the traditionally large state police power¹⁶⁹ and such subjects as liquor; that power may not be permitted to sustain summary administrative procedures. At the time of issuance of the present license it was true that on the record the license was rather definitely shown to be illegal under existing state law.

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

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

164. *State v. Dunne*, 71 So.2d 746 (Fla. 1954).

165. 80 So.2d 913, 914 (Fla. 1955).

166. See *Johnson v. Trader*, 52 So.2d 333, 336 (Fla. 1951).

167. 77 So.2d 872, 874 (Fla. 1955) (constitution or statutes, the basis?)

168. See *Holloway v. Schott*, 64 So.2d 680 (Fla. 1953).

169. In line with a general weakening of the state tax power over gambling; see *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954).

There were several cases in the last two years which involved administrative hearings incomplete in some detail. In two of these, the judicial concern was over varying uses of judicial notice by the administrative hearing officer. In *Jackson v. Mayo*¹⁷⁰ the petitioner was released from prison on parole under supervision of the Florida Parole Commission; that Commission issued to petitioner notice charging violation of the parole which on its face had required petitioner to "avoid injurious habits" and not to "associate with persons of harmful character." At the hearing the Commission did not introduce evidence but took judicial notice of an investigator's report which was part of its files. The statute authorized revocation when the Commission had "reasonable ground" to believe a parolee had violated his parole. The statute also provided that the state and the parolee could enter evidence at the hearing. The Court insisted upon a hearing of a fuller nature under the statute even if not "formal in nature". The basis for the decision seemed to be, at least partially, procedural due process, in the sense that the charges should be known to the parolee who should have an opportunity to meet them by competent evidence, and be heard by counsel upon the probative force of the evidence adduced by both sides. Running through the decision there seemed to be an indication that the legislature constitutionally could have abolished a hearing altogether in parole situations, obviously referring to the great state police power, in the premises. However, where a hearing is required by statute the Court apparently will insist that due process requirements be met in interpretation of the statutory hearing requirement.

*Seaboard Airline R.R. Co. v. Gay*¹⁷¹ was a very interesting recent case. Several administrative hearings were involved. In the first, the State Comptroller gave plaintiff notice of a hearing to consider valuation of plaintiff's property. The officer announced he had assessed the property at a certain figure, thereby not accepting the plaintiff's evaluation. The plaintiff was then noticed of another hearing before the Railroad Assessment Board. At that hearing the plaintiff offered evidence; the Railroad Assessment Board did not. That Board accepted the Comptroller's figure. The Court held that the Comptroller could make up his mind without evaluating plaintiff's evidence and arguments since his conclusion was not binding on the Board, indicating that every hearing does not have to be a full hearing where there are a series of hearings in an administrative process. The Court further held that due process did not require such a board be bound by evidence, as a matter of record, in property assessment hearings. In assessment matters, therefore, the assessment board may depend on the "best information" available, including judicially noticing the judgment of employees. Only notice and the opportunity to be heard were required under the statute and due process, and the administrative

170. 73 So.2d 881 (Fla. 1954).

171. 74 So.2d 569 (Fla. 1954).

officer could use his "informed judgment." The administrative decision was apparently sustained because the Court realized a *de novo* review was possible with only a "presumption" in favor of the validity of the assessment in the Court. The Court indicated due process would require this under these circumstances. Also mentioned, in passing, was the fact that Board members did not have to submit themselves to cross examination concerning the basis for their assessment. The Court properly put their determination beyond a judicial veil.¹⁷²

The Court in *In Re Smith*¹⁷³ permitted the Florida Hotel and Restaurant Commission to suspend a hotel license, with the suspension based on evidence of a possibly illegal nature. Florida law permits the Hotel Commission to suspend any hotel license when gambling operations are found to be carried on in the hotel. The Commission also has the power to inspect every hotel without warrant. In this case, a deputy hotel commissioner, after obtaining entrance to the hotel, was refused admittance to certain rooms by the hotel operator, a colored man. The Commissioner seized him and used abusive language, enabling the Commissioner to enter the rooms. The Court recognized the abuse and the severity of the search but permitted the admittance of the evidence to sustain the license revocation. Fortunately the Court also related the decision to the fact that "a licensee who obtained . . . a license as such as herein involved becomes bound to . . . conform with the . . . statute," a possible constitutional waiver in advance, then.

In a 1954 decision¹⁷⁴ the Court stated that when the plaintiff company was denied a building permit to construct a gasoline station on its property by a city building inspector, and the inspector acted after receiving a letter, adverse to the application, from the city commission who employed him, the action of the inspector was valid. The record indicated the inspector realized he had discretion regardless of the letter.

The only observation that the writer can make on the Florida administrative due process field is that the Florida Supreme Court when weakening procedures, ordinarily necessary for due process in administrative hearings, generally relates the weakening to either the strength of the state police power over the subject matter, some fiction such as the "privilege-right" dichotomy, or to the fact of a subsequent court review which *will* reflect procedural due process.

(II) *Judicial Due Process (Civil)*

Notice—The Court, in *Moore v. Lee*,¹⁷⁵ an original action for custody of a child in which a petition was filed to modify a former decree, after the time for final appeal had run, ruled on the notice necessary. The original

172. See *Morgan v. United States*, 313 U.S. 409 (1941).

173. 74 So.2d 353-355 (Fla. 1954); noted 9 *MIAMI L.Q.* 108 (1954).

174. *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544, 546 (Fla. 1954).

175. 72 So.2d 280, 282 (Fla. 1954).

decree had retained jurisdiction of the cause. More than eight months had passed from the final decree and no notice was served upon the defendants by mail, or otherwise. Only a copy of the petition to modify was sent to the former attorney of record. The Court held that in proceedings of this sort the defendant was not entitled to actual service of process but was unquestionably entitled to "an adequate and proper notice of the new proceedings." The Court would not presume that the attorney of record for a party in an action, after the original appellate period had run, still had authority to bind the party in subsequent proceedings to modify. In another case, *Mullin v. County of Polk*,¹⁷⁶ the issue was the legality of a deed from a county when the property was acquired in a suit to quiet title for delinquent taxes. The statutory procedure directed the clerk to mail to the person claiming title to the property a copy of a newspaper containing notice that suit had been started, if the name and address of that owner appeared on the tax roll. If this were impossible, then the notice was to be mailed to the person last paying taxes on the property, according to the tax collector's receipt book. In this case there had been an error in the receipt book and the notice was never received. The issue was whether due process required more. It was stated that it would be "an intolerable burden on the clerk" to make independent examination in every case to determine if the information in the collector's office was accurate. The Court indicated that with an action in rem such notice was legal if the statutory procedure was followed. Perhaps the entire case is conditioned on the factor that the state tax police power was involved.

The *International Shoe* case¹⁷⁷ possibilities were not extended by the Court in *Gessler v. Gessler*,¹⁷⁸ in which a child custody proceeding was brought by the father who established his Florida domicile with his minor children. The action was against the mother, a resident of Pennsylvania; the mother having forcibly taken the children back to Pennsylvania. Constructive service was obtained on the defendant. The Court held that "when the custody of minor children is involved they must be in the jurisdiction of the Court before the question will be considered."

In a somewhat dissimilar situation¹⁷⁹ the Court permitted the Secretary of State to accept service of process, under a law so authorizing him, for non-residents doing business in the state. The statute was here applied to defendant non-residents who had purchased an orange grove in Florida and listed it with the plaintiff for sale. The plaintiff sued on that listing contract. The Court followed the modern trend in validating this procedure and utilized the *International Shoe Company* approach in finding

176. 76 So.2d 282, 284 (Fla. 1954).

177. 326 U.S. 310 (1945).

178. 78 So.2d 722 (Fla. 1955) (The mother's Florida activity was striking, to say the least).

179. See *State v. Register*, 67 So.2d 619 (Fla. 1953).

the "certain minimum contacts" with the state necessary so the suit maintenance did not offend "traditional notions of fair play and substantial justice."

The *International Shoe Company* language was also decisive in *Mason v. Mason Products Co.*,¹⁸⁰ in which service of process was attempted on a foreign corporation by service upon the corporation's salesman, who had a tenuous relation with the defendant in that the salesman was not paid on a regular basis, had only taken two orders for the defendant, and was under no supervision. The Court cited the *International Shoe Company* case in determining that the "contacts" here were not substantial enough; the relationship between the salesman and the defendant was such that he had no "legal or moral duty to report and properly handle a summons served on him as agent" of the defendant.

Hearing—The legality of judicial notice and hearing was passed upon in several recent cases. In one case,¹⁸¹ the plaintiff was expelled from membership in a private country club without notice of charges and without hearing. The by-laws of the club permitted such an expulsion. The Court determined that expulsion of private club members cannot be accomplished in this manner. Partially, the Court reached this result on the basis of "principles of natural justice". The Court also determined that the statute under which the club was incorporated demanded the same. Probably the Court was determining that the judiciary in Florida will insist upon certain procedural requirements with reference to expulsion of private club members.

At issue in *Atkinson v. Atkinson*¹⁸² was the applicability of Rule 3.15, 1954 Florida Rules of Civil Procedure. The rule authorized an attachment against a party, upon the affidavit of his adversary, when that party failed to perform a "specific act." The plaintiff's wife in a divorce suit had obtained a decree ordering defendant to pay certain sums for the support of their minor children. Subsequently she filed with the clerk of the circuit court an affidavit setting out the date, and amount of the last payment, and the sum the defendant was in arrears. The clerk issued a writ of attachment directed to the sheriff ordering him to take the defendant into custody and to detain him until compliance. The Court reflected that serious constitutional problems would be involved without a notice and hearing with a situation as here presented. Apparently the rule should only be applied to simple acts such as a failure to execute a conveyance, while more complicated facts ("Myriads of situations that might [be involved in justification of such a nonpayment and the] varying possible punishments . . . calling for a considered judgment" made the difference) require

180. See 67 So.2d 763 (Fla. 1953).

181. *LaGorce Country Club v. Cerami*, 74 So.2d 95, 96 (Fla. 1954); noted 8 FLA. L. REV. 125 (1954).

182. 80 So.2d 464-465 (Fla. 1955).

full hearing. In *State v. Amidon*¹⁸³ the Supreme Court held that a criminal court of record lacked jurisdiction to enter a nunc pro tunc order for inclusion of a provision for forfeiture of money, alleged used in a lottery, in the judgment and sentence. The Court stated that an adjudication in a court of proper jurisdiction based on notice and hearing would be necessary before such a forfeiture would be valid. Agreement between parties did not change the conclusion. It is difficult to determine whether the Florida constitution or statutes were referred to in sustaining this decision.

The Court also validated, in *Belcher v. Florida Power & Light Co.*,¹⁸⁴ the statutory speedy procedure in eminent domain for obtaining possession of property heretofore similarly validated in *State Road Department v. Forehand*.¹⁸⁵ This law permits a speedy procedure under which defendants have counsel, appraisers are appointed and proper monies paid into court. In the *Belcher* case, the Court permitted the clothing of a public service corporation with the special power of condemnation.

In *State v. Lewis*,¹⁸⁶ the Court missed an excellent opportunity to develop a judicial procedural due process measure when the same judge tried a case "involving a personal assault on his character"; as pointed out by Justice Terrell, concurring, such an attack is practically impossible of judicial determination without a "show of resentment and all that such an impulse leads to. When there is this danger, he should not hesitate to request that another judge take his place." Justice Terrell did not suggest this on a due process basis.

Review—In *Seaboard Airline Ry. Co. v. Gay*,¹⁸⁷ the Court in a proceeding on petition for a writ of certiorari to review an order of the Railroad Assessment Board stated that a full determination of all questions in the circuit court and appellate review in the Florida Supreme Court was "due process of law." In a more recent case¹⁸⁸ the Court came to a like conclusion in another assessment situation, apparently requiring as part of due process, a de novo review of the hearing procedures, conclusions and findings of fact on the administrative side, with reference to assessments. This definitely was necessary as the Court, unfortunately, had not required adequate due process procedures in the administrative hearings which preceded the court review. In *Wilson v. McCoy Mfg. Co.*¹⁸⁹ the Court held that the law providing that orders of the full Industrial Commission be subject to review only by writ of certiorari, filed in the Florida Supreme Court, was not unconstitutional in abrogating the right to appeal.

183. 68 So.2d 403, 404 (Fla. 1953).

184. 74 So.2d 56 (Fla. 1954).

185. 59 So.2d 901 (Fla. 1952).

186. 80 So.2d 685, 694 (Fla. 1955).

187. 68 So.2d 591, 594 (Fla. 1953).

188. *Seaboard Air Line R.R. v. Gay*, 74 So.2d 569, 572 (Fla. 1954).

189. 69 So.2d 659, 661 (Fla. 1954).

The Court stated that the right to appeal is not "essential to due process of law" at least in the fullest sense of those words. However, apparently some type of review would be necessary under due process—a fuller review than certiorari to a lower court of record, since there "the parties have had their day in a . . . court."

(III) *Judicial Due Process (Criminal)*

The Court determined a number of factors to be a part of the total picture of adequate criminal judicial due process in Florida. In *Jefferson v. Sweat*¹⁹⁰ the Court stated that the legislature could enact that one fact be presumptive or prima facie evidence of another fact, if there was a rational connection between the two, so that the inference was not unreasonable and the accused was afforded a fair opportunity to make his defense in rebuttal. Justice Terrell stated this did not take from defendant his presumption of innocence since he could, with any proof he had, rebut the state's prima facie case. Under this language it would seem the state, within rational bounds, could shift the burden of proof. At issue in the case was the federal statute taxing gambling in relation to a state law which stated in effect that the holding of a federal tax stamp for gambling would be held in the state courts as prima facie evidence of violation of the state gambling laws, and that upon production of the stamp, a grand jury could indict the holder without further proof. On rehearing,¹⁹¹ Justice Matthews stated that in this case there was no evidence of any gambling, only possession of the gambling stamp, and that was not sufficient, since one presumption cannot be the basis of another. The Court insisted upon independent proof that the gambling laws had been violated.¹⁹²

In another case¹⁹³ at issue was whether the defendant was denied the right to a "fair and impartial trial by the refusal of the trial court to order a change of venue." The motion filed for defendant was supported only by her affidavit and the certificate of her counsel that "he has investigated the prospects of procuring supporting affidavits and it is *impracticable*, and he *believes impossible* because of the hostile sentiments existing in Swannee County, Florida, against his client." The motion was traversed by prosecution, with 37 affidavits of citizens to the effect that the defendant could receive a fair trial. Defendant failed to offer any affidavits or evidence at the hearing and the Court denied the motion.¹⁹⁴ At best the constitu-

190. 76 So.2d 494 (Fla. 1954).

191. *Id.* at 498. Difficult to determine which constitution involved, or which particular constitutional phrase.

192. The trial area was a committing officer rather than a trial on the substantive charges.

193. *McCullum v. State*, 74 So.2d 74 (Fla. 1954).

194. Court stated defendant failed to conform to requirements on such motions because of absence of supporting affidavits and fact that counsel's certificate allegations were made on belief, not supported by oath or affirmation.

tional facts offered by the defendant did not demonstrate much significance, particularly as the lower court's position was aided by careful questioning of prospective jurors.

The Court in *State v. Whisnant*¹⁹⁵ passed on the adequacy of information allegation. The major criteria was the sufficiency of the allegations to assist defendant in preparing his defense.

On the use of violence to obtain evidence, the Court recently held¹⁹⁶ that when an officer merely tapped defendant on the shoulder, exhibited his badge and said that he wanted to talk to him, the defendant's rather extreme fear was an abnormal reaction. The Court used the "reaction of a reasonable man" test here; therefore, the confession was not void for lack of a voluntary element, or because of violence.

The Court decided two cases,¹⁹⁷ in which the competency of defendants to enter a plea of guilty was at issue. In one, the defendant alleged being under the influence of a drug and therefore not legally competent to enter a plea. In the other, the defendant argued that he had not realized the consequences of the guilty plea. The Court stated in the latter case that "the petition was not verified or signed by the petitioner personally, and he clearly did not come within the rule applied in those cases where, because of extreme youth, inexperience, illiteracy, etc., a prisoner who pleads guilty without benefit of counsel may be permitted to withdraw his plea." The discretion of the trial court obviously should generally control in these cases.

There were a number of other recent due process (criminal) decisions. The Court stated¹⁹⁸ that the Legislature "may by special or local law declare stated things to be unlawful and provide by valid general law a punishment for failure to abide thereby." However, in all cases the initial law had to declare the prescribed conduct "unlawful" or to be a "misdemeanor." In *North v. Chapman*¹⁹⁹ the Court stated "neither the statute nor the Constitution requires that the name or identity of the executioner be further identified." The statute stated that the executioner should be the first assistant engineer of the Florida State Prison. Also, at issue in the recent criminal procedural due process portrait was the validity of a law on appointment of medical experts to examine the defendant and the experts' further examination by court and counsel.²⁰⁰ This was stated not to be a deprivation of "due process."

195. 80 So.2d 611, 612 (Fla. 1955).

196. *Simring v. State*, 77 So.2d 833 (Fla. 1955).

197. *Stratton v. State*, 77 So.2d 865 (Fla. 1955); *Shoemaker v. Mayo*, 75 So.2d 690 (Fla. 1954).

198. *Taulty v. Hobby*, 71 So.2d 489, 490 (Fla. 1954).

199. 74 So.2d 787, 789 (Fla. 1954) (probably a due process issue possibility).

200. *McVeigh v. State*, 73 So.2d 694 (Fla. 1954), appeal dismissed, 348 U.S. 885 (1955). Decision is not very clear.

Probably the most important decision in the last two years was *Sneed v. Mayo*.²⁰¹ There the Court indicated that when the record in the trial court did not relate the "steps necessary to constitute due process . . . affirmatively reflected by the original transcript . . ." and affirmative statements by a petitioner for a writ of habeas corpus alleged a similar lack of due process procedures, a "sufficient predicate" would have been laid to entitle the petitioner to a "writ . . . in the first instance." The Court strongly stated that it was not bound by the *record* of due process but the test was whether in fact due process was observed. To put it another way, the failure of the trial court to observe the law on how to make and record a waiver of jury was not held "ipso facto" a failure of due process. In these cases the procedure of the Court has been to refer the habeas corpus petitions to a circuit judge as a commissioner of the Supreme Court to take testimony on the issues and report findings of fact and conclusions of law.

(IV) *Clarity or Definiteness of Expression*²⁰²

The Court in *Phillips Petroleum Co. v. Anderson*²⁰³ passed on a city ordinance which read that "all of the above listed uses in a business 'A' district shall be permitted . . . provided that no operation shall be carried on which is injurious to the operating personnel of the business or to other properties, or to the occupants . . . by reason of the objectionable omission of cinders, dust, dirt, fumes, gas, odor, noise, refuse matter, smoke, vapor, vibration or similar substances or conditions." The company requested a building permit to build a gasoline filling station on its property. The record indicated that the building inspector, the board of adjustment, and the lower court had come to different conclusions on interpretation of the ordinance. The Supreme Court invalidated the law on that basis, that it was void for vagueness *and* was an invalid delegation of legislative power. These two constitutional principles are quite differentiable and it is difficult to determine from the Court's statement which principle the decision is actually based upon. Perhaps the vagueness only goes to the delegation. The Court insisted that there be an "intelligible principle" to guide the administrative agency, and the law be fixed "with such certainty that they not be left to the whim or caprice of the administrative agency."

CONSTITUTIONAL FACETS OF PROCEDURE²⁰⁴

(I) *Bail*

The Florida Constitution, Declaration of Rights, Section 9 states that "all persons shall be bailable by sufficient sureties, except for capital offense

201. 69 So.2d 653-655 (Fla. 1954).

202. One might argue over where to place this section. See Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955).

203. 74 So.2d 544, 547 (Fla. 1954).

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

where the proof is evident or the presumption great." In *Lloyd v. State*²⁰⁵ the Court did *not* mention this constitutional statement and required the trial court test for bail to be discretionary ". . . in the light of the facts and circumstances of each particular case." The trial court judge was permitted, as an element of that discretion, his desire to "break up this type of offense." In a habeas corpus proceeding to determine legality of defendant's detention on a first degree murder charge, without bail, the circuit court was ordered²⁰⁶ to permit defendant to examine state's witnesses as to the crime elements, including defendant's state of intoxication and passion when the crime was committed—this since the problem was whether the "proof is evident or the presumption is great." Both intoxication and passion factors, of course, disturb the first degree murder picture clarity. A "full hearing" was necessary on constitutional bail. This decision, while not apparently restrictive of law enforcement practices, would seem excellent to procedurally strengthen the bail privilege.

(II) Jury

In *McVeigh v. State*,²⁰⁷ a murder trial, the issue was the validity of a law authorizing appointment of medical experts to examine defendant and the examination of the experts by court and counsel. It was held not a deprivation of the constitutional trial by jury. A refusal of a trial court to order a change of venue, because of impossibility of obtaining a fair trial in the county, was sustained.²⁰⁸ The Supreme Court's evidentiary requirements to support a venue change, with its attendant possibilities of a less hostile jury panel, perhaps carves the venue change out of the constitutional trial by jury.²⁰⁹ The lower court also validly held that a physician-patient relationship between the murdered doctor and six veniremen was not objectionable in itself.²¹⁰ *Sneed v. Mayo*²¹¹ made a second appearance in the Supreme Court. In that case, the petitioner initially sought to obtain release from imprisonment on original habeas corpus proceedings in the Florida Supreme Court. The element of unusualness was that petitioner convinced the court that a hearing on the merits of his arguments was imperative. Petitioner's letter to one of the justices mentioned that he was poor, uneducated, only 21 years old at trial and unfamiliar with things legal. He insisted he so informed the trial judge and that he objected to trial without jury. The prison custodian's answer denied the essentials

205. See 79 So.2d 778 (Fla. 1955).

206. *State v. Kelly*, 68 So.2d 351 (Fla. 1953).

207. 73 So.2d 694 (Fla. 1954), *appeal dismissed*, 348 U.S. 885 (1955). Federal and state law argued.

208. *McCollum v. State*, 74 So.2d 74 (Fla. 1954).

209. Perhaps the presumption *against* the change could be softened—particularly with minority defendants in cases involving the extraordinary hostility of, say, a small county. Of course, the due process clause is a possibility, see *Moore v. Dempsey*, 261 U.S. 86 (1923).

210. One does feel slightly uneasy on reading this case.

211. 69 So.2d 653 (Fla. 1954). The first time was 66 So.2d 865, 870-871 (Fla. 1953).

in petitioner's letter. Attached to the answer was a certified copy of what trial testimony there was and an affidavit by the trial judge to the effect that petitioner had waived a jury trial. The lower court record showed only that there was no jury trial. The Supreme Court stated a preference to rely on the "official court record—the only vehicle through which a court of general jurisdiction can speak officially." This was silent on any waiver of the "right" to trial by jury made in "open court." This silence was held to throw serious doubt on the legality of trial. Obviously, judges would have to insist that waiver be made in open court and that it appear "affirmatively either from the record proper or from the transcript." The judge's affidavit was held incompetent. The burden of proof at the hearing on the merits of petitioner's claim was placed on the petitioner. Speculation on the number of records which do not reflect such waivers was fascinating. The Court on the issues made by the pleading referred the matter for hearing to a circuit judge as Court commissioner to make findings of fact and law. That judge found as a matter of *actual* fact that the petitioner did request court trial, but that failure to obtain a record waiver required by law demanded reversal. The Court in the present case wisely backtracked, placed the entire problem in a procedural due process setting, and permitted the actualities at the trial—here a procedurally valid jury waiver—rather than omissions of record, to control.

(III) *Double Jeopardy*

There were several cases involving the Florida Constitution, Declaration of Rights, Section 12, which provides that "No person shall be subject to be twice put in jeopardy for the same offense." In *Bizzell v. State*²¹² there was a prosecution for embezzlement, under an information charging the crime during several months, including September, 1952. At the trial, and apparently at the defendant's insistence, the state's proof was limited to time periods *other* than September. After an acquittal a new information charged embezzlement during that month. Constitutional double jeopardy was found under the test "If the facts so charged were found to be true they would have warranted a conviction upon the first information. . . ." So the limitation of proof by the State at the first trial was meaningless. In *Deal v. Mayo*,²¹³ a Florida law, providing a maximum punishment of one year for deserting a child or withholding from the child the means of support, was held to state *one* offense, with the result that separation into two counts was double jeopardy. In another case²¹⁴ the Court struck down as too indefinite an information, partially using as a basis of decision that such indefiniteness might lead to "the danger of a second prosecution."

212. 71 So.2d 735 (Fla. 1954).

213. 76 So.2d 275 (Fla. 1954).

214. *State v. Russee*, 68 So.2d 897, 898 (Fla. 1953).

The Supreme Court again²¹⁵ stated that where a mistrial was granted in "absolute necessity in the interest of justice" or on the *defendant's* motion, double jeopardy was not an issue. In the case the state tried to use a witness not listed with defendant and a mistrial was granted defendant.

(IV) *Privilege of Counsel*

The Florida Constitution, Declaration of Rights, Section 2, states that the accused "shall be heard by himself, or counsel, or both." In the section, *supra*, on constitutional trial by jury²¹⁶ the second appearance of *Sneed v. Mayo* was discussed on that point. In that case the petitioner also used the constitutional attorney privilege path. He claimed that he requested counsel, in addition to the allegations already mentioned. The custodian's answer was similar on this issue, as was the trial judge's affidavit. The Court spelled out a good deal of general law on this subject, and, being the latest pronouncement, is of interest. Waiver was possible when accused was of "mature age and judgment." Otherwise? There was no absolute duty of court appointment of counsel "for indigent defendants except where capital punishment is involved." Record silence inferred that defendant waived benefit of counsel. This amounted to a presumption, to be overcome by a "showing that the accused was incapable, because of age, ignorance, or lack of mental capacity, of representing himself." Defendant's capacity was a factual issue. A finding on this point by the "trier of facts", supported by evidence of record, would stand on review. Lack of such "finding" meant the competency issue could be raised in a "post conviction proceeding." The court made a plea for complete trial transcripts, which was understandable. The trial judge's affidavit was held incompetent. The case was set for hearing on the merits, and the burden on this issue was placed upon petitioner. It was difficult from reading the decision to determine whether the conclusion was based upon state or federal constitutional law. The result of referring the matter to a circuit judge for hearing was a conclusion by that judge that, in fact, petitioner was competent to "dispense with the aid of counsel." The Court gave the whole case a strong procedural due process flavor on the second time around.

In *Shay v. State*,²¹⁷ it was indicated that there might have been a constitutional issue had "the jury believed" the "story" that defendant was

215. *McLendon v. State*, 74 So.2d 656, 657 (Fla. 1954); see 8 *MIAMI L.Q.* 183-4 (1954).

216. See note 211 *supra*. Similar in result was *Stratton v. State*, 77 So.2d 865 (Fla. 1955), in which defendant alleged pleading guilty without benefit of counsel, with ignorance of consequences. Upon this motion trial court conducted a hearing, and motion denied. The Court gave weight to facts that the petition was not verified or signed by petitioner personally and petitioner-defendant was mature, college-educated and competent to act for himself. See BEANY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955); Fellman, *Right to Counsel Under State Law*, 55 *Wisc. L. REV.* 281 (1955).

217. 70 So.2d 363, 364 (Fla. 1954).

not permitted to interview a lawyer from Friday to Tuesday. Of course, the police denied the story.

EQUAL PROTECTION SITUATION²¹⁸

The strength of the equal protection limitation on governmental power to a greater or lesser degree depends upon the relative strength of the governmental police power.²¹⁹ Probably no law is applied to all persons at one and the same time. Children, the insane, women, men, the unhealthy, corporations and wage earners, to name a few, have been the basis of classification in the operation of law. So the basic premise we start with is that *some* classifications, in application of law, are legally possible. That delightfully vague statement is made even more ephemeral by the test,²²⁰ that a classification is valid unless demonstrated to be not "reasonable." It would probably be impossible to draw a line between the "reasonable" of police power exercise and the "reasonable" of equal protection. Both are, finally, a matter of how the Florida Supreme Court subjectively thinks. As with the review, by the court, of police power regulations, the review of equal protection situations lies largely in the self-restraint the court chooses to impose upon itself.

(I) *The Non-Negro Cases*²²¹

Where the Florida Supreme Court generally permits large police power activity in the state the equal protection limitation is quite limp. A good example is *Southern Bell Telephone & Telegraph Co. v. State*²²² where the Court permitted the legislature to distinguish between railroad and telephone companies in a law forcing the latter, at their own expense, to relocate facilities to accommodate construction of a new toll highway. The decision recognized that highways provide "one of the clearest fields for the exercise of the police power." The apparently plenary police power over bar admissions validated one of those uneasy-reading acts providing admission for a unique class of one individual.²²³

Zoning classifications had rough judicial treatment during the Survey period; this is unfortunate since the supposedly strong legislative presumption of validity in zoning must be applied to equal protection *as well as*

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

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

220. E.g., *Rodriguez v. Jones*, 64 So.2d 278 (Fla. 1953). Whether a law is "reasonable" is still the test for economic due process, see Note, 53 COL. L. REV. 6 (1953); *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954).

221. This classification is a natural in Florida.

222. See 75 So.2d 796 (Fla. 1954).

223. See *Barr v. Watts*, 70 So.2d 347 (Fla. 1954). Justice Terrell, dissenting, at p. 352, thoughtfully described the act and raised the equal protection—really unequal privilege—possibility. Similar approach in *Fuller v. Watts*, 74 So.2d 676, 678 (Fla. 1954).

police power arguments to be effective. In *Charnofree Corp. v. Miami Beach*,²²⁴ the Court invalidated a zoning ordinance removing from authorized uses in larger hotels, a number of retail stores, leaving barber shops, tobacco shops and so on. One of the reasons stated was that equal protection demands that zoning ordinances treat similarly situated hotels alike. This ordinance was enacted after the other hotels were constructed. In these zoning cases²²⁵ it was difficult to distinguish (if the Supreme Court intended that possibility) between the weakness of the state police power and the strength of the equal protection guarantee.

In the last *Survey*²²⁶ this writer blandly stated that classification under the state taxation power proved relatively simple to maintain. There has been a drastic constitutional change, through *Volusia County Kennel Club v. Haggard*.²²⁷ At issue was the validity of an additional tax upon the dog racing track operators' "take", a tax based upon the amount of daily gross receipts with a different rate imposed upon each daily pool according to amount. The argument stressed equal protection under the Florida and federal constitutions. The Court strongly rejected a police power over gambling enterprises greater than that over businesses less well regulated at common law, and this by referring to legislative statements abrogating the "noxious odor" traditional to gambling. Apparently a tax must do more than just be classified on the basis of differing income; definitely some sort of supposed ideal standard of equality would have to be behind this requirement²²⁸ that all race tracks be treated alike regardless of "take." On the federal constitution, the Court (amazingly, considering the approach the same year in *Board of Public Instruction v. State*),²²⁹ determined to be controlled by equal protection decisions of the United States Supreme Court which, as Justice Terrell's dissent²³⁰ stated, could easily be distinguished—gambling taxation and grocery taxation being what they are. On rehearing²³¹ the Court brought the decision partially under a cloak

224. 76 So.2d 665, 669 (Fla. 1954) (the police power, with reference to zoning, did not appear in a strong light in case).

225. See *Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428, 430 (Fla. 1954).

226. 8 MIAMI L.Q. 185 (1954)—I take it all back. In justification, however, it is easy to point to *Smithers v. North St. Lucie River Drainage Dist.*, 73 So.2d 235 (Fla. 1954). There an act attempted (with adequate procedural safeguards) to reclassify district lands so that, for tax purposes, the more valuable land be distinguished from the less valuable. The act recited facts to indicate the necessities of the situation. A correctly used legislative presumption of validity obtained the proper decision. Difficult to determine which clause(s) of which constitution(s) involved.

227. 73 So.2d 884, 887, 891 (Fla. 1954).

228. Probably that equality damned by Anatole France.

229. 75 So.2d 832, 835-838 (Fla. 1954) (Here the Florida court showed great hesitancy in following a very clearly written decision of the United States Supreme Court, and on equal protection, too), see note 238 *infra*.

230. 73 So.2d 884, 890 (Fla. 1954). The Court relied on *Stewart Dry Goods Co. v. Lewis*, 294, U.S. 550 (1935) and *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936). These cases do not control economic taxation under the Fourteenth Amendment, beyond the factual situations involved; see *Tigner v. Texas*, 310 U.S. 141 (1940) and *Sholley, Equal Protection In Tax Legislation*, 24 VA. L. REV., 229, 388 (1938); *Berman, The Chain Store Tax*, 25 TAXES 627 (1947).

231. 73 So.2d 884, 895 (Fla. 1954).

of respectability by indicating²³² that a tax too closely related to income would run aground on the constitutional income tax bar. The Court opened one possibility to the legislature by a privilege tax geared to legislative findings evaluating the particular privilege;²³³ balancing this, the Court absolutely closed the judicial door under both constitutions to any tax based "solely on the amount of the gross receipts of a business . . . recognized by the Legislature as being a legitimate business." This statement would seem to foreclose *any* tax, on practically *any* business, which effectively would distinguish income.

In *Lynch v. Durrance*,²³⁴ equal protection was stated as an issue under the "Warren Act," one interpretation permitting local laws to vary state-wide prohibition of livestock from running at large, in connection with a uniform basis for tort liability and criminal penalty.

(II). *The Negro Cases*²³⁵

In the last *Survey*²³⁶ this writer stated that in this limited field one can say that Florida constitutional law and federal constitutional law separate. The possible local equal protection of the laws restriction on governmental power was practically nonexistent. The march of the United States Supreme Court up the broad equal protection of the laws avenue, with reference to equal treatment for citizens regardless of color, had not been matched by the Florida Supreme Court. The United States Supreme Court has slowly been crushing the once wide discretionary segregation fields within the states' police power. The then recent Florida decisions could not be characterized as particularly sympathetic to the aspirations of colored citizens to weaken the legal and social segregation framework presently existent in Florida. This attitude on the part of our highest state court was not unnatural considering the mores of the community.

*Board of Public Instruction v. State*²³⁷ presently indicates that *Brown v. Board of Education*²³⁸ has changed nothing in Florida. *Board of Public Instruction v. State* was a school bond issue case in which the Court validated the purpose of the bonds, even though the proposed school bond construction program had built in segregation features. The Florida Court

232. 73 So.2d 884, 890 (Fla. 1954) (The court stated "if the increase in the rate was made to apply to all dog tracks alike" the increase would be constitutional).

233. See LAWS OF FLA., c. 29751 (1955).

234. 77 So.2d 458, 459-460 (Fla. 1955). Also, in *Jefferson v. Sweat*, 76 So.2d 494, 502 (1954) it was indicated that mere possession of a federal gambling tax stamp could not be presumptive evidence of probable cause that gambling laws had been violated, and this is on due process and equal protection grounds. Why was not discussed.

235. With few exceptions, and this is one, this paper does not deal with the Florida Supreme Court's determination of federal constitutional law. See LAWS OF FLA., c. 29746 (1955).

236. 8 MIAMI L.Q. 185 (1954) (footnotes are omitted).

237. 75 So.2d 832-838 (Fla. 1954).

238. 347 U.S. 483 (1954).

stated that the *Brown* decision destroyed all legality surrounding public school segregation;²³⁹ argued that the South is different where ending segregation is concerned (psychological arguments to physical arguments on local patterns of settlement); mentioned the cost in rendering present plants useless and sheltered validating the bond issue behind the *Brown* decision call for implementation argument. The Court's not unnatural distaste for the *Brown* implications was not hidden by reflection that that case "was a great mistake" and would not be enforced in Florida for "a long time."

The various devices²⁴⁰ by which states are attempting to avoid *Brown* may, it is true, be somewhat efficacious in bridging public opinion gaps. School construction programs initiated *after Brown*, however, in deliberately continuing the segregation social patterns perhaps will solidify the *Brown* opposition during what should be the transition period—the argument of *post Brown* cost in rendering valueless *more* buildings being ever-present.²⁴¹ School buildings *do* last a long time.

Justice Mathews²⁴² brilliantly argued for an end to subterfuge. His proposition was that the *Brown* decision definitely invalidated Florida Constitution, Article XII, Section 12, that "white and colored children shall not be taught in the same school, but impartial provision shall be made for both;" that the entire Florida statutory education framework implements Section 12 and that, therefore, *Brown* in effect destroyed the Florida public education legal structure.²⁴³ His statement that there "is no reason why we should dodge this question or why it should only be discussed behind closed doors" really demands that the complex social and economic problem of what Florida citizens want in public education, limited by the *Brown* decision, is a political question, not judicial. Invalidation of Florida Constitution, Article XII, Section 12, would realize just that approach.

In *State v. Mayo*²⁴⁴ the argument was tried by petitioner that the death penalty imposed on him for murder was discriminatory under both constitutions since that penalty for his crime, in his age group, was only meted out to those of his race. A statement of the Florida Bureau of Vital Statistics indicated that during the "12-year period . . . there were 7 deaths . . . of non-white persons in the 15 to 19 year age group, while . . . no deaths . . . of white persons in the same age group." Supposedly at fault was the law permitting a mercy recommendation by a jury. The Court

239. The *Brown* case did too; see e.g., *Segregation in Education*, 34 B.U.L. REV. 463 (1954).

240. Nicholson, *Legal Standing of the South's School Resistance Proposals*, 7 S.C.L.Q. 1 (1954).

241. The Court's cost argument, then, perhaps works both ways.

242. 75 So.2d 832, 840 (Fla. 1954).

243. Another possibility is that the *Brown* case only invalidated specific segregation education requirements in Florida law, leaving a riddled, but operative, body of law. Since the legislative intent throughout the legislative scheme would seem to be in line with Fla. Const. Art. XII, § 12, invalidation of that Article would seem to tumble the entirety.

244. 69 So.2d 307-309 (Fla. 1954) (Waiver of constitutional objection, too).

stated this evidence was of "an inconclusive nature." Certainly more should be demonstrated to invalidate such a sentence on equal protection grounds.

To summarize, as the writer has already suggested, the Florida law on equal protection of the laws and negro segregation doubtless is practically non-existent. At least in practice, federal constitutional law rides pretty much alone.²⁴⁵

UNREASONABLE SEARCHES AND SEIZURES

In 1953²⁴⁶ this writer stated that this provision²⁴⁷ in our Florida constitution had had a healthy life during the proceeding two years, and that perhaps after a few more years of such judicial activity law enforcement officers operating under it would be able to stride confidently up to erring citizens, march triumphantly into court with the results of a *legal* search and seizure and, later, not be disciplined by the Florida Judiciary for a certain lack of prognostic powers²⁴⁸—powers which, this writer believed, no one could demonstrate on then existant materials.²⁴⁹ This legal situation is still not in hand.

(1). *The Automobile Cases*

The searches and seizures restriction on government power insures that in a great number of ordinary police searches there has been a prior en-

245. The real hostility of the Florida Court to the *Brown* decision is simple to record: for example, see *State v. Kelly*, 76 So.2d 798, 803 (Fla. 1954) or *Board of Pub. Inst. v. State*, 75 So.2d 832, 838 (Fla. 1954) (the *Brown* case "was a great mistake."). Many scholars deny this, i.e., ASHMORE, *THE NEGRO AND THE SCHOOLS* (1954). See also, WILLIAMS AND RYAN, *SCHOOLS IN TRANSITION* (1954), for an interesting sociological survey indicating the resistance to *Brown* may have been overestimated, and detailing procedures to facilitate *Brown* operation. See Sutherland, *Segregation by Race in Public Schools Retrospect and Prospect*, 20 LAW & CONT. PROB. 169 (1955).

The Florida Court very recently in *State v. Board of Control*, 83 So.2d 20 (Fla. 1955), stated that the Court was controlled by *Brown*, as modified by the United States Supreme Court in *Brown v. Board of Education*, 349 U.S. 294 (1955). The Florida Court, therefore, took a step toward constitutional legality in relation to equal protection, education and the negro. In the remainder of the decision the Florida Court tip-toed, perhaps, in the opposite direction by interpreting the *Brown* implementation decision, *supra*, to apply to a *graduate law school*. This writer believes the United States Supreme Court, in implementing *Brown*, did not intend to inter *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). This would seem obvious; see *Lucy v. Adams*, 76 S. Ct. 33 (1955). Justice Terrell concurred specially in an unusual opinion; see, e.g., TENBROEK, BARNHART, MATSON, *PREJUDICE, WAR AND THE CONSTITUTION*, pp. 1-99 (1954) for a stereotype which led to unusual constitutional results in World War II. Justices Thomas and Sebring concurred in part and dissented in part; this opinion demonstrates how far the Florida Court strayed from the federal constitutional path.

246. Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q. 187 (1954). See Unpublished Article, Hausler, *Search and Seizure in Florida*, prepared for 1954 Dade County Grand Jury, for a conservative view.

247. FLA. CONST. D. R., § 22 (1951).

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

249. This was simply because the decisions did not lay out a pattern sufficient for predictive purposes.

trance on the scene by a magistrate who has been convinced there is sufficient²⁵⁰ reason for bothering a citizen and his effects. This checks the momentum of the police action. However, resort to the search warrant is impractical in several instances, and the fast moving automobile is one of these.

In *Byrd v. State*²⁵¹ the sheriff received information, within plenty of time to obtain a warrant, that a truck was loaded with moonshine. It was kept under surveillance until driven out at night. The sheriff stopped the truck simply because of his "information." The officers, in walking about the truck, discovered a dripping substance which they stated could be identified as moonshine. They arrested and searched, over the protest of the appellant (who, incidentally, knew his constitutional law²⁵²). The Court stated again the proposition that "a minor traffic violation cannot be used as a pretext to stop a vehicle and search it for evidence of violation of other laws," and that this included a check for driver's license.²⁵³ The officer may only search, without warrant, when he can demonstrate "he had 'probable cause' for his acts or 'reasonable belief' or 'trustworthy information' that the car was engaged . . ." in an unlawful activity. This test is essentially that of the 1953 decision, *Collins v. State*;²⁵⁴ in commenting²⁵⁵ on that case this writer indicated that since this was the language of the law on issuance of search warrants, an officer must have had sufficient reasons to convince a magistrate a warrant should issue, if the officer had applied for one, to arrest and subsequently search. On the theory that the unauthorized stopping did not vitiate all official activity thereafter attempted, the state argued that since the officer saw and smelled the leaking moonshine, an arrest was properly made—validating the search. The Court determined by judicial notice that an officer's sense of smell cannot distinguish only moonshine liquor, and transport of *all* liquor is not illegal. The Court did admit the constitutional unusualness of the smell from dwellings wherein moonshine is manufactured. The lack of "probable cause" to arrest here invalidated the search.²⁵⁶

Earlier the Court held in *Mitchell v. State*,²⁵⁷ that the action of a car driver in throwing bolita packages into brush permitted arrest and search.

250. Qualitatively this depends on the particular state policy.

251. 80 So.2d 694 (Fla. 1955).

252. 80 So.2d 694, 695 (Fla. 1955) (" . . . nobody going in there without a search warrant.").

253. In *Ippolito v. State*, 80 So.2d 332 (Fla. 1955), failure to obey a stop sign was not adequate to initiate arrest and search for lottery materials.

254. 65 So.2d 61, 64 (Fla. 1953).

255. 8 MIAMI L.Q., 188 (1954).

256. Similar was *Ippolito v. State*, 80 So.2d 332 (Fla. 1955) in which officers in a nondescript car, while dressed in plain clothes, ordered appellant to stop after violation of a stop-sign. A chase was had; the Court determined that under the circumstances appellant, never apprised of officer's identity, could flee because of fear of foul play.

257. 60 So.2d 726 (Fla. 1952).

In 1955, *Ippolito v. State*²⁵⁸ was distinguished when lottery materials were knocked from the appellant by violence after a car chase had ended. The voluntary element seemed decisive.

(II). *Statutory Consent (and otherwise)*

The state police power is broad enough to condition hotel licensing so that acceptance of the license authorizes the Florida Hotel and Restaurant Commissioner to inspect hotel premises without warrant. In one case²⁶⁰ deputy sheriffs and deputy hotel commissioners were refused entrance to a hotel. After obtaining entrance the officers were refused permission to search certain rooms until one commissioner coerced the hotel operator. The Court thoughtfully discussed this statutory search field, stating that inspection of premises was tolerated only in connection with the commission duties, which duties included suspension of licenses for violation of gambling laws. The search was not limited to public hotel portions and argument that a guest or operator occupied room did not deter. The "right" of search was as if officers came "equipped with a warrant." Does this mean as limited somehow by the particularity of the warrant language? Justice Terrell,²⁶⁰ concurring, suggested the test for warrant necessity here depends on whether a raid or an ordinary inspection tour is involved. Dayton, Associate Justice, in his dissent,²⁶¹ kindly reviewed the record which did raise a strong implication that *this* inspection was more than "for the purpose of looking at the window screens, lighting fixtures, fire escapes . . ." and so on.

(III). *Arrest and Search*

Here, as in the automobile cases, a valid arrest eliminated the search warrant necessity. In *Baglio v. State*,²⁶² the defendant ran from a jewelry store show window, chased by a screaming employee. A policeman cornered the runners and arrested the defendant who threw her bag down saying that now the officer had the bag would he please let her go. The Court validated the arrest under these facts, and the decision scarcely admits argument. In *Melton v. State*²⁶³ the arresting officer obtained information on defendant's activities by sending someone to buy moonshine from her. Several days after the officer obtained a search warrant he went to the home of defendant, informed her of his mission and, after reading the warrant to her in the kitchen, pulled aside a rug and located the moonshine. The warrant was invalid for search purposes. The questions were whether a lawful arrest was affected by service of the invalid search warrant and

258. 80 So.2d 332 (Fla. 1955).

259. See *In re Smith*, 74 So.2d 353 (Fla. 1954), noted in 9 MIAMI L.Q. 108 (1954). See also 8 MIAMI L.Q. 191 (1954).

260. *Id.* at 356.

261. *Id.* at 358-60.

262. 75 So.2d 218 (Fla. 1954).

263. 75 So.2d 291 (Fla. 1954) (unlawful possession and concealment of moonshine).

whether there was "probable cause" for arrest independent of the search warrant. The Court stated that even though the search warrant stated an order for the person named, it was conditioned on the officer *first* finding the property described. As for the second question, an officer could "arrest without warrant when he has reasonable grounds to believe . . . a felony has been or is about to be committed. . . ." The Court permitted these facts to pass that test, but once again²⁶⁴ held that the intention of the arresting officer controls. Here that officer only intended to arrest if he located the moonshine, making the arrest incidental to the search result. This type of distinction must, to understate, disturb law enforcement officers.

Until recently, the Court has refused to pass on the necessity of relating the seized property and the crime for which the defendant is arrested.²⁶⁵ *Courington v. State*²⁶⁶ probably signals a change. In *Courington*, an officer appeared after an automobile accident and arrested defendant for drunken driving. Witnesses informed the officer that the defendant had placed some papers in the car trunk, and a search turned up gambling implements. The Court insisted that the search had to be "appropriately incident to making effective a lawful arrest for driving while intoxicated." The search here was only made after witnesses had informed. Justice Roberts, dissenting, pointed out²⁶⁷ the Court had been equating the Florida and federal decisions in search and seizure and that the federal rule permitted an adequate search as incident to making a valid arrest.²⁶⁸ Persons so arrested could be searched to find articles which were the means of crime committed, or could possibly aid in escape; he also stated that seizure of instruments of a wholly unrelated crime was valid where the articles were contraband, as here. Justice Roberts, therefore, would ignore the reasonableness of the search and the time involved within which to obtain a search warrant, as beside the point. He indicated that the officer, through the witnesses' words, had justification to arrest.

(IV). *Conclusion*

The Court decided several miscellaneous cases during this *Survey* period. In *Townsend v. State*,²⁶⁹ some law on seizures was pronounced. A beverage department officer had information for several weeks that a truck would carry illegal liquor. He stopped the truck, arrested the driver, and seized the liquor without warrant. He maintained he could see the

264. See *Kramer v. State*, 60 So.2d 615 (Fla. 1952).

265. *Collins v. State*, 65 So.2d 61, 64 (Fla. 1953). See Laws of Fla., c. 29774 (S.B. 402) (effective July 1, 1955).

266. 74 So.2d 652, 653 (Fla. 1954).

267. *Id.* at 654.

268. *United States v. Rabinowitz*, 339 U.S. 56 (1950), annotated, 36 CORNELL L.Q. 125 (1950).

269. 76 So.2d 888 (Fla. 1955) (decided on statute?). See Laws of Fla., c. 29665 (May 17, 1955) and Laws of Fla., c. 29676 (Aug. 2, 1955); See Laws of Fla., c. 29712 (May 30, 1955).

liquor after the truck stopped and that he received consent to search. The unlawfulness consisted in liquor transportation in quantities of more than 12 bottles, except for certain classes of parties specifically excepted in the law. The state failed to show that these exceptions were here not involved (i.e., such as that defendant was no common carrier). The Court refused seizure and forfeiture unless a law authorizing same was strictly followed. The law as to valid search was here severed from the law of valid seizure—neither being a ground to validate the other. The sufficiency of a search warrant was discussed in one decision.²⁷⁰ In another case ²⁷¹ permission was given a police officer to search an automobile and over 24 hours later two other officers searched, with a holiday as the intervening day. It was held that the consent apparently went to the entire police force and, in a time sense, was still valid.²⁷²

SELF-INCRIMINATION

(I) *Criminal Communism*

Self-incrimination in Florida in the last two years has been a fruitful decision area. In *State v. Kelly*²⁷³ the petitioners were held in contempt, and committed to jail for refusing to answer questions before a grand jury. All petitioners claimed the privilege under the Fifth Amendment to the United States Constitution and Section 12, Declaration of Rights, Florida Constitution. The questions concerned the witnesses' contacts with the Communist party or associations affiliated therewith; the witnesses' acquaintance with persons allegedly members of such organizations; and meetings attended by the witnesses at which alleged members of such organizations were present. The Florida Supreme Court equated in meaning, for interpretative purposes, the Fifth Amendment privilege and the Florida privilege; stating in parallel fashion that the federal Smith Act and the Florida legislation on criminal communism should receive similar interpretative treatment. The Court determined from federal decisions²⁷⁴ that under the operation of the federal privilege such questions as these, in federal proceedings, would incriminate the witnesses; the Florida legislation (similar in effect to the Smith Act) in connection with these questions, therefore, would provide a link in the chain of evidence which could be used to incriminate the witnesses. In this determination the Court apparently validated the Florida legislation on criminal communism and determined that the Communist party activities were in the

270. *Bonner v. State*, 80 So.2d 683 (Fla. 1955). The warrant alleged a house was in the city on a street when it was in the county; only one such street was in county and Court emphasized officers had before them a "designation that points . . . to the exclusion of all others . . ."

271. *Shay v. State*, 70 So.2d 363 (Fla. 1954). Two other voluntary consent cases were *James v. State*, 80 So.2d 699 (Fla. 1955); *Simring v. State*, 77 So.2d 833 (Fla. 1955).

272. Recent article in field was Edwards, *Criminal Liability for Unreasonable Search and Seizures*, 41 VA. L. REV. 621 (1955).

273. 76 So.2d 798 (Fla. 1954).

274. Such as *Blau v. United States*, 340 U.S. 332 (1950).

clear and present danger area, from a judicial notice standpoint of world conditions, legislative findings of fact in Florida, and analogous congressional findings of fact. Apparently, therefore, the Florida Supreme Court will interpret the Florida privilege against self-incrimination as the United States Supreme Court interprets the federal privilege.²⁷⁵

(II) *Immunization Problems*²⁷⁶

Florida's immunization statute states that: "no person shall be excused from . . . testifying . . . upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against . . . gaming or gambling . . . upon the ground . . . that the testimony . . . may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may so testify . . . and no testimony so given or produced shall be received against him This law was recently interpreted by the Florida Supreme Court in *State v. Kelly*.²⁷⁷ The ultimate issue was whether the defendant could remain silent because of possible self-incrimination in the state courts. The problem was whether the statute applied since the investigation of the Grand Jury, which questioned the defendant, was on the subject of conspiracy to violate the gambling laws and conspiracy is not mentioned specifically in the statute. The Court stated that "the statute has no application where the subject matter of the investigation is only into an offense not specified in the statute If the subject matter of the investigation . . . had been only a conspiracy to violate the gambling laws, the immunity statute would have had no application, such investigation being only into an offense not specified in and subordinate to the offenses enumerated" That, however, was not the situation here. The subject matter was an investigation into gambling activities and it apparently did not matter that the related subordinate offense was also involved; therefore, the statute being applicable to gambling, it afforded the immunity as to "any possible disclosure of a related conspiracy to violate the

275. In *Boynton v. State*, 75 So.2d 211 (Fla. 1954), the defendant typically interposed the self-incrimination phraseology of both the Federal and Florida constitutions. Involved in the case was the Florida self-incrimination—immunization statute. The Court throughout the decisional language worried over the interlocking effect of the two privileges, so that the witness possibly would be injured by an immunity statute of one or the other government. The Court failed to determine whether federal decisions indicate one cannot plead self-incrimination on the ground that his testimony may be used to incriminate in the State courts. Definitely, the Florida Court insisted that the testimony given by the witness in the federal system under pressure of immunization from penalty cannot be used to prosecute in Florida courts; see also *State v. Kelly*, 71 So.2d 387, 895 (Fla. 1954). The Court stated that the Florida constitutional provision against self-incrimination "protects against the use of testimony compelled under Federal law." The possible interlocking effect of the two constitutional privileges, therefore, is at present in a rather curious state. See note, 26 TEMP. L.Q. 64 (1953).

276. *Ibid.* See *Federal Anti-Subversive Legislation of 1954*, 55 COL. L. REV. 632 (1954).

277. 71 So.2d 887 (Fla. 1954).

gambling laws." So the statute applied. Then the issue became whether the immunity was restricted to offenses mentioned in the statute or "to the offenses necessarily revealed or in answer responsive to an eliciting relevant question." The Court construed "transaction" to refer to "testimony . . . relevant to . . . (and having a) substantial connection with the subject of inquiry." The testimony therefore had to be "relevant to such subject matter." Similarly in *State v. Pearson*²⁷⁸ defendant was informed against for conspiracy to violate lottery laws of the state. The defendant argued that during a grand jury investigation his private records were taken from his home in response to a subpoena from the jury. The defendant also appeared before the body and testified in answer to questions, arguing this immunized him from prosecution under the Florida immunization law. The issue was whether, when such a defendant simply alleged testifying "concerning gambling" before a grand jury that returned the indictment upon which the information was based, the writ of prohibition should issue to stop the criminal court from trying defendant for conspiracy to violate the state lottery laws. The Court stated that there was no complete immunity from prosecution for gambling under the immunity statute "in any form," simply by giving testimony concerning gambling. Immunity was only to be granted from prosecution for offenses "in connection with the specific transactions, matters or things concerning which the accused actually testified or produced evidence." The Court stated that this is as far as the immunity need extend to meet constitutional guarantees. What was necessary was an allegation "as to what the subject matter of relator's testimony before the grand jury was—other than it concerned gambling—that the relator is entitled to the presumption that the information filed against him relates to the 'transaction, matter or hearing concerning which' he there gave evidence." Here, on the showing made, the relator was not entitled to immunization.

In *Lorenzo v. Blackburn*²⁷⁹ a county solicitor was conducting an investigation of gambling and during the investigation summoned the petitioner, who refused to answer questions on the ground of possible incrimination under the motor vehicle law. The question he refused to answer was relative to the subject matter of the investigation of the solicitor, and the immunity statute was held to protect him from prosecution for other offenses against Florida laws. That law immunizes with reference to "any investigation . . . for a violation of statutes . . . against . . . gambling . . ."; the Court stated that an investigation by a county solicitor is such an investigation. Definitely the subject matter of the investigation or trial must be one of the five statutory categories enumerated, but with this requirement met, the immunity is to "any transaction . . . concerning which he may so testify . . ." The Court also stated that if the testimony

278. 68 So.2d 400 (Fla. 1953).

279. 74 So.2d 289 (Fla. 1954).

is "relevant to and has . . . a substantial connection with the subject of inquiry . . ." the immunity attaches if the testimony is a "link in the chain of evidence needed to prosecute such witness thereafter charged for such offense revealed by testimony he was required to give . . ."

(III) Self-Incrimination, Generally

In *Boynton v. State*²⁸⁰ the Court held, as earlier was held in *Florida State Board of Architecture v. Seymour*,²⁸¹ that certain traditional *civil actions* will be determined penalties under the operation of the Florida privilege against self-incrimination. In the *Boynton* case, the state sued under proper legislation to enjoin as a nuisance certain property used by defendant in a lottery operation. An answer was filed in which defendant declined to respond to the complainant's allegations, including interrogatories propounded by the state, all on the grounds that a response would incriminate the defendant in the state and federal courts. The state argued that the Florida immunity statute relieved the defendant from any possible *prosecution*, and that by response to the allegations, he would receive immunity; failure to answer was argued as an admission sufficient to support a decree enjoining the nuisance. The Court held that application of the nuisance law here would involve a penalty, which is, perhaps, a rather extreme extension of the privilege against self-incrimination.²⁸² The Court²⁸³ generally has stated that the privilege was not to protect against the revealing of facts leading to a *civil liability*. The Court, however, rarely seems to decide a case in which a civil liability is defined.²⁸⁴

The operation of the recent federal tax gambling statute and Florida self-incrimination has been troublesome. In *Boynton v. State*,²⁸⁵ where the state, in attempting to enjoin the nuisance, relied on possession of the federal stamp which indicated gambling at the place sought abated, the

280. 75 So.2d 211 (Fla. 1954); noted in 68 HARV. L. REV. 1074 (1955).

281. 62 So.2d 1 (Fla. 1952).

282. See general discussion of the privilege, from conservative viewpoint, 8 WIGMORE, EVIDENCE, § 2250 (3d ed. 1940).

283. See *State v. Kelly*, 71 So.2d 887 (Fla. 1954).

284. E.g., *Florida State Board of Architecture v. Seymour*, 62 So.2d 1, 2 (Fla. 1952). See also *Sheimer v. State*, 82 So.2d 657 (Fla. 1955) (very recent case). In *Scheiner*, the Supreme Court of Florida apparently held that: (1) for the purpose of self-incrimination, attorney disbarment will be distinguished from separation from public employment; (2) the practice of law is no mere "privilege", in the sense that the state is substantively and/or procedurally unrestrained in disbarment; (3) the ordinary criminal due process procedures may be required in disbarment; (4) the factual inference leading from a claim of the privilege (the Court did not distinguish between the federal and state) will not, alone, support disbarment; (5) an attorney, where the issue has to do with association with the Communist Party, has a duty in the disbarment hearing to satisfy the trier of fact of his *present* situation with reference to the Party; (6) the state must *prove* more than just a claim of the privilege (probably places the burden of proof on the Communist issue on the state) against self-incrimination as a basis to disbar. The Court did not deal with the Florida Bar disciplinary procedures. The decision is in line with the position of some scholars on the validity of factual inferences from bare assertion of the privilege, e.g., Griswold, *The 5th Amendment Today* (1955).

285. 75 So.2d 211 (Fla. 1954). See notes 275, 280 *supra*. This was a very confused decision.

Court interpreted the federal case, *McNabb v. United States*,²⁸⁶ in extraordinary fashion, stating that "if payment of the 10 per cent excise tax for the privilege of gambling is to be treated as a confession, it is condemned by McNabb." The Court stated that securing a confession is the same by force as by operation of law. The Court then definitely foreclosed any attempt to make such a stamp holder, paying the Federal tax, testify in an admission sense, under the self-incrimination clauses of either, or both, constitutions. The Court's statement was that both governments were in the "gambling business" and that the governments grant a privilege and take a "cut" and so on. The Court requested "fair play and sportsmanship" with the gambling profession on the theory that it would be unfair under the circumstances to take a "cut", use the evidence required filed, and "entrap and convict" thereon. An interesting attitude toward self-incrimination, this.

The Court placed the burden on the witness in *Lorenzo v. Blackburn*²⁸⁷ to "lay a sufficient predicate for his failure to answer the question." Also it was for the trial court to determine if the particular answer would incriminate, and the Supreme Court insisted upon "substantial and imminent danger" of prosecution.

Earlier in Florida²⁸⁸ the Court had needlessly combined the privilege of self-incrimination and the privilege against illegal searches and seizures. The Court recently²⁸⁹ may have done the same thing with a statement (referring to an allegation that a constable had seized defendant's papers) that a finding "insuring that these private papers contained [no] inculpatory matter" had not been made.

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

The legal developments in Florida during the last two years in state, county and municipal bond financing have not been startling. Public works and improvements are necessities which have to be financed. Without constitutional restrictions the various creatures of government could, and probably would, borrow money without reference to the tax structure the future would bear. The Florida Constitution, Article IX, Section 6, contains the major restrictions on such bond issues:

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

286. 318 U.S. 332 (1943).

287. 74 So.2d 289, 291 (Fla. 1954); *State v. Kelly*, 71 So.2d 887 (Fla. 1954) (same).

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

289. *State v. Pearson*, 68 So.2d 400, 402 (Fla. 1953).

This provision refers only to "bonds," practically insures no *state* bond issues and definitely relates the business of paying for public improvements to the local people who will bear the tax burdens. The legal history of this constitutional endeavor can be characterized in terms of the devices the Supreme Court of Florida has fashioned to get around it.²⁹⁰ The description given the instrument in the particular decision will be followed—generally "bond" or "certificate."

(I) *State Agency Financing*

Various state agencies have been permitted by the court to enter bonding arrangements which do not involve general obligations of the state.²⁹¹ The recent cases in this area were not unique.

In *State v. Florida Turnpike Authority*,²⁹² the argument that the state would have a *moral* obligation to discharge the debt of proposed turnpike bonds failed. The title to, and the body of, the law authorizing the issue stated the bonds to be solely payable from tolls and that no debt of the state was incurred; the form of the proposed bonds provided that the state credit was not pledged. The Court indicated these provisions would preclude coercive collection from the state and, further, noticed the lenders.²⁹³

*State v. Florida State Improvement Commission*²⁹⁴ was a suit to validate revenue bonds to finance Broward county bridge system construction. The Commission contracted with the State Road Department; under that agreement the Commission was to issue the bonds, take title to the system and lease it to the Department. Tax funds accruing to the Department for expenditure in the county were pledged to service the bonds, which on their face so restricted payment. The Department agreed to pay rental, however, from other sources, for all current operational costs and, if necessary, monies to complete construction. This arrangement found Court approval on the issue whether a general pledge of credit had been contracted. This contract, then, did not demonstrate a pledge of taxing power to service the bonds.

(II) *County and Municipal Financing*

In a very real sense, about all one can state that occurred in this area of constitutional debt was that quite a number of counties and cities

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

291. *Id.* at 301-304.

292. 80 So.2d 337, 343 (Fla. 1955).

293. *State v. State Bd. of Ed.*, 67 So.2d 627. (Fla. 1953) was similar. The FLA. CONST. Art. XII, § 18 provided for creation of fund from motor licensing tax. The State Board was authorized to issue anticipation certificates. The issuance was validated since the court found this constitutional provision related the sole way to service the issue; the state could not be required to pay even if the taxes were insufficient, and the face of bond defined the sole payment source.

294. 71 So.2d 146 (Fla. 1954). See *State v. Florida State Improvement Comm'n.*, 72 So.2d 28 (Fla. 1954) (the fact the Court determined the taxing power was not pledged to service bonds was important).

validly borrowed money. Some possible decisional distinctions were drawn, however, in the Supreme Court's ever present efforts to write exceptions into this constitutional restriction. It is difficult to determine whether the county-municipal problems, inherent in governmental bonds under Article IX, Section 6, are distinguishable on any basis founded in reality. Constitutional municipal financing seems to follow the general exceptions laid down by the Supreme Court for counties.

Certificates payable from improvement revenues.—*Orlando v. State*²⁹⁵ exemplifies this judicial exception to Article IX, Section 6, very well. There the city, by ordinance, established a special fund and deposited therein all special assessment tax liens which the city agreed to levy against the private property benefitted by the proposed improvement. The necessity of freeholder vote, of course, was the issue. It was held that certificate liquidation solely from the proceeds "of an independent revenue producing asset" made the debt not a constitutional "bond". Attorneys drafting certificate forms should be cognizant that the Court emphasized the safety of a certificate form relating payment to be solely from the improvement revenue or the lien, or the same statement in the resolution or law authorizing the issue.²⁹⁶ Other decisions were similar to the *Orlando* case in approach and result.²⁹⁷

Certificates payable from other than ad valorem taxation—*State v. Miami*²⁹⁸ is typical of this court constructed exception to Article IX, Section 6. The Court validated a city authorized bond issue, serviced solely from sums payable to the city by the Florida Power and Light Company franchise. The Court related this sole revenue pledge to the apparent legal disability of a future taxing power pledge. A similar anticipated cigarette tax pledge also sailed to safety.²⁹⁹ Notice to lenders through the certificate face, and so on, here too was emphasized.³⁰⁰

(III) *Miscellany and Conclusion*

The state police power to borrow money, with the constitutional inhibitions involved, is dealt with in the police power section. However, there were several miscellaneous decisions in constitutional financing. In *State v. North Bay Village*³⁰¹ the issue was whether registration of freeholders prerequisite to bond election was constitutional in view of Florida Constitution Article IX, Section 6, and Article VI, Sections 1 and 2. The

295. 67 So.2d 673 (Fla. 1953); See *Hubbard Const. Co. v. Orlando*, 67 So.2d 675 (Fla. 1953).

296. See *State v. Dade County*, 70 So.2d 837 (Fla. 1954) (net revenues of Port Authority facilities, placed in special fund, to service).

297. *State v. Miami*, 72 So.2d 655 (Fla. 1954) (warehouse revenue certificates); *State v. Dade County*, 70 So.2d 837 (Fla. 1954).

298. 76 So.2d 294, 296 (Fla. 1954).

299. *State v. Coral Gables*, 72 So.2d 48 (Fla. 1954); *State v. Tampa*, 72 So.2d 371 (Fla. 1954) (same); accord: *Riviere v. Orlando Parking Commission*, 74 So.2d 694 (Fla. 1954).

300. See *State v. Coral Gables*, 72 So.2d 48 (Fla. 1954).

301. 76 So.2d 886, 887 (Fla. 1955).

Court thoughtfully described the necessary constitutional niceties. The Florida State Turnpike Authority bonds, to be serviced solely by tolls, were validated as not pledging the faith and credit of the state under Article IX, Section 10.³⁰²

In conclusion the writer would like to reiterate, in this Survey, that unless one is particularly interested in governmental financing, this constitutional provision, as such, means little. Yet to the initiated there is much of import here. Prior to the adoption of Article IX, Section 6, it has been stated that the "only acts necessary for the issuance of . . . bonds and the levy . . . and collection of ad valorem taxes were to have a delegation in the Legislature from the county who would put through a special act . . . and then bonds could be issued . . . without any vote of the freeholders or the people who had to pay the bill."³⁰³ The differing rationale behind the various twists³⁰⁴ the Supreme Court has taken are simply that "to suggest that the freeholders will not wisely determine the matter is to suggest the unwisdom of democratic government"³⁰⁵ as opposed to the attitude that democracy has been exercised when the local people vote for local representation. The pressure by the counties and cities to finance needed long-range improvements—and without "democratic government's" second chance vote—is presently mirrored in the Florida decisions.

LEGISLATION AND THE CONSTITUTION

There are several provisions in the Florida Constitution which require a certain awareness on the part of the legislature in the mundane business of mechanics of the legislative process³⁰⁶ or the equally mundane problems of constitutional drafting.³⁰⁷ The recent cases interpreting these provisions were not particularly notable.³⁰⁸

(1) Article III, Section 16

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

The Court stated that³⁰⁹ the purpose of this provision "was to prevent surprise or fraud upon the people and legislature." Apparently the title

302. *State v. Florida Turnpike Auth.*, 80 So.2d 337 (Fla. 1955).

303. *State v. Fla. State Improvement Comm'n*, 60 So.2d 747, 750 (Fla. 1952).

304. See note 290 *supra*.

305. See note 303 *supra*, at p. 759.

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

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

308. See, generally, Manson, *The Drafting of Statute Titles*, 10 IND. L.J. 155 (1934) and Cloe and Marcus, *Special and Local Legislation*, 24 KY. L.J. 351 (1936). See, also, Comment, *The Legislative Subject Requirement*, 9 MIAMI L.Q. 431 (1954).

309. *State v. Florida Turnpike Auth.*, 80 So.2d 337, 342 (Fla. 1955).

should be "comprehensive" and the acts purpose "plain." The law here judged was validated since all portions were relevant to the title or "connected with the subject." Held unconstitutional³¹⁰ was a child molester law, the title to which was insufficient to give notice to the public of "drastic amendments to the rape statute" in changing the penalty for rape when the female age was fourteen years or under. Also constitutionally frowned upon was the failure of the same law to amend as Article III, Section 16, was held to require. The law embraced eleven different crimes defined by other laws and did not publish *at length* the statutes, with reference to rape, which were amended.³¹¹

(II) Article III, Section 20

This section states that the "Legislature shall not pass special or local laws in any of the following enumerated cases: that is to say, regulating the jurisdiction and duties of any class of officers, or for the punishment of crime . . . regulating the practice of courts. . . ."

A suit³¹² to determine the constitutionality of a civil service law requiring certain procedures in hiring and firing deputy sheriffs depended on whether deputy sheriffs were "officers" in the constitutional sense. Deputy sheriffs were held a "class of officer." In another case³¹³ a local act, which prohibited the State Comptroller from withholding from a city the distribution of cigarette tax money, was held valid on the ground that the law imposed duties on the officer merely incidental to the main purpose of the law. In *Lynch v. Durrance*³¹⁴ the Court may³¹⁵ have held that portion of a local law imposing a fine, of not "to exceed \$500.00 or imprisonment . . . not to exceed six months . . .," invalid. The law curbed livestock from roaming at large.

(III) Article III, Section 21³¹⁶

Slight judicial activity was evident here. In *State v. Mellick*³¹⁷ a special act called for a referendum on whether it would become operative. The

310. *Copeland v. State*, 76 So.2d 137 (Fla. 1954).

311. See Justice Mathews, concurring to order, in *State v. Gray*, 74 So.2d 114, 125 (Fla. 1954). The Justice suggested the invalidity of a general appropriation act, the title to which failed to mention fixing the governor's salary and attempted to amend without re-enacting and publishing at length.

312. *Blackburn v. Brorciu*, 70 So.2d 293 (Fla. 1954).

313. *State v. Tampa*, 72 So.2d 371 (Fla. 1954).

314. 77 So.2d 458, 459 (Fla. 1955).

315. It is difficult to determine. Perhaps a similar case was *Taulty v. Hobby*, 71 So.2d 489-490 (Fla. 1954) (Court stated the legislature "may by special or local law declare stated things to be unlawful and provide by valid general law a punishment for failure to abide thereby.")

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

317. 68 So.2d 824 (Fla. 1954).

fact that the act election date coincided with the city general election date did not invalidate the act.

Under this provision special or local laws affecting cities may be enacted when the bill is submitted to qualified electors. In one case³¹⁸ the entire bill was not printed on the ballot, only the purpose was described. It was stated that: "All that the Constitution requires . . . is that the voter have notice of that which he must decide. It is a matter of common knowledge that many weeks are consumed in advance of election, apprising the electorate of the issues . . . and that in this day and age of radio, television . . . it is idle to argue that every proposition on a ballot must appear at great . . . length." The requirement was that the ballot fairly advise the voter sufficiently to enable an intelligent decision.

(IV) Conclusion³¹⁹

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

CONCLUSION³²⁰

It is still difficult for this writer to resist the temptation of a few concluding remarks upon the health of Florida constitutional law during the *Survey* years.³²¹

Bluntly, the constitutional legal scene is ailing and a diagnosis defies simplicity. Since this characterization of the situation would amply describe much of Florida law, in general, more must be attempted—and it is possible to localize several causation factors. An incredibly over-worked state supreme court explains much of the inadequacy. Maintenance of enlarged judicial reviewing practices by the Court, when elsewhere such judicial power

318. *Hill v. Milander*, 72 So.2d 796, 798 (Fla. 1954).

319. Several miscellaneous provisions in this general constitutional field were litigated. FLA. CONST. Art. III, § 30, restrictive of provision subjects in salary appropriation acts of public officers and appropriations for current expenses, was determined to have a purpose "to prohibit the general appropriation bill for state expenses (from being) laden with items that tend to hamper the conduct of government;" *State v. Florida Racing Comm'n*, 70 So.2d 375, 379 (Fla. 1954). See also Justice Mathews, concurring to order, in *State v. Gray*, 74 So.2d 114, 125 (Fla. 1954). Also passed on were FLA. CONST. Art. III, § 33, stating that "No statute shall be passed lessening the time within which a civil action may be commenced on any civil action existing at the time of its passage," in *H.K.L. Realty Corp.*, 74 So.2d 876, 878 (Fla. 1954) (stated that law not violative as long as "a reasonable time is provided for the enforcement of the cause of action before the restriction becomes effective.")

320. This conclusion is that printed two years ago, which attempted a slight evaluation of that prior *Survey* period. The story is the same, apparently only the names of the parties have been changed.

321. See Alloway, *Florida Constitutional Law*, 8 MIAMI L.Q. 202 (1954).

properly dwindles, provides a partial explanation. Perhaps the entirety is reached by reflection on the antique, poorly drafted, and just as poorly amended state constitution. Only slight exploration of these is feasible here. The heavy time burden under which the Court struggles undoubtedly parallels the analytical nightmare in Florida constitutional law—a nightmare which only thoughtful analysis can dissipate. The decisions, at times, have wrongly decided federal constitutional issues,³²² or so failed to differentiate between such issues and the state constitutional law that the actual basis for decision is impossible to determine.³²³ Statements, unnecessary to decision, impregnate the cases.³²⁴ A Florida judiciary favorite is the shotgun approach to constitutional law—a number of constitutional grounds being urged by the court for invalidation purposes.³²⁵ This approach is particularly deadly to the reach of legislative power in the state. Another untidy practice has been a comingling of statute and constitutional law to the extent that analysis is impossible.³²⁶ Other decisions have not been *specifically* related to a *particular* clause in the constitution.³²⁷ The meaning of such decisions always remains unclear. It might be suggested that the Florida Supreme Court simply write fewer decisions. This is not a brilliant or original suggestion, yet under it, quantity, not quality, undoubtedly would suffer.³²⁸ There are other, less obvious, suggestions.³²⁹

322. E.g., the *Hawkins* decision, see *Miami Herald*, Oct. 20, 1955, p. 1, col. 7, in which the Florida Court, supposedly moving under the protective coloring of *Brown v. Board of Education*, *supra*, appointed a commission to take testimony to determine when it will be possible for Hawkins, who applied six years ago, to enter the University of Florida Law School without creating "public mischief." The *Brown* case under no hypothesis overruled *McLaurin v. Oklahoma State Regents*, 330 U.S. 637 (1950), which required *immediate* unconditioned entrance to the Oklahoma University (*graduate*) Law School; see note 245 *supra*. See *Phillips v. West Palm Beach*, 70 So.2d 345, 347 (Fla. 1954) (somewhat unsupported federal constitutional statement) and *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954) (very uneasy federal constitutional interpretation).

323. E.g., *Miami Beach v. Silver*, 75 So.2d 817 (Fla. 1954); *Smithers v. North St. Lucie River Drainage Dist.*, 73 So.2d 235 (Fla. 1954); *McVeigh v. State*, 73 So.2d 694 (Fla. 1954) (if the Court, in the particular instance desired to parallel federal and state law, it would seem wise to so indicate).

324. *Deal v. Mayo*, 76 So.2d 275 (Fla. 1954); e.g., *Clearwater v. Caldwell* 75 So.2d 765 (Fla. 1954) (constitutional argument unnecessary to decision).

325. E.g., *Miami Beach v. 8701 Collins Ave.*, 77 So.2d 428 (Fla. 1954) (probably equal protection and substantive due process); *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544 (Fla. 1954) (due process and improper delegation).

326. E.g., *Armstrong v. State*, 69 So.2d 319 (Fla. 1954). See *Lambert v. State*, 77 So.2d 869, 871 (Fla. 1955) (the "application of these and other principles [?] we think removes respondent from the class defined . . .")

327. E.g., *Atkinson v. Atkinson*, 80 So.2d 464, 465 (Fla. 1955) (Court merely stated "under the Constitution . . .") A different example was *LaGorce Country Club v. Cerami*, 74 So.2d 95, 96 (Fla. 1954) (the denial of "minimum procedural safeguards" was related to "principles of natural justice.")

328. Why make it easy for those who insist that the present appellate process is really adequate—no intermediate appellate court system or revision of our present system seems necessary when the Court quantitatively is up-to-date. See note 7 *supra* for possible intermediate appellate court relief.

329. A great part of the problem is simply adequate analysis, sufficiently translated to the bar. Compare: *Boynton v. State*, 75 So.2d 211, 216 (Fla. 1954) ("For these reasons and others which I have not explored I do not think the state can . . .")

Judicial self-restraint is difficult to over-emphasize in constitutional law. Constitutional revolutions have recently taken place which have successfully breached an over-powering wall of judicial supremacy.³³⁰ The hard won presumptions of legislative correctness are of *extreme* necessity, since so much of constitutional law is purely a subjective area directly reflecting the judges' personality and background.³³¹ In a modern state the police power, restricted to health, safety and morals, is a poor thing. The administrative process limited by passé separation and delegation of power arguments crumbles before modern problems.³³² The possibility of yet other constitutional revolutions—filtering from the federal to the states—may soon be realized.³³³ Contraction of Florida judicial power will facilitate entrance thereof on the Florida legal stage.

These concerns the Florida Supreme Court rapidly can correct. Fairness compels, however, the admission that an ultimate, other than partial, solution to Florida constitutional ills undoubtedly necessitates a modern constitution.³³⁴

with the well-reasoned *State v. Kelly*, 76 So.2d 798 (Fla. 1954) (excepting the concurring opinion at page 803); *Belcher v. Florida Power & Light Co.*, 74 So.2d 56 (Fla. 1954); *Moore v. Lee*, 72 So.2d 280 (Fla. 1954). The Court also has a reverence for the American Jurisprudence work (and like publications) which is unfortunate—these are not particularly brilliant sources for constitutional law. The Court apparently relied heavily on such works in many cases. E.g., *Sunny Isles Fishing Pier v. Dade County*, 79 So.2d 667, 669 (Fla. 1955); *Southern Bell Telephone & Telegraph Co. v. State*, 75 So.2d 796, 800 (Fla. 1954); *Clearwater v. Caldwell*, 75 So.2d 765, 767 (Fla. 1954); *In re Smith*, 74 So.2d 353, 356 (Fla. 1954) (Corpus juris relied on); *Lippow v. Miami Beach*, 68 So.2d 827, 829 (Fla. 1953). Two Florida law encyclopedias are newly on the market—reliance on the analysis and policy judgments inherent in such works would be unjustifiable—in relation to a state supreme court and the state constitutional law.

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

331. The Florida Court in an admirably frank opinion, *Miles Laboratories v. Eckerd*, 73 So.2d 680, 682-683 (Fla. 1954), simply rejected the Florida Legislature's economic judgment. Why not the same open approach in *Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954), in which the invalidation certainly required the same subjective economic imposition? Any difficult constitutional decision—any possible ambiguity in constitutional statement—results in real, though often concealed, judicial legislation; read Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 550 (1948).

332. Unsympathetic judicial treatment wrecks the administrative process. Of course, the lack of a state administrative procedure act helps the judicial hostility to remain at high tide; absence of traditional judicial procedures, however, may result in a more expert judgment. See Dession, *The Trial of Economics Issues of Fact*, 58 *YALE L.J.* 1019, 1242 (1949).

333. See CORWIN, *TOTAL WAR AND CONSTITUTION* (1st ed. 1947). For example, the vast constitutionally accommodated legislative-administrative changes of great economic-social depth, developed in a nation state which majestically maintains political and civil "rights," are well described in FRIEDMAN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* (1951). Increasing economic complexity in our social life probably will again result in importation of English social-economic legislative experimentation.

334. E.g., the many recent constitutional problems attendant on the untimely death of Governor McCarty amply prove the point.