Denver Law Review

Volume 40 | Issue 3 Article 2

April 2021

One Year Review of Constitutional Law

Morton Gitelman

ONE YEAR REVIEW OF CONSTITUTIONAL LAW

BY MORTON GITELMAN*

One function of the highest appellate court, be it state or federal, is to resolve with some degree of finality those troublesome questions created by societal progress. By substituting an appellate court for some other method of resolving the issues that beset a society, in opposition to a legislative, executive, or administrative solution, at least two things are accomplished — some meaning is given to the concept of "rule of law" and the high courts are constantly exposed to a barrage of criticism.

Any state court of last resort which undertakes to rule on a question having political overtones or a question presenting a dramatic and divisive constitutional issue is bound to suffer the slings and arrows of public criticism. Recalling the observation of an English reporter, "At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start."[1]

The United States Supreme Court has, over the years, developed a resilient skin, relatively impervious to missiles fired by the public. The Colorado Supreme Court and other state courts are, in contrast, much more vulnerable to public criticism. Consequently, constitutional issues may, at times, be approached with reluctance, or trepidation, or misgiving. Thus, in the broad view, little consistency can be seen in the Colorado court's approach to similar constitutional problems.[2]

The Colorado Supreme Court has had, in the context of the above discussion, a difficult year. In four cases the court was faced with constitutional problems, the resolution of which inevitably created public criticism. Rather than rake up old editorial coals, the following discussion of the four "big" cases in 1962 will review the court's approach and method. Some of the other important or interesting cases will be discussed in the second part of this review and the minor constitutional law cases will be summarized in Part III.

I.

The four most publicized constitutional law decisions of the Colorado court in 1962 dealt with the diverse and serious problems of raising funds for metropolitan improvements,[3] legislative reapportionment,[4] non-discrimination in employment,[5] and non-discrim-

* Assistant Professor of Law, University of Denver College of Law.

1 The Economist, May 10, 1952, p. 370. Quoted by Mr. Justice Frankfurter in the Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952).

2 For example, compare the court's approach in Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 368 P.2d 970 (Colo. 1962) with Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34 (Colo. 1962). Both cases will be discussed, *infra*.

3 Four-County Metro. Capital Imp. Dist. v. Board of County Comm'rs, 369 P.2d 67 (Colo. 1962).

4 In re Legislative Reapportionment, 374 P.2d 66 (Colo. 1962).

5 Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 368 P.2d 970 (Colo. 1962).

ination in housing.[6] The members of the court, understandably, were not in agreement in any one of the cases.[7]

A. *Metropolitan Improvements*

Early in 1962 the Colorado court was faced with the problem of determining the validity of a legislative scheme for providing metropolitan capital improvements through a sales and use tax imposed throughout a metropolitan district (MCID).[8] The statute involved in the case was a legislative attempt to solve the problem, relatively new in Colorado, created by metropolitan growth.[9] Briefly, the problem centers about the accommodation of the interests of a city, legally limited by its boundaries, with the interests of people located in surrounding governmental units, physically indistinguishable from the city.

As a metropolitan area grows in size, capital improvements within the city limits tend to inure to the benefit of suburban residents as well as to the inhabitants of the city. For example, a city government may feel impelled to relieve traffic congestion caused by "rush hour" travels of suburbanites oscillating between jobs in the city and homes outside the city. Thus, a street-widening project may benefit the suburban travelers more than city residents living in an opposite corner of the city. As the costs of such improvements increase and the amount of available revenue decreases (due in part to the exodus of middle and upper class families to the suburbs) the financing of capital improvements within the city inevitably grows more difficult.

In one sense, the difficulties alluded to above are due to the highly artificial and usually anachronistic legal lines drawn about cities. One side effect of increased urbanization is the unnecessary duplication of governmental units; because of an invisible legal line drawn down the center of a street, people require two police departments, two fire departments, two sanitation departments, two school districts, two city governments. These governmental services are constantly costing more, local taxes are increasing, and, anomalously, the need for such services is decreasing in the sense of wasteful metropolitan duplication, triplication, or even great multiplication.

In essence, then, the problem posed by the *MCID* case was whether the state legislature could constitutionally provide a method for multi-government participation in local capital improvements. The legislative purpose, as reflected in Section 1 of the act is particularly illuminating:

> . . . The general assembly hereby finds . . . that local governmental units within the metropolitan areas of this state have common problems and needs which transcend

---

6 Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34 (Colo. 1962).

7 In the four cases, a total of fifteen opinions were reported. In the Metropolitan Capital Improvement District case, note 3, *supra*, Justice Moore wrote the majority opinion, Justice Sutton concurred specially and Justice McWilliams dissented; Justice Moore also wrote an opinion on the petition for rehearing. In the Reapportionment case, note 4, *supra*, Chief Justice Day wrote the majority opinion, Justice Sutton concurred specially, Justice Moore dissented (joined by Justice Frantz) and Justice Hall dissented. In the Continental Air Lines case, note 5, *supra*, Justice Moore wrote the majority opinion, Justice Frantz dissented (joined by Justice McWilliams) and Justice Pringle dissented. In the Case case. note 6, *supra*, Justice Moore wrote the majority opinion, Justice Frantz concurred specially, Justice Pringle concurred specially and Justice Hall dissented.

8 Note 3, *supra*.

9 Colo. Sess. Laws 1961, ch. 179.

the boundaries of such local governmental units; that as metropolitan areas become urbanized the need for capital improvements increases at an accelerated rate; that modern means of communication and transportation and the attendant mobility of population have transformed metropolitan areas into homogeneous areas in which ease of movement is an absolute necessity and in which capital improvements must be geared to the needs of the entire area; that capital improvements in any part of a metropolitan area inure to the benefit of the entire area, as well as to the people of the state; and that there is need for coordination of overall planning, financing and construction of capital im-

> provements and for the acquisition of capital equipment in order to enable local governmental units to cope with the problems of urbanization and to provide the means by which the planning, acquisition, construction and financing thereof may be accomplished. To these ends the provisions of this act shall be liberally construed.[10]

The Colorado Supreme Court held that the act was unconstitutional in that the state legislature did not have the power to delegate the authority to do the things set forth in the act. The unlawful powers delegated by the legislature to the administering agency were held to be the power to levy and collect a sales and use tax throughout the established multi-county district,[11] the power to decide which proposed capital improvement projects should be carried out,[12] and the power to vest title to the completed projects in the various participating governmental units.[13]

The court viewed the statutory district as an unconstitutional interference with the powers allocated to local governments by article XX of the Colorado Constitution. One feature of the statutory provisions that irritated the court especially was the "conduit" nature of the district:

> It is indisputably clear that the district is a conduit through which to channel taxes earmarked for local "capital improvement" or "capital equipment" in the county or city areas where collected. . . . Indisputably the district becomes a conduit, created by statute, through which activity is channelled to accomplish objectives which for generations have been achieved by local officers directly responsible to the people, and upon whom the duty of discharging such local responsibilities has heretofore been placed by constitutional provision or municipal home rule charter provision, or both.[14]

Unfortunately, the court never tells us why a "conduit" is such a venal legislative device. The approbative connotation is even less understandable when one realizes that almost every administrative agency, state or federal, serves as a "conduit."

Specifically, the court felt that the district was created and authorized to accomplish objectives which article XX of the constitution placed in the sole jurisdiction of home rule cities. Article XX states in part that the City and County of Denver has the power

> . . . within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use or extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof. . . .[15]

The court reasoned that since article XX gave home rule cities all the powers necessary in regard to capital improvements, the

10 *Ibid.*
11 Colo. Sess. Laws 1961, ch. 179, § 14 at 552.
12 Colo. Sess. Laws 1961, ch. 179, § 13(5) at 551.
13 Colo. Sess. Laws 1961, ch. 179, § 19 at 555.
14 Note 8, *supra* at 71.
15 Colo. Const. art. XX, § 1.

legislature had no powers left to delegate.[16] To substantiate this reasoning the court pointed to the advertised plans of the district for Denver capital improvements which included branch libraries, street widening, parks, swimming pools, boating facilities, a fire station and maintenance equipment.[17] These activities fall within the realm of "official functions of home rule cities with relation to local and municipal affairs,"[18] and, therefore, can be exercised only by home rule cities.

One difficulty with this reasoning is simply that although each home rule city within a metropolitan area has the *power* under article XX to provide for its own "capital improvement" needs, it may not have the *means* to do so in the absence of some supra-municipal method of financing, such as an area-wide sales and use tax. The point which the court never really comes to grips with is: What is so invidious about multi-municipal cooperation to solve metropolitan problems? This is the heart of the matter.

Perhaps the answer to the above question can be found in the method provided by the legislature for creating and running the district. The creation of a district was conditioned upon a petition[19] filed in a district court,[20] a judicial hearing and findings[21] and a judicially ordered and controlled election.[22] If a majority of the votes cast were in favor of creating the district, the district was authorized by a district court decree.[23] Looking at what actually occurred in the Denver area, one can readily discern the flaw in the act—in each of the counties surrounding Denver the voters rejected the district but enough voters in Denver cast affirmative ballots, thus authorizing the district by a majority of the total votes cast.[24] In addition, the act provided that the Board of Directors of the district could contain, up to one half of the board, Denver directors.[25]

Obviously, the court could have invalidated the act on the basis that, mechanically, it allowed a large city, such as Denver, to cause the creation of a district without the approval of the suburban citizenry. If the act had contained safeguards against such a possibility, *e.g.*, requiring approval of a majority of the voters in each county of the proposed district, one would be hard pressed to find any justification for the court's decision. In other words, the court *should* have based its decision upon the last mentioned grounds rather than upon article XX prohibiting the legislative delegation of power. If the court had followed this suggestion, it would not have gotten into the question of special improvement districts.

When the decision was first announced many people were concerned that the court was impliedly disapproving of all types of

16 " . . . it has been made perfectly clear that when the people adopted Article XX they conferred every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs . . . . In the area of providing local 'capital improvements' and 'capital equipment' in the cities, the General Assembly had nothing to give in the way of power or authority to any new superstructure of government encompassing multiple counties and numerous towns and cities." Note 8, *supra* at 72 (emphasis in original).

17 *Id.* at 73.

18 *Ibid.*

19 Colo. Sess. Laws 1961, ch. 179, § 5 at 546.

20 Colo. Sess. Laws 1961, ch. 179, § 6 at 546.

21 Colo. Sess. Laws 1961, ch. 179, §§ 7, 8, 9 at 546.

22 Colo. Sess. Laws 1961, ch. 179, § 10 at 547.

23 Colo. Sess. Laws 1961, ch. 179, § 11 at 548.

24 The court, interestingly enough, took judicial notice of these occurrences but hardly emphasized them. Note 8, *supra* at 70.

25 Colo. Sess. Laws 1961, ch. 179, § 12(3) at 549.

multi-governmental special improvement districts such as water, sewage, and sanitation districts. On the petition for rehearing, the court explained that "improvement districts" were still valid and distinguished metropolitan capital improvement districts:

> In matters which are not local and municipal and are particular projects which cannot be handled by the immediate area in which the physical installation is located . . . , or where water conservation will benefit a large area . . . , or where cooperative effort between areas extending beyond municipal or county lines is essential with references to a particular project in sanitation affecting the public health of the entire area, an "improvement district" is perfectly proper.[26]

In distinguishing the two kinds of districts, several factors were emphasized:

1. Valid "improvement districts" finance improvements by a mill levy on real property to be benefited by the improvement rather than a sales tax.
2. After completion of the capital improvement project, title was to be conveyed to the local unit involved, rather than being retained and managed by the district.
3. Qualifications of the directors under the statute were designed to protect certain local rather than district-wide interests.
4. The district would be authorized to acquire personal property.

Justice McWilliams, in his dissenting opinion, could see no difference between the metropolitan capital improvement district and other improvement districts. His opinion is based heavily upon the case approving the improvement district created to construct the Moffat Tunnel.[27]

By choosing to ground its decision upon article XX of the Colorado constitution, the court is using a provision intended to grant powers to municipalities for the purpose of restricting the legislature's power to provide solutions for metropolitan problems. If municipalities can cooperate and do together what each could do apart,[28] and if the legislature can create a supra-municipal improvement district which taxes real property located within the district,[29] then the *MCID* decision is explainable, not because of the limitations of article XX, but because the statutory method provided for creating and managing the proposed district smacks of allowing large cities to initiate a district against the will of suburbanites.

Although the only precedent value of the *MCID* case is to perhaps create a brake on legislative zeal,[30] the court's result might have been more palatable to the dissenting portion of the public had it been based upon the invalidity of the particular statute rather than upon a holding that the legislature has no power to deal with anything that judicial interpretation might place within the ambit of article XX.

---

26 Note 8, *supra* at 77.
27 Milheim v. Moffat Tunnel Dist., 72 Colo. 268, 211 Pac. 649 (1922).
28 See McQuillan, Municipal Corporations § 37.04.
29 See note 27, *supra*.
30 The court does not purport to lay down any general principles in the sense of precedent; indeed the case may be viewed by attorneys as being limited to its peculiar facts.

B. *Legislative Reapportionment*

In March, 1962, the United States Supreme Court decided the case of *Baker v. Carr*,[31] holding that malapportionment of a state legislature which denies some voters equal protection of the laws gives rise to a justiciable controversy open to judicial consideration. This decision literally "opened the floodgates." By August, 1962, four states had been reapportioned and court actions or legislative action was pending in twenty-five other states.[32] In February, 1963, it was reported that "Lawsuits [on reapportionment] have been filed in at least 35 states, and in 18 states there have been judicial decisions holding the existing legislative apportionment of one or both houses invalid."[33]

Soon after *Baker v. Carr* removed the bar of "nonjusticiable political question" from reapportionment suits,[34] an original proceeding was filed in the Colorado Supreme Court seeking a writ requiring the General Assembly to reapportion.[35] The suit was directed at the Governor, Secretary of State, Treasurer, and the General Assembly. The petition sought the following relief: 1. An order requiring the Governor to call the legislature into special session for purposes of reapportionment; 2. An order enjoining the Secretary of State from carrying out an election under the allegedly invalid apportionment act; 3. An order enjoining the Treasurer from paying legislators salaries under the existing apportionment act; and 4. An order requiring the General Assembly to reapportion.

The first action taken by the Colorado court was to discharge the rule against the Governor, Secretary of State, and Treasurer. The court said ". . . we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion, and we deem his authority to call the Legislature into special session to be such prerogative."[36] This aspect of the decision is hardly startling and is entirely consistent with constitutional history.[37] As

31 369 U.S. 186 (1962).
32 N.Y. Times, Aug. 5, 1962, § E, p. 5.
33 Jewell, Reapportionment and the Courts, The New Republic, Feb. 2, 1963, p. 17.
34 See Colegrove v. Green, 328 U.S. 549 (1946). Also see Part IV of the majority opinion in Baker v. Carr, note 31, *supra*.
35 In re Legislative Reapportionment, 374 P.2d 66 (Colo. 1962).
36 *Id.* at 67. The court cited Veto Power, etc., 9 Colo. 642, 21 Pac. 477 (1886), a per curiam decision stating, *inter alia*, "Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session . . . is a matter resting entirely in the judgment of the executive."
37 See, e.g., Mississippi v. Johnson, 71 U.S. (4 Wall.) 437 (1866); 2 Warren, The Supreme Court in United States History 462 (Rev. ed. 1928).

to the other executive officers, the court held their duties to be beyond the court's reach in so far as the duties involved are imposed on the officers by the constitution or not given to them by the constitution.[38]

Turning next to the question of jurisdiction over the subject matter, the court felt bound by *Baker v. Carr* and quoted approvingly from a recent New Jersey reapportionment case:

> If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him.[39]

The court then proceeded to dispose of the petition by the amazing feat of interpreting the state constitution so as to find the 1963 General Assembly "the session next following" the 1960 United States census. The constitution provides that the general assembly shall revise the apportionment "at the session next following an enumeration made by the authority of the United States."[40] A "reasonable interpretation"[41] of this provision results in the following analysis:

1. The 1961 General Assembly was not the session next following the 1960 census because the session was "for all practical purposes" over by the time the official certification of the enumeration was available.
2. The 1961 extraordinary session can not be counted because it was called "especially to correct some school finance legislation."
3. The 1962 General Assembly does not count because there were no even-numbered annual sessions at the time article V, § 45, was embodied in the constitution and, further, because even-year sessions are limited to fiscal matters and subjects designated by the Governor.
4. Therefore, the 1963 General Assembly is the session next following the 1960 enumeration! "We hold that we can and must await the action of the 44th General Assembly."[42]

Two reasons are apparent to explain the court's reluctance to grant relief. First, the necessary remedy, ordering the 1962 elections to be held at large, seemed unworkable to the court and perhaps more mischievous than another year or two of malapportionment. Second, at the time the petition was filed, several proposals for constitutional amendments were being aired,[43] and the court felt it should not act until both the legislature and the people have failed to reapportion:

> We believe there should be no judicial intrusion into the legislative and executive affairs of the state, and we should

38 Note 35, *supra* at 67.
39 Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 11, 161 A.2d 705 (1960).
40 Colo. Const. art. V, § 45.
41 Note 35, *supra* at 69. Why did the court refuse to interpret art. XX of the constitution "reasonably" in the MCID case?
42 *Id.* at 70.
43 Two amendments appeared on the November, 1962, election ballot and Amendment 7, the so-called Federal Plan, was adopted by the voters. The constitutionality of this amendment was litigated before a three-judge federal court and the validity upheld in a 2-1 decision.

> be ever mindful of the necessity of preserving the integrity and independence of the coordinate branches of government. We should, therefore, exercise an appropriate degree of restraint to see if they will carry out their duties. Only if both they and the people fail to act will it become a judicial function to step into the void.[44]

As a result, article V, § 45, of the constitution now requires the general assembly to reapportion at *some* session after the United States census with such duty becoming mandatory only after the people have failed to invoke the initiative and referendum powers.

Finally, the court entered an order retaining jurisdiction "until either a constiutional amendment has been passed by the voters in November, 1962, or until the 44th General Assembly in its 1963 session has had an opportunity to act in the matter. . . ."[45] This retention of jurisdiction has presumably expired of its own terms because of the constitutional amendment adopted in November, 1962.

Justice Moore dissented, urging:

> In the case before us the petitioner is entitled to equal protection of the law—NOW! . . . . That which deprives a citizen of this "equal protection" must be swept aside and held for naught, even though it be an act of the general assembly or a provision of the state constitution![46]

Justice Moore felt the proper remedy to be an at-large election.

Justice Hall also dissented, disagreeing with both the majority and Justice Moore, on the ground that the judiciary had no power to grant appropriate relief in malapportionment cases:

> The powers and duties of the Supreme Court are limited, well defined by the Constitution and enabling legislation. I find nothing therein remotely suggesting that this court has the power to step in and fill the breach occasioned by the failure of the executive or legislative branches of the government to perform their constitutional duties.[47]

Justice Hall would have dismissed the petition with no retention of jurisdiction.

A similar suit, seeking an injunction to enjoin enforcement of the offensive apportionment statutes, was pending in the federal courts at the time of the Colorado Supreme Court suit discussed above. The three-judge federal court also withheld judgment pending the 1962 elections and retained jurisdiction until after the election, ordering a pre-trial conference "on or about November 15, 1962."[48]

C. *Discrimination in Employment*

The Colorado Anti-Discrimination Act of 1957[49] makes it an unfair employment practice "For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of

---

44 Note 35, *supra* at 71.
45 *Id.* at 72.
46 *Id.* at 76-77. Compare Justice Moore's language in the MCID case: "Any who seek to persuade this court to emasculate this constitutionaal provision [art. XX] by judicial fiat, are doomed to disappointment. To nullify constitutional safeguards for the sake of expediency in solving local problems of Home Rule Cities . . . would establish a precedent contrary to all precepts of constitutional government . . . . " Four-County Metro. Capital Imp. Dist. v. Board of County Comm'rs, 369 P.2d 67, 77 (Colo. 1962).
47 Note 35, *supra* at 83.
48 Lisco v. McNichols, 208 F.Supp. 471 (D.Colo. 1962).
49 Colo. Rev. Stat. § 80-24-1 to -8 (Supp. 1960).

compensation against any person otherwise qualified, because of race, creed, color, national origin or ancestry."[50] After a hearing, the Colorado Anti-Discrimination Commission found that Continental Air Lines had violated the act by denying employment to an otherwise qualified Negro applicant for a job as airline pilot. Continental sought judicial review.[51] The district court, Judge Black, held that the act could not be constitutionally applied to Continental because of its position as an interstate air carrier, and that application of the act would constitute a burden on interstate commerce.[52]

The commission and complainant sought reversal of the district court judgment by writ of error in the Colorado Supreme Court. The supreme court affirmed the district court.[53]

In reaching the conclusion that the Colorado Act could not be applied to an interstate air carrier, the court relied on three United States Supreme Court cases, *Cooley v. Board of Wardens*,[54] *Hall v. DeCuir*,[55] and *Morgan v. Virginia*.[56]

The *Cooley* case established the broad proposition that states are prohibited, under the commerce clause, from regulating those areas of interstate commerce which by their nature require uniform treatment. The *Hall* and *Morgan* cases apply that principle in situations of racial discrimination by interstate carriers.

In *Hall*, a Louisiana statute prohibited discrimination in passenger accommodations and a Mississippi statute required segregation. The defendant, owner of a steamship plying between the two states, was sued for denying a Negro equal accommodations. The Supreme Court held the Louisiana statute invalid:

> Uniformity in the regulations by which he [the interstate carrier] is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be.[57]

In the *Morgan* case, a Virginia statute requiring segregation on all passenger motor vehicles was held unconstitutional when challenged by an interstate passenger. The test was stated thusly:

> There is a recognized abstract principle . . . that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation.[58]

---

50 Colo. Rev. Stat. § 80-24-6(2) (Supp. 1960).
51 Colo. Rev. Stat. § 80-24-8(1) (Supp. 1960): "Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof . . . ."
52 Continental Air Lines v. Colorado Anti-Discrimination Comm'n, Denver Dist. Ct., B-29648, Jan. 7, 1961.
53 Colorado Anti-Discrim. Comm'n v. Continental Air Lines, 368 P.2d 970 (Colo. 1962).
54 53 U.S. (12 How.) 996 (1851).
55 95 U.S. 485 (1877).
56 328 U.S. 373 (1946).
57 Hall v. DeCuir, 95 U.S. (5 Otto) 547, 548 (1877).
58 Morgan v. Virginia, 328 U.S. 373, 377 (1946).

Applying these authorities to the case at bar, the Colorado court concluded that the state was powerless to legislate concerning racial discrimination by employers engaged in interstate commerce: "The Supreme Court of the United States has clearly indicated that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."[59]

Justice Frantz dissented in a lengthy, well-documented opinion. In essence, the most persuasive reasons for his dissent were the ideas that employment contracts are not commerce and can thus be regulated by the states under their police power, and that state anti-discrimination statutes aid rather than burden commerce in fulfilling the requirements of the 14th amendment.

Justice Pringle wrote a separate dissent, which can be summed up in the following extract:

> . . . I cannot believe that a law passed by a state which implements a basic concept of our form of government—the right of a man, otherwise well qualified, not to be denied a job solely because of his race, color or creed—can be deemed to be a *burden* on interstate commerce.[60]

The United States Supreme Court granted certiorari on October 8, 1962,[61] and on April 22, 1963, handed down a unanimous opinion reversing the Colorado court.[62] Mr. Justice Black wrote for the Court and held, in effect, that the Colorado court had misread the *Hall* and *Morgan* cases. Those cases are distinguisable upon the theory that they involved situations where the interstate carriers were exposed to inconsistent legislation in different states; the burden on interstate commerce arose out of the hazard of conflicting state treatment.[63] In the instant case, however, the Court felt that enforcement of Colorado's anti-discrimination act would not expose, and indeed could not expose, Continental to conflicting statutes in other states; in other words, no other state could compel the employer to behave contrary to the order issued by the Colorado Anti-Discrimination Commission. Therefore, reasoned the Court, this is

59 Note 53, *supra* at 974-75.
60 *Id.* at 982 (emphasis in original).
61 Colorado Anti-Discrim. Comm'n v. Continental Air Lines, 83 S.Ct. 26 (1962).
62 Colorado Anti-Discrim. Comm'n v. Continental Air Lines, 83 S.Ct. 1022 (1963).
63 This is the approach taken in Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), where the Court held that a new safety device (contour mud-flaps on large trucks) out of line with the requirements imposed by other states (which required straight mud-flaps) may place an unconstitutional burden on interstate commerce.

not a case requiring uniformity among states in the sense of *Cooley*, *Hall* and *Morgan*.

D. *Discrimination in Housing*

The Colorado Fair Housing Act of 1959[64] makes it unlawful For any person having the right of ownership, or possession, or the right of transfer, rental, or lease of any housing:[65] To refuse to transfer, rent, or lease, or otherwise to deny or to withhold from any person or persons such housing because of race, creed, color, sex, national origin, or ancestry; to discriminate against any person because of race, creed, color, sex, national origin, or ancestry in the terms, conditions, or privileges pertaining to any housing, or the transfer, rental, or lease thereof, or in the furnishing of facilities or services in connection therewith; to cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, national origin, or ancestry of a person seeking to purchase, rent, or lease any housing.[66]

The validity of this and other provisions of the fair housing act were called into question in *Colorado Anti-Discrimination Comm'n v. Case*.[67]

In the *Case* case, a Negro couple answered a newspaper advertisement for sale of a home in Colorado Springs, inserted by the owner who was a real estate broker. After visiting the property and giving the salesman a $500 deposit, the Negroes were informed by an employee of the broker that they would be unhappy in that neighborhood. When the Negroes insisted on purchasing the house, they were told it had been sold; actually the house was conveyed to one of the broker's salesman who subsequently resold the house to a white purchaser.

The commission found, after hearing, that an unfair housing practice had been committed and ordered the respondent real estate firm to offer the complainants a comparable home in the same or a comparable neighborhood. Upon review in the district court,[68] that portion of the act authorizing the commission to enter the order it did was held unconstitutional as being vague and indefinite and an unlawful delegation of legislative power.[69]

64 Colo. Rev. Stat. § 69-7-1 to -7 (Supp. 1960).

65 "Housing" is defined in the act to " . . . mean any building, structure, or part thereof which is used or occupied . . . as the home or residence of one or more human beings; or any vacant land for sale or lease; but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants and not more than four boarders or lodgers." Colo. Rev. Stat. § 69-7-3(c) (Supp. 1960). The meaning of this definition is unclear (and uninterpreted); apparently, it is intended to exempt from the act those property owners who rent out rooms in their homes, so long as less than four boarders are taken in.

66 Colo. Rev. Stat. § 69-7-5(1)(b) (Supp. 1960). The act goes on to establish other unfair housing practices of a similar vein in connection with financing and advertising housing and inserting restrictive covenants in real estate instruments. §§ 69-7-5(1)(c), (d), (e), (f). Subsection (2) carves out an exception for religious organizations which gives preferences to members of the religious denomination. § 69-7-5(2). This subsection is obviously designed to exempt nursing homes, sanitoria, old peoples' homes, etc., operated by religious bodies. In this connection, the provision must be read along with § 69-7-3(b) defining "person."

67 380 P.2d 34 (Colo. 1963). The case was decided on December 17, 1962, and rehearing denied April 8, 1963. The author felt it was more important to include the case in the 1962 review while it is still fresh.

68 Colo. Rev. Stat. § 69-7-7(1) (Supp. 1960). The wording of this section is exactly the same as in note 51, *supra*.

69 Colo. Rev. Stat. § 69-7-6(12) (Supp. 1960): "If, upon all of the evidence at a hearing, the commission shall find that the respondent has engaged in or is engaging in an unfair housing practice . . . the commission shall . . . issue . . . an order requiring such respondent to cease and desist from such unfair housing practice and to take such affirmative action, including (but not limited to) the transfer, rental, or lease of housing; the making of reports as to the manner of compliance and such other action as in the judgment of the commission will effectuate the purposes of this article."

The supreme court discussed first the validity of the fair housing act in light of the contention that the act takes property without due process[70] and takes private property for private use in violation of article II, § 14, of the Colorado Constitution. The court upheld the act as a valid exercise of the police power, balancing the property rights asserted by the real estate firm with the human rights asserted by the complainants. The court held that the ninth amendment to the United States Constitution buttressed by the Colorado Constitution, article I, §§ 3 and 28, establish inherent and inalienable human rights superior to property rights which have never been regarded as absolute.[71]

The court bases its decision, then, on a theory of natural rights —the right of an individual to acquire and possess property free from racial or religious discrimination far outweighs any right, claimed to be "inherent," of a property owner to discriminate in the transfer of his property to anyone he sees fit. Although it is unusual for a court to talk in terms of inherent rights, an analysis of the two concepts, "private property" and "police power" shows that they are often in conflict in the sense that almost every exercise of the "police power" results in an uncompensated burden on private property. As was so well stated so long ago by Professor Ely:

> Now there is more in this police power than regulation of property relations and contractual relations. But there is no difficulty except where property and economic relations are concerned. No one objects to general benevolence —to doing good without cost—so when we consider police power, its essence is the interpretation of property, and when we consider the real essence of the police power as found in the leading American decisions we find that it is consistent with this concept. *It is that power of the courts committed to them by American Constitutions whereby they must shape property and contract to existing social conditions by settling the question of how far social regulations may, without compensation, impose burdens on property.*[72]

The court answered the contention that the act takes private property for private use without compensation, a taking prohibited by article II, § 14, of the state constitution, by pointing out that the act only comes into operation once the owner of the property, of his own free will, places the property on the open market.

After establishing the validity of the fair housing act under the state police power, the court turned to the problem of whether § 6(12) of the act[73] amounts to an unlawful delegation of legislative power. The court held that the portion of § 6(12) empowering the commission to take "such other action as in the judgment of the commission will effectuate the purposes of this article" did amount

70 In violation of the fourteenth amendment to the United States Constitution and article II, § 25 of the Colorado Constitution.

71 The court quoted from Nebbia v. New York, 291 U.S. 502, 523 (1934): " . . . But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

72 1 Ely, Property and Contract in Their Relation to the Distribution of Wealth 220 (1914) (emphasis in original).

73 See note 69, *supra*.

to an unlawful delegation: "The legislature cannot delegate to any administrative agency 'carte blanche' authority to impose sanctions or penalties for violation of the substantive portion of a statute."[74]

Presumably, the result of this holding is that the commission may order the transfer, rental or leasing of housing, but is powerless to fashion any other remedies. This holding is perhaps consonant with other Colorado cases[75] but seems out of line when viewed in light of most modern decisions in other states, and under federal law. More and more states today are following the federal view of delegations to administrative agencies and holding that such delegations are valid if intelligible standards are set forth to guide the agency in exercising its discretion.[76] The Colorado legislature certainly gave the commission a standard in § 6(12)—"such action . . . as will effectuate the purposes" of the act.[77]

A majority of the court, then, upheld the fair housing act in ringing terms[78] but limited the power of the Anti-Discrimination Commission to fashion remedies appropriate to correction of unfair housing practices. This feature of the case is perhaps the most difficult to appreciate as one so rarely sees judicial liberalism and judicial conservatism so emphatically displayed in the same opinion. On the one hand, the court talks in terms of "natural rights" and ascribes to the legislature the valid and laudable purpose of saving the nation from tyranny while, on the other hand, the court invokes the delegation doctrine in all of its fictitious majesty and says only the legislature can detail the remedies to be applied under the act.

Justices Frantz and Pringle concurred specially, in separate opinions. Justice Frantz used his opinion to indicate that the fair housing act is in line with Colorado's historical role of liberalism in questions of race and color:

> Our pronouncement this day is on the side of history. What we have here said is in harmony with eternal principles to which the founding fathers pledged fealty in simple, noble language in the Declaration of Independence. For it is historical fact that Colorado's statehood marks the first fulfillment of these principles.[79]

Justice Pringle in his concurrence indicated his belief that even though the commission is now limited under § 6(12) to ordering the transfer, rental or lease of housing, an order may be entered requiring a respondent to procure "comparable housing in the same or in a comparable neighborhood" in those cases where there is evidence in the record to substantiate the availability of comparable housing.

---

74 Note 67, *supra* at 43.

75 See, e.g., Casey v. People, 139 Colo. 89, 336 P.2d 308 (1959).

76 For an excellent discussion of the delegation problem, see Jaffe, *An Essay on Delegation of Legislative Power*, 47 Colum. L. Rev. 359, 560 (1947).

77 Compare this language with the Emergency Price Control Act of 1942 which authorized the Administrator to establish prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." This delegation was upheld in Yakus v. United States, 321 U.S. 414 (1944).

78 *E.g.*, "When, as at present, the entire world is engulfed in a struggle to determine whether the American concept of freedom with equality of opportunity shall survive . . . we would be blind to stark realities if we should hold that the public safety and the welfare of this nation were not being protected by the Act in question. Indeed, whether the struggle is won or lost might well depend upon the ability of our people to attain the objectives which the Act in question is designed to serve." Note 67, *supra* at 41-42.

79 *Id.* at 43. Justice Frantz went on to point out that the spirit of the thirteenth, fourteenth and fifteenth amendments was embodied in the Enabling Act creating the State of Colorado and that the constitution of the new state reflected this spirit.

Justice Hall dissented, believing the entire act unconstitutional as in direct violation of article II, § 14, of the state constitution, "Private property shall not be taken for private use unless by consent of the owner." Justice Hall first pointed out that other states with fair housing acts limit the application of the statute to publicly assisted housing; only Massachusetts applies its statute to all housing[80] and that state has no constitutional provision like article II, § 14. Then he indicated that the effect of enforcing the fair housing act would be to divest the owner of the property of his title and place title in the complainants. "Such a result, in my humble opi-

80 Massachusetts Comm'n Against Discrimination v. Colangelo, 182 N.E.2d 595 (Mass. 1962). New York, on April 22, 1963, extended its statute to cover private housing, effective September 1, 1963.

nion, would constitute a 'taking of property in a constitutional sense' and in flagrant violation of article II, section 14 of the Constitution of the State of Colorado."[81]

II.

In the four cases just discussed, the court was subjected to extensive public criticism. However, in four other constitutional law cases the court handed down opinions on fairly important questions with little publicity attending the pronouncements. These four cases will be discussed here.

A. Real Estate Taxes and Judicial Review

In *Mardi, Inc. v. City and County of Denver*,[82] the court invalidated a statute requiring payment of assessed property taxes as a condition precedent to judicial challenge of the correctness of the assessment.

The City and County of Denver assessed plaintiffs' property, Cherry Creek Shopping Center, in 1958. The plaintiffs objected to the assessment; after hearings, the Board of Equalization denied the petitions for reduction in the amount of assessment. The denial was by means of written notice dated December 31, 1958, and received by the plaintiffs on Friday, January 2, 1959. Upon appeal to the district court, the decision was for the defendant because of plaintiffs' failure to comply with the statutory provision," . . . before the appeal to the district court shall be allowed, the petitioners shall pay to the county treasurer the amount of the tax levied pursuant to such assessment."[83]

The Colorado Supreme Court was, on appeal, faced with the question of whether the above statute requires or can require payment of taxes levied under a contested assessment as a condition precedent to the district court's jurisdiction. The supreme court found that the requirement of § 38 is void as an "invidious and unwarranted distinction not countenanced by constitutional requirements of equality."[84]

Because another statute provides that "all taxes shall be due and payable, one-half on or before the last day of February, and the remainder on or before the last day of July of the year following the one in which they were assessed,"[85] the court found protesting taxpayers are discriminated against in having to pay all the assessed taxes prior to their district court appeal,[86] while non-protesters need not pay until the end of February and July.

The courts holding—that § 38 is discriminatory and void because of no justifiable basis for the prepayment requirement—displays an unfortunate application of constitutional principles. Assuming the correctness of the result, the court, by invalidating the statute, used a solid club rather than a flexible birch rod in achieving that result. Whether or not it is reasonable to require payment of taxes prior to judicial challenge of the assessment, is primarily

81 Note 67, *supra* at 48. Justice Hall went on to say that "Winking at clear constitutional provisions and giving judicial sanction to unlimited expansion of the police powers may well be forerunners of a police state." *Ibid.*
82 375 P.2d 682 (Colo. 1962).
83 Colo. Rev. Stat. § 137-3-38 (1953).
84 Note 82, *supra* at 685.
85 Colo. Rev. Stat. § 137-9-3 (1953).
86 Protesters must appeal by the first Monday in January. Colo. Rev. Stat. § 137-3-38 (1953).

a legislative question, *i.e.*, the legislature has the power to prescribe conditions precedent to using the courts for judicial determination of tax problems. In the *Mardi* case, however, the court is using an equal protection theory because of discrimination between two dissimilar classes—protesting and non-protesting taxpayers. This injudicious use of equal protection notions and of heavy-handed statute voiding are especially indefensible because another theory was available to the court for achieving the same result.

The court pointed out, in the *Mardi* case, that the plaintiffs had only one day in which to prepare their district court appeal because they were notified of the rejection of their administrative appeal on January 2, a Friday, and the statute required filing of the appeal by the first Monday of January. This, the court said in a dictum, "can be scarcely deemed to be due process of law, or fair."[87] Thus, the court could have decided that these plaintiffs were denied due process, or that the statute *as applied* to them imposed an unconstitutional requirement, instead of abstractly deciding that the statute is void on its face because some class other than the one utilizing the statute is treated differently!

B. Annexations

When the City of Denver annexes territory of an adjacent county, must this annexation be approved by a majority of voters in the entire county affected? The Colorado court, in *Board of County Comm'rs v. City and County of Denver*,[88] said such approval need not be obtained.

The Board of County Commissioners of Jefferson County sought judicial review[89] on behalf of the residents of the county and in their individual capacities to challenge two annexations of Jefferson County territory. The basis for the challenge was that the provisions[90] allowing Denver to annex territory of other counties without submitting the question to *all* the voters in that county constitute a denial of equal protection under the fourteenth amendment.

The supreme court carefully analyzed the equal protection argument[91] and decided first that the county commissioners in their official capacity could not avail themselves of fourteenth amendment protection, on the theory that subdivisions of a state government cannot challenge state action.[92]

The court then decided that the county commissioners, in their individual capacities, were not denied equal protection. This part of the decision is based on the Supreme Court case of *Hunter v. Pittsburgh*[93] holding that citizens have no vested right, in the constitutional sense, in municipal boundaries.

The county commissioners, in this case, tried to depict the annexation provisions as allowing the City of Denver to encroach upon the territory of surrounding counties at will, upsetting county tax

87 Note 82, *supra* at 683.
88 372 P.2d 152 (Colo. 1962), *appeal dismissed*, 82 S.Ct. 679 (1963).
89 Under the provisions of Colo. Rev. Stat. § 139-11-6 (1963).
90 Colo. Const. art. XX, § 1. Also see Colo. Rev. Stat. § 139-11-3 (1953).
91 Compare the court's approach in this case with the loose language in the Mardi case discussed in the previous section of this article. The variation in approach is even less understandable when one notes that the two opinions were written by the same justice.
92 The court relied on Williams v. Mayor, 289 U.S. 36 (1933), holding that a municipal corporation has no privileges and immunities under the fourteenth amendment.
93 207 U.S. 161 (1907).

planning and altering intra-county districts. This depiction was rejected by the court:

> Annexations to Denver . . . are the product of the free choice of the majority of statutorily authorized persons in the district seeking annexation. The City Council of Denver does not initiate the annexation proceedings; it merely accepts or rejects the annexation petition presented, subject to other statutory requirements.[94]

An appeal to the United States Supreme Court was dismissed for want of a substantial federal question.[95]

C. Zoning

Board of County Comm'rs of Jefferson County v. Shaffer[96] involved a challenge of a zoning classification resulting in a supreme court decision which clearly sets forth the role of the judiciary in zoning cases.

In the *Shaffer* case, the county zoned the plaintiffs' property R-2, residential; petitions to change the zoning classification were denied, and a suit was brought alleging that the zoning resolution as applied to the plaintiffs was confiscatory, discriminating, unreasonable and, therefore, violative of the equal protection and due process provisions of the state and federal constitutions. The trial court granted relief and issued decrees which, *inter alia,* rezoned the property in question.

The supreme court reversed, holding that the trial court exceeded its powers in substituting its judicial judgment for that of the zoning agency. The courts cannot interfere with the discretion vested in the zoning body except where there is a clear showing of an abuse of that discretion and, further, where the question is merely debatable no abuse of discretion exists. In reviewing the instant record, the court emphasized the following principles:

1. The fact that property might be more valuable in a commercial use than in a residential use is not sufficient in and of itself to upset a zoning ordinance establishing the property as residential.
2. The fact that adjoining streets are redesigned to carry a heavy flow of traffic (thus greatly increasing the commercial value of the property and decreasing its residential value) is insufficient to establish the unreasonableness of the residential classification.
3. Unless there is a showing that the property cannot be used for the purposes limited in the zoning ordinance, one cannot establish an abuse of the zoning agency's discretion in denying a change of classification.

The court's decision is based on the feeling that a court is not equipped to engage in the business of zoning and that for a court to substitute its judgment as to the correct zoning classification of a particular piece of property would result in more harm than good because of the evils of spot zoning. Consequently, so long as there

---

94 Note 88, *supra* at 157.

95 82 S.Ct. 679 (1963).

96 367 P.2d 751 (Colo. 1962). The principles underlying this decision were reaffirmed in City and County of Denver v. American Oil Co., 374 P.2d 357 (Colo. 1962). Also see Baum v. City and County of Denver, 363 P.2d 688 (Colo. 1961).

is some evidence to support the zoning authority's classification, it will be upheld.

The import of this decision lies in the notice given by the court that the only way to upset a zoning classification judicially is to show a clear abuse of discretion. Furthermore, a showing that the property is more valuable in another use will not satisfy the abuse of discretion requirement so long as some evidence exists that the property can be used for purposes consistent with the zoning agency's classification.

D. Unemployment Compensation

In *Donnell v. Industrial Comm'n*,[97] the court upheld the statute authorizing the commission to use its discretion in denying jobless pay for voluntary quits. The statute provides that ". . . if an individual . . . has quit his job without good cause and without extenuating circumstances, he shall be disqualified for not less than ten weeks nor more than thirty-two and one-half weeks . . . as determined by the department in each case according to the circumstances or seriousness of the act or offense. . . ."[98]

In the *Donnell* case, a woman quit her job after a salary dispute with the employer. Upon applying for benefits she was awarded compensation with a twenty-two week disqualification. The employer appealed on the ground that the former employee was not entitled to any benefits. The supreme court held the statute consti-

97 368 P.2d 777 (Colo. 1962).
98 Colo. Rev. Stat. § 82-4-9(1)(c) and (d) (Supp. 1960).

tutional on the basis of a former decision involving the same wording in a predecessor statute.[99]

This decision was the impetus for proposed legislation in the General Assembly to amend the statute and eliminate compensation for those who quit their jobs voluntarily. As of this writing, no such legislation has been passed. Although unemployment compensation statutes in many states provide total disqualification for voluntary quits,[100] good words can be said for the Colorado approach, in that the statute recognizes the difficulty of defining accurately "good cause" and "unemployed through no fault of his own" and leaves to the department the task of assessing the degree of "fault" which attached to the voluntary quit.[101]

III.

Several other cases involving constitutional law issues were decided by the court in 1962. Because of the relatively minor significance of the constitutional law decisions in these cases, they will merely be digested here.

In *Goldy v. Gerber*,[102] the court decided, among other things, that the business of conducting an industrial bank could be regulated and even prohibited under the police power of the state.

McCarty v. Goldstein[103] upheld the validity of the two year statute of limitations for malpractice actions against doctors, chiropractors, osteopaths, chiropodists, midwives and dentists. The statute had been challenged as violative of equal protection because other practitioners of healing arts, such as nurses and psychologists, were not included. The court held that "The classification of occupations and professions for limitation and regulation is a matter for legislative determination, and when based upon reasonable grounds will not be interfered with by the judiciary."[104]

In *Farmers Irrigation Co. v. Game and Fish Comm'n*,[105] the court held that a priority to use of water constitutes a property right which is protected under the eminent domain provisions of the state constitution.

Whether the non-exercise of a special power of appointment in Colorado, thus passing the assets of a New York trust in accordance with the trust, creates a taxable transfer in Colorado was decided in *People v. Cooke*.[106] In that case, a trust was created by decedent's mother in Connecticut in 1931, the trustee and trust assets located in New York; decedent was designated an income beneficiary for life with a general power of appointment. In 1949, decedent in New Jersey reduced her general power to a special power; in 1956 decedent became domiciled in Colorado and in 1957 she executed a will providing that it was not her intent to exercise the special power. After decedent's death, Colorado sought to include the trust assets in the estate for inheritance tax purposes. The executor challenged such inclusion on constitutional grounds. The Colorado court

99 Cottrell Clothing Co. v. Teets, 139 Colo. 558, 342 P.2d 1016 (1959).
100 *E.g.*, Illinois Unemployment Compensation Act § 601 B: "An individual who has left work voluntarily without good cause . . . shall be ineligible for benefits . . . ."
101 See Teple, *Disqualification: Discharge for Misconduct and Voluntary Quit*, 10 Ohio St. L.J. 191 (1949); Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 Yale L.J. 147 (1945).
102 377 P.2d 111 (Colo. 1962).
103 376 P.2d 691 (Colo. 1962).
104 *Id.* at 693.
105 369 P.2d 557 (Colo. 1962).
106 370 P.2d 896 (Colo. 1962).

held that, for tax purposes, a special power of appointment could constitutionally be treated as a general power:

> . . . a general power of appointment, exercised or non-exercised, is a proper foundation upon which to impose a succession tax, even though the intangible assets are located in a state other than that where the person possessing the power of appointment is domiciled.[107]

In *Peters v. People*,[108] the court decided two constitutional law points. First, the court held that the larceny by bailee provision of the criminal code[109] is not vague and indefinite in the constitutional sense of informing men of common intelligence of its meaning and application.[110] Second, the court stated its understanding of *Mapp v. Ohio*:[111]

> We conclude that the decision of the Supreme Court of the United States went no farther than to exclude in the state courts the use of evidence obtained by way of an unreasonable search and seizure as forbidden by the Fourth Amendment. . . . It does not exclude all evidence which might be obtained as an incident to a lawful arrest, nor does it preclude the admission of all evidence which may have been obtained without the sanction of a search warrant [such as a permissive search].[112]

The court, in *Bunzel v. City of Golden*,[113] upheld a city ordinance imposing a very high license fee upon "operators" of coin-operated amusement games and a relatively low license fee for "dealers." The court held that the business of operating pinball machines is not "inherently useful or harmless" and thus may be regulated without regard to fourteenth amendment arguments. This conclusion was based on the statute authorizing cities to prohibit or suppress gaming devices[114] and a 1936 decision holding that pinball machines are gaming devices within the statute.[115]

In *Sunray Mid-Continent Oil Co. v. State*,[116] the court held that the state constitution, article IX, §§ 9 and 10, gives the state board of land commissioners the power to control public lands and this power encompasses the granting of mineral leases without prior approval of other state agencies.

Finally, in *May Stores Shopping Centers, Inc. v. Shoemaker*,[117] the court, in invalidating the method utilized to assess shopping center property (the assessor based the determination on a comparison with a "model shopping center" located elsewhere in the city), held that hearings before the Board of Equalization[118] are

---

107 *Id.* at 899. The reason for treating a general or a special power (non-exercised) the same is that in either case the trust beneficiaries receive their bounty by the inaction of the decedent. *Id.* at 900.
108 376 P.2d 170 (Colo. 1962).
109 Colo. Rev. Stat. § 40-5-14 (1953): "If any bailee, by finding or otherwise of any money, bank bill, or note, or goods or chattels, shall convert the same to his own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking has [sic] been felonious, and on conviction thereof shall be punished accordingly."
110 See e.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939).
111 367 U.S. 643 (1962).
112 Note 108, *supra* at 175.
113 372 P.2d 161 (Colo. 1962).
114 Colo. Rev. Stat. § 139-32-1(66) (1953).
115 Walker v. Begole, 99 Colo. 471, 63 P.2d 1224 (1936).
116 368 P.2d 563 (Colo. 1962).
117 376 P.2d 679 (Colo. 1962).
118 Colo. Rev. Stat. § 137-3-38 (1953).

quasi-judicial; thus due process requires a full adversary type hearing and no use of extra-record evidence.

IV.

In attempting to summarize the work of the Colorado court in constitutional law cases the difficult task is to find a common thread running through the major cases. The only effective and constructive criticism lies in examining the court's approach to constitutional cases and, unfortunately, the Colorado court's approach in 1962 was so varied and so inconsistent that, in effect, no approach can be discerned. One expects differing approaches from different justices but how can one deal with very different approaches from the same justice?[119]

One conclusion, then, is inescapable—the court and the individual justices have not developed a consistent, philosophically based approach to constitutional problems. Rather, the methodology is intensely casuistic. This is, perhaps, undesirable from the point of view of the practitioner who would like to predict the outcome of his case. However, one finds the same phenomenon operating in connection with most state supreme courts. The reason is, in part, due to the type of work performed by the state appellate courts. Constitutional problems are only one part, and a small one at that, of the workload of the Colorado court. Thus the court does not have the opportunity to develop an approach to constitutional problems as does the United States Supreme Court.

The question thus becomes whether one can expect the justices to do more than react to the immediate issues before them. Perhaps the only practical way to answer the question is to express a hope that the members of the court will more carefully consider the language of their opinions in light of what they have expressed in prior opinions involving constitutional issues.[120]

---

119 See notes 2, 41, 46, 91, *supra*, and accompanying text.

120 This comment is in no way intended to reflect upon the results reached in the cases discussed — only upon the methods and language used in arriving at those results.