Roger Williams University Law Review

Volume 5 | Issue 2 Article 13

Spring 2000

1999 Survey of Rhode Island Law: Cases: Constitutional Law

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Constitutional Law. *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999). The Rhode Island Supreme Court determined that section 44-18-30(30) of the Rhode Island General Laws,[1] exempting bibles and other canonized scriptures from the state sales tax, violates the Free Press Clause of the First Amendment to the United States Constitution.[2] The Rhode Island Supreme Court noted that while the statute granted tax exemptions to certain "religious" publications, other publications were not afforded similar tax treatment due to their content.[3] The court, therefore, held that such a statute violates the First Amendment because it unlawfully classifies and rewards certain publications based upon their content.[4]

FACTS AND TRAVEL

This cause of action originated from the promulgation of Regulation SU 92-136 by the defendant Gary Clark, Tax Administrator of the State of Rhode Island (tax administrator).[5] The regulation, which made bibles and other canonized scriptures subject to state sales tax, was enacted in response to *Texas Monthly, Inc. v. Bullock*,[6] where a similar sales tax exemption for bibles and other religious literature was found unconstitutional by the United States Supreme Court.[7] The tax administrator's regulation, however, conflicted with the mandate of section 44-18-30(30) of the Rhode Island General Laws, which exempts bibles and other canonized scriptures from the Rhode Island sales tax.[8] Thus, because the newly enacted regulation contradicted the explicit command of the statute, Rhode Island book sellers and buyers were in the dark as

1. *See* R.I. Gen. Laws § 44-18-30(30) (1956) (1994 Reenactment) (providing that no sales tax shall be due "[f]rom the sale and from the storage, use, or other consumption in the state of any canonized scriptures of any tax exempt non-profit religious organization including but not limited to the Old Testament and the New Testament versions"). Notably, other sub-sections of the same statute similarly exempted newspapers, textbooks, and promotional boat literature. *See* R.I. Gen. Laws §§ 44-18-2, -37, -39 (1956) (1994 Reenactment).

2. *See* U.S. Const. amend. I. (stating that "[C]ongress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). The Fourteenth Amendment applies such a prohibition to the states. *See* U.S. Const. amend. XIV, § 1.

3. *See* Ahlburn v. Clark, 728 A.2d 449, 453 (R.I. 1999).

4. *See id.*

5. *See id.* at 451.

6. 489 U.S. 1 (1989).

7. *See id.*

8. *See Ahlburn*, 728 A.2d at 450.

to whether the sales of bibles and other canonized scriptures were subject to the state sales tax.[9]

As a result of the conflict, commercial retailers and consumers filed an action in the district court seeking injunctive and declaratory relief with respect to the constitutionality of section 44-18-30(30).[10] The district court held that the statute exempting bibles from state sales tax was unconstitutional under the Establishment Clause of the First Amendment.[11] However, the district court denied the plaintiffs' request for injunctive relief because the regulation remained effective without the contradicting statute.[12] Ultimately, the tax administrator and the Division of Taxation (the State) petitioned for certiorari to the Rhode Island Supreme Court.[13]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court first addressed whether the plaintiffs had standing to assert their claims. In do so, the court applied the standing requirements recently addressed in *Pontbriand v. Sundlun*[14] and found that the plaintiffs had standing because they alleged an "injury in fact resulting from the challenged [act]."[15] Specifically, the plaintiffs were sellers and buyers of religious publications who alleged injury from the conflicting statute and regulation, which collectively rendered them unable to determine whether to collect and remit sales tax on such purchases and sales.[16]

The Rhode Island Supreme Court then affirmed the district court's ruling that section 44-18-30(30) was unconstitutional, but

9. The plaintiffs in this action initially petitioned the tax administrator for a conclusive ruling as to whether the regulation or the statute would apply to their future transactions in the once-exempted literature. The tax administrator was unable to resolve the conflict, except to emphasize the applicability of the regulation. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* at 451.

13. *See id.* at 450.

14. 699 A.2d 856 (R.I. 1997).

15. *Id.* at 862 (quoting Rhode Island Ophthalmological Society v. Cannon, 317 A.2d 124, 129 (R.I. 1974)).

16. *See Ahlburn*, 728 A.2d at 451. As evidence of potential injury to the plaintiffs, the court noted the potential liability to retailers from uncollected and unpaid sales taxes. *See id.* at 451-52.

on the ground that it violates the Free Press Clause of the First Amendment, rather than the Establishment Clause.[17] Accordingly, the remainder of the court's opinion dealt with the First Amendment's Free Press guaranty.

In support of its decision, the Rhode Island Supreme Court relied heavily on the rationale and holding of *Arkansas Writers' Project, Inc. v. Ragland*.[18] In *Ragland*, the United States Supreme Court invalidated a comparable Arkansas statute that exempted certain publications from the state sales tax.[19] The United States Supreme Court found the statute to be unconstitutional because "a statute operating in such a way that a given publication's tax status depends entirely upon its content is particularly repugnant to the First Amendment."[20] Indeed, in this case the statute granted tax benefits to publications because of their religious content, while other publications, because of their non-religious content, were subject to the sales tax. Thus, the court determined that such content-based discrimination was a "paradigmatic example" of what the Free Press Clause was designed to prohibit.[21]

In order to justify such a classified taxation program, the State needed to show that the statute was necessary to serve a compelling state interest and that the statute was tightly tailored to achieve such an end.[22] The State, however, advanced only one state interest in support of the statutory tax exemption—namely, the State's interest in promoting religious activity and non-profit groups.[23] While assuming that such a concern was indeed compelling, the court reasoned that "the Legislature's placement of a sales-tax exemption for canonized religious literature in a section of the General Laws that also exempts newspapers, textbooks, and promotional boat literature . . . is not carefully drawn to achieve that end."[24] Consequently, the court pronounced that the exemption was particularly underinclusive to accomplish the legislature's

17. *See id.* at 452.

18. 481 U.S. 221 (1987).

19. *See Ahlburn*, 728 A.2d at 452-53.

20. *Id.* at 453 (citing *Ragland*, 481 U.S. at 230).

21. *See id.*

22. *See id.* (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581-85 (1983)).

23. *See id.* at 453-54.

24. *Id.* at 454.

broad-based purpose of advancing the well-being of Rhode Island's citizens.[25]

CONCLUSION

The Rhode Island Supreme Court's decision in *Ahlburn v. Clark* demonstrates that a state statute will be subject to heightened judicial review whenever it draws a content-based classification that implicates constitutional concerns. Since these tax exemptions applied solely to the sale of canonized scriptures and other religious publications, the court unearthed the General Assembly's obvious intent to "engage in" a preferential effort to foster the communication of certain privileged publications in a manner that is anything but content neutral."[26] Moreover, under *Ahlburn*, a heavy burden is placed on the state to show that the challenged statute necessarily serves a compelling state interest and that the statute is carefully tailored to achieve such an end.

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25. *See id.*
26. *Id.*

Constitutional Law. *FUD'S, Inc. v. State*, 727 A.2d 692 (R.I. 1999). The statutory procedures of the Fair Employment Practices Act (FEPA),[1] which grants the right to bypass the Rhode Island Commission for Human Rights and file suit in superior court to the employee only, violates the employer's right to a jury trial guaranteed by article 1, section 15 of the Rhode Island Constitution. A claim brought pursuant to FEPA is analogous to a common law action at law, and the court may award a legal remedy to the employee. Accordingly, the right to a trial by jury is guaranteed by the Rhode Island Constitution.

FACTS AND TRAVEL

This case originated with a charge filed by Denise A. Thayer (Thayer) with the Rhode Island Commission for Human Rights (Commission). Thayer was a former employee of FUD'S, where she worked as a waitress.[2] Thayer suffered from a degenerative myopia in both eyes, which allegedly prevented her from operating a motor vehicle.[3] At some point during the course of her employment, Thayer was asked about her ability to drive herself to work and back.[4] Thayer claimed that FUD'S fired her because of her disability, discriminating against her with respect to the terms and conditions of her employment.[5] FUD's maintained that Thayer was not fired, but that she refused to continue working at the restaurant.[6]

The Commission investigated Thayer's charge, and upon finding probable cause to support her claim, the Commission issued a notice of hearing.[7] Following the hearing, a decision was issued, finding that FUD'S discriminated against Thayer regarding the terms and conditions of her employment, and also refused to grant her reasonable accommodations for her disability.[8] The Commis-

1. R.I. Gen. Laws § 28-5-24.1 (1956) (1995 Reenactment).
2. *See* FUD'S, Inc. v. State, 727 A.2d 692, 694 (R.I. 1999).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.* Both actions violate the Fair Employment Practices Act, which prohibits, inter alia, firing an individual because of a disability, or refusing to reasonably accommodate an individual's disability. R.I. Gen. Laws § 28-5-7 (1956) (1995 Reenactment).

sion granted Thayer $14,201.18 in back pay and $7,000 in compensatory damages.[9] FUD'S was also ordered to rehire Thayer when a waitressing position became available, and to cease and desist from committing unlawful employment practices.[10]

FUD'S appealed the Commission's decision to the superior court, claiming that the procedures available to an employer under the procedures of FEPA violated the Rhode Island Constitution by denying an employer the right to a jury trial.[11] The Attorney General intervened in support of FUD'S, and moved to certify the question of whether the FEPA procedures violated the right to a jury trial to the Rhode Island Supreme Court.[12] The superior court granted the Attorney General's request, and the supreme court answered the certified question.[13]

BACKGROUND

Under the Fair Employment Practices Act, employees and other aggrieved parties may file unlawful employment practice charges against their employers with the Rhode Island Commission of Human Rights.[14] If the Commission finds probable cause to support the employee's complaint, it can issue a complaint to the employer and notice a hearing.[15] At this point, the employee may choose to have the complaint heard by a hearing officer on behalf of the Commission, or, if the employee files a request with the Commission between 120 days and two years after the charge is filed, the employee may bypass the Commission and file suit in the superior court.[16] The Commission is required to grant the employee's request within 30 days.[17]

Once the complaint has been filed in the superior court, either the employee or the employer may request a jury trial.[18] Unlike the employee, the employer cannot request that the complaint be

9. *See FUD'S*, 727 A.2d at 694-95.
10. *See id.*
11. *See id.* at 695.
12. *See id.*
13. *See id.*
14. *See id.* at 693; R.I. Gen. Laws § 28-5-1 (1956) (1995 Reenactment).
15. *See id.* at 693-94; R.I. Gen. Laws § 28-5-18 (1956) (1995 Reenactment).
16. *See id.* at 694.
17. *See id.* However, the employee may not request a right-to-sue authorization from the Commission once the hearing has begun. *See id.*
18. *See id.*

transferred to superior court.[19] Therefore, the employer's right to request a jury trial is triggered only after the employee opts to bypass the Commission and file suit in superior court.[20] If the employee chooses to have the charge heard by the Commission, there is no jury present, and any subsequent appeal in the superior court is reviewed under the provisions of the Rhode Island Administrative Procedures Act.[21]

ANALYSIS AND HOLDING

The right to a jury trial is guaranteed by article I, section 15 of the Rhode Island Constitution, which states that "[t]he right of trial by jury shall remain inviolate."[22] The Rhode Island Constitution became effective in 1843.[23] Therefore, a jury trial is available to any plaintiff or defendant in a legal action that would have been heard by a jury in the year 1843.[24]

When determining whether a particular cause of action triggers the right to a jury trial, the court engages in two inquires. First, the court determines whether the cause of action at issue or an analogous cause of action was amenable to a jury trial in 1843.[25] Second, the court asks whether the remedies available are equitable or legal in nature.[26] The "available relief" inquiry is the more important of the two, and if the relief is legal, the parties have a right to a jury trial.[27]

In the present case, the court noted that until 1991, the remedies available to an employee under the FEPA were largely equitable in nature, encompassing cease and desist orders, back pay, reinstatement, and upgrade of the employee.[28] However, in 1991,

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19. *See id.*
20. *See id.*
21. R.I. Gen. Laws § 42-35-15 (1956) (1993 Reenactment). Under this statute, the superior court must defer to the hearing commissioner's judgment on the weight of the evidence and questions of fact. The decision can be reversed or modified only if they are in violation of the law, in excess of the agency's authority, the result of unlawful procedure, made in error of law, clearly erroneous, or arbitrary and capricious. *See id.*
22. R.I. Const. art I, § 15.
23. *See FUD'S*, 727 A.2d at 695.
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.* (citing Tull v. United States, 481 U.S. 412, 421 (1987)).
28. *See id.* at 695-96.

the FEPA was amended to authorize the award of compensatory and punitive damages against an employer by the Commission.[29] Noting that compensatory and punitive damages are forms of legal relief, the Rhode Island Supreme Court began an additional inquiry, which it characterized as a "distinctly more historical approach with respect to this issue than the [United States] Supreme Court."[30]

Before concluding that a cause of action includes the right to a jury trial under the Rhode Island Constitution, the Rhode Island Supreme Court makes a particularized inquiry into the historical and common-law treatment of the remedies available under the cause of action before the merger of law and equity.[31] The court concluded that both punitive and compensatory damages were considered legal relief in both the Rhode Island courts and the federal courts.[32] Prior to the merger of law and equity, juries were seen as better suited to determine the amount of legal damages a plaintiff should receive, rather than "the conscience of an equity judge."[33]

Here, the compensatory and punitive damages that may be awarded under the FEPA are a significant portion of the relief that an employee may seek.[34] Therefore, the supreme court held that a cause of action brought under the FEPA is most similar to an action at law, and triggers the right to a jury trial for the employer as well as the employee.[35]

In addition to concluding that employers have a right to a jury trial for a claim brought pursuant to the FEPA, the supreme court also took the opportunity to answer the question of whether the General Assembly could assign duties traditionally fulfilled by the judiciary to administrative bodies.[36] While noting that a FEPA action does involve "public rights," the resolution of which may be delegated solely to an administrative agency,[37] the court held that

29. *See id.* at 696; R.I. Gen. Laws §§ 28-5-24(b) and 28-5-29.1 (1956) (1995 Reenactment).

30. *See FUD's*, 727 A.2d at 696.

31. *See id.*

32. *See id.* at 696-97.

33. *Id.* at 697 (quoting 2 Commentaries on Equity Jurisprudence § 794, at 1-2 & n.1 (12th ed. 1877).

34. *See id.*

35. *See id.*

36. *See id.* at 698.

37. *See id.* (citing National Velour Corp. v. Durfee, 637 A.2d 375, 379 (R.I. 1994)).

the availability of legal remedies places a FEPA action in the category of hybrid causes of action.[38] Thus, the court resolved a question it previously declined to answer, concluding that there is a right to a jury trial where a claim involves both public rights and a complainant's right to receive a legal remedy.[39]

CONCLUSION

In *FUD'S Inc. v. State*, the Rhode Island Supreme Court cemented an employer's right to a jury trial where an employee files a charge against the employer under the FEPA. In so holding, the supreme court emphasized the importance of the historical analysis employed by the court to determine whether a cause of action is entitled to a jury trial under the Rhode Island Constitution, noting that the inquiry is more specific than the one used by the United States Supreme Court. Furthermore, the court concluded that the "public rights" doctrine could not remove a claim encompassing the right to receive a legal remedy from the jurisdiction of the superior court.

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38. *See id.*
39. *See id.*; *National Velour*, 637 A.2d at 380-81 n.8.

Constitutional Law. *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999). The Rhode Island Supreme Court advised that the Rhode Island Ethics Commission acted beyond its constitutional authority when it enacted a regulation which prohibits members of the General Assembly from serving on public boards or from participating in the appointment of any other person who is to serve as a member of a public board. The regulation is unconstitutional because it fundamentally alters the constitutional structure of the government of the State of Rhode Island.

In *In re Advisory Opinion to the Governor*,[1] the Rhode Island Supreme Court was asked, by Governor Lincoln C. Almond, to issue their advisory opinion on three questions of law pertaining to the approval of Regulation 36-14-5014 (Regulation 5014).[2] The court concluded that it was only proper to answer one of the questions in the form of an advisory opinion.[3] The court thus advised that Article III, section 8 of the Rhode Island Constitution does not provide the ethics commission with the power to adopt Regulation 5014.[4]

FACTS AND TRAVEL

On November 20, 1997, pursuant to article X, section 3 of the Rhode Island Constitution, Governor Lincoln C. Almond (the Governor) propounded a request for an advisory opinion[5] to the Rhode Island Supreme Court, regarding the constitutionality of Regulation 5014 promulgated by the ethics commission on May 5, 1997.[6] In particular, the Governor asked:

> 1) Does Article III, section 8 of the Rhode Island Constitution, which empowers the Rhode Island Ethics Commission to 'adopt a code of ethics, including, but not limited to provisions

1. 732 A.2d 55 (R.I. 1999).
2. *See id.* at 57.
3. *See id.* at 72.
4. *See id.*
5. As noted by Justice Flanders in his separate opinion,
> [i]t is important to remember that the advisory opinions given by the Justices of this Court . . . are just that: advisory. . . . there is no binding legal precedent created . . . [and] [f]or these reasons, neither the proponents nor the opponents of Regulation 5014 are bound by what the Justices of this Court have said today."

Id. at 110.
6. *See id.* at 57.

> on conflicts of interest, . . . [and] use of position' provide the Ethics commission with the power to adopt Regulation 36-14-5014?
>
> 2) Is the principle of separation of powers contained in the Rhode Island Constitution properly interpreted in the same fashion as it has been interpreted in the United States Constitution with respect to appointments, such that neither legislators, nor their appointees, may serve on any public body within the executive branch of state government, or state executive, public and quasi-public boards, authorities, corporations, commissions, councils or agencies except those which: i) function solely in an advisory capacity; or ii) exercise solely legislative functions?
>
> 3) Does the separation of powers principle contained in the Rhode Island Constitution impose any limits whatsoever on legislative appointments to a public board or body (as defined above)? In particular, does the Constitution prohibit legislators and/or their appointees from constituting a majority of the membership of a public board or body? Does the Constitution prohibit appointment of sitting legislators to a public board or body?[7]

Regulation 5014 provides:

> Prohibited Activities—Members of the General Assembly—Restrictions on activities relating to Public Boards.
>
> (1) No member of the General Assembly shall serve as a member of a Public Board. No member of the General Assembly shall participate in the appointment, except through advice and consent as provided by law, of any other person to serve as a member of a Public Board.
>
> (2) For purposes of this regulation, 'Public Board' means all public bodies within the executive branch of state government, and all state executive, public and quasi-public boards, authorities, corporations, commissions, councils or agencies; provided, however, that the foregoing definition shall not apply to any such entity which (i) functions solely in an advisory capacity, or (ii) exercises solely legislative functions.
>
> (3) The effective date of this regulation is July 1, 1999.[8]

Pursuant to its authority under article III, sections 7 and 8 of the Rhode Island Constitution, the Rhode Island Ethics Commis-

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7. *Id.*
8. *Id.*

sion adopted Regulation 5014.[9] However, prior to the approval of the regulation, the ethics commission sought advice regarding the constitutional validity of the regulation.[10] The feedback that the commission received was that the regulation appeared to be unconstitutional.[11] Regardless, the commission unanimously adopted Regulation 5014.[12]

Although the regulation was adopted in May 1997, its effective date was delayed until July 1, 1999, so that the Governor could request an advisory opinion from the Rhode Island Supreme Court.[13] On November 10, 1998, the court heard oral arguments on the matter.[14]

BACKGROUND

In November 1986, the Rhode Island Constitution was amended to incorporate an ethics commission, an independent, non-partisan body, which would oversee state and local government ethics.[15] The 1986 ethics amendment to the constitution is embodied in article III, sections 7 and 8.[16] Section 8 mandates that the General Assembly establish the ethics commission which in turn would adopt a code of ethics that would apply to all public officials and employees, as stated in section seven.[17] Article 3, section 8 also establishes the ethics commission's duties and provides that "[t]he ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as pro-

9. *See id.* at 58. Regulation 5014 was proposed as regulation 5.13A, but was renumbered. *See id.* The regulation was only adopted in May 1997, after a series of public hearings required by the Code of Ethics, R.I. Gen. Laws § 36-14-9(3) (1956) (1994 Reenactment), and the Administrative Procedures Act, R.I. Gen. Laws § 42-35-3 (1956) (1994 Reenactment). *See id.*

10. *See id.* The ethics commission sought the advice of its executive director, its legal counsel (who declined to provide the commission with a legal opinion) and Professor Geoffrey C. Hazard of the University of Pennsylvania. *See id.* Professor Hazard is "a nationally renowned scholar and authority in the field of ethics in government and ethics legislation." *Id.*

11. *See id.* at 58-59 (referring, in particular, to the opinions conveyed by the commission's executive director and Professor Hazard).

12. *See id.* at 59.

13. *See id.*

14. *See id.*

15. *See id.* at 57-58.

16. *See id.* at 58.

17. *See id.*

vided by law; and the commission shall have the power to remove from office officials who are not subject to impeachment."[18]

ADVISORY OPINION AND ANALYSIS

1986 State Constitution

The court commenced its advisory opinion by noting that, as a procedural matter, it was not required to give its opinion on the constitutionality of statutes which were not yet effective.[19] The court stated that it has previously interpreted article X, section 3 of the Rhode Island Constitution to declare that the court is only required to give its opinion when questions of law are propounded by the Governor or General Assembly if the constitutionality of an existing statute is at issue.[20] However, the court stated that although Regulation 5014 was not yet effective, it would render its advisory opinion due to the significant constitutional issue and great public interest involved.[21]

The court found that article III, sections 7 and 8 of the Rhode Island Constitution grant the ethics commission the authority to establish a code of ethics, investigate violations of the code and enforce the code's provisions.[22] However, the court stated that the power granted to the ethics commission is not limitless, because the commission is subject to judicial review.[23] Furthermore, the court noted that the commission was not a separate, fourth branch of government, but was to work concurrently with the General Assembly which, pursuant to the Rhode Island Constitution, reserved authority to enact codes of ethics legislation.[24]

The court also declared that it would determine whether the ethics commission exceeded its authority by promulgating Regulation 5014 *de novo,* without deference to the agency's interpreta-

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18. *Id.* (quoting R.I. Const. art. III, § 8).

19. *See id.* at 59.

20. *See id.* (citing *In re* Advisory from the Governor, 633 A.2d 664, 666 (R.I. 1993)).

21. *See id.*

22. *See id.* at 60 (citing *In re* Advisory Opinion to the Governor, 612 A.2d 1, 10-11 (R.I. 1992)).

23. *See id.*

24. *See id.* (citing *In re Advisory Opinion to the Governor*, 612 A.2d at 14).

tion.[25] The court applied this standard because it was faced with questions of law, rather than questions of fact which require the court to show great deference to the agency's interpretation.[26]

Purpose and Scope of Regulation 5014

The court found that the commission unequivocally exceeded its constitutional authority by promulgating Regulation 5014 because it interfered with the constitutionally structured government.[27] The court opined that when the ethics commission was created, it was not to be a limitless, unfettered fourth arm of government.[28] As a result, it did not have the power to sit as a "constitutional convention" and alter the structure of government.[29] Rather, the commission was found to have a compilation of legislative, judicial and executive functions.[30]

The court stated that the constitutional framework of the government was being altered by the ethics commission by way of Regulation 5014 because it prohibited members of the General Assembly from serving on any public boards.[31] The effect of the regulation also made it a violation for a member of the General Assembly to participate in the appointment of a public board member, except through advice and consent.[32] However, each of these responsibilities is rightfully reserved to the General Assembly by way of article VI, section 10 of the 1986 Rhode Island Constitution which states that the general assembly shall "continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution."[33] The court then recounted a brief history of the

25. *See id.* at 60 (citing City of East Providence v. Public Utilities Commission, 566 A.2d 1305, 1307 (R.I. 1989); Stephen G. Bryer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 371 (1986)).

26. *See id.*

27. *See id.* at 68.

28. *See id.* at 62.

29. *See id.* at 61-62.

30. *See id.* at 61.

31. *See id.*

32. *See id.* The court also notes at this point that if Regulation 5014 were to be deemed valid, then the membership of the ethics commission itself would be illegal considering the General Assembly participated in the appointments of the members. *See id.*

33. *See id.* at 62 (quoting R.I. Const. art. VI, § 10 (1986)).

Rhode Island government and concluded that the General Assembly has appointive powers dating back to 1663.[34]

The court also found that Regulation 5014 itself is unconstitutional for two other reasons.[35] First, it violates the basic constitutional principle that every person is presumed innocent until proven otherwise by an impartial jury.[36] The court noted that Regulation 5014 singles out General Assembly members as guilty of a conflict of interest or abuse of their positions if they serve on a public board or partake in the appointments of such.[37] Nothing in article III, section 8 gives the ethics commission this authority.[38] Second, the scope of Regulation 5014 is too broad.[39] The effect of the regulation restructures Rhode Island's government.[40] The regulation is thus inconsistent with the constitutional authority delegated to the ethics commission.[41]

The court concluded by stating that "the function of the commission is to adopt regulations that would prevent improper conduct or self-dealing on the part of elected or appointed officials, not to create changes in the structure of government on the basis of the commission's belief that such change would lead to better ethical conduct."[42] As a result, the court found that it was beyond the scope of the ethics commission to adopt Regulation 5014 and that the regulation was unconstitutional.[43]

The court's conclusion served only to answer the first of the three questions posed to it by Governor Almond.[44] The court declined to answer questions two and three on the basis that these questions required fact finding and the court has previously held that it lacks "the power to issue advisory opinions which implicate

34. *See In re Advisory Opinion to the Governor*, 732 A.2d at 63-65 (encapsulating the history of Rhode Island government, in particular the traditional powers maintained by the General Assembly).

35. *See id.* at 66.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.* at 68.

40. *See id.*

41. *See id.* As noted earlier, art. III, § 8 of the Rhode Island Constitution "grants to the ethics commission 'the limited and concurrent power to enact substantive ethics laws[,]' and to investigate and sanction violations thereof." *Id.* (quoting *In re Advisory Opinion to the Governor*, 612 A.2d at 10-11, 14).

42. *Id.* at 71.

43. *See id.*

44. *See id.* at 72.

fact-finding."[45] Therefore, the court found that an advisory opinion was not a proper forum in which to answer these questions and that it would answer the queries when a litigated case was presented.[46]

Justice Flanders' Opinion

Justice Flanders opined that the ethics commission acted within its constitutional powers in promulgating Regulation 5014 and that Regulation 5014 is a valid ethics provision.[47] Justice Flanders disagreed with the majority of the court and instead of applying a *de novo* standard of review, he accorded deference to the ethics commission's interpretation of its enabling laws.[48] Justice Flanders found that "the commission's adoption of Regulation 5014 constitutes a legislative enactment pursuant to an express constitutional provision authorizing such activity,"[49] and thereby stated that it could only be declared unconstitutional if it was proven as such beyond a reasonable doubt.[50] Therefore, Justice Flanders concluded that because the opponents were unable to meet the burden established, Regulation 5014 was promulgated within the constitutional scope of the ethics commission's powers.[51]

Justice Flanders next decided that Regulation 5014 itself is a valid provision primarily because: 1) the scope of the regulation is confined to executive boards and not all public boards,[52] 2) the plain meaning of article III, section 8 of the Rhode Island Constitution grants the commission the power to adopt this regulation,[53] 3) it is consistent with a 1993 advisory opinion issued by the court,[54] 4) this would not result in the ethics commission sitting in the capacity as a "fourth branch" of government with limitless powers,[55] and 5) the regulation is consistent with other similar bans on pub-

45. *Id.* (citing *In re* Advisory Opinion to the Governor, 324 A.2d 641, 647-48 (R.I. 1974)).
46. *See id.* at 72-73.
47. *See id.* at 77.
48. *See id.* at 75-77.
49. *Id.* at 76.
50. *See id.* at 77.
51. *See id.*
52. *See id.* at 77-79.
53. *See id.* at 79-82.
54. *See id.* at 82-86.
55. *See id.* at 86-90.

lic officials' participation in multiple office holding.[56] Justice Flanders opined that the Rhode Island Constitution's clear and unambiguous language contained in article III, sections 7 and 8, grant the commission the power to adopt ethical regulations such as Regulation 5014, regardless of its ramifications.[57]

Justice Flanders also took the opportunity to answer questions two and three, finding that answering all of the questions queried by the Governor is necessary because the Governor is relying on the answers in order to fulfill his present and future executive duties.[58] Justice Flanders began answering the second question by pointing out that textual differences exist between the federal and state constitutions regarding separation of powers.[59] He stated that although the separation of powers principle on the state level may not be interpreted exactly the same as on the federal level, overall the same separation of powers principle applies.[60]

Justice Flanders answered the third question in the affirmative, finding that the Rhode Island Constitution does impose limits on legislative appointments to a public board.[61] However, he opined that the Rhode Island Constitution does not prohibit the mere appointment of sitting legislators to each and every public board or body, irrespective of their executive function.[62] Beyond this, Justice Flanders stated that a more particular response could only be rendered in light of a specific case.[63]

CONCLUSION

The Rhode Island Supreme Court was asked by Governor Almond to give its opinion on three specific questions regarding the separation of powers in Rhode Island. The supreme court found that it was only proper to address one of the questions in the form

56. *See id.* at 91-96.

57. *See id.* at 96.

58. *See id.* at 97.

59. *See id.* For example, Justice Flanders indicates that art. II, § 2, cl. 2 of the United States Constitution contains a general appointments clause which does not appear in the state constitution. *See id.* Rather, art. IX, § 5 and art. IV, § 4 of the state constitution gives the Governor and General Assembly the power to participate in specific appointments and elections. *See id.*

60. *See id.* at 110.

61. *See id.*

62. *See id.* (citing Parcell v. State, 620 P.2d 834, 836 (Kan. 1980)).

63. *See id.*

of an advisory opinion. To this end, the supreme court opined that the ethics commission exceeded its constitutional authority, embodied in article III, sections 7 and 8 of the Rhode Island Constitution, when it promulgated Regulation 5014. Regulation 5014 prohibits members of the General Assembly from serving as members of public boards or from participating in appointments of other persons to serve as members of a public board. The Rhode Island Supreme Court stated that the commission thus exceeded its authority because it interfered with the constitutional structure of the Rhode Island government by promulgating the regulation.

The court also found that Regulation 5014 itself was unconstitutional. The court stated that the regulation was invalid because its scope was too broad and it violated the presumption that a person is innocent until proven guilty. The court concluded that the ethics commission was established to adopt regulations to prevent improper conduct or self-dealings, to investigate violations and to enforce the code of ethics provisions. The ethics commission was not established to alter the constitutional structure of Rhode Island.

Melissa Coulombe Beauchesne

Constitutional Law. *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 51 F. Supp.2d 107 (D.R.I. 1999). The antisolicitation provision of section 38-2-6 of the Rhode Island General Laws, prohibiting the use of public information for commercial solicitation, violates the Free Speech Clause of the First Amendment to the United States Constitution. Once information has been classified as a "public record," the State of Rhode Island cannot constitutionally limit its use for legitimate commercial purposes unless the limitation can be justified under the four-part test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[1]

FACTS AND TRAVEL

In *Rhode Island Association of Realtors v. Whitehouse*,[2] the Rhode Island Association of Realtors, Inc. (the Association) filed suit against the state of Rhode Island pursuant to 42 U.S.C. section 1983.[3] The Association claimed that section 38-2-6 of the Rhode Island General Laws unconstitutionally barred their ability to perform, gain new members and market their services by prohibiting access to certain public records.[4] The Association argued that section 38-2-6's ban on the use of public records "to solicit for commercial purposes or to obtain a commercial advantage over the party furnishing that information to the public body"[5] was a violation of the Free Speech Clause of the First Amendment of the United States Constitution.[6] Therefore, the Association sought a declaratory judgment that section 38-2-6 of the Rhode Island General Laws was unconstitutional,[7] and asked that an injunction be granted in order to prevent the enforcement of the statute.[8] The Rhode Island Attorney General moved to dismiss due to lack of standing and the Association moved for summary judgment.[9]

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1. 447 U.S. 557 (1980).
2. 51 F. Supp.2d 107 (D.R.I. 1999).
3. *See id.* at 109.
4. *See id.* at 110.
5. R.I. Gen. Laws § 38-2-6 (1956) (1997 Reenactment).
6. U.S. Const. amend. I.
7. *See Rhode Island Assn. of Realtors*, 51 F. Supp.2d at 110.
8. *See id.*
9. *See id.*

ANALYSIS AND HOLDING

In reviewing the constitutionality of section 38-2-6, the United States District Court for the District of Rhode Island applied the four-part test promulgated by the United States Supreme Court in *Central Hudson Gas & Electric Corp v. Pubic Service Commission of New York*.[10] State regulation of commercial speech must be analyzed with respect to the following factors.[11] First, the state must determine whether or not the speech concerns a legal activity and is not misleading.[12] Second, the state interest in the regulation must be substantial.[13] Third, the regulation must directly advance the state interest.[14] Fourth, the state must not be able to accomplish its interest in any other way that is less intrusive than the proposed regulation.[15]

Applying the four-part test to the present case, the district court found that Rhode Island's regulation of public records that may be used for some legitimate commercial purpose was unconstitutional.[16] The court found that the proposed speech involved a legal activity and was not misleading.[17] The burden then shifted to the state to show that the "regulation is narrowly tailored to directly advance a substantial governmental interest."[18]

The court found that the state had a "legitimate and substantial interest" in regulating access to and use of personal information given to governmental agencies by its citizens.[19] Although Rhode Island may solicit private information from its citizens in order to achieve a specific governmental purpose, that does not give others the right to access such information if it is against the wishes of the individual.[20] In such a situation there is absolutely no justification for invading an individual's privacy interests.[21]

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10. *See id.* at 113.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *Id.*
19. *Id.*
20. *See id.*
21. *See id.*

However, the court found that the Attorney General failed to establish a substantial interest in "protecting the privacy of its citizens as a justification for the limitations contained in § 38-2-6."[22] The court further found that the State of Rhode Island failed to show how section 38-2-6 served the state interest or why that interest could not have been satisfied by excluding the individual's private information from the definition of "public records."[23]

Based on its analysis under the four-part test, the court found that section 38-2-6's "blanket prohibition against using public information to solicit for commercial purposes" was unconstitutional.[24] However, the court did not invalidate the entire statute.[25] Since the Rhode Island Public Records Act has a severability clause, a finding of unconstitutionality regarding a certain provision of the chapter does not render the whole chapter unconstitutional.[26] Therefore, absent the antisolicitation clause, prohibiting the use of public information for commercial solicitation, section 38-2-6 remains in full force.[27]

CONCLUSION

In *Rhode Island Association of Realtors, Inc. v. Whitehouse*, the United States District Court for the District of Rhode Island held that the antisolicition provision of section 38-2-6 of the Rhode Island General Laws was unconstitutional. Because the state's interest in protecting the privacy of Rhode Island citizens could be achieved through less restrictive means, the prohibition on the use of public information for commercial solicitation violated the Free Speech Clause of the United States Constitution.

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22. *Id.* at 114.
23. *See id.*
24. *Id.*
25. *See id.*
26. *See id.*
27. *See id.*

Constitutional Law. *Rhode Island Medical Society v. Whitehouse*, 66 F. Supp.2d 288 (D.R.I. 1999). Section 23-4.12 of the Rhode Island General Laws, the partial birth abortion ban (the Act), is unconstitutional. The entire Act is unconstitutional on three grounds: the definition of "partial birth abortion" is vague, the Act lacks an exception for the health of the mother, and the Act does not provide an exception sufficient to safeguard the life of the mother. In addition, the Act's civil remedies provision is unconstitutional because it places an undue burden on the woman's right to seek an abortion.

FACTS AND TRAVEL

The General Assembly first passed a bill banning partial birth abortions in 1996.[1] This bill was signed into law by Governor Lincoln Almond on July 2, 1997. Plaintiffs, the Rhode Island Medical Society, Planned Parenthood of Rhode Island, Dr. Pablo Rodriguez and Dr. Benjamin Vogel (Plaintiffs) sought and received a temporary restraining order against enforcement of the Act from the United States District Court for the District of Rhode Island on July 11, 1997.[2]

During the hearing on the temporary restraining order, the district court stated that the Act appeared to be unconstitutional.[3] Thereafter, the case was stayed so that the General Assembly could amend the Act.[4] The amended bill was signed by Governor Almond in July of 1998.[5]

As amended, the Act defined a " partial birth abortion" as "an abortion in which the person performing the abortion vaginally delivers a living human fetus before killing the infant and completing that delivery."[6] The Act defines vaginal delivery of a living fetus as the intentional delivery of a living fetus, or "a substantial portion thereof" into the vagina.[7] The Act makes an exception for the life of the mother, but does not mention the mother's health.[8] In addi-

1. *See* Rhode Island Med. Soc. v. Whitehouse, 66 F. Supp.2d 288, 294 (D.R.I. 1999).
2. *See id.* at 299-300.
3. *See id.* at 294.
4. *See id.* at 300.
5. *See id.*
6. R.I. Gen. Laws § 23-4.12-1(a) (1956) (Supp. 1999).
7. *Id.* § 23-4.12-1(c).
8. *Id.* § 23-4.12-3.

tion, the Act grants a private cause of action to the father of the fetus and the maternal grandparents of the fetus unless they consented to the abortion or caused the pregnancy by their own criminal conduct.[9]

Plaintiffs alleged that the amended Act was unconstitutional and named Attorney General Sheldon Whitehouse and Governor Almond as defendants (Defendants).[10] A bench trial was conducted on May 3-6, 1999. The trial consisted largely of the testimony of medical experts; plaintiff Rodriguez and Dr. Phillip Stubblefield for the plaintiffs, and Dr. Frank Boehm for the defendants.[11] All three experts were qualified as experts in abortion practice, and various types of abortion procedures were described to the court by the expert witnesses.[12] However, only the two abortion procedures at issue in the present case, the D & E and D & X procedures, will be described here.

In a D & E abortion,[13] the fetus is removed from the woman's body through the vagina after the doctor dilates her cervix and uses suction and traction to dismember the fetus.[14] A D & E abortion requires the physician to rupture the amniotic sac and cut the fetus into parts before attempting to bring the fetus outside the uterus and down through the vaginal canal.[15] Because the bones of the fetus become stronger as the pregnancy progresses, a D & E is usually performed only up until 23 weeks.[16] Although it is possible for a fetus to be removed from the uterus intact, this is not the goal of a D & E abortion. At times, the body of the fetus is delivered up to the head, at which point the size of the skull prevents the doctor from completely removing the fetus.[17] However, this is also considered a "rare event."[18]

The D & X abortion is a variation of the D & E procedure that can be performed after the 24th week of pregnancy.[19] During this

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9. *Id.* § 23-4.12-4(a).
10. *See Rhode Island Med. Soc.*, 66 F. Supp.2d. at 295.
11. *See id.*
12. *See id.* at 295-98.
13. "D & E" is shorthand for "dilation and extraction," and is the most common method of abortion performed between 12 and 23 weeks. *See id.* at 296.
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *Id.*
19. *See id.* at 297.

procedure, also known as a partial birth abortion, the fetus is brought out of the uterus and down the vaginal canal, feet first, until the skull blocks further passage through the cervix.[20] At that point, the skull is minimized by either crushing it with forceps, or by evacuation of the brain.[21] While the issue in the present case revolves around the Act's definition of a partial birth abortion, all three expert witnesses relied on the medically-accepted definition adopted by the American College of Obstetricians and Gynecologists (ACOG).[22] ACOG defines a D & X abortion as one in which (1) the cervix is deliberately dilated, (2) there is a conversion of the fetus to a footling breach, (3) there is a breech extraction up to the head, and (4) the brain of the fetus is removed to enable the intact but dead fetus to be delivered vaginally.[23]

BACKGROUND

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a woman's right to an abortion before the fetus reaches viability.[24] In *Planned Parenthood v. Casey*,[25] the United States Supreme Court held that state regulation of abortion is constitutional unless it places an undue burden on the woman's right to have an abortion.[26] The "undue burden" test was described as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."[27] Post-viability, states may go so far as to proscribe abortions, but must make exceptions for instances where an abortion is necessary to save the life or health of the mother.[28]

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20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.* at 300 (citing Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973)).

25. 505 U.S. 833 (1992).

26. *See id.* at 876.

27. *Id.* at 877.

28. *See Rhode Island Med. Soc.*, 66 F. Supp.2d at 300 (citing Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 193 (6th Cir. 1997)).

ANALYSIS AND HOLDING

Standing

The United States District Court for the District of Rhode Island first addressed the issue of whether the plaintiffs had standing to bring this lawsuit. Where a plaintiff claims that a criminal statute is unconstitutional on its face, a four-part test is applied to determine whether the plaintiffs have standing.[29] Because such plaintiffs should not have to "violate the law and volunteer their heads on the chopping block,"[30] standing is established where the plaintiffs show they intend to engage in a certain course of conduct, the conduct is arguably affected by a constitutionally protected interest, the challenged statute proscribes that conduct, and there is a credible threat of prosecution.[31]

No Rhode Island doctors currently perform the D & X abortion procedure.[32] However, Dr. Rodriguez's testimony indicated that all of the plaintiffs perform D & E abortions or have members that perform D & E abortions.[33] Doctors who perform abortions are affected by a constitutional interest when a law threatens them with criminal prosecution for providing a constitutionally protected medical procedure.[34] Noting that the construction of the statute was the ultimate issue in this case, the district court concluded that for purposes of determining standing, it was sufficient that a reasonable reading of the statute suggested that both D & E and D & X abortions were proscribed by the statute.[35] Finally, a credible threat of prosecution exists where a statute facially restricts constitutional rights.[36] After noting that it was unclear whether D & E abortions could trigger criminal prosecution, and that the civil remedies provision could be pursued even if the State of Rhode Island did not file criminal charges, the district court concluded that plaintiffs met all four prongs of the standing test.[37]

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29. *See id.* at 301.
30. *Id.*
31. *See id.* (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 299 (1979)).
32. *See id.* at 298.
33. *See id.* at 301.
34. *See id.* at 302.
35. *See id.*
36. *See id.* at 302-03.
37. *See id.* at 303-04.

Construction of "Partial Birth Abortion" as Defined in the Act

The definitive issue for the district court was the definition of the terms "partial birth abortion" and "substantial portion" contained in Rhode Island General Laws section 23-4.12-1(a) & (c).[38] Although the defendants argued several limited definitions of "partial birth abortions" at trial, such as the ACOG definition, the General Assembly did not include that definition in the Act.[39] Therefore, the district court was required to determine whether a reasonable construction of the Act would enable the Act to survive plaintiff's constitutional challenge.

The district court noted that it was required to read the Act "in a light favorable to seeing it as constitutional . . . [and] must consider limiting constructions offered by the state."[40] However, a limited construction will only be applied where that construction is reasonable.[41] The district court then concluded that none of the constructions offered by the defendants were reasonable.[42]

The defendants argued that the Act applied only to partial birth abortions as they were defined by ACOG, but the district court stated that because this definition was not included in the Act, it was unreasonable to read the Act as being directed at those procedures alone.[43] Defendants also argued that the Act only applied to delivery of an intact fetus or substantial portion thereof, but again, the absence of the term "intact fetus" in the Act rendered this construction unreasonable.[44] Defendants then argued that the Act only proscribed the partial birth of a viable child, but the district court noted that "the Act does not limit itself to viable births."[45] Finally, defendants argued that the Act was limited to proscribing abortions where the child is killed in the vagina as opposed to in the uterus.[46] However, the medical testimony at trial demonstrated that doctors could not differentiate between abor-

38. *See id.* at 305.

39. *See id.*

40. *Id.* (citing Forsyth County v. Nationalistic Movement, 505 U.S. 123, 1331 (1992)).

41. *See id.* (citing Reno v. ACLU, 521 U.S. 844, 884 (1997)).

42. *See id.* at 306-07.

43. *See id.* at 306.

44. *See id.*

45. *Id.* at 307.

46. *See id.*

tions that occur is the vagina or the uterus, which rendered this construction unreasonable as well.[47]

After dismissing the constructions offered by the defendants as unreasonable, the district court proceeded to delineate how the Act would be read. The district court determined that the Act defined a partial birth abortion as a procedure where the performing physician knowingly engaged in a strict sequence of steps with the intent to kill the infant.[48] Under section 23-4.12(a) & (c), a partial birth abortion is performed where a physician delivers a substantial portion of the fetus into the vagina with the intention of killing the fetus, that the physician then knowingly performs a procedure that kills the infant, and then knowingly completes the delivery of the infant.[49]

Examining the Act under the United States Constitution

After enunciating a reasonable construction of the Act, the district court determined whether the Act could be constitutionally applied to the abortion procedures in question.[50] The district court determined that despite the defendant's protestations to the contrary, the Act could proscribe D & E abortions.[51] Because a D & E abortion requires a doctor to reach into the uterus and remove as much of the fetus as possible into the vagina, the doctor could be viewed as having removed a "substantial portion" of the fetus before knowingly killing the fetus in violation section 23-4.12-1(c).[52]

The district court's conclusion rested in part on its finding that the term "'substantial portion' [was] vague and [does] not provide doctors with sufficient guidance to know what the Legislature has made illegal."[53] The medical experts disagreed over whether delivery of a toe was enough, or if more than half of the fetus must be delivered into the vagina.[54] If doctors cannot decide whether a procedure will be legal or not, they will assume the D & E is illegal,

47. *See id.*
48. *See id.*
49. *See id.* at 308.
50. The court first found that the Act would not ban hysterectomies, hysterotomies, vacuum aspiration, or inductions. *See id.* at 308-09.
51. *See id.* at 309.
52. *See id.*
53. *Id.*
54. *See id.* at 310.

producing a chilling effect that places an undue burden on the woman's right to have an abortion.[55]

Furthermore, the court noted that the scienter requirement in the Act could not save the Act from a vagueness challenge.[56] Requiring a defendant to do something "knowingly" is useless if it is unclear what the defendant would have to "know." Thus, a scienter requirement that modifies a vague term cannot cure that term's vagueness.[57]

The district court next concluded that the Act was unconstitutional for other reasons in addition to vagueness. The district court held that because the Act effectively banned D & E abortions, it created an undue burden for women seeking that type of abortion.[58] In addition, the Act was declared unconstitutional because it failed to include an exception for the health of the mother.[59] Under *Casey*, the mother's health exception must apply even after viability of the fetus.[60] Thus, the absence of such an exception rendered the Act unconstitutional.[61]

Although the Act contained an exception for the life of the mother, the district court concluded that the exception was insufficient, and the Act unconstitutional on this ground as well.[62] Under the Act, a partial birth abortion could be performed to save the life of the mother only where "no other procedure would suffice."[63] In the words of the district court, "[i]f a woman could die, then she has the constitutional right to have *any and all operations* that would save her life."[64] Furthermore, the court noted that a D & E procedure, which could certainly be used to save a woman's life, was nevertheless banned by the Act.[65] Therefore, the inade-

55. *See id.* at 310.

56. *See id.* at 311.

57. *See id.*

58. *See id.* at 313-14.

59. *See id.* at 314.

60. *See id.*

61. *See id.* The district court also states that this flaw in the Act would render the Act unconstitutional even if it had been drafted to proscribe only D & X abortions. *See id.*

62. *See id.*

63. *Id.* (quoting R.I. Gen. Laws § 23-4.12-3 (1956) (Supp. 1999)).

64. *Id.*

65. *See id.*

quacy of the mother's life exception renders the Act unconstitutional.[66]

Finally, the court turned to the private cause of action created by the Act for the father of the fetus and the maternal grandparents of the fetus. The court stated "[i]t is a fact that the private right of action . . . will cause doctors to require pre-abortion consent from the father of the fetus and the mother's parents."[67] Based on evidence that physicians and clinics will require a consent form before performing D & E abortions in order to insulate themselves from liability, the district court concluded that the burden created by this provision of the Act amounts to an even greater burden than the spousal-consent provision struck down in *Casey*.[68] Therefore, this provision of the Act is also unconstitutional.[69]

CONCLUSION

In recent years, legislatures across the country have attempted to limit a woman's right to choose an abortion in the later weeks of her pregnancy by passing partial birth abortion bans. In *Rhode Island Medical Society v. Whitehouse*, the United States District Court for the District of Rhode Island held that a similar attempt in Rhode Island did not pass constitutional muster. Although the district court recognized the often brutal aspects of abortion, it safeguarded a woman's right to choose an abortion free from undue burden as guaranteed by the United States Constitution.

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66. *See id.* at 315.
67. *Id.*
68. *See id.*
69. *See id.* at 316.

Constitutional Law. *State v. Desjarlais*, 731 A.2d 716 (R.I. 1999). Where a sentencing law has changed between the time of the criminal offense and sentencing, the amended law applies where there is no increase in punishment within the meaning of the Ex Post Facto Clause. Furthermore, within the meaning of the Ex Post Facto Clause, a change in the nature or conditions of confinement does not constitute an increase in punishment.

In *State v. Desjarlais*,[1] the Rhode Island Supreme Court was faced with the question of whether a defendant in a criminal case could be sentenced to home confinement when the criminal statute providing for home confinement was amended to exclude the crimes for which the defendant was convicted after the offense but prior to sentencing.[2] Due to the timing of the amendment to the law, the court had to determine whether the Ex Post Facto Clauses of the United States and Rhode Island Constitutions were violated.[3]

FACTS AND TRAVEL

On December 18, 1997, a judge found the defendant, Steven Desjarlais, guilty of one count of driving to endanger, resulting in death and one count of driving under the influence, resulting in death for an automobile accident that occurred in February of 1993.[4] At the time the accident occurred, both of these crimes were included as offenses for which home confinement was a possible sentence.[5] However, in 1994, the General Assembly modified the home confinement statute to exclude the offenses for which the defendant was charged from crimes eligible for a sentence of home confinement.[6] On March 13, 1998, a judge sentenced the defendant to a cumulative term of twenty years incarceration at a correctional facility, of which all but five years were suspended, and fifteen years probation.[7] The court ordered the defendant to serve four of the five years incarceration in home confinement.[8]

1. 731 A.2d 716 (R.I. 1999).
2. *See id.* at 717.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*

At the sentencing, the State argued that the defendant was not eligible for home confinement as a result of the statute revision in 1994.[9] The trial judge rejected this argument.[10] In response, the State filed a motion based on Rule 35 of the Superior Court Rules of Criminal Procedure to correct the sentence.[11] The motion was denied by the trial judge.[12] Upon the State's request for review, the Supreme Court of Rhode Island issued a writ of certiorari.[13]

ANALYSIS AND HOLDING

The State argued that the 1994 amendment to the home confinement statute rendered the sentence illegal because the offenses committed by the defendant were among those excluded from a possible home confinement sentence.[14] The defendant took the position that because his accident occurred prior to the amendment, the sentence was legal. Furthermore, the defendant argued that application of the amended home confinement statute would violate the Ex Post Facto Clauses of the United States and Rhode Island Constitutions because the offense took place before the statute was amended.[15] The relevant portion of the federal Ex Post Facto Clause provides that "No State shall . . . pass any . . . ex post facto law."[16] In *Lynce v. Mathis*,[17] the United States Supreme Court explained that in order "[t]o fall within the *ex post facto* prohibition, a law must be retrospective . . . and it 'must disadvantage the offender'. . . by altering the definition of criminal conduct or increasing the punishment for the crime."[18]

Retrospective law

In *Miller v. Florida*,[19] the United States Supreme Court explained that "[a] law is retrospective if it 'changes the legal conse-

9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.* (referring to U.S. Const. art. I, § 10; R.I. Const. art 1, § 12).
16. U.S. Const. art. I, § 10.
17. 519 U.S. 433 (1997).
18. *Id.* at 441 (quoting Collins v. Youngblood, 497 U.S. 37, 50 (1990)).
19. 482 U.S. 423 (1987).

quences of acts completed before its effective date.'"[20] In the present case, when the defendant committed the criminal act in 1993, the statute provided that he could be sentenced to home confinement.[21] However, by the time he was sentenced in 1998, the statute had been amended and no longer permitted home confinement as a sentence for the crimes for which the defendant was convicted.[22] Application of the amended statute, then, is retrospective in that it changes the possible legal consequences of the defendant's acts by changing the nature or conditions of his confinement.[23]

Increase in Punishment

In *California Department of Corrections v. Morales*,[24] the United States Supreme Court clarified the Ex Post Facto Clause by stating that it does not "require that the sentence be carried out under the identical legal regime that previously prevailed."[25] The United States Court of Appeals for the First Circuit relied on *Morales* in *Dominique v. Weld*.[26] In *Dominique*, the issue was whether a defendant's inability to continue to participate in a work release program constituted an increase in punishment.[27] The *Dominique* court decided that although "it [could] be argued that the regulation increases the penalty because it subjects Dominique to a different and stricter prison regime . . . this change in the conditions determining the nature of his confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for ex post facto purposes."[28] Therefore, based on the court's interpretations in the preceding cases, changing the nature and conditions of the confinement is not an increased penalty within the meaning of the Ex

20. *Id.* at 430 (quoting Weaver v. Graham, 450 U.S. 24, 31 (1981)).

21. *See Desjarlais*, 731 A.2d at 718.

22. *See id.*

23. *See id.*

24. 514 U.S. 499 (1995).

25. *Desjarlais*, 731 A.2d at 718 (quoting California Dep't of Corrections v. Morales, 514 U.S. 499, 510 n.6 (1995).

26. 73 F.3d 1156 (1st Cir. 1996).

27. *See id.* at 1156-57.

28. *Id.* at 1163 (quoting *Morales*, 514 U.S. at 510 n.6).

Post Facto Clauses of the United States and Rhode Island Constitutions.[29]

In *State v. Quattrocchi*,[30] the Rhode Island Supreme Court held that "home confinement . . . is a form of imprisonment."[31] Furthermore, in *State v. Mariano*,[32] the Rhode Island Supreme Court stated that a sentence of home confinement instead of incarceration in a correctional facility is simply "a change in the place where [the defendant] is confined."[33] Therefore, application of the 1994 amended home confinement statute to the defendant did not result in an increase in the level of punishment, but merely a change in the condition of his punishment.[34] In 1998, when the defendant was sentenced, home confinement was not an option due to the 1994 amendment to the statute.[35] Therefore, the Rhode Island Supreme Court held that the trial justice erred in his sentencing of the defendant.[36] The Rhode Island Supreme Court, in its decision, quashed the sentence imposed by the trial judge and remanded for a new sentence consistent with its holding.[37]

CONCLUSION

In *State v. Desjarlais*, the Rhode Island Supreme Court determined that the Ex Post Facto Clause was not violated by application of a criminal penalty provision amended after the defendant committed the crime but prior to his conviction and sentencing where there is no corresponding increase in punishment. In so holding, the court concluded that a change in the nature or conditions of confinement, such as the distinction between home confinement and incarceration, is not an increase in punishment within the meaning of the Ex Post Facto Clause.

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29. 687 A.2d 78 (R.I. 1996).
30. *See Desjarlais*, 731 A.2d at 718.
31. *Quattrocchi*, 687 A.2d at 79.
32. 648 A.2d 803 (R.I. 1994).
33. *Id.* at 804.
34. *See Desjarlais*, 731 A.2d at 718.
35. *See id.*
36. *See id.*
37. *See id.*