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Scott Denson

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FLORIDA'S CONSTITUTIONAL SHIELD: AN EXPRESS RIGHT TO BE LET ALONE BY GOVERNMENT AND THE PRIVATE SECTOR

SCOTT DENSON*

Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.¹

I. INTRODUCTION

THE *United States Constitution* includes piecemeal protections of individual civil liberties. The government cannot search our homes without cause,² cannot prevent us from bearing arms,³ cannot silence political speech,⁴ and cannot interrogate accused criminals without providing access to advice by counsel.⁵ The Constitution, however, weaves no mystic web about our private selves. As long as the government observes the fragmented protections guaranteed by the Constitution, both the government and the private sector may invade private areas unprotected by state law.

The limited nature of the constitutional right to privacy was succinctly described in *Katz v. United States*.⁶ In *Katz* the Federal Bureau of Investigation eavesdropped on a private telephone conversation by connecting electronic devices to the outside of a public telephone booth used by a man suspected of illegal gambling.⁷ *Katz* argued that the government intruded upon his right to privacy and committed a

* The author thanks Warren Husband, whose insight was instrumental in completing the skeletal framework of this Comment; Nancy Jack, whose emphasis on correct and detailed supporting documentation added greater sinew and muscle to that framework; and Kim Stott, whose insistence on clarity helped bring color to its cheeks.

1. FLA. CONST. art. I, § 23.

2. See U.S. CONST. amend. IV.

3. See *id.* amend. II.

4. See *id.* amend. I.

5. See *id.* amend. VI.

6. 389 U.S. 347 (1967).

7. *Id.* at 348.

search and seizure that violated the Fourth Amendment.⁸ The government countered that a public telephone booth was not a constitutionally protected area.⁹ It also claimed, in the alternative, that even if Katz had a reasonable expectation of privacy within the four walls of the closed booth, the government never invaded this area.¹⁰

Katz clarified earlier decisions that may have indicated the protections afforded by the Fourth Amendment were only to be asserted within certain places.¹¹ The Court explained that the Constitution protected people, not places,¹² and that its reach extended to any activity reasonably intended to be undertaken in private.¹³ The Court, however, refused to recognize a constitutionally protected general right of privacy.¹⁴ Such a general right of privacy, wrote Justice Stewart, was protected by state, not federal, law.¹⁵

Thus, *Katz* recognized the states' authority to protect their citizens' general right of privacy. The Florida Supreme Court accepted that authority in *State v. Sarmiento*,¹⁶ where the police wiretapped an undercover narcotics officer's conversation in a suspect's home. The court held that although Sarmiento discussed the sale of heroin with the undercover officer, the officer had no right to electronically transmit the conversation to associates outside the suspect's home without a warrant.¹⁷

Although the transmission did not violate the Fourth Amendment,¹⁸ the court found it was prohibited by article I, section 12 of the *Florida*

8. *Id.* at 349-50.

9. *Id.* at 351. Traditionally, the Court considered certain areas, such as the home, so intimately personal that they should be constitutionally protected. *Id.* at 351 n.8 (citing *Weeks v. United States*, 232 U.S. 383 (1914)). Other areas, such as an open field, were deemed too public to prevent warrantless entry by authorities. *Id.* (citing *Hester v. United States*, 265 U.S. 57 (1924)).

10. *Id.* at 351.

11. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 512 (1961) ("[A] decision [that intrusion of a 'spike mike' into a heating duct in Silverman's home violated the Fourth Amendment] is based upon the reality of an actual intrusion into a constitutionally protected area."); *see also Lopez v. United States*, 373 U.S. 427, 439-40 (1963) (Fourth Amendment did not bar law enforcement agent from taping conversation in Lopez's office where the agent entered with Lopez's permission and the tape was made solely to corroborate the agent's testimony at trial).

The Court in *Katz* cited to *Silverman* and *Lopez* and stated that "[i]t is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' . . . but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." *Katz v. United States*, 389 U.S. 347, 352 (1967).

12. *Katz*, 389 U.S. at 351.

13. *Id.* at 351-52.

14. *Id.* at 350-51.

15. *Id.*

16. 397 So. 2d 643 (Fla. 1981).

17. *Id.* at 644-45.

18. *See id.* at 646 (Alderman, J., dissenting).

Constitution,¹⁹ which guaranteed "[t]he right of the people to be secure in their persons, houses, papers and effects against . . . the unreasonable interception of private communications by any means."²⁰ The court reasoned that every person has a reasonable expectation of private communication within his or her home.²¹ Even if the *United States Constitution* did not prevent interception of such communications, the people of Florida had assured additional protection through their state constitution.²² Moreover, the court deemed it "[a] fundamental task of the judiciary" to preserve the rights so created.²³

Thus, *Sarmiento* accepted the authority offered by *Katz*. If the general right to privacy must be shielded by the individual states, *Sarmiento* established that Florida's courts will protect any such rights constitutionally created by its citizens. However, for reasons not stated in its analysis of *Sarmiento*, the court based its decision solely on the privacy protections afforded by the search-and-seizure provision of the *Florida Constitution* despite the adoption of the privacy amendment by Florida's voters on November 4, 1980.²⁴

Since the adoption of the privacy amendment to the *Florida Constitution*, the state's district courts of appeal have addressed its provisions in more than fifty cases.²⁵ Beginning with *Florida Board of Bar Examiners Re: Applicant*,²⁶ the Florida Supreme Court has repeatedly construed the meaning and extent of the state privacy right,²⁷ showing

19. *Id.* at 644 (citing FLA. CONST. art. 1, § 12).

20. FLA. CONST. art. 1, § 12. Note, however, that *Sarmiento* preceded the November 1982 adoption of the conformity amendment to article I, § 12 of the *Florida Constitution*. This amendment, which became effective on January 3, 1983, provides that "[t]he right of the people to be secure in their persons, houses, papers and effects . . . against the unreasonable interception of private communications . . . shall be construed in conformity with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court." *State v. Hume*, 512 So. 2d 185, 187 (Fla. 1987).

21. *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981).

22. *Id.*

23. *Id.*

24. Article I, § 23 was adopted by public referendum on November 4, 1980. The final vote was 1,722,980 in favor, 1,120,302 opposed. Gerald B. Cope, Jr., *A Quick Look at Florida's New Right of Privacy*, FLA. B.J., Jan. 1981, at 12, 14 n.3 [hereinafter "*Cope, Privacy*"].

25. See, e.g., *Parnell v. St. Johns County*, 603 So. 2d 56 (Fla. 5th DCA 1992); *State v. Brewster*, 601 So. 2d 1289 (Fla. 5th DCA 1992); *Doe v. State*, 587 So. 2d 526 (Fla. 4th DCA 1991); *Forrester v. State*, 565 So. 2d 391 (Fla. 1st DCA 1990).

26. 443 So. 2d 71 (Fla. 1983).

27. Cases essential to understanding the state right to privacy and the elements of a successful claim under article I, § 23 include *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S. Ct. 1572 (1992); *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 111 S. Ct. 288 (1991); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989); *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989); *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533 (Fla. 1987); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452

attorneys how to measure and frame viable claims. However, although the courts have provided ample material, no commentator has yet outlined a framework to guide the analysis of privacy claims.²⁸ In fact, commentators have largely ignored both the need for the framework and the landmark cases that would make its construction possi-

So. 2d 921 (Fla. 1984); *Applicant*, 443 So. 2d 71; *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980), *adopting* 362 So. 2d 160 (Fla. 4th DCA 1978) (holding before the adoption of article I, § 23 that a competent patient had the right to refuse life-sustaining medical treatment).

28. One commentator has listed four approaches to constitutional analyses:

1. *The Primacy Method: State Constitutional Analysis First, Supplemented by Federal*

The primacy approach looks to the state constitution first, treating the federal Constitution as supplemental filler.

....

2. *The Independent Method: Simultaneous Evaluation of State and Federal Constitutions*

The independent method of constitutional analysis calls for evaluation of both state and federal provisions to determine protection afforded under each even if analysis at one level is dispositive of the issue

3. *The Interstitial Method: Federal Constitutional Analysis First, Supplemented by State*

The interstitial approach mirrors the primacy approach, looking to the federal Constitution first and treating the state constitution as supplemental. If the federal Constitution is dispositive, then state constitutional analysis is not triggered.

....

4. *The Lockstep Method: State Constitutions at the Vanishing Point*

The lockstep approach calls for adoption of the federal standard when there are analogous federal and state constitutional provisions.

Michael J. Mello, *The Jurisdiction To Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 946-49 (1991).

Mello argues that the Florida Supreme Court uses the primacy approach in article I, § 23 cases involving abortion, the interstitial approach in right-to-die cases and a primacy approach influenced by a lockstep mandate for search-and-seizure claims in disclosure cases. *Id.* at 960-61. Mello's guidelines for constitutional analysis are useful in determining how state courts will apply article I, § 23 to various facts. He cites *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989), as an example of the interstitial interpretation in a right-to-die case. *Id.* at 961 n.188. However, *Wons* is analyzed using Florida common law rather than federal constitutional law. Generally, the supreme court has used the primacy approach in other right-to-die cases. See *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (applying Florida common law to interpret the "fundamental right of privacy . . . expressly enumerated in article I, section 23 of the Florida Constitution").

Florida courts also apply a primacy analysis to disclosural cases—those involving the right to withhold private information—because article I, § 23 protects only "except as otherwise provided herein" and article I, § 12 requires search and seizure in strict conformance with the Fourth Amendment to the *United States Constitution*. See also *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987) (analyzing disclosure case under state's "strong, freestanding right of privacy . . . [protecting] those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions").

We may accept Mello's thesis that the outcome of a case may partly be forecast by deciding what law will be applied. Mello, *supra*, at 942-61. However, it is still uncertain what varying standards of review will be applied to the privacy amendment cases, what tests will be applied under those standards, what facts will raise a colorable claim, and what ends will be pursued by the courts.

ble. These failures, coupled with the broad protection promised by what this author considers the provision's facial ambiguity and the high standard of review imposed by the supreme court,²⁹ have led to a burgeoning caseload of privacy claims.³⁰

On another front, Florida's privacy provision has been read only to protect against governmental intrusion into personal privacy.³¹ This interpretation, following early textual analyses developed before Florida's first construction of the provision, is contradicted by widespread judicial dicta and analyses indicating the law perhaps could be extended to prohibit certain invasions by the private sector.³² The interpretation also conflicts with any reasonable application of the traditional tools used to construe the *Florida Constitution*.³³

This Comment has two purposes. First, I will argue that the privacy amendment adopted by the voters as article I, section 23 of the *Florida Constitution* provides an express right of privacy against intrusions by the private sector. Second, I will analyze the right to privacy, describing both its elements and the standard of review courts apply to intrusive actions. However, because no case involving private sector intrusion has been decided, I will analyze the right to privacy by construing the law in light of relevant cases involving the public sector.

II. THE PRIVACY AMENDMENT: A SEARCH FOR ITS PROPER SCOPE

Laws are typically created by the Legislature, then construed by the judiciary and evaluated by the critics. Constitutional amendments, however, may take a different course. After the privacy amendment was proposed by the Constitution Revision Commission,³⁴ it was ana-

29. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) ("The right of privacy . . . demands the compelling state interest standard"). The scope of this standard, however, is limited to public sector cases.

30. Article I, § 23 is cited in 71 appellate decisions, approximately one-third of which have been reported since March 31, 1989. See, e.g., cases cited *supra* note 25.

31. See, e.g., *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462, 463 (Fla. 1st DCA 1987); *Winfield*, 477 So. 2d at 547.

32. See, e.g., *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 375 (Fla. 1984) (Overton, J., concurring) ("Because the proper parties and facts are not before this Court, I would not address the issue of whether a civil action for invasion of privacy could be maintained against persons who use personal, intimate information . . . for strictly private purposes totally unconnected with governmental accountability, but would recognize that this could be a justiciable issue in a future proceeding"); see also *Williams v. City of Minneola*, 575 So. 2d 683, 688 (Fla. 5th DCA 1991) (quoting above language in *Forsberg*). See also *infra* notes 87, 108-27, and accompanying text.

33. See *infra* text accompanying notes 88-99 for a discussion of the methods used to construe the constitution.

34. Generally, article XI, § 1 requires that the Legislature propose the constitutional amendment. However, in 1968, article XI, § 2 was added to create a Constitution Revision Com-

lyzed by the critics³⁵ before the public adopted it by referendum. Only then was it judicially construed. Consequently, the courts could consider three elements in divining the scope of the new provision. The effects of each of these—the framers' intent, persuasive critical analysis, and the will of the adopters—will be considered separately.

A. *The Intent Underlying the Proposed Privacy Amendment*

The history of Florida's constitutional privacy provision has been fully analyzed elsewhere.³⁶ The purpose of this section is instead to glean from those analyses guidance to the intent behind the Commission's efforts and the public policy and other secondary concerns that may have limited the framers' efforts.

Article I, section 23 developed in three stages. First, at the opening meeting of the Constitution Revision Commission, Ben F. Overton, a commissioner and then-Chief Justice of the Florida Supreme Court, described the need for a constitutional provision protecting individual privacy against governmental and private intrusion.³⁷ In opening remarks quoted repeatedly in court decisions construing the intent of the amendment, Justice Overton declared:

Because government in its operation does affect more citizens, the task of this Commission to review our basic constitutional document is even more critical to ensure constitutional protection of individual rights.

. . . .

And who, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business . . . ? There is public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage It is a new problem that should be addressed.³⁸

Second, the Commission held meetings across the state seeking citizen input, then referred the matter to its own Ethics, Privacy, and

mission. It provided that recommendations from the Commission be submitted directly to the Secretary of State. Patricia A. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U. L. REV. 609, 611 n.9 (1978) (citing Sandy D'Alemberte, *Commentary*, in 26A FLA. STAT. ANN. 548 (West 1970)).

35. See Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 673, 721-36 (1978) [hereinafter "Cope (1978)"]; Dore, *supra* note 34, at 650-57.

36. See Cope (1978), *supra* note 35; Dore, *supra* note 34.

37. Cope (1978), *supra* note 35, at 722 (quoting then-Chief Justice Ben Overton, Address to the Constitution Revision Commission (July 6, 1977)).

38. *Id.* at 721-22. Overton's remarks have been quoted in, for example, *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987).

Elections Committee.³⁹ This Committee was responsible for determining whether Justice Overton's recommended constitutional provision should be proposed, and if so, how it should be formulated.⁴⁰ The Committee quickly decided that the right to privacy deserved constitutional status.⁴¹ The members determined that the right was fundamental and that acts affecting individual privacy should meet the highest possible standard of review.⁴² The Committee, however, believed the compelling state interest standard was too weak.⁴³ Consequently, the Committee refused to include an express standard of review in the proposed text, deciding instead to express the right in absolute terms prohibiting all government intrusion into private life.⁴⁴

The major substantive issue confronting the Committee was whether the provision would protect individuals against private intrusion.⁴⁵ As Justice Overton's remarks suggest, the right to be free from private interference seems inherent in the right to be let alone.⁴⁶ The Committee initially approved, in principle, a right protecting against either public or private intrusion.⁴⁷ The members ultimately concluded, however, that such a right could improperly curtail the media's power to collect information.⁴⁸ After consideration, the Committee submitted to the Commission Proposal 132, which stated that: "(a) Every individual has the right to be let alone and free from governmental intrusion into his private life. (b) The legislature shall protect by law the private lives of the people from intrusion by other persons."⁴⁹

Third, the Commission considered the proposal.⁵⁰ The Committee had sought to create a self-executing right of privacy against the government and a non-self-executing order for the Legislature to prevent intrusion by the private sector.⁵¹ The Commission disagreed, however, because the Legislature already could protect individual privacy inter-

39. Cope (1978), *supra* note 35, at 723; Dore, *supra* note 34, at 650.

40. See Cope (1978), *supra* note 35, at 723-24.

41. *Id.* at 724.

42. *Id.* at 724-25.

43. *Id.* at 725.

44. Dore, *supra* note 34, at 652-55.

45. See Cope (1978), *supra* note 35, at 725-27.

46. See Cope (1978), *supra* note 35, at 722 (quoting Justice Overton, *supra* note 37) ("There is public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business.") (emphasis added).

47. Dore, *supra* note 34, at 650.

48. *Id.* at 651.

49. *Id.* at 651 n.257.

50. *Id.* at 651.

51. Commissioner Moyle argued this position to the Commission. See Cope (1978), *supra* note 35, at 731.

ests against private intrusion.⁵² The Commission therefore deleted subsection (b).⁵³

Even on the surface, the Commission's reasoning appears suspect. The Legislature's power to enact laws protecting against private invasions of privacy gives no assurance that it will pass such laws. In the twelve years since the Commission's proceedings, the Legislature has not yet enacted the protection from private invasion that article I, section 23 affords against intrusion by the state.⁵⁴

Consequently, the history of the privacy amendment indicates ambivalence, not toward the idea of a general right of privacy against all comers, but toward the idea of a constitutional amendment as the best means of protecting that right. However, because the Commission recognized the Legislature's power to protect the privacy right from intrusions by the private sector, one can correctly rely on the framers' intent as a basis for restricting the scope of the privacy amendment to governmental intrusion.⁵⁵

52. Dore, *supra* note 34, at 651:

While genuine concern was expressed about invasions of personal privacy by private individuals and organizations, the commission seemed to feel that the legislature would address those problems without a constitutional directive. The vagueness of the language, the worry about increasing governmental regulation of private enterprise, and the possibility of judicial constructions resulting in unforeseen consequences resulted in the commission's refusal to go along with the committee proposal as it related to the private sector.

(citations omitted); *see also* Cope (1978), *supra* note 35, at 736 nn.379-80 and accompanying text.

53. Cope (1978), *supra* note 35, at 736. In addition, critics generally point out that the privacy amendment was intended to protect only against governmental action, although they agree that the Committee wanted to protect against both public and private sector intrusion. *See infra* notes 68-86 and accompanying text; *see also* Dore, *supra* note 34, at 650-51.

54. The Legislature has offered limited protection of the right to be let alone. Currently, Floridians are protected against stalkers who "wilfully, maliciously, and repeatedly [follow] or harass" them, FLA. STAT. § 784.048 (Supp. 1992); harassing or obscene telephone calls, *id.* § 365.16 (1991); and unwanted solicitation of goods or services. *Id.* §§ 470.026(3), 497.03. Protection of the disclosural privacy interests of the general public is limited to chapter 934, *Florida Statutes*, which prohibits unauthorized interception of wire, electronic, and oral communications.

Other laws preventing private sector intrusion are mainly intended for protected or "special" classes. *See, e.g.*, FLA. STAT. § 228.093 (1991) (student records); *id.* § 381.004, 384.25, 384.29(1), 392.25, 392.53 (Supp. 1992) (records of patients testing positive for tuberculosis or human immunodeficiency virus); *id.* § 393.13 (persons with developmental disabilities); *id.* § 394.459(9) (mentally ill); *id.* § 400.401(2) (Supp. 1992) (elderly and disabled residents of adult living centers); *id.* § 400.609(2) (Supp. 1992) (hospice-care patients); *id.* § 413.012 (blind persons); *id.* § 651.083 (nursing home patients); *id.* §§ 744.3215, 744.708(1),(2) (incapacitated persons); *id.* ch. 943, 958.13(2) (requiring criminal and law enforcement records to be collected and disseminated with "due regard to the privacy interests of individuals").

55. Notably, a similarly worded proposed constitutional revision was defeated in 1978. Cope, *Privacy*, *supra* note 24, at 12. However, the privacy proposal offered that year was part of

B. The Critical Framework—Early Guidelines for Judicial Construction

The earliest critical analyses of Florida's privacy provision actually preceded the adoption of the amendment. A seminal Note⁵⁶ and its sequel Article,⁵⁷ both written by Gerald B. Cope, Jr.,⁵⁸ are typically the only amendment-based studies cited by the Florida Supreme Court in its privacy decisions.⁵⁹ Cope's Note traces the development of the federal and Florida rights of privacy and analyzes constitutional models open to states seeking to protect privacy.⁶⁰ Among other recommendations, Cope urged a "free-standing right of privacy . . . to protect against governmental intrusion."⁶¹ He also recommended that the courts and Legislature be given the power to protect individuals against "intrusions by the private sector."⁶²

Following publication of Cope's Note, his remarks before the Commission on the need for a state privacy provision,⁶³ and Justice Overton's urging at those hearings,⁶⁴ the Commission approved the wording ultimately adopted as article I, section 23: "Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."⁶⁵

Shortly after the Commission's action, Cope wrote his second study of Florida's privacy right.⁶⁶ The Article's analytical core is a brief,

the 1978 omnibus revision of the *Florida Constitution* which required voters to accept or reject a package of about 50 amendments. *Id.* See also *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 641 (England, C.J., dissenting). Consequently, its defeat should not be viewed as a rejection of a greater protection of privacy interests. See *id.*

56. Gerald B. Cope, Jr., Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977) [hereinafter "Cope (1977)"].

57. Cope (1978), *supra* note 35.

58. Currently a judge on Florida's Third District Court of Appeal, Cope, graduated with high honors from The Florida State University College of Law in 1977. Judge Cope practiced law in Miami with Arky, Freed, Stearns, Watson & Greer before rising to the bench in 1988.

59. See *Stall v. State*, 570 So. 2d 257, 265 (Fla. 1990); *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990); *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989); *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 n.4 (Fla. 1987).

60. Cope (1977), *supra* note 56, at 732-42.

61. *Id.* at 742.

62. *Id.*

63. Cope (1978), *supra* note 35, at 673.

64. See Dore, *supra* note 34, at 650.

65. FLA. CONST. art. I, § 23. See Dore, *supra* note 34, at 651-57 for a history of the proposals considered by the Commission. These proposals are more fully discussed *supra* text accompanying notes 36-55.

66. See generally Cope (1978), *supra* note 35.

straightforward textual analysis of the proposed article I, section 23.⁶⁷ Significantly, Cope's analysis parallels the rationale used by the Florida Supreme Court in subsequent decisions.

Cope argues that Florida proposed a "general" right that neither engulfed nor eroded other constitutional rights, yet which was embodied in "a separate free-standing constitutional section which declares a fundamental right."⁶⁸ He then analyzes the proposed section phrase-by-phrase. He writes that the phrase "every natural person" restricts the privacy right to individuals,⁶⁹ protecting neither the activities nor information of business organizations, private associations, or government agencies.⁷⁰ He describes Florida's "right to be let alone," which he equates with a "right of privacy,"⁷¹ as a blanket immunity for all individuals subject to the three restrictions explicitly imposed by the text's language: "and free from governmental intrusion," "into his private life," and "except as otherwise provided herein."⁷²

Cope reads the clause "and free from governmental intrusion" to limit the amendment's protection to state interference.⁷³ The modifier "into his private life" indicates that the right extends only to private matters, not those involving second parties (e.g., business transactions) where the individual surrenders the right to a reasonable expectation of privacy.⁷⁴ The phrase "except as otherwise provided herein" subordinates the right to other constitutional grants of state power.⁷⁵

67. *Id.* at 740-44.

68. *Id.* at 740. The framers of the provision, see *supra* note 42 and accompanying text, and the Florida Supreme Court agreed that the right of privacy was a fundamental right. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985). Considering the universal agreement about its importance, it seems incongruent that this "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *id.* at 546 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), should be limited to freedom from state oppression alone.

69. Cope (1978), *supra* note 35, at 741.

70. *Id.* at 742.

71. Cope (1978), *supra* note 35, at 741 n.408. Florida has generally followed this equation, using the two terms interchangeably. *But see* Cope (1977), *supra* note 56, at 688-89 (privacy in contemporary jurisprudence is protected as it corresponds with liberty interests); *Stall v. State*, 570 So. 2d 257, 266-67 (Fla. 1990) (Kogan, J., dissenting) (brief history of development of right to privacy in federal and Florida law, noting, *inter alia*, that right to be let alone encompasses the right to self-autonomy and the right to a zone of physical and psychological secrecy). Thus, the provision protects both the right to self-autonomy, see, e.g., *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (right to refuse medical treatment); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (right of minor to terminate pregnancy), and the right to keep personal matters from others. See *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71 (Fla. 1983).

72. Cope (1978), *supra* note 35, at 742-44.

73. *Id.* at 742.

74. *Id.* at 742-43.

75. *Id.* at 742; see, e.g., FLA. CONST. art. I, § 12 (search and seizure); *id.* § 24 (requiring public records and open meetings of state employees); *id.* art. II, § 8 (ability to require financial disclosure).

Finally, Cope's analysis focuses on the first issue to be decided by the Florida courts: the standard of review when construing article I, section 23.⁷⁶ Reasoning that the few available Florida constitutional privacy cases "point to the compelling interest standard," Cope wrote that the article I, section 23 right of privacy "should elicit the same level of scrutiny as . . . other fundamental rights."⁷⁷ Consequently, he recommended that Florida apply the compelling state interest standard to article I, section 23 privacy claims.⁷⁸

Cope's paradigm for Florida privacy analysis, and the major issues it outlines, may be better explained by comparison to a Note published some three years later. In 1981 Joseph S. Jackson wrote a second textual analysis of article I, section 23.⁷⁹ The Note's centerpiece is a phrase-by-phrase textual analysis modeled largely on that of its predecessor.⁸⁰

Cope and Jackson agree that article I, section 23's promise of a "right to be let alone and free from governmental intrusion" protects individuals only against state intrusion.⁸¹ Cope rests his conclusion on both textual analysis⁸² and the drafters' intent to leave to the Legislature the duty of protecting against intrusions by the private sector.⁸³ However, Jackson's opinion, which is based on an expansion of

76. Cope (1978), *supra* note 35, at 744-50.

77. *Id.* at 748 (citing *Hagaman v. Andrews*, 232 So. 2d 1, 9 (Fla. 1970); *Byron, Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg*, 360 So. 2d 83 (Fla. 1st DCA 1978), *quashed and remanded*, 379 So. 2d 633, 639 (Fla. 1980)). Both cases were decided before the privacy provision was adopted.

78. Cope (1978), *supra* note 35, at 750. The Florida Supreme Court later adopted the compelling state interest standard requiring "heightened review"—proof of a compelling state interest pursued by the least intrusive means. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

79. Joseph S. Jackson, Note, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565 (1981). Jackson is cited in *Stall v. State*, 570 So. 2d 257, 267 (Fla. 1990) (Kogan, J., dissenting), for the proposition that Florida's privacy right protects both actions taken in seclusion and those within "a certain sphere of personal autonomy that is beyond the scope of any governmental interference whatsoever, whether 'secluded' or not."

Jackson's theory broadens the range of self-autonomy protected in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); *In re T. W.*, 551 So. 2d 1186 (Fla. 1989); and other cases involving activities the control of which are essential to liberty. *See, e.g., Browning*, 568 So. 2d at 10; *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 536 (Fla. 1987). These cases include activities less intensely personal than the right to refuse medical treatment or to obtain an abortion. Such an expansion would confront the "reasonable expectation of privacy" test's touchstone of seclusion, to which the court has adhered in disclosure cases. *See, e.g., Winfield*, 477 So. 2d at 547.

80. Jackson, *supra* note 79, at 571-80.

81. Cope (1978), *supra* note 35, at 742; Jackson, *supra* note 79, at 575-76.

82. Cope (1978), *supra* note 35, at 742 n.413 ("nonsensical" to read "right to be let alone and free from governmental intrusion" as two correlative rights "to be let alone" and "to be free from governmental intrusion.").

83. *Id.* at 726-28, 731-35.

Cope's textual analysis,⁸⁴ is potentially misleading and logically flawed.

Notably, Jackson states that:

A persuasive argument has been made that as used in the new provision, "and" does not mean "as well as" but rather operates in conjunction with the words that follow to limit the preceding broad right. Two reasons support this construction. First, the text speaks of a single right, not a group of rights. If "and" were given its normal meaning a duplicity of rights would be created: the right to be left alone and the right to be free from governmental intrusion into one's private life. Second, this reading of "and" would render the succeeding words surplusage Conversely, "the right to be let alone" is not rendered meaningless by the limitation imposed by the succeeding text.

. . . .
The general import of the term "governmental" is relatively clear, given the foregoing conclusion that it operates to limit the protection of the right to be let alone. It establishes that the new provision curtails only state, and not private, interference with one's right to be let alone.⁸⁵

Jackson refuses to give "and" its "normal meaning" to avoid implying two rights: the right to be let alone and the right to be free from governmental intrusion into one's private life. In fact, a "normal" reading of the language would allow the provision to assert the right to be let alone in one's private life against all comers while simultaneously protecting against intrusion into private data by government. Such a reading would not constitutionally interfere with commercial data collection, but would protect the general right to privacy by mandating judicial or legislative action as required to enforce that right.

Article I, section 23 states that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life." The ambiguous text, insofar as it appears to yield a "plain meaning," does not agree with the Cope/Jackson interpretation. Regardless of its actual intent, the Commission appears to have effectively drafted a provision recognizing a right to be let alone by all others, a right which included protection from governmental intrusion into private affairs.

Both Cope and Jackson, of course, focused on the framers' intent in their interpretations, ignoring other traditional tools of constitu-

84. Jackson, *supra* note 79, at 575.

85. *Id.* at 577-78.

tional construction.⁸⁶ Moreover, neither author had our present advantage of broad-based judicial construction; an advantage which, as will be shown, reveals that courts have provided persuasive language on whether article I, section 23 can be read to protect against intrusion by the private sector.⁸⁷

C. *The Intent of the People: The Forgotten Element in Analyzing the Privacy Amendment*

Florida's courts, like Cope and Jackson, have construed the privacy provision in keeping with the drafters' intent to limit the scope of the amendment to governmental intrusion.⁸⁸ This technique, however, fails to use "well settled" tools of constitutional construction.⁸⁹ As the Florida Supreme Court explained: "In construing provisions of the constitution, each provision must be given effect, according to its plain and ordinary meaning. The court must give provisions a reasonable meaning, tending to fulfill, not frustrate, the intent of the framers and adopters. Constructions which are strained . . . must be

86. Both Cope's Note and Article were written before the 1980 adoption of the provision. Therefore, he could not be expected to consider public opinion in analyzing the proposal. Jackson's 1981 Note, on the other hand, simply failed to consider this central factor.

87. No court has yet construed article I, § 23 to specifically include or exclude protection against private sector intrusion. The First District Court of Appeal has construed the privacy amendment to preclude governmental intrusion. See *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462, 463 (Fla. 1st DCA 1987). The Third District Court of Appeal has struggled to allow claims where no clear state intrusion has occurred. See *Rasmussen v. South Fla. Blood Serv.*, 467 So. 2d 798 (Fla. 3d DCA 1985) (finding in court-compelled discovery an adequate nexus to meet the state action requirement so as to prevent private sector intrusion). The Second District Court of Appeal has indicated that article I, § 23 might also prohibit private actions. See, e.g., *Doe v. Sarasota-Bradenton Fla. Television Co.*, 436 So. 2d 328, 329-30 (Fla. 2d DCA 1983) (court's language indicated the privacy amendment could, in some circumstances, be applied against a privately-owned business, such as the television station in *Doe*).

The Florida Supreme Court, in *Shaktman v. State*, 553 So. 2d 148, 150 (Fla. 1989), gave the privacy provision expansive reach:

This right ensures that individuals are able "to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTON, *Privacy & Freedom* (1967); see also T. Emerson, *The System of Freedom of Expression* 548 (1970) (arguing that "the main thrust of any realistic system for the protection of privacy" must be the prevention of outside persons from obtaining information about individuals seeking privacy"). One of its ultimate goals is to foster [the freedom] . . . which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent.

(emphasis added). See also *infra* notes 108-10 and accompanying text.

88. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) ("We believe that the amendment should be interpreted in accordance with the intent of its drafters.").

89. See *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960) (constitutional amendments must be construed to "fulfill the intent of the people").

avoided.”⁹⁰ The court, therefore, must fulfill the intent of both the framers and the adopters. However, where those intents differ, the voters’ will must rule because “[t]he fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers . . . in such a manner as to fulfill the intent of the people, never to defeat it.”⁹¹ In cases where the provision is drafted by public committee, the drafters’ intent will be given great weight,⁹² but should always be outweighed by the probable intent of the voters.⁹³

Thus, the overriding question should be whether the voters understood the right of privacy embodied in article I, section 23 to protect them from private sector intrusion. That understanding may be ascertained from the “plain meaning” of the text,⁹⁴ explained by reference to popular dictionaries,⁹⁵ the historical record,⁹⁶ or common sense.⁹⁷

After the privacy amendment was adopted, Cope reiterated that the provision protected only against government intrusion, this time referring to the “plain language” approved by the voters:

Florida citizens have [declared] that privacy is an important right, deserving of recognition and protection.

THE PLAIN LANGUAGE

A phrase-by-phrase analysis of the privacy section indicates its major features:

“*Right of Privacy—Every natural person has the right to be let alone*”. . . . The basic declaration that each person has the right to be let alone is limited, and explained, by the remainder of the section.

“*and free from governmental intrusion*”—The right of privacy protects against government activity but not against intrusions by private individuals or businesses.⁹⁸

90. *In re Advisory Opinion to the Gov.*, 374 So. 2d 959, 964 (Fla. 1979); *see also* Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) (same language regarding the construction of article II, § 8(d) of the Sunshine Amendment).

91. *Gray*, 125 So. 2d at 852.

92. *Williams*, 360 So. 2d at 420 n.5.

93. *See, e.g.*, *Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978) (interpreting the voters’ perception of language in Florida’s Administrative Procedure Act (APA) where the Governor submitted the APA to the voters for adoption).

94. *See Williams*, 360 So. 2d at 419.

95. *See, e.g.*, *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (ascertaining the intent of the framers of a constitutional provision by reference to OXFORD ENGLISH DICTIONARY (2d ed. 1989) and BLACK’S LAW DICTIONARY (5th ed. 1979)); *Myers*, 362 So. 2d at 930 (ascertaining the voters’ intended understanding of the terms “judicial tribunal” in the APA by reference to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

96. *See, e.g.*, *Gray v. Bryant*, 125 So. 2d 846, 856 (Fla. 1960).

97. *In re Advisory Opinion to the Gov.*, 374 So. 2d 959, 964 (Fla. 1979).

98. *Cope, Privacy, supra* note 24, at 12.

The provision clearly offers the meaning suggested by Cope only when annotated. Without critical comment, it is unlikely that the voters would understand that the "basic declaration . . . [of] the right to be let alone" is limited, rather than expanded, by the addition of a right to be free from governmental intrusion. In seeking the will of the adopting voters, we should first seek the most reasonable interpretation of the text standing alone.⁹⁹ Such a reading could appear to promise a bipartite right: the general right to be let alone by all and to be free from governmental intrusion into one's private life.

The historical record provides some guidance. In the weeks before the 1980 election, Florida's major newspapers were primarily concerned with the presidential contest and the fate of the hostages in Iran.¹⁰⁰ Issues published after the proposal's adoption do reveal that the amendment had been a matter of some debate.¹⁰¹ However, that debate basically disregarded the question of whether the amendment would provide a general or limited right of privacy. Rather, the major concerns appear to have been that police investigation might be inhibited and that homosexuals might gain freedom from government intrusion into their private lives.¹⁰² Yet, although there appears to have been a media consensus that the amendment was generally intended to protect against state intrusion,¹⁰³ only the *Miami Herald* and the *Florida Times-Union* expressed such an opinion in the days before its November 4 adoption.¹⁰⁴

On election day, the newspapers reminded the voters that they would decide on a "constitutional right of privacy."¹⁰⁵ The sample

99. See *Advisory Opinion*, 374 So. 2d at 964 ("The Court must give provisions a reasonable meaning.").

100. The headlines included Saul Friedman & Remer Tyson, *Two Days Left and Odds Say It's Reagan*, TALLAHASSEE DEMOCRAT, Nov. 2, 1980, at A1; *Iranian: Release a Problem of Time*, TAMPA TRIB., Nov. 1, 1980, at A1; Bill King, *10,000 Greet Carter at Lakeland Rally*, TAMPA TRIB., Nov. 1, 1980, at A1; James McCartney, *Iran Sets Terms for Release*, TALLAHASSEE DEMOCRAT, Nov. 3, 1980, at A1; Hedrick Smith, *50-State Survey Reflects Reagan Surge*, FLA. TIMES-UNION & J., Nov. 2, 1980, at A1.

101. See Rick Barry, *4 Out of 5 Amendments on the Road to Passing*, TAMPA TRIB., Nov. 5, 1980, at 1B; Larry Lipman, *Voters To Decide Privacy Issue*, ORLANDO SENTINEL STAR, Nov. 5, 1980 at 9E; Peter McMahan, *Amendments: Right to Privacy, 3 Other Constitutional Changes Okayed By Voters*, ST. PETERSBURG TIMES, Nov. 5, 1980 at 5B.

102. See articles cited *supra* note 101.

103. See, e.g., R. Michael Anderson, *What the Amendments Will Do*, FLA. TIMES-UNION & J., Nov. 2, 1980, at C11; Barry, *supra* note 100; Orval Jackson, *Privacy Issue Faces Newly-affirmed State Justices*, TALLAHASSEE DEMOCRAT, Nov. 5, 1980, at 2B.

104. See Anderson, *supra* note 103; Craig Matsuda, *State Questions Are a Mix of Roads, Water, Privacy*, MIAMI HERALD, Nov. 2, 1980, at B4.

105. Jack Greene, *78% Turnout Expected For Election*, TAMPA TRIB., Nov. 4, 1980, at 1A; *Races, Issues*, TALLAHASSEE DEMOCRAT, Nov. 4, 1980, at 2B ("[Amendment] No. 2—Would establish constitutional right to privacy").

ballots provided by county supervisors of elections were no more informative, stating merely that article I, section 23 would establish a "constitutional right of privacy."¹⁰⁶ These samples were identical to the ballots provided at the voting booths. Because the ballots were silent on governmental intrusion, and in fact never set forth the text of the provision, most voters probably never considered whether the promise of a general right of privacy was restricted in any way.

The text of the privacy provision seems to facially promise the general right to be let alone, accompanied by the right to escape government intrusion into personal matters. This common sense reading, while it protects the person from all comers, protects private information only from state intrusion. Thus, it permits business and individuals to seek such information so long as they do not invade *personal* privacy. Such a reading comports with the Commission's concern that—although individual rights were to be protected—business interests in the collection of essential data were not to be thwarted.¹⁰⁷

Those voters familiar with the proposal's wording would find in the newspapers' and ballot's description of a "constitutional right to privacy" confirmation of their "normal" reading. Those confused by its ambiguity would find in the wording of the ballot a simple explanation. Consequently, the public record from the period surrounding the election provides only sketchy evidence that the public was aware that they would gain *only* the right to be let alone by the state.

D. *Misreading the Framers' Intent To Make It Conform to the Demands of Public Policy Considerations*

The Florida Supreme Court has repeatedly recognized that constitutional provisions first must be interpreted according to their plain meaning to ascertain the adopting public's intent.¹⁰⁸ The framers' intent will be followed only when it does not contradict that of the voters.¹⁰⁹ It is therefore surprising that Florida courts have followed Cope and other early authors in construing the privacy amendment solely as its framers intended.¹¹⁰ Even more surprising, the high court has misread that intent to effectively find in the amendment an attempt to protect against intrusion from *any* source.

106. See, e.g., Robin C. Krivanek, Supervisor of Elections, Hillsborough County, *Sample Ballot*, TAMPA TRIB., Nov. 4, 1980, at 4A; Wilma S. Sullivan, Supervisor of Elections, Leon County, *Sample Ballot*, TALLAHASSEE DEMOCRAT, Nov. 2, 1980, at 6A.

107. See *supra* text accompanying note 48; see also Dore, *supra* note 34, at 650-51.

108. See *supra* notes 90-93 and accompanying text.

109. *Gray v. Bryant*, 125 So. 2d 846, 851-52 (Fla. 1960).

110. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

*Rasmussen v. South Florida Blood Service, Inc.*¹¹¹ provides instructive insight into the court's reading of the intent of the provision. The decision quotes Justice Overton's remarks on the concerns of citizens about the collection of private information "whether . . . by government or by business."¹¹² From this, the court concludes: "Thus, a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life."¹¹³ In *Rasmussen* the court chooses Justice Overton's remarks as a proper summary of the framers' intent,¹¹⁴ even though those remarks were made at the opening of the Commission's hearings. After the address, the Ethics, Privacy, and Elections Committee declined to include an express self-executing right against private invasion within the amendment's language, opting instead for an instruction to the Legislature.¹¹⁵ Subsequently, the Commission rejected even that provision.¹¹⁶ Thus, the supreme court's choice of Justice Overton's remarks concerning a general right of privacy against even private invaders reflects a choice to address three policy concerns.

First, the right to be let alone—deemed fundamental by both federal¹¹⁷ and state¹¹⁸ courts—cannot be interpreted as the right to be free from government intrusion alone. Second, the state must be barred from improper action whether acting on its own motivation or as the agent¹¹⁹ or servant¹²⁰ of a private entity. Third, Justice Overton's remarks provided an entry by which the court could fulfill the authority recognized by the United States Supreme Court in *Katz v. United States*:¹²¹ "[T]he protection of a person's general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States."¹²² The duty to protect the *general*

111. 500 So. 2d 533 (Fla. 1987).

112. *Id.* at 536 (quoting Justice Overton, *supra* note 37).

113. *Id.*

114. *See id.*

115. *See supra* notes 51-53 and accompanying text.

116. *See supra* notes 51-53 and accompanying text.

117. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (cited by *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 546 (Fla. 1985)).

118. *See, e.g., Winfield*, 477 So. 2d at 547.

119. *See, e.g., Rasmussen v. South Fla. Blood Serv. Inc.*, 500 So. 2d 533, 537 (Fla. 1987) (litigant asking court to require discovery of blood donors' identities).

120. *See, e.g., In re T.W.*, 551 So. 2d 1186, 1188 (Fla. 1989) (state law requiring parental notice before minor can obtain abortion).

121. 389 U.S. 347 (1967).

122. *Id.* at 350-51 (cited in *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)). The court also noted that it "accepted that responsibility of protecting the privacy interests of Florida citizens" in *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981). *See supra* notes 6-23 and accompanying text.

right to privacy recognized by federal and state case law, combined with judicial hypersensitivity to an otherwise unprotected right deemed fundamental by the court, leads the court to find a less-confining drafters' intent in the provision's broad language.

Cope¹²³ and Professor Patricia Dore's¹²⁴ careful historical studies of the history of the provision would not permit the Florida courts to apply article I, section 23 to cases involving private-sector intrusion into personal life. Nevertheless, key public policy concerns—the fundamental nature of the privacy right, the duty of the states to protect that right, and the failure of the Legislature to develop law as expected by the Commission—all support a broader reading of the intent of the amendment.

The strong emphasis on public policy concerns leading to the broad reading of intent urged by *Rasmussen* and *Shaktman v. State*¹²⁵ may be viewed in two radically different ways. First, it may be seen as an example of judicial activism: the courts' attempt to provide constitutional rights never intended—and in fact specifically rejected—by the framers. Alternatively, the focus on public policy may be regarded as a judicial attempt to clothe article I, section 23 with the powers the drafting committee sought to provide, but was unable to press through the Commission. In either case, such a broad reading would allow creation of an article I, section 23 penumbra under which to shield individuals against private intruders.¹²⁶

We have already seen that the court would have reached the same end had it construed the provision according to the voters' will.¹²⁷ If it had done so, the court would have accomplished two goals. First, it would have signaled the legal community that the intent of the adopting public would be honored, and that a "general right of privacy" would be found in the privacy provision. Second, the broadened right—being created not by judicial *fiat* but by traditional constitutional principles—would have stood on firmer ground.

III. JUDICIAL CONSTRUCTION OF THE PRIVACY RIGHTS AFFORDED BY ARTICLE I, SECTION 23

A. *Developing the Standard of Review*

In his Article, Cope demonstrated that the Legislature, although it deemed the privacy right of primary importance, left to the judiciary

123. Cope (1978), *supra* note 35.

124. Dore, *supra* note 34.

125. 553 So. 2d 148 (Fla. 1989).

126. *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 537 (Fla. 1987), analyzed *infra* notes 156-74 and accompanying text, provides the single example of Florida's application of article I, § 23 in a case involving nongovernmental intrusion into private life.

127. See *supra* notes 94-107 and accompanying text.

the duty to assign an appropriate standard of review for intrusive state actions.¹²⁸ Before deciding how to test the state's capacity to override an individual right, however, the court would be required to determine the depth and scope of the protected right. These efforts were undertaken, in part, in *Florida Board of Bar Examiners Re: Applicant*,¹²⁹ a case involving the question of whether the state bar could require an applicant to reveal his history of psychological treatment.

1. *The Importance of the Right to Privacy*

The two key issues in *Applicant* were whether the bar's requirement constituted governmental intrusion governed by article I, section 23, and if so, whether the amendment prohibited the intrusion.¹³⁰ The Florida Supreme Court held that the privacy right was not unlimited, but was governed by the circumstances of the person asserting the right.¹³¹ Essentially, although the claimant may argue a stronger right in some scenarios, privacy may be deemed less crucial in others. Moreover, the right may be asserted only where the individual has not implicitly waived some or all of the protection normally afforded.¹³² In short, a case of impermissible state intrusion into one's private life requires not only proof that the claimant show a sufficient interest in maintaining privacy, but a reasonable expectation of such privacy.¹³³

Notwithstanding that *Applicant's* plaintiff had waived at least some measure of his right to be let alone by applying for admission to the Bar, the court found that the right to privacy did in some measure exist.¹³⁴ The court was thus required to determine whether the state's

128. Cope (1978), *supra* note 35, at 724-25.

129. 443 So. 2d 71 (Fla. 1983).

130. *Id.* at 74.

131. *Id.* ("[T]he applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right.").

132. *Id.* at 74. ("By making application to the Bar, [the applicant] has assumed the burden of demonstrating his fitness for admission into the Bar.").

133. The reasonable "expectation of privacy" test was further developed by *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (relying on *Applicant*). See also *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) (requiring a determination "be made by considering all the circumstances [of the case], especially objective manifestations of that expectation"). The test has been applied to refuse relief where no such expectation exists. See, e.g., *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) ("no legitimate reasonable expectation of privacy in being able to patronize retail establishments" for the purpose of buying obscene materials), *cert. denied*, 111 S. Ct. 288 (1991); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 114, 119 (Fla. 1988) (holding that "all trials, civil and criminal, are public events" and disapproving in part *Sentinel Communications Co. v. Smith*, 493 So. 2d 1048 (Fla. 5th DCA. 1986), which held that article I, § 23 protected the right of parties to dissolution proceedings to close court files).

134. *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 74 (Fla. 1983); see also *id.* at 77 (Adkins, J., dissenting).

intrusion violated that limited right.¹³⁵ Finding that the state interest was sufficiently compelling to outweigh the petitioner's right to privacy and the means used by the state were narrowly crafted to achieve its interest, the court upheld the state's right to require applicants to reveal their psychological histories.¹³⁶ However, because the state's actions met even strict review standards, the court refused to set forth an explicit standard of review.¹³⁷

2. *The Standard of Review*

Having decided that article I, section 23 provided no blanket right to all persons regardless of their status, and that its protection was not

135. *Id.* at 74.

136. *Id.* at 74-76.

137. *Id.* at 74. *Sub silentio*, the case provides useful guidance on related issues. On the issue of whether article I, § 23 protects only liberty, see Jackson, *supra* note 79, or both liberty and privacy, see Cope (1978), *supra* note 35, *Applicant* for the first time allows individuals to assert a privacy interest in personal information. On the question of whether the provision protects against private sector invasions, the court's framing of the case is instructive: "Preliminarily, we must determine whether the requirement that applicant answer item 28(b) and execute the authorization and release falls within the governmental intrusion [sic] as contemplated by article I, section 23, and, if so, we must decide whether this intrusion violates the applicant's constitutional right of privacy." *Applicant*, 443 So. 2d at 74.

Merely taking care to analyze the action solely under the more narrowly drawn "governmental intrusion" plank of the provision instead of arguing that it implicated the more general "right to be let alone" by government implies that the court would be willing to listen to private persecution claims under that clause. As to whether the Florida right encompasses those rights protected by federal law, enlarges those rights, or protects other rights, the court recognizes two different provinces protected by the separate rights:

We also hold that the Board's action does not violate applicant's federal constitutional right of privacy. . . . The threshold question for our analysis of that claim would be to determine which zone of privacy applicant's asserted privacy rights fell within. If we were to conclude they fell within the decision-making or autonomy zone of privacy interests we would be required to apply the compelling state interest test. The privacy interests . . . are only those which are fundamental or implicit in the concept of ordered liberty. These are matters relating to marriage, procreation, contraception, family relationships and child rearing, and education. The other privacy interests described by the Supreme Court of the United States . . . , involve one's interest in avoiding public disclosure of personal matters. In this area, a balancing test has been held to be the appropriate standard of review—comparing the interests served with the interests hindered.

Id. at 76 (citations omitted).

Because Florida refused to apply a balancing test standard of review in this disclosure case, it allowed article I, § 23 to provide greater protection than that afforded by federal law. The supreme court later applied article I, § 23 to self-determination cases involving abortion, see *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), family relationships and child rearing, see *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989) (woman had right to refuse life-saving medical treatment despite impact on family), and medical treatment. See *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (incompetent person had right to decline life-prolonging treatment without which death would shortly ensue). Article I, § 23 clearly includes and expands beyond federally-protected rights.

absolute, the court was still faced with the duty of framing an appropriate standard of review.¹³⁸ The court met this task in *Winfield v. Division of Pari-Mutuel Wagering*.¹³⁹ *Winfield* arose from an attempt by the Florida Department of Business Regulation's Division of Pari-Mutuel Wagering to obtain the private banking records of Malcolm and Nigel Winfield.¹⁴⁰ The Winfields gained an injunction in circuit court on the grounds that the state's subpoenas duces tecum forced involuntary disclosure of the records, thereby violating the plaintiffs' rights under article I, section 23.¹⁴¹ On appeal, the Fourth District Court reversed, but certified two questions to the high court: (1) whether article I, section 23 prevented the state from subpoenaing a Florida citizen's bank records without notice, and (2) whether a search of all bank records under the facts of this case constituted an "impermissible and unbridled exercise of legislative power."¹⁴²

In answering these questions, the court was confronted by a clear case of state intrusion into a private area where the private individual had not waived any of the protections normally afforded. Unlike the petitioner in *Applicant*, the Winfields had not invited or acquiesced to a state search of their files.¹⁴³ Consequently, the supreme court was able to address the issue of whether and how a person's general right of privacy—unaffected by any waiver—was to be treated when confronted by asserted state interests.¹⁴⁴ Recognizing that article I, section 23 included no textual standard of review, the court relied on federal and state case law for the proposition that the right to privacy deserved heightened scrutiny:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.¹⁴⁵

The *Winfield* test requires that the state prove its actions are motivated by a compelling state interest and are pursued by means so nar-

138. See *supra* text accompanying note 44.

139. 477 So. 2d 544 (Fla. 1985).

140. *Id.* at 546.

141. *Id.*

142. *Division of Pari-Mutuel Wagering v. Winfield*, 443 So. 2d 455, 456-57 (Fla. 4th DCA 1984).

143. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 546 (Fla. 1985).

144. *Id.*

145. *Id.* at 547 (citing *Roe v. Wade*, 410 U.S. 113 (1973)); *In re Estate of Greenberg*, 390 So. 2d 40 (Fla. 1980).

rowly drawn that they violate personal rights no more than necessary to achieve the state's interest.¹⁴⁶ The court also added two key qualifiers. Like *Applicant*, *Winfield* required the citizen to prove a reasonable expectation of privacy.¹⁴⁷ Moreover, it clarified the sweep of article I, section 23 protection: Because the federal government gives states the duty to protect personal rights of privacy,¹⁴⁸ and because the court earlier accepted that responsibility,¹⁴⁹ "it can only be concluded that the right [protected by article I, section 23] is much broader in scope than that of the Federal Constitution."¹⁵⁰

Under this reasoning, the court concluded that the Winfields had a reasonable expectation of privacy in their banking records and that the constitution protected that interest.¹⁵¹ However, the state could assert a compelling state interest in gambling within state boundaries and that it had used the least restrictive means of protecting that interest.¹⁵² The court therefore found that the state's investigation did not violate article I, section 23 and answered the certified questions in the negative.¹⁵³

Consequently, *Winfield* established a two-part test. First, an individual must demonstrate that an area in which he or she had a reasonable expectation of privacy was subjected to intrusive state action.¹⁵⁴ Second, the state must prove both that it has a compelling need to intrude and does so by narrowly-tailored means.¹⁵⁵ This test provides the centerpiece of Florida's article I, section 23 standard of review. This heightened scrutiny, however, does not provide the complete regimen of tests to which state actions are exposed. Moreover, the full panoply of such tests does not apply when the case involves private-sector infringement.

3. *Rasmussen v. South Florida Blood Service*,¹⁵⁶ *Heightened Strict Scrutiny in State Claims, and the Elements of Private Sector Claims*

In May 1982, Donald Rasmussen was struck by an automobile while sitting on a park bench.¹⁵⁷ Fourteen months after receiving fifty-

146. *Winfield*, 477 So. 2d at 548.

147. *Id.*

148. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 350-51 (1967)).

149. *Id.* at 547-48 (citing *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981)).

150. *Id.* at 548.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 500 So. 2d 533 (Fla. 1987).

157. *Id.* at 534.

one pints of blood as treatment for his injuries, he was diagnosed with Acquired Immune Deficiency Syndrome (AIDS).¹⁵⁸ In a suit against the driver for personal injuries, Rasmussen tried to identify his blood donors to prove he had contracted AIDS from the blood transfusions made necessary by the accident.¹⁵⁹ The trial court ordered South Florida Blood Service to release the subpoenaed information.¹⁶⁰ On certiorari review, however, the Third District Court of Appeal reversed the order as a violation of Florida's discovery rules.¹⁶¹ The supreme court upheld the Third District Court, finding that the donors' rights of privacy and the public interest in maintaining a reliable blood supply outweighed the plaintiff's interests in gaining the information.¹⁶²

The certified question of whether "the privacy interests of volunteer blood supply donors and . . . society's interest in maintaining a strong volunteer blood donation system"¹⁶³ outweighed the plaintiff's interest in discovery implicated article I, section 23 only if the provision's protective shield extended into the private sector. Because the court analyzed the privacy interests only as they were covered by article I, section 23, and weighed those rights against the interests of a private party plaintiff,¹⁶⁴ the privacy provision could be considered to have been used as a shield against private sector action.

The court's decision not to undertake a compelling state interest analysis is telling on the issues of whether and how article I, section 23 could be construed to cover private sector infringements. *Winfield* involved a subpoena duces tecum ordered on behalf of a state agency.¹⁶⁵ *Rasmussen* can be distinguished as arising from an identical order requested by a private litigant.¹⁶⁶ The result of this central difference is that fundamentally different tests will apply in cases so distinguished. *Winfield* stands for the proposition that where state action confronts

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 534-35. In applying its balancing test, the court found that although the plaintiff had a valid interest in obtaining the subpoenaed information, the release of the data could seriously harm any number of the suspect donors. *Id.* at 537. Moreover, if the public doubted the confidentiality of donor records, the volunteer blood supply might well be threatened. *Id.* at 537-38. Faced with the prospect of "serious disincentive to volunteer blood donation," the court concluded that discovery should be denied. *Id.* at 538 (quoting *South Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 804 (Fla. 3d DCA 1985)).

163. *Rasmussen*, 467 So. 2d at 805 n.13.

164. See *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536-37 (Fla. 1987). The court specifically weighed article I, § 23 interests without applying the compelling state interest test required under *Winfield* for all contests involving state action. *Id.* at 535.

165. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 546 (Fla 1985).

166. 500 So. 2d at 534.

the privileges protected by article I, section 23, the intrusion must survive strict scrutiny.¹⁶⁷ *Rasmussen* does not lower the heightened scrutiny to which state actions are exposed.¹⁶⁸ Rather, it opts for a balancing test in private-sector contests, first comparing the interests of the parties and then weighing the interests of the public *at large*.¹⁶⁹

Rasmussen would appear to vest article I, section 23 with the power to protect against both private and public intrusion.¹⁷⁰ Its balancing test may be applied in both governmental and private-sector cases. In the former, the court will engage in strict scrutiny, but may also compare the effects of state actions on third parties.¹⁷¹ The decision therefore qualifies the *Winfield* standard of review. Instead of facing merely a test of whether its interest is compelling and closely followed by the intrusive action, the state may also be forced to survive a balancing test against the general public. In effect, *Rasmussen* creates a two-part standard of heightened strict scrutiny in governmental action cases: the government's need must not only outweigh the interests of the adverse party, but also the actual or possible concerns of the public at large.

In private-sector cases, on the other hand, the court applies only the balancing test.¹⁷² Even against a private party, however, the courts deem the privacy right to be fundamental.¹⁷³ Therefore, third party or public policy concerns must prove compelling to justify violation of the article I, section 23 cloak.¹⁷⁴ In both public and private areas,

167. See *supra* notes 143-45 and accompanying text.

168. 500 So. 2d at 535.

169. See *id.* at 535-36.

170. See *id.* at 536, 537 (quoting, in part, address by Justice Overton, *supra* note 37):

"There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. . . ."

Thus, a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life.

. . .

By the very nature of this case, disclosure of donor identities is "disclosure in a damaging context." We conclude, therefore, that the disclosure sought here implicates constitutionally protected privacy interests.

(citations omitted). Under this reasoning, this author believes the protection afforded by article I, § 23 is offered against all comers.

171. See, e.g., *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989) (effect on minor children of mother's death resulting from exercise of privacy right to refuse life-saving blood transfusion).

172. See *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987).

173. See generally *id.*

174. *Id.*

however, the injured party must prove a reasonable expectation of privacy before the intrusion will face the appropriate standard of review.

B. The Scope of Article I, Section 23 Protection: Where Does a Florida Citizen Possess a Reasonable Expectation of Privacy?

As a general rule, article I, section 23 grants its rights to "every natural person."¹⁷⁵ The Florida Supreme Court has construed this term comprehensively to include competents,¹⁷⁶ incompetents,¹⁷⁷ minors,¹⁷⁸ and every citizen of the state.¹⁷⁹ *Applicant*¹⁸⁰ and *Winfield*,¹⁸¹ however, caution that this right is not absolute. The threshold issue for an article I, section 23 claim is whether the plaintiff has a reasonable expectation of privacy.¹⁸² Federal privacy cases may be divided into two classes. First are those involving the "decision-making or autonomy zone of privacy interests," those freedoms "fundamental or implicit in the concept of ordered liberty," and second are those involving the "disclosure of personal matters."¹⁸³ However, while the federal right to decision-making privacy is deemed fundamental, its right to prevent forced disclosure of personal information faces only intermediate scrutiny—a simple weighing of conflicting interests between the parties.¹⁸⁴

Although the Florida courts follow this classification method,¹⁸⁵ the state rights are deeper and broader than their federal counterparts. They are deeper because Floridians hold a reasonable expectation of a

175. See Cope (1978), *supra* note 35, at 735 (noting Constitution Revision Commission's decision to replace proposal's "individual" with "natural person" to restrict scope of the provision to nonorganizational entities).

176. See, e.g. *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71 (Fla. 1983).

177. See, e.g., *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (stroke victim).

178. See *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The right of privacy extends to '[e]very natural person.' Minors are natural persons in the eyes of the law and '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults . . . possess constitutional rights.") (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

179. *In re T.W.*, 551 So. 2d at 1193.

180. *Applicant*, 443 So. 2d at 74.

181. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

182. See *supra* notes 130-33 and accompanying text.

183. *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 76 (Fla. 1983).

184. *Id.*

185. See, e.g., *In re Guardianship of Browning*, 568 So. 2d. 4, 10 (Fla. 1990); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989); *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 535 (Fla. 1987).

fundamental right to privacy in both disclosural¹⁸⁶ and autonomy cases.¹⁸⁷ State intrusions uniformly trigger strict scrutiny, while private-sector actions require a balancing test.¹⁸⁸

The scope of the right is also broader because the federal privacy right—especially in the autonomy zone—has been strictly limited to matters essential to the concept of ordered liberty; matters involving “marriage, procreation, contraception, family relationships and child-rearing, and education.”¹⁸⁹ While article I, section 23 has been construed to cover the same rights as those protected by federal law,¹⁹⁰ it has also been construed to protect a “general” right of privacy.¹⁹¹ Thus, while it has been applied in the autonomy arena in cases involving procreation, family relationships and child-rearing,¹⁹² it has also been applied in a variety of other contexts.¹⁹³

In short, Florida’s citizens have a general right to expect privacy in both the self-determination and disclosural arenas. However, the assertion of the privacy right is not absolute. It may, for example, be

186. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) (disclosure of financial records).

187. See *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 926 (Fla. 1984) (recognizing the right to terminate medical treatment).

188. See *supra* notes 167-74 and accompanying text.

189. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 76 (Fla. 1983) (citation omitted).

190. See, e.g., *Rasmussen v. South Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535-36 (Fla. 1987) (describing the federally-protected right to privacy as “comprehensive” (citing for support *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (protecting disclosure and decision-making freedoms and areas independently protected by the state constitution)).

191. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985):

Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

192. See, e.g., *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989).

193. See, e.g., *Wons*, 541 So. 2d 96; *John F. Kennedy Memorial Hosp. Inc. v. Bludworth*, 452 So. 2d 951 (Fla. 1984); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

The substantive aspects of Florida’s right of privacy in relation to medical treatment have been well canvassed. See, e.g., Scott A. Frick, *The Right To Forego Life-sustaining Procedures in Florida: Is Florida “Cruzan-Proof”?*, 20 STETSON L. REV. 519, 540-54 (1990) (summary of health-law autonomy cases); Sandra G. Krawitz, *Dying With Dignity in Florida—New Legislation*, 64 FLA. B.J. 39 (Nov. 1990) (analysis of issues, holding, and reasoning of *Cruzan v. Director, Mo. Dep’t. of Health*, 497 U.S. 261 (1990), including court-developed safeguards for determining how a surrogate may exercise an incompetent’s right to decline medical treatment); William F. McHugh, *AIDS in the Workplace: Policy, Practice, and Procedure*, 18 STETSON L. REV. 35, 55-56 (discussion of public sector employees’ rights to refrain from revealing private medical information). McHugh’s study involves only state employee rights against their employer. Consequently, he follows the traditional view of article I, § 23 as a shield against state action.

waived by submitting to intrusion¹⁹⁴ or—in autonomy cases—by publicly participating in an activity that would be protected if pursued in private.¹⁹⁵

C. *A Privacy Paradigm*

The foregoing analysis allows this author to develop a six-part test by which to assess potential privacy claims. Practitioners must, in the following order, answer these questions:

(1) Whether the plaintiff may assert a reasonable expectation of privacy;¹⁹⁶

(2) Whether the privacy interest has been invaded;¹⁹⁷

(3) In governmental actions, whether the state may assert a compelling interest in the attempted intrusion,¹⁹⁸

(4) Whether the state uses the least intrusive means of achieving its compelling goal;¹⁹⁹

(5) In private-sector actions, whether the opposing party's interests outweigh the individual's right to privacy;²⁰⁰ and

(6) In any action, whether the opposing party's interests outweigh the public policy concerns of the right to privacy.²⁰¹

If the first two questions are answered in the affirmative, and the remaining applicable questions are answered in the negative, a viable claim exists. Otherwise, the individual either has no claim, or one destined to fall before the opponent's superior and pressing rights.

IV. CONCLUSION

Article I, section 23 of the *Florida Constitution* provides a textual basis for what the Florida Supreme Court has repeatedly recognized as a fundamental, general, and broad-based right to be let alone. In construing the privacy amendment, however, the court has read the framers' intent with a jaundiced eye to gain a proper interpretation of

194. See, e.g., Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983) (by seeking admission to the Florida Bar, applicant acquiesced to investigation).

195. See *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (although petitioner had the right to possess obscenity in the privacy of his home, he had no right to engage in a commercial transaction to gain access to such materials).

196. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544; *Applicant*, 443 So. 2d 71 (Fla. 1985).

197. See discussion of *Applicant supra* text accompanying notes 130-37.

198. See discussion of *Winfield supra* text accompanying notes 138-55.

199. See *id.*

200. See *Rasmussen v. South Fla. Blood Serv. Inc.*, 500 So. 2d 533 (Fla. 1987); see also discussion of *Rasmussen, supra* text accompanying notes 156-74.

201. See *id.*

the provision. Had the court relied on other traditional tools of constitutional construction, it could have examined the plain meaning of the text, supplementing its analysis by considering the framers' intent as it furthered the will of the adopting voters. Thus, the court could have found that the fundamental right to privacy provided by article I, section 23 protects state citizens against intrusion from any source—government or private.

Nevertheless, the courts have sought the right end by the wrong route. The Florida Supreme Court has broadly read the intent of the privacy amendment, has provided numerous examples of dicta supporting a private-sector application of article I, section 23, has accepted the duty to protect the general right of privacy, and has crafted a suitable standard of review for private-sector cases in *Rasmussen*.

This indicates that the supreme court might be willing—given the right facts—to construe the privacy provision anew to make it conform to the will of the adopting public. In the alternative, the court might follow *Rasmussen* and *Shaktman*'s lead to extend article I, section 23's protection over more areas than its critics have heretofore supposed. The Legislature's reluctance to protect its constituents' right to be let alone in an increasingly pervasive world soon may provide such an opportunity.