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1995 Supreme Court of Rhode Island Survey: Constitutional Law

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Constitutional Law. *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). Rhode Island's public school financing system does not violate education clause or equal protection clause of the State Constitution.

Challenges to state systems of funding public education have arisen in nearly every state in the past 20 years.[1] Primarily, these suits have been based on what is characterized as unequal funding for public school children. In *City of Pawtucket v. Sundlun,* the Rhode Island Supreme Court faced the issue of whether the state's public education financing system violated the education clause or the equal protection clause of the state constitution. The Supreme Court reversed a superior court decision and held that the statutory financing scheme did not violate either provision of the state constitution.

FACTS AND TRAVEL

In 1991, three Rhode Island communities initiated suit in superior court alleging that the state's appropriation for elementary and secondary education as well as the state's method of funding public education violated the Rhode Island Constitution.[2] The defendants included the Governor, Lieutenant Governor and the Board of Regents for Elementary and Secondary Education.[3]

At trial, a proceeding in which over 1,400 pages of testimony were recorded, the plaintiffs contended that the state's system of financing public education violated the education clause[4] as well as the equal-protection and due-process guarantees[5] of the State Con-

1. *See, e.g.*, Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Abbot v. Burke, 575 A.2d 359 (N.J. 1990); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); McDuffy v. Secretary of Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993).

2. City of Pawtucket v. Sundlun, 662 A.2d 40, 42 (R.I. 1995).

3. *Id.* at 42 n.2.

4. R.I. Const. art. XII, § 1, which provides: "The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services."

5. *See,* R.I. Const. art. I, § 2, which provides: "[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws."

stitution.[6] Specifically, plaintiffs alleged that their right to education was compromised because schools in poorer districts received less funding than those in wealthier districts.[7] Conversely, the defendants argued that the "education clause does not guarantee a right to education, but rather, only a right to have the General Assembly formulate a system of education."[8] Additionally, the defendants contended that the means to finance education fall within the purview of the Legislature's power and that because the state has a compelling interest in delegating educational control to local communities, the funding policy did not violate the equal protection clause.[9]

The superior court held that under the Rhode Island Constitution, "education is a "fundamental and constitutional right" which "each child has as a resident of Rhode Island . . . and that right is to an opportunity to receive an equal, adequate, and meaningful education."[10] Under this premise, the court found that the state's public school financing system violated the education clause, equal protection clause and due process guarantees of the constitution. As such, the superior court ordered defendants to "proceed with all deliberate speed to formulate and establish a system of public school finance which complies with [the court's decision and judgment]."[11]

Subsequent to the superior court's entry of judgment, motions to intervene were filed by five Rhode Island School Districts.[12] The trial justice denied all motions and three of the districts filed an appeal with the supreme court.[13] In March of 1994, one of the intervenors, East Greenwich, joined by the Westerly and South Kingstown School Districts, filed a petition for the issuance of certiorari to review the superior court's order. This petition was granted by the court.[14] On the same day, the superior court heard and denied a motion to intervene by the Jamestown School Dis-

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6. *Sundlun*, 662 A.2d at 60.
7. *Id.* at 60.
8. *Id.* at 54.
9. *Id.*
10. *Sundlun*, 662 A.2d at 55.
11. *Id.*
12. Exeter-West Greenwich, East Greenwich, Foster-Glocester, Bristol-Warren, Middletown; *Id.* at 43.
13. *Id.* Bristol-Warren and Middletown did not file appeals in this matter.
14. *Id.*

trict. The next day, Jamestown filed a petition for certiorari which was granted by the court and consolidated with all other pending appeals in the matter.[15]

In June of 1994, the Mayor, Superintendent of Schools, and the School Committee of Providence petitioned to intervene as plaintiffs in the matter and the court granted their petition.[16] During this interim period, plaintiffs filed a motion to remand the proceedings back to superior court. On April 28, 1994, the Supreme Court denied the motion to remand "and pointed out that our grants of certiorari and the pending appeals deprived the Superior Court of jurisdiction."[17] Following this flurry of motions and interventions, on a fully consolidated appeal, the supreme court was presented with the issue of whether the state's public school financing system violated the educational, due process, and equal protection clause of the state constitution.

BACKGROUND

The debate over school financing has been an active one over the last twenty-five years, permeating nearly every state in the country.[18] The landmark decision in school financing is the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez.*[19] In *Rodriguez,* the Court held that although education is one of the most important services performed by the state, it is not within the limited category of rights recognized by the Court as guaranteed by the United States Constitution.[20] From *Rodriguez* onward, the school financing debate has festered throughout the union.

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15. *Sundlun,* 662 A.2d at 44.

16. *Id.*

17. *Id.*

18. *See e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Parker v. Mandel, 344 F.Supp. 1068 (D. Md. 1972); Van Duzartz v. Hatfield, 334 F.Supp. 870 (D. Minn. 1971); Buruss v. Wilkerson, 310 F.Supp. 572 (W. D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F.Supp. 327 (N. D. Ill. 1968), *aff'd mem. sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary of the Exec. Office of Educ., 615 N.E.2d 516 (Ma. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

19. 411 U.S. 1 (1973).

20. 411 U.S. at 35.

It has been suggested that school finance litigation across the country has appeared in three distinct waves.[21] The first wave is what became known as the "fiscal neutrality theory."[22] Under this theory, reformers claimed that the Federal Constitution's Equal Protection Clause guaranteed equal funding for all school districts within a state, and that any disparities based on wealth denied poor children equal protection under the law.[23]

The second wave of school finance cases involved the same equal protection reasoning as the first wave with one marked difference. Due to the Supreme Court's decision in *Rodriguez,* litigants were now forced to rely upon the equal protection clauses found in state constitutions as opposed to the equal protection clause of the federal constitution.[24]

The third and final wave began in 1989, as state courts began striking down school financing systems not based on state constitution equal protection clauses, but rather, based on state education clauses.[25] This trend, favoring quality of education over equality of funding based on state education clauses as opposed to equal protection provisions, appears to be the future of school finance litigation.[26] It is under the guise of the state education clause as well as the equal protection clause of the state constitution which the plaintiffs in *Sundlun* brought their claim.[27]

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21. *See* William E. Thro, *The Third Wave: The Implications of the Montana, Kentucky, and Texas Decisions for the Future of Public School Finance Reform Litigation*, 19 J.L. & Educ. 219 (1990).

22. Betsy Levin, *Current Trends in School Finance Reform Litigation: A Commentary,* 1977 Duke L.J. 1099, 1101 (1977); William Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation,* 75 Va. L. Rev. 1639, 1650-51 (1989).

23. U.S. Const. amend. XIV § 1. *See* Serrano v. Priest, 487 P.2d 1241, 1247 (Cal. 1971).

24. *Rodriguez,* 411 U.S. at 1 (no fundamental right to education under the Constitution); *See eg.,* Robinson v. Cahill. 303 A.2d 273 (N.J. 1973), *cert denied,* 414 U.S. 976 (1973)(overturning N.J. school finance system, which relied on local property taxes, as violative of state constitution education clause).

25. *See e.g.,* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); William Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model,* 35 B.C. L. Rev. 597 (1994).

26. Thro, *supra* note 25, at 604.

27. *Sundlun,* 662 A.2d at 40.

ANALYSIS AND HOLDING

The *Sundlun* court began its analysis by summarizing the standard of review in construing statutory and constitutional provisions.[28] The court explained that "[b]ecause of the broad plenary power of the General Assembly, this court's evaluation of legislative enactments has been extremely deferential . . ."[29] Specifically, the court noted that it would "not invalidate a legislative enactment unless the party challenging the enactment can prove beyond a reasonable doubt . . . that the statute in question is repugnant to a provision in the constitution."[30]

After a substantial review of the statutory and constitutional underpinnings of public education in Rhode Island the court concluded that equal division of funds was not intended and further that education not was a fundamental right.[31] Specifically, the court came to examine Article XII of the State Constitution as adopted in 1986 and stated that: "[t]he convention's adoption of article 12, section 1, signifies that the framers of the 1986 Constitution did not intend to alter the state's approach to funding education or to impose new constitutional requirements upon the General Assembly in respect to education."[32]

Based upon this historical precedent and the language of the constitution, the court concluded that the education clause did not confer a fundamental and constitutional right to education and did not guarantee "equal, adequate, and meaningful education."[33] The court buttressed this conclusion by stating "at the time article 12 was adopted and for decades afterward, there was no requirement that public education be provided at all in this state."[34]

Conversely, the plaintiffs cited extensively to the Supreme Court's decision in *School Committee of Westerly v. Westerly Teachers Ass'n*[35] claiming the court had "consistently found education to be a fundamantal right under the Rhode Island Constitution."[36]

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28. *Id.* at 45.
29. *Id.* at 44.
30. *Id* at 45 (citing Gorham v. Robinson, 186 A. 832, 837 (R.I. 1936)).
31. *Sundlun*, 662 A.2d at 45-50.
32. *Id.* at 50.
33. *Id.* at 55. *See supra* note 4.
34. *Sundlun,* 662 A.2d at 55 citing Charles Carroll, *Public Education in Rhode Island,* ch. IV at 145 and ch. V at 202.
35. 299 A.2d 441 (R.I. 1973).
36. *Sundlun,* 662 A.2d at 57.

The Court, however, disagreed and stated that "*Westerly Teachers* stands for the propostion that outside forces may not interfere with the education of Rhode Island youth. It does not cite any restrictions on the General Assembly's constitutionally assigned duty to promote public education in Rhode Island."[37]

The Court then went on to to find that plaintiffs' request for relief, namely, the creation of new financing standards, would violate the separation of powers doctrine.[38] Under *INS v. Chadha,*[39] the separation of powers doctrine can be violated in two ways. First, "one branch may interfere impermissibly with the other's performance of its constitutionally assigned function" or secondly, a violation occurs "when one branch assumes a function that more properly is entrusted to another."[40]

In *Sundlun*, the court held that the plaintiffs' requested relief would violate both propositions. First, it would force the court to "interfere with the plenary constitutional power of the General Assembly in education."[41] Second, "by urging that we order 'equity' in funding sufficient to 'achieve learner outcomes,' plaintiffs have asked that the court take on a responsibility explicitly committed to the Legislature."[42] Accordingly, the court held that the proper forum for this deliberation is in the General Assembly; for it is the court's duty to determine the law, not make it.[43]

The plaintiffs' final challenge rested on the premise that the school financing system violated the equal-protection and due-process guarantees of the state constitution.[44] This argument was similarly rejected by the court.[45] The court first stated that there exists no fundamental right to education and that wealth is not a suspect class for purposes of equal protection analysis. Therefore, the proper level of review was that of "minimal scrutiny."[46] In other words, the funding system had to be upheld if it was "ration-

37. *Id.*
38. *Id.* at 58.
39. 462 U.S. 919 (1983).
40. *Sundlun*, 662 A.2d at 58 (quoting *Chadha,* 462 U.S. at 963).
41. *Id.*
42. *Id.*
43. *Id. See* United States v. Nixon, 418 U.S. 683, 703 (1974).
44. *Sundlun,* 662 A.2d at 60.
45. *Id.* at 61.
46. *Id; See Rodriguez,* 411 U.S. at 35; Maher v. Roe, 432 U.S. 464, 471 (1977).

ally related to a legitimate state interest."[47] Under this rational basis test, the court held that the "preservation of local control is a legitimate state interest and that the current financing system is rationally related to that legitimate state interest."[48] As such, the public school financing system was held not to violate the equal protection clause of the state constitution and the decision of the lower court was reversed in full.

CONCLUSION

In *Sundlun*, the Rhode Island Supreme Court decided that neither the Education, nor the Equal Protection Clauses of the Rhode Island Constitution were violated by the General Assembly's education financing system. The court concluded that determinations of educational financing are properly addressed by the legislature. Under the complicated constitutional scenario of this case, this survey is best concluded by Justice Lederberg's own words: "A judge accustomed to the constraints implicit in adversary litigation cannot feasibly by judicial mandate interfere with this delicate balance without creating chaos."[49]

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47. *Sundlun*, 662 A.2d at 61.
48. *Id.* at 62.
49. *Id.* at 63.

Constitutional Law. *Dart Industries, Inc. v. Clark*, 657 A.2d 1062 (R.I. 1995). Section 44-11-11 of the Rhode Island General Laws, which treats foreign and domestic dividends differently for tax purposes, declared unconstitutional as violative of the Foreign Commerce Clause of the United States Constitution.

Article I, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate commerce with foreign Nations."[1] The Fourteenth Amendment then states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[2] Based upon these constitutional provisions, as well the recent holding of the United States Supreme Court in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*,[3] the Rhode Island Supreme Court declared section 44-11-11 of the Rhode Island General Laws[4] unconstitutional. The statute violates the Foreign Commerce Clause because of its treatment of foreign dividends "less favorably than those paid by domestic corporations."[5]

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1. U.S. Const. art. I, § 8, cl. 3.

2. U.S. Const. amend. XIV, § 1.

3. 505 U.S. 71 (1992) (holding Iowa statute allowing corporations to take deductions for dividends received from domestic, but not foreign subsidiaries, declared unconstitutional in that it facially discriminates against foreign commerce in violation of the Foreign Commerce Clause).

4. R.I. Gen. Law § 44-11-11 (1995) states:

> Net income means for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, plus (i) any interest not include in the taxable income, (ii) any specific exemptions, and (iii) the tax imposed by this chapter, and minus (iv) interest on obligations of the United States or its possessions, and other interest exempt from taxation by this state, and (v) the federal net operating loss deduction. (2) . . . However, Rhode Island taxable income shall not include the 'grossup of dividends' required by the federal Internal Revenue Code to be taken into taxable income in connection with the taxpayer's election of foreign tax credit . . . *Id.*

Unlike the federal statute, this section does not allow a corporation receiving foreign dividend income to credit that income against its Rhode Island tax liability for any portion of the foreign taxes attributable to foreign dividend income. Dart Indus., Inc. v. Clark, 657 A.2d 1062, 1064 (R.I. 1995); 26 U.S.C. §§ 901, 902 (1988).

5. *Dart*, 657 A.2d at 1066.

FACTS AND TRAVEL

Dart Industries (Dart), a manufacturer of plastic products, maintains a local office in Woonsocket, Rhode Island.[6] From 1981 to 1983, Dart filed its Rhode Island Business Corporation Tax return with the Rhode Island Division of Taxation.[7] Over the course of those three years, Dart excluded, "by deductions or otherwise, dividends it received from foreign subsidiary corporations (foreign dividend income)."[8] In 1984, Dart was the subject of a field audit which encompassed the taxable years of 1981, 1982 and 1983.[9]

As a result of the audit, "the tax division's field auditor included foreign dividend income in computing Dart's net income subject to Rhode Island apportionment and taxation for each calendar tax year in question."[10] Following the adjustments, Dart's tax liability was recomputed and the tax division's issued of deficiency notices to Dart for the taxable years in question.[11] In October of 1985, Dart filed a request for administrative review.[12]

The first component of the Dart's review consisted of an informal preliminary conference which resulted in a reduction of the additional tax assessments.[13] Thereafter, Dart, not satisfied with these initial reductions, filed for a formal hearing pursuant to Rhode Island's Administrative Procedure Act.[14] At the formal hearing, Dart contended that § 44-11-11 violated the Foreign Commerce Clause because it treated domestic dividends more favorably than those dividends received from foreign subsidiaries.[15] The presiding officer rejected Dart's contention and reasoned that these constitutional arguments "would be better suited to the federal

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6. *Id.* at 1063.
7. *Id.*
8. *Dart,* 657 A.2d at 1063.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Dart,* 657 A.2d at 1063.
13. *Id.* Review pursuant to Rhode Island Division of Taxation regulation No. AHP 94-01 B.5.
14. *Id.* R.I. Gen Laws §§ 42-35-1 to -18 (1993) R.I. Gen. Law § 44-11-6 (1995) states in part: If any taxpayer is not satisfied with the amount of tax so determined, the tax administrator, upon being so notified in writing within thirty (30) days from the date of the mailing of the notice, shall fix an early date at his or her office when the taxpayer can be heard to show cause why the tax should be changed, and after which the tax administrator may redetermine the amount of that tax. *Id.*
15. *Dart,* 657 A.2d at 1064.

courts."[16] The tax administrator adopted the written recommendation in his final opinion and thereafter, Dart prepaid the revised tax assessments[17] and "availed itself of the opportunity for a *de novo* review of the administrator's Final Decision and Order in the Sixth Division District Court."[18] The district court then issued a judgment stating that Dart was not entitled to a tax refund since sections 44-11-11 and 44-11-12 did not violate the Foreign Commerce Clause and/or the Equal Protection Clause of the United States Constitution.[19]

Following the issuance of the district court's decision, Dart filed both a motion to reconsider in the district court and a writ of *certiorari* to the Rhode Island Supreme Court.[20] The district court denied Dart's motion to reconsider, causing Dart to file a second writ of *certiorari* with the supreme court.[21] The supreme court granted both petitions and consolidated them for briefing and argument.[22] In the time span between granting *certiorari* and docketing the matters, the United States Supreme Court issued its decision in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance.*[23] As a result of this decision,[24] the Rhode Island Supreme Court remanded the case back to the district court "for reconsideration of the issues in light of *Kraft* and for a determination of whether *Kraft* [should] be applied prospectively only or retroactively."[25]

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16. *Id.*

17. *Id. See generally* R.I. Gen. Laws § 8-8-26 (1985) and R.I. Gen. Laws § 44-11-35 (1985), *amended by* P.L.1982, ch. 388, §§ 3,8.

Section 44-11-35 states in relevant part: "[T]he taxpayer's right to appeal hereunder shall be expressly made condition upon prepayment of all taxes, interest and penalties" unless the taxpayer is granted an exemption by meeting the very stringent requirements of section 8-8-26 by proving that the taxpayer has a reasonable probability of success on the merits and is financially unable to pay the taxes due. *See Dart*, 657 A.2d at 1064 n.4.

18. *Dart*, 657 A.2d at 1064. *See* § 44-11-35 and R.I. Gen. Laws §§ 8-8-24 to -32 (1985).

19. *Dart*, 657 A.2d at 1064.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Kraft*, 505 U.S. 71.

24. *See supra* note 3.

25. *Dart*, 657 A.2d at 1064 (quoting Dart Indus., Inc. v. Clark, 619 A.2d 1130, 1131 (R.I. 1993)(alteration in original).

On remand, the district court held that *Kraft* applied retroactively and thus invalidated section 44-11-11 under the Foreign-Commerce Clause.[26] In addition, the district court also concluded that Dart was entitled to a refund of his prepaid taxes and that "the predeprivation remedies available to a Rhode Island taxpayer were inadequate to satisfy the due-process clause of the Fourteenth Amendment to the United States Constitution so as to preclude claim for a refund."[27]

The court granted certiorari to determine "(1) whether the United States Supreme Court's *Kraft* decision should apply retroactively, (2) whether section 44-1-11 entitles Dart to a refund of prepaid taxes, and (3) whether Rhode Island's predeprivation remedies were sufficient under the Due Process clause of the Fourteenth Amendment to the United States Constitution."[28]

BACKGROUND

Pursuant to the Internal Revenue Code, a corporation receiving a dividend from a domestic subsidiary is allowed to deduct all or a portion of that dividend from its taxable income.[29] On the other hand, "a corporation receiving a *foreign* dividend is only allowed to claim a deduction for the foreign taxes that were paid by the foreign affiliate to earn the funds represented by that dividend."[30] Therefore, if a domestic corporation owned at least ten percent of the voting stock of a foreign corporation and received dividends as a result, the domestic corporation could elect to include in its income "an amount equal to the foreign taxes that are deemed attributable to the foreign dividend," and could then "claim a credit against its own tax liability for those foreign taxes."[31]

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26. *Id.* at 1065.
27. *Id.*
28. *Id.*
29. 26 U.S.C. §§ 241 and 243 (1988). Section 243 states, in part, "In the case of a corporation, there shall be allowed as a deduction . . . the amount received as dividends from a domestic corporation."
30. *Dart*, 657 A.2d at 1063. *See* 26 U.S.C. § 164 (1988). Section 164 states, in part, "Except as otherwise provided in this section, the following taxes shall be allowed as a deduction . . . (3) state and local, and foreign, income, war profits, and excess profits taxes." *Id.* at 26 U.S.C. § 164(a)(3) (1988).
31. *Dart*, 657 A.2d at 1063. 26 U.S.C. §§ 901-902 (1988) (taxes of foreign countries and of possessions of the United States. Section 901 deemed paid credit where domestic corporation owns 10 percent or more of voting stock of foreign corpora-

Under Rhode Island law, a corporation's net income is defined as its federal taxable income.[32] Pursuant to section 44-11-11, a corporation could exclude from its Rhode Island income "dividends received from the shares of stock of . . . any corporation liable to a tax imposed by this chapter."[33] Under this language, an exemption is created for dividends paid by corporations with a connection to Rhode Island.[34]

Section 44-11-11, unlike 26 U.S.C. §§ 901-902, "does not allow a corporation receiving foreign dividend income to credit that income against its Rhode Island tax liability for any portion of the foreign taxes attributable to foreign dividend income."[35] Accordingly, since Rhode Island has no mirror to the federal credit system, foreign dividends are usually taxable as net income in Rhode Island, whereas domestic dividends are not.[36]

Similarly, in *Kraft*, the United States Supreme Court held that an Iowa statute, which did not allow a credit for taxes paid to foreign countries, facially discriminated against foreign commerce in violation of the Foreign Commerce Clause.[37] In *Kraft*, the Court stated "[t]he adoption of the federal system in whole or in part, however, cannot shield a state tax statute from Commerce Clause scrutiny. The Iowa statute cannot withstand this scrutiny, for it facially discriminates against foreign commerce and therefore violates the Foreign Commerce Clause."[38] Based upon the U.S. Supreme Court's holding, the issue before the Rhode Island Supreme Court became how to apply the holding in *Kraft*, specifically, whether *Kraft* should be applied prospectively or retroactively.

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tion. *Dart*, 657 A.2d at 1063. (Section 901 applies to taxation of foreign countries and of possessions in the United States; section 902 applies to deemed paid credit where domestic corporation owns 10 percent or more of the voting stock of a foreign corporation).

32. *Dart*, 657 A.2d at 1063. *See supra* note 4.

33. *Id.* at 1063. *See supra* note 4.

34. *Id.*

35. *Id.* at 1064. *See also* R.I. Gen. Laws § 44-11-11; 26 U.S.C. §§ 901, 902.

36. *Dart*, 657 A.2d at 1064.

37. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992).

38. *Id.* at 82.

ANALYSIS AND HOLDING

The court, in deciding to apply *Kraft* retroactively, relied upon the United States Supreme Court's recent ruling in *Harper v. Virginia Department of Taxation.*[39] In *Harper,* the Supreme Court reinforced a principle mandating that when the Supreme Court

> applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[40]

Prior to *Harper,* courts, in determining the application of a new decision, relied upon a three-pronged equitable analysis as set forth by the Supreme Court in *Chevron Oil v. Huson.*[41] Since 1971, however, the Supreme Court has slowly chipped away at this three-prong rule.

The first step in this diminution occured in the criminal context when the Supreme Court discarded the equitable analysis rule and held that all newly declared rules must be applied retroactively to all criminal cases pending on direct review.[42] The diminution continued in *Harper,* "the United States Supreme Court appears to have virtually eviscerated *Chevron Oil's* equitable analysis in the civil context."[43] The *Harper* Court further stated that

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39. 509 U.S. 89 (1993).

40. *Harper,* 509 U.S. at 96. *See* James Beam Distilling Co. v. Georgia, 501 U.S. 529, 539 (1991).

41. 404 U.S. 97 (1971)("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity'." 404 U.S. at 106-107 (internal citations omitted)(alterations in original).

42. *Dart,* 657 A.2d at 1065; *See* Griffith v. Kentucky, 479 U.S. 314 (1987), *overruling* Linkletter v. Walker, 381 U.S. 618.

43. *Dart,* 657 A.2d at 1065. ("[t]hus, *Harper* appears to be the culmination of the United State's Supreme Court's efforts to prohibit from consideration the " 'particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from retroactive application of the new rule" in determining the retrospective application of a recent decision. *Id.*; *See Harper,* 509 U.S. at —, 113 S.Ct. at 2517 (quoting in part *James Beam,* 501 U.S. at 543).

"the legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a *Chevron Oil* analysis.' "[44]

Accordingly, under the rule set forth in *Harper*, the Rhode Island Supreme Court was bound to apply *Kraft* retroactively."[45]

With the *Kraft* decision being applied retroactively, the Rhode Island Supreme Court was compelled to hold that section 44-11-11, which contained the same "fatal flaw"[46] present in the Iowa statute, "facially discriminates against against foreign commerce and therefore violates the Foreign Commerce Clause."[47]

Finally, the administrator contended that even if *Kraft* did apply retroactively, section 44-1-11 did not entitle Dart to a refund of the prepaid taxes.[48] The administrator argued that the term "overpayment" and "erroneous payment" contained in the statute did not allow a refund for illegal or unauthorized payments.[49] The supreme court, utilizing well settled rules of statutory construction, disposed of the administrator's argument. The court explained that such a construction would produce an absurd or unreasonable result, because the taxpayer would be forced to either acquiesce to an adverse decision of the tax administrator, or prepay the tax, challenge the decision, and even if successful, be denied a refund.[50] As such, Dart was entitled to a refund of his prepaid taxes.

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44. *Dart*, 657 A.2d at 1066; *See Harper*, 509 U.S. at —, 113 S.Ct. at 2519 (quoting *James Beam*, 501 U.S. at 540).

45. *Dart*, 657 A.2d at 1066.

46. A preference for domestic commerce over foreign commerce. *Id.*

47. *Dart*, 657 A.2d at 1066 (quoting *Kraft*, 505 U.S. at 82).

48. *Id.* at 1066. R.I. Gen. Laws § 44-1-11 G.L.1956 (1980 Reenactment) is a refund statute which provides: "[w]henever an erroneous payment, or any patment in excess of the correct amount of any tax, excise, fee, penalty, interest, or other charge shall have been made to the tax administrator, the general treasurer shall, after certification by the tax administrator with the approval of the director of administration, refund such erroneous payment or overpayment, or the tax administrator may credit the same against any tax then or thereafter due, as the circumstances may warrant." *Dart*, 657 A.2d at 1066 n.7.

49. *Dart*, 657 A.2d at 1066.

50. *Id.* *See also*, State v. Benoit, 650 A.2d 1230, 1232 (R.I. 1994); State v. Kane, 625 A.2d 1361, 1363 (R.I. 1993); State v. McDonald, 602 A.2d 923, 926 (R.I. 1992); Trembley v. City of Central Falls, 480 A.2d 1359, 1360 (R.I. 1984).

Conclusion

While on the surface the application of the *Kraft* decision appeared to be a clear cut issue, the Rhode Island Supreme Court was forced to contend with what has been an ongoing debate over the application of new federal law to pending cases. Be that as it may, once the issue of retroactivity was resolved, the court declared section 44-11-11 unconstitutional because it treated foreign dividends less favorably than domestic dividends in violation of the Foreign Commerce Clause.

Joseph T. Healey

Constitutional Law. *Rhode Island Depositors Economic Protection Corporation v. Brown*, 659 A.2d 95 (R.I. 1995). DEPCO Act found constitutional under the Equal Protection, Due Process and Bill of Attainer Clauses of the United States Constitution and the Rhode Island Constitution.

The Rhode Island Depositors Economic Protection Corporation ("DEPCO") was created by the Rhode Island General Assembly in response to the ensuing financial crisis that affected the state, attributable to the closing of RISDIC and the forty five financial institutions and credit unions it insured.[1] In *Rhode Island Depositors Economic Protection Corporation v. Brown*[2] the Governor of Rhode Island requested an advisory opinion[3] from the Rhode Island Supreme Court regarding the constitutionality of the Act.[4]

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1. R.I. Gen. Laws §§ 42-116-1 to -40 (1993). The DEPCO Act provides in relevant part:

> Notwithstanding any provisions of law to the contrary, a person, a corporation, or other entity who has resolved its liability to the Rhode Island Depositors' Economic Protection Corporation, the receiver of Rhode Island Share and Deposit Indemnity Corporation or the receiver of any state chartered financial institution in a judicially-approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any other joint tortfeasors unless its terms so provide, but it reduces the potential liability of such joint tortfeasors by the amount of the settlement.

"The provisions of this section shall apply solely and exclusively to the settlement of liabilities to [DEPCO]. . . ." R.I. Gen. Laws § 42-116-40 (1993). DEPCO, a public corporation, was charged with the payment of the deposit liabilities of the failed financial institutions, the liquidation of their assets, and the pursuit of tortfeasors who contributed to the banking crisis.

2. 659 A.2d 95 (R.I. 1995).

3. The Governor may request a legal opinion from the Rhode Island Supreme Court pursuant to article 10, section 3, of the Rhode Island Constitution. R.I. Const. art. X, § 3.

4. The Governor's request was in the form of three questions;

> 1. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?
>
> 2. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?
>
> 3. Whether the provisions of R.I. Gen. Laws § 42-116-40 constitute an unlawful bill of attainer in violation of Article I, Section 10 of the [United States] Constitution? *Brown*, 659 A.2d at 98.

Consequently, the Rhode Island Supreme Court consolidated the matters and responded in the form of an opinion which found the Act to be constitutional.[5]

FACTS AND TRAVEL

DEPCO's duties included pursuing tortfeasors thought responsible for the banking crisis.[6] On February 20, 1992, DEPCO filed a complaint against Ernst & Young[7] in Rhode Island Superior Court. The cause of action was negligence, negligent misrepresentation and breach of contract.[8]

In July of 1993 the Rhode Island General Assembly passed the Act. Among other things, the Act retroactively eliminated rights of non-settling parties involved in the credit union crisis from seeking contribution from settling parties.[9]

On September 29, 1994, plaintiffs DEPCO and Edward D. Pare, Jr., in his capacity as receiver for Brown University Employees Credit Union, filed a complaint against certain former officers and directors of the Brown University Employees Credit Union "alleging that the directors' negligence in the supervision, management, and operation of the credit union caused its failure and resulted in damages to plaintiffs."[10] On October 14, 1994, the defendants filed a third-party complaint for contribution and indemnity against Ernst & Young and certain of its present and former partners, as well as a motion to certify questions concerning the

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5. *Brown*, 659 A.2d 95.

6. *Id.* at 99.(The legislation created an entirely new financial institute receivership law and appointed DEPCO as the receiver for RISDIC. Fulfilling its statutory duties, DEPCO pursued parties who contributed to the banking crisis and litigation ensued in Rhode Island Superior Court).

7. Ernst & Young is a public accounting firm whose responsibilities included auditing and reporting the financial condition of the institutions which RISDIC insured.

8. *Brown*, 659 A.2d at 99. (The complaint alleged that Ernst & Young issued unqualified audit opinions to RISDIC and sought damages from Ernst & Young for not properly auditing and reporting the financial condition of the failed institutions).

9. *Id.* at 104. Two weeks after passage of the Act, Ernst & Young filed a declaratory judgment action in Federal District Court seeking to declare the Act unconstitutional. The district court dismissed the complaint on ripeness and abstention grounds and the First Circuit subsequently affirmed on appeal. Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530 (1st Cir. 1995).

10. *Brown*, 659 A.2d at 98.

constitutionality of the Act.[11] The trial justice entered an order approving the settlement and certified[12] to the supreme court four questions essentially similar to those certified by the Governor.[13]

BACKGROUND

Prior to the enactment of the Act, a non-settling defendant in a RISDIC case was able to seek contribution from all other joint tortfeasors pursuant to sections 10-6-1 to -11 of the Rhode Island General Laws, with the exception of those defendants who had entered into settlements that expressly released all claims against all potentially responsible parties for the settling party's proportionate share of the overall liability.[14] Under the DEPCO Act, however, a tortfeasor who refuses to settle out of court, but is later found liable at trial, may not bring an action for contribution against a party that had previously settled out of court.[15] Rather, that tortfeasor could only deduct the full amount of any settlement by joint tortfeasors from the judgment against it.[16]

ANALYSIS AND HOLDING

In determining whether the Act violated equal protection principles the court began with the assumption that all legislative enactments of the General Assembly are presumed to be valid and

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11. *Id.* (On October 17, 1994, the plaintiffs filed a similar motion, questioning the constitutionality of the Act, and a motion seeking the Superior Court's approval, pursuant to the Act, of a settlement that plaintiffs and defendants had reached). *Id.*

12. *Id.* Parties may motion the court or the court may on its own certify questions for appeal pursuant to R.I. Gen. Laws § 9-24-27.

13. *Id.* (The questions submitted by the Rhode Island Superior Court differ only in that the certified questions of the Governor's also request an opinion from the Court with respect to whether the Act constitutes a law impairing the obligation of contracts in violation of Article 1, Section 12, of the Rhode Island Constitution). *Id.*

14. R.I. Gen. Laws §§ 10-6-1 to -11 (1985) state, in part: "The prior contribution law ensured that, if a joint tortfeasor were held responsible (and paid) more than its ratable share of damages, it could seek damages in the form of contribution from other joint tortfeasors who had not paid their proportionate share of liability."

15. R.I. Gen.Laws § 42-116-40 (1993).

16. *Id.*

constitutional[17] and that the party challenging the constitutional validity of an act carries the burden of persuading the court.[18]

Since the parties conceded that the Act did not infringe on a fundamental right or result in the creation of a suspect class, the court determined that the Act was an example of economic legislation entitled to rational review.[19]

In support of their argument that the Act violates equal protection principles, Ernst & Young reminded the court that the state may not rely on an illegitimate or invidious goal when distinguishing among similarly situated persons.[20] In furtherance of that argument Ernst & Young cited to *Boucher v. Sayeed* to demonstrate that the court found a legislative enactment could be unconstitutional even under the minimal standard of rational basis review.[21]

Ultimately, the court differentiated the DEPCO Act from the legislation in *Boucher* and held that the "Act comports with the requirements of equal protection under both the United States and Rhode Island Constitutions."[22] The court explained that the defendants in RISDIC tort cases are insured under "defense-within-limits" or "wasting asset" insurance policies.[23] The court concluded that more of the insurance proceeds will reach DEPCO through settlements rather than through costly litigation, thus ruling that the settlement provisions within the Act related to the legitimate state objective of resolving the banking crisis.[24]

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17. *Brown*, 659 A.2d at 100, *citing* Kennedy v. State, 654 A.2d 708, 712 (R.I. 1995); Kass v. Retirement Bd. of the Employees Retirement System, 567 A.2d 358, 360 (R.I. 1989).

18. *Id.* at 100, *citing* Brennan v. Kirby, 529 A.2d 633, 639 (R.I. 1987).

19. *Id.* (The Court points out that to survive rational review, the Act must be related to a legitimate legislative objective). *Id.*

20. Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 883 (1985).

21. Boucher v. Sayeed, 459 A.2d 87, 94 (R.I. 1993). In *Boucher*, the Court held that amendments to the state's Medical Malpractice Reform Act failed to satisfy rational basis review under the equal protection clause because the amendments gave medical doctors and hospitals special treatment unavailable to the tortfeasors and treated medical malpractice plaintiffs different from other plaintiffs.

22. *Brown*, 659 A.2d at 101.

23. *Id.* (Under these policies all costs associated with litigation are paid by the insurance companies and are deducted from the policy limits as they are incurred).

24. *Id.*

Next, the court held that the Act had a retroactive effect upon a property right subject to due process.[25] In making that determination, the court looked to whether the statute attached new legal consequences to events completed before its enactment. In this matter it was clear that before the Act was adopted, Ernst & Young held a claim for contribution against all potential tortfeasors arising out of their past actions concerning RISDIC and the credit unions.[26] The Act proceeded to eliminate this right against tortfeasors who settled with DEPCO.[27] The court further determined that Ernst & Young's pre-existing right to contribution was properly viewed as a property right.[28]

The court explained that although a statute has a retroactive effect that implicates property rights, it does not necessarily follow that the statute is unconstitutional.[29] Employing a balancing test in making its final determination, the court weighed the public interest in retroactivity against the unfairness created.[30] In determining that Ernst & Young's reliance on the preexisting state of contribution law did not outweigh the benefits of the Act, the court recognized the great public interest in minimizing the taxpayers liability for the depositor bailout.

In analyzing the question of whether the Act constitutes an unlawful attainer[31], the court followed a three-part inquiry established by the United States Supreme Court in *Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 852 (1984).[32] The Court held that the "Act is intended to promote the settlement of claims, not to operate as a criminal penalty."[33]

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25. *Id.* at 102 (*citing* Landgraf v. USI Film Product, 114 S. Ct. 1483, 1499 (1994)).

26. *Brown*, 659 A.2d at 102.

27. *Id.*

28. *Id.*

29. *Id.* at 103 (*citing* Brennan v. Kirby, 529 A.2d 640,641 (R.I. 1987) (upholding statutory denial of seniority rights to combat veterans)).

30. *Brown*, 659 A.2d at 103.

31. The U.S. Constitution provides in part that "[no] state shall. . . pass any bill of attainer." U.S. Const. art. I, Sec. 10.

32. 468 U.S. at 852. The three steps identified by the United States Supreme Court are: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.' "

33. *Brown*, 659 A.2d at 105.

Moreover, the Court pointed out that the Act's goal of encouraging settlement and saving the amount and cost of litigation could reasonably be said to further non-punitive legislative purposes.[34] Because the Court could find no clear legislative intent to target specific individuals, nor could it determine whether the Act standing alone would advantage or disadvantage a discernible party it ruled that the Act could not be construed as an unlawful bill of attainder.[35]

Finally, the Court held that the Act is not a law which impairs the obligation of contracts in violation of the Rhode Island or United States Constitution.[36] The Court finding no contractual right which was impaired by the Act , restated it's settled position that " 'even if [they] were to find an impairment of the contractual relationship, that impairment would be outweighed by the legitimate public purpose of returning funds to the deposit creditors and eventually to the Rhode Island economy.' "[37]

CONCLUSION

Recognizing the importance of it's decision in *Brown* the court stated that, "[t]he determination of the constitutionality of the DEPCO Act is the linchpin of the settlement in the underlying cause of action and all future settlements in DEPCO litigation."[38] By upholding the constitutional validity of the Act, the court reinforced the state legislature's attempts to guide Rhode Island out of financial uncertainty and into an environment which promises predictability and equality for all those affected by the closing of RISDIC.

As a consequence of this decision, parties to DEPCO litigation are encouraged to settle claims out of court, thus minimizing litigation cost and maximizing judicial efficiency. This legitimate legislative objective allows for the most efficient allocation of the

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34. *Id.*

35. *Id.*

36. *Id.* at 106.

37. *Brown*, 659 A.2d at 106 (*quoting* In re Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 949 (R.I. 1991)).

38. *Id.* at 100.

liability insurance of the failed credit unions which will ultimately minimize the taxpayers liability for the depositor bailout.

Peter E. LaPointe

Constitutional Law. *State v. Lopes*, 660 A.2d 707 (R.I. 1995); *State v. Chiaradio*, 660 A.2d 276 (R.I. 1995). The constitutional right to privacy of unmarried persons does not include the right to commit acts against nature.[1]

The Constitution of the United States provides for a fundamental right of privacy.[2] However, the Rhode Island Supreme Court, in *State v. Lopes*[3] and *State v. Chiaradio*[4] has reitterated that the "decision of unmarried adults to engage in private consensual sexual activities is not of such a fundamental nature . . . to warrant its inclusion in the guarantee of personal privacy."[5] The court in *Lopes* and *Chiaradio* reaffirmed its long standing position that the constitutionally provided right to privacy does not extend to unmarried adults committing crimes against nature.[6]

FACTS AND TRAVEL

A. *Lopes*

In *Lopes*, the defendant, Jorge Lopes, was charged with four counts of first-degree sexual assault under R.I. General Laws section 11-37-2,[7] and two counts of acts against nature pursuant to R.I. General Laws section 11-10-1.[8] At trial before the Superior Court, the victim testified that Lopes forced her to go to his residence, where he then coerced her into two acts of oral sex, one act of vaginal intercourse and one act of anal intercourse.[9] Lopes testi-

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1. Black's Law Dictionary defines crimes against nature as "sexual intercourse per os or per anum between human beings who are not husband and wife and any form of sexual intercourse with an animal." Black's Law Dictionary 371 (6th ed. 1990).

2. U.S. Const. amend. XIV; *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); *See* discussion *infra* pp. 252-53.

3. 660 A.2d 707 (R.I. 1995).

4. 660 A.2d 276 (R.I. 1995).

5. *Lopes*, 660 A.2d at 710, (quoting, State v. Santos, 413 A.2d 58 (R.I. 1980)).

6. *Id.*; *Chiaradio*, 660 A.2d at 278.

7. *Lopes*, 660 A.2d at 708. *See also* R.I. Gen. Laws § 11-37-2 (1956) as amended by 1987 R.I. Pub. Laws ch. 238, § 1.

8. *Lopes*, 660 A.2d at 708. *See also* R.I. Gen. Laws § 11-10-1 (1956). The Act states: "Every person who shall be convicted of the abominable and detestable crime against nature, either with mankind or with any beast, shall be imprisoned not exceeding twenty (20) years nor less than seven (7) years."

9. *Lopes*, 660 A.2d at 708.

fied that the victim had consented to sex, and that only one act of oral sex occurred.[10] The jury acquitted Lopes on all counts of first degree sexual assault, but found that he was guilty of two counts of crimes against nature, namely, the acts of oral sex and anal intercourse.[11]

After the guilty verdicts were entered, Lopes filed a motion with the superior court for arrest of judgement under superior court Rule 34.[12] Lopes argued that section 11-10-1 of the Rhode Island General Laws was an unconstitutional intrusion on his right to privacy, and that section 11-10-1 violated the equal-protection clause of both the United States and Rhode Island Constitutions because it treats married and unmarried couples differently.[13] While the superior court, citing *State v. Santos*, found that unmarried persons did not have a fundamental right to privacy with respect to acts against nature, the court concluded that married couples have a greater right of privacy than unmarried couples and the prosecution of married couples under section 11-10-1 would be unconstitutional.[14] Thus, the superior court reasoned that since section 11-10-1 treated equally situated couples differently it violated the equal-protection clause.[15] As such, the issues before the supreme court on appeal were; (1) whether the "fundamental right to privacy of unmarried persons . . . encompass[es] [the] right to commit crimes against nature,"[16] and, (2) whether the superior court erred in ruling that section 11-10-1 violated the equal-protection clause.[17]

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10. *Id.* at 708

11. *Id.* at 709.

12. *Id.* Rhode Island Superior Court Rules of Criminal Procedure Rule 34 states:

> The court on motion of a defendant shall arrest judgment if the indictment, information, or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within ten (10) days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 10-day period.

13. *Lopes*, 660 A.2d at 709.

14. *Id.*

15. *Id.*

16. *Id.* at 707.

17. *Lopes*, 660 A.2d at 709.

B. *Chiaradio*

In *Chiaradio*, Paul Chiaradio and Stephen C. Turrisi were each charged with one count of an act against nature stemming from their engaging in acts of oral sex upon female exotic dancers during a bachelor party.[18] Both defendants moved to dismiss the charges stemming from section 11-10-1 on the grounds that it had been declared unconstitutional by the superior court in *State v. Lopes*.[19] Because both parties determined that the question of constitutionality in *Lopes* had yet to be finally determined by the supreme court, the question of section 11-10-1 's constitutionality was certified to the supreme court.[20]

BACKGROUND

While there is no express provision of a right to privacy in either the Rhode Island or United States Constitutions, the Bill of Rights to the United States Constitution provides for a right of personal privacy.[21] The United States Supreme Court in *Griswold v. Connecticut*,[22] in overturning a state law banning contraceptives, found that the Bill of Rights carves out a zone of personal privacy for married couples that the government may not interfere with.[23]

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18. *Chiaradio*, 660 A.2d at 277. The facts of the case, which include the specific sexual activities of both Chiaradio and Turrisi at the bachelor party were stipulated to by the parties exclusively for the purposes of determining the question certified to the supreme court.

19. *Id.*

20. *Id.* R.I. Gen. Laws § 9-24-27 (1956) states:

> Whenever in any proceedings, civil or criminal, legal or equitable, in the superior court or in any district court, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding or if he has intervened therein, is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined; Provided, That no question shall be so certified in any criminal case where the defendant has not been released on bail.

21. U.S. Const. amend. XIV.; State v. Santos, 413 A.2d 58, 66 (R.I. 1980).

22. 381 U.S. 479 (1965).

23. *Id.* at 485-86. The U.S. Supreme Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), extended the court's holding in *Griswold* regarding contraceptives to include unmarried couples. While the Court in *Lopes* recognized the expansion of privacy rights made in *Eisenstadt*, it was unpersuaded that § 11-10-1's constitu-

Further, in *Roe v. Wade*[24], the Supreme Court held that only those rights that are "fundamental" are protected by the right to privacy, which includes those activities involving marriage, contraception and procreation.[25]

The constitutionality of section 11-10-1 has been addressed by the Rhode Island Supreme Court a number of times in the past.[26] In particular, the question of whether the proscriptions of section 11-10-1 violate a person's right to privacy was addressed by the court in *State v. Santos*, where the court determined that because the acts against nature prohibited by section 11-10-1 did not relate directly to the procreative rights defined as protected in *Roe*, they were not protected by the constitutional right to privacy.[27]

ANALYSIS AND HOLDING

In *State v. Lopes*, the court affirmed the trial court's ruling that the offense of an abominable and detestible crime against nature is not protected by an unmarried person's right to privacy.[28] In reaching this conclusion, the court based its reasoning on its past decision in *State v. Santos*, holding that the prosecution of an unmarried person under section 11-10-1 is constitutional when the

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tionality was determined by *Eisenstadt* since *Eisenstadt*'s scope was clearly within the "family relationships, marriage, or procreation" field.

24. 410 U.S. 113, 152 (1973).

25. *Santos*, 413 A.2d at 68.

26. In State v. Milne, 187 A.2d 136 (R.I. 1962), the court determined that proscribed conduct of "all acts against nature" was not so overly vague to render the statute void for vagueness. This position was further reinforced by the court in State v. Levitt, 371 A.2d 596 (R.I. 1977), as well as *Santos*, 413 A.2d 58 (R.I. 1980) (statute that forbade detestable and unnatural sexual acts not unconstitutionally vague when applied against accused who committed anal sex upon victim).

27. *Santos*, 413 A.2d at 68. In its opinion in *Santos* the court noted at length that its position with respect to personal privacy rights in certain sexual acts was not followed in many states. *See, e.g.*, State v. Saunders, 381 A.2d 333 (N.J. 1977) (fornication statute prohibiting sex between unmarried couples unconstitutionally infringes upon citizen's right to privacy, even in light of state's interest in preventing illegitimate children and sexually transmitted diseases); State v. Callaway, 542 P.2d 1147 (Ariz. Ct. App. 1975) (statute prohibiting sodomy and unnatural acts unconstitutionally infringes on unmarried couple's right of privacy); State v. Elliot, 539 P.2d 207 (N.M. Ct. App. 1975) (state's police power does not encompass ability to prohibit sodomy between unmarried consenting couples); *In re P.*, 400 N.Y.S. 2d 455 (Fam.Ct. 1977) (statute that prohibits unmarried consenting adults from deviate sexual activity violates equal protection clause when it would not forbid married couples from performing same acts).

28. *Lopes*, 660 A.2d at 710.

acts did not involve "family relationships, marriage, or procreation."[29]

The *Lopes* Court, however, reversed the trial court's ruling that section 11-10-1 violated the equal-protection clause of the Fourteenth Amendment.[30] The supreme court found that the trial judge misstated the law when he concluded that section 11-10-1 could not be constitutionally applied to married persons, and further noted that this question was not properly before the trial judge for his decision, because the issue was never brought up at trial.[31] Furthermore, the court ruled that the trial court's determination that a married person's right to privacy afforded him the right to participate in acts against nature was unfounded and not supported by the holdings of either the United States or the Rhode Island Supreme Court.[32] The court reasoned that because the trial court could not properly determine whether married persons were governed by section 11-10-1, it was foreclosed from an equal-protection analysis.[33] Finally, the court concluded that, in light of its holding in *State v. Santos*, the trial court erred in determining that married couples and unmarried couples were similarly situated for equal protection clause analysis, for *Santos* is silent on the question of the applicability of section 11-10-1 to married couples.[34]

In *Chiaradio*, the court postponed its decision until its opinion in *Lopes* was decided.[35] Based upon its holding in *Lopes*, the court had little difficulty in determining that section 11-10-1 was constitutionally applied to both defendants.[36] As the unmarried defendant in *Lopes* had no protectable privacy interest in engaging in oral sex with a woman, the court reasoned that the right to privacy argument was foreclosed in *Chiaradio*, where the defendants were unmarried.[37]

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29. *Id.*
30. *Id.*
31. *Id.* at 709.
32. *Lopes*, 660 A.2d at 709.
33. *Id.*
34. *Id.*
35. *Chiaradio*, 660 A.2d at 277.
36. *Id.*
37. *Id.* at 277-78.

Conclusion

By reinforcing the notion that sexual acts that do not result in procreation are acts against nature, the court in both *Lopes* and *Chiaradio* is simply upholding Rhode Island statutory law that dates as far back as 1897. Although this position is supported solidly by prior decisions, its outcome may not necessarily coincide with the state of the law in other jurisdictions as well as current societal norms of what is tolerable sexual behavior.

Edward M. Medici, Jr.