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Good Intentions - Questionable Results: Florida Tries the Primacy Model

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Good Intentions—Questionable Results: Florida Tries The Primacy Model

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I. THE FLORIDA SUPREME COURT DISCOVERS THE FLORIDA CONSTITUTION

Twenty-five years after the adoption of the modern Florida Constitution,[1] the Florida Supreme Court recognizes the state constitution as a primary protection of individual rights for people in Florida. In 1989, the Florida Supreme Court recognized that the state constitution should be utilized first in an analysis involving assertions about violations of basic individual rights.[2] The court prioritized the Florida Constitution over the United States Constitution.[3] First, attorneys and the Florida courts should look to the Florida Constitution to protect individual rights, and only if the state constitution fails to protect individual rights should attorneys and the Florida courts apply the Federal Constitution to the issues involved in any case.

The Florida Supreme Court joins courts in other states that utilize their state constitutions as primary protection of individual rights including

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1. The modern Florida Constitution is the result of major revisions to the 1885 Constitution approved by the Florida electorate in 1968.

2. *See In re* T.W., 551 So. 2d. 1186, 1190 (Fla. 1989).

3. *Id.*

Oregon,[4] New Hampshire,[5] New Jersey,[6] Washington,[7] Texas,[8] Michigan,[9] and Vermont.[10]

The Florida Supreme Court signaled strongly that Florida constitutional practice should reflect the primacy model of constitutional application in which the state constitution is relied upon first to resolve individual rights problems.[11] Under the primacy model, state courts avoid utilizing the Federal Constitution until the state constitution fails to protect an activity protected by the Federal Constitution.[12] State courts that utilize a primacy approach wean themselves away from relying on the Federal Constitution as the basic protector of individual rights, thereby avoiding the relegation of state constitutions to the level of protecting rights only when the Federal Constitution fails to do so.[13]

The Florida Supreme Court has just begun the process of converting the Florida Constitution into the primary protection of individual rights. In 1989 and 1990 the court recognized the primary strength and application of the Florida Constitution, but the court never developed a primacy model in

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4. *See* Oregon v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983).

5. *See* New Hampshire v. Ball, 471 A.2d 347, 351 (N.H. 1983).

6. *See* New Jersey v. Hunt, 450 A.2d 952, 953 (N.J. 1982).

7. *See* Washington v. Gunwall, 720 P.2d 808, 811 (Wash. 1986); Washington v. Langland, 711 P.2d 1039, 1042 (Wash. Ct. App. 1989).

8. *See* Heitman v. Texas, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991).

9. *See* Michigan v. Bullock, 485 N.W.2d 866, 870 (Mich. 1992).

10. *See* Vermont v. Jewett, 500 A.2d 233, 236 (Vt. 1985).

11. *See* Hans A. Linde, *First Things First: Rediscovering the State's Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

12. *See* Robert F. Utter and Sanford E. Pitler, *Presenting a State Constitutional Law Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647-48 (1987); Charles G. Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 140-42 (1988); Ronald K. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 333-39 (1986); Stephen F. Aton, *State Constitutions Realigning Federalism: A Special Look at Florida*, 39 U. FLA. L. REV. 733, 768-73 (1987).

13. David J. Fine, *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 286-90 (1973); Wallace P. Carson, *"Last Things Last:" A Methodological Approach to Legal Arguments in State Courts*, 19 WILLAMETTE L. REV. 641, 650-52 (1983); Earl M. Maltz, *False Prophet-Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 435-37 (1988); Ronald K. Collins, *Reliance On State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 14-15 (1981); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500-02 (1977).

a meaningful fashion.[14] In 1992, the court finally faced the task of developing the intricacies of a primacy model,[15] but the court subsequently failed to apply its own interpretive methodology forcefully.[16]

II. PRIVACY AND THE INITIATION OF PRIMACY

Abortion and death provided the Florida Supreme Court with opportunities to recognize the primacy application of article I of the Florida Constitution. In 1989, the Florida Supreme Court in *In re T.W.*[17] recognized the right of a female minor to obtain an abortion without the consent of the minor's parent. The *T.W.* court struck down a Florida statute that required minors to obtain parental consent for an abortion,[18] finding that the statute violated the Florida constitutional privacy provision.[19] A year later, the Florida Supreme Court held in *In re Browning* that a surrogate for an incompetent patient suffering from an incurable terminal disease could order life-prolonging medical procedures withheld from the patient.[20] The surrogate attempted to follow a written directive from the patient requesting discontinuation of nutrition and hydration provided by medical technological means.[21] The court allowed surrogates for incompetent, terminal patients to discontinue life prolonging procedures when the patient expressed orally or by a written directive her or his will to die.[22] The Florida Supreme Court based its decision on the Florida constitutional right to privacy,[23] just as it had done the previous year in *T.W.*

The *T.W.* court adopted a primacy approach for the application of the Florida Constitution by utilizing a two-step analysis for cases involving a constitutional issue.[24] First, the court examined the parental consent statute

14. *See* discussion *infra* part II.
15. *See* discussion *infra* part III.
16. *See* discussion *infra* part IV.
17. 551 So. 2d 1186 (Fla. 1989).
18. *See* FLA. STAT. § 390.001(4)(a) (Supp. 1988).
19. *In re* T.W., 551 So. 2d at 1196 (citing FLA. CONST. art. I, § 23(1980)). Article I, section 23 provides: "Every natural person has the right to be let alone and free from government intrusion into his private life except as provided herein." FLA. CONST. art. I, § 23 (1980).
20. 568 So. 2d 4 (Fla. 1990).
21. *Id.* at 8.
22. *Id.* at 15.
23. *Id.* at 10; *see also In re T.W.*, 551 So. 2d at 1190.
24. *In re T.W.*, 551 So. 2d at 1190.

in the context of the Florida Constitution.[25] If the court had found that the Florida Constitution failed to protect a minor's right to choose an abortion without parental consent, the court would have moved to the second level of the analysis and applied the Federal Constitution.[26] The *Browning* opinion followed the lead of the *T.W.* opinion.[27] Although the *T.W.* court explicitly described a primacy approach composed of a two-step, state first, federal second, constitutional analysis, the *Browning* court only implicitly utilized a primacy approach by focusing solely on the state constitutional right to privacy as a source of rights protective law.[28]

While *T.W.* and *Browning* utilized the Florida Constitution as the primary basis for individual rights analysis and protection, neither case provided any depth into the primacy approach for applying the Florida Constitution. At best, both cases merely mouthed or pretended a primacy approach, creating a veneer of importance for the Florida Constitution. Neither case truly relied on a Florida-based legal analysis. Although *T.W.* explicitly stated that the parental consent statute would be examined first by the court under the Florida Constitution, the court actually based its analysis on an amalgam of federal constitutional legal doctrine and the national privacy policy.[29] The heart of the *T.W.* analysis relied on *Roe v. Wade*.[30] When the *T.W.* court defined the scope of the right to choose an abortion in Florida, the court utilized the trimester system developed in *Roe*.[31]

In the first pages of the *T.W.* opinion, the Florida Supreme Court outlined the history of federal abortion law relating to minors, describing the elements of the trimester system.[32] When the court finally defined the scope of Florida law, the court copied the basics of the *Roe* approach finding that until the end of the first trimester, women in Florida remain free to decide whether to abort a fetus free of state restriction.[33] After the end of the first trimester, the State of Florida may impose regulations safeguarding the health of the mother.[34] However, when the fetus becomes viable,

25. *Id.*
26. *Id.* at 1190, 1196.
27. *In re Browning*, 568 So. 2d at 10.
28. *Id.*
29. *See* Daniel R. Gordon, *One Privacy Provision, Two Privacy Protection: The Right to Privacy In Florida After Roe v. Wade*, 5 WIS. WOMEN'S L.J. 81, 111-20 (1990).
30. *See In re T.W.*, 551 So. 2d at 1193; *see also* Roe v. Wade, 410 U.S. 113 (1973).
31. *In re T.W.*, 551 So. 2d at 1193; *see also Roe*, 410 U.S. at 160.
32. *In re T.W.*, 551 So. 2d at 1190.
33. *Id.*
34. *Id.*

the state may restrict all abortions to protect potential life.[35] The Florida Supreme Court differed with the *Roe* court on a definition of viability. The Florida Supreme Court viewed the *Roe* court as defining viability as the time at which the fetus becomes capable of meaningful life with artificial medical aid.[36] The *T.W.* court proceeded to define viability as meaningful life outside the womb through standard medical measures.[37] The court never explained the difference between artificial aid to a fetus and standard medical procedures for a fetus.[38] The court's utilization of *Roe* to define abortion rights in Florida occurred in the context of a discussion about general privacy policy.

The *T.W.* court set the stage for defining Florida abortion law by reviewing general privacy policy. Instead of focusing on the importance of privacy to Floridians and state policy, the *T.W.* court meshed Florida constitutional doctrine with national privacy norms. The court viewed the concept of privacy as deeply rooted in the nation's political system and heritage,[39] relying on Justice Brandeis' dissent in *Olmstead v. United States*[40] to emphasize the importance of the right to be let alone.[41] The Florida court observed that a wide scope of federal privacy protection shields individual autonomy in personal decisions involving marriage, procreation, contraception, family relations, child rearing and education.[42] The *T.W.* court defined the Florida constitutional privacy law[43] by quoting from Professor Larry Tribe's works on national constitutional policy[44] and federal abortion cases such as *Thornburgh v. American College of Obstetricians & Gynecologists*.[45]

The *Browning* opinion paralleled the *T.W.* opinion. The court in *Browning* also asserted that the Florida Constitution provides the basic individual rights for people within the state.[46] The court relied heavily on the Florida constitutional privacy provision as the primary source of legal

35. *Id.* at 1193.
36. *Id.*
37. *In re T.W.*, 551 So. 2d at 1194.
38. *See id.*
39. *Id.* at 1191.
40. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
41. *In re T.W.*, 551 So. 2d at 1191.
42. *Id.*
43. *Id.*
44. *See generally* LAWRENCE L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).
45. 476 U.S. 747 (1986).
46. *In re Browning*, 568 So. 2d at 10.

authority for its decision.[47] At the same time, the *Browning* court recognized little Florida public policy reflected in Florida constitutional privacy law.[48] Unlike *T.W.*, *Browning* failed to rely heavily on federal constitutional law and vague national privacy philosophy referring sparingly to some federal constitutional law such as *Cruzan v. Director, Missouri Department of Health*.[49] Some of *Browning's* procedural requirements for determining when a surrogate may order the end of life prolonging treatment paralleled aspects of *Cruzan*, such as the requirement of clear and convincing evidence of a patient's wishes.[50]

The *Browning* court, for the most part, avoided relying heavily on *Cruzan* or any other federal constitutional law. Instead, the *Browning* court utilized a universal or global analysis to determine the privacy rights of terminally ill patients. This global or universal analysis was intended to support the application of a state constitutional privacy provision, but more closely resembled a generalized common law analysis which reviewed a variety of cases across a spectrum of jurisdictions in order to synthesize a transcendent set of principles.[51]

The *Browning* court utilized cases from New York,[52] California,[53] and a number of other states[54] to develop a general theory of Florida constitutional law. The *Browning* court even bolstered its common law style analysis by referring to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.[55] Florida cases were utilized but only in tandem with case law from other states[56] or after the court laid a general policy foundation involving case law from

47. *Id.*

48. *See id.*

49. 497 U.S. 261 (1990).

50. *In re Browning*, 568 So. 2d at 15; *see also Cruzan*, 497 U.S. at 261.

51. For more on the common law, see generally JAMES R. STONER, COMMON LAW AND LIBERAL THEORY (1992); RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO AMERICAN LEGAL COMMUNITY (1987); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (1985).

52. *See In re Browning*, 568 So. 2d at 10 (citing Shloendorff v. Society of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914)).

53. *In re Browning*, 568 So. 2d at 12 n.8 (citing Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct: App. 1986)).

54. *Id.* at 12 nn.7, 8.

55. *Id.* at 10.

56. *See Cruzan*, 497 U.S. at 261, where Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989), and other Florida cases implicating the right to refuse treatment are discussed either along with, or in the context of, cases from other states.

other states.[57]

The *T.W.* court also utilized Florida law but did so more broadly than the *Browning* court. The *T.W.* court surveyed the decisions of Florida cases that implicated the right to privacy under Florida law.[58] However, the court failed to clarify whether all of the cases mentioned involved the Florida constitutional right to privacy. For example, *Satz v. Perlmutter*[59] was decided prior to the effective date of the state constitutional privacy provision.[60] Even when the Florida Supreme Court relied on Florida case law to develop Florida constitutional policy, the court interjected federal constitutional law.[61]

The *T.W.* and *Browning* opinions supposedly reflected a commitment by the Florida Supreme Court to a primacy approach to the application of the Florida Constitution. In *T.W.* and *Browning*, the supreme court looked to Florida constitutional law as the first source of constitutional protection for individual rights in Florida. However, the court never followed through in developing primary Florida constitutional doctrines for the right to choose an abortion or the right to die. Instead, the court relied on federal constitutional law, national legal policy and philosophy, and an out-of-state based common law style analysis. This analysis has not only prevented the Florida Constitution from being the primary protection of individual rights, but also has effectively relegated the privacy provision to the least important source of legal protection for individuals.

The half-hearted nature of the primacy model adopted by the Florida Supreme Court in *T.W.* and *Browning* was particularly peculiar given the context of the state constitutional privacy provision. The Florida Supreme Court developed Florida constitutional policy for a privacy provision that the court in *T.W.* itself acknowledged was unusual. Only three other state constitutions contain an express, free standing privacy provision.[62] At the same time, the court found that the Florida constitutional privacy section provides greater protection than the Federal Constitution,[63] and should be read more expansively than any sections of the Federal Constitution which

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57. *See In re Browning*, 568 So. 2d at 12-14, where the court focuses primarily on Florida cases which have surveyed federal law and laws of other states.

58. *In re T.W.*, 551 So. 2d at 1192.

59. 379 So. 2d 359 (Fla. 1980).

60. FLA. CONST. art. I, § 23 (1980); *see also supra* note 19 and accompanying text.

61. *See In re T.W.*, 551 So. 2d at 1192 n.5, 1193.

62. *Id.* at 1190 n.4.

63. *Id.* at 1191-92 (citing Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).

only implicitly protect privacy.[64] It is unclear why the Florida Supreme Court avoided developing a doctrine based analysis and doctrine based on an analysis of Florida law and public policy considerations. Such a Florida-based analysis seems natural for a Florida constitutional provision not found in many other constitutions, federal or state. By relying in *T.W.* and *Browning* on federal constitutional policy, national privacy policy and a common law type analysis based on out of state cases, the Florida Supreme Court defied the unique nature of the Florida constitutional right to privacy.

The closest the *T.W.* court came to utilizing a Florida policy analysis was its application of a statute providing that unwed pregnant minors and unwed mothers may obtain medical care for their fetuses or children without obtaining permission from an unwed pregnant minor's parents.[65] The court viewed this statute as evidence of Florida's public policy to empower pregnant minors with the authority to choose treatment for their fetuses or children. The court found lacking the state's contention that a minor's procurement of an abortion implicated a compelling state interest, a position seemingly inconsistent with Florida's public policy of favoring the empowerment of unwed pregnant minors.[66] The Florida Supreme Court in *T.W.* and *Browning* in 1989 and 1990 avoided the expansive use of such a Florida based analysis.

III. THE MATURATION OF THE PRIMACY APPROACH

The Florida Supreme Court in *T.W.* and *Browning* established a bare skeleton for a primacy application of the Florida Constitution. The Florida Supreme Court utilized a two-step approach for analyzing constitutional issues. First, the court applied the Florida Constitution—the Federal Constitution would only be applied if the Florida Constitution failed to provide individual rights protection. In doing so, the court utilized federal constitutional law, national policy, and a common law analysis based on non-Florida cases when applying the Florida Constitution, rendering *T.W.* and *Browning* primacy cases in name only. In 1992, the Florida Supreme Court in *Traylor v. State*[67] placed some Florida meat on the primacy skeleton erected in *T.W.* and *Browning*.

In *Traylor*, a convicted murderer complained that police obtained

64. *Id.* at 1192.
65. *Id.* at 1195; *see* FLA. STAT. § 743.065 (1979).
66. *In re T.W.*, 551 So. 2d at 1195.
67. 596 So. 2d 957 (Fla. 1992).

murder confessions in violation of his right to counsel and his right against self-incrimination.[68] The Florida Supreme Court not only decided the criminal procedure issues against the convicted murderer,[69] but also engaged in an extensive discussion of how the Florida Bill of Rights[70] must be utilized in Florida litigation involving constitutional issues.[71] As it explicitly stated in *T.W.*, the Florida Supreme Court declared that the primacy model of applying a state constitution is now the law in Florida.[72]

What distinguished *Traylor* from *T.W.* and *Browning* was the supreme court's recognition that the primacy model must be utilized for every phrase and clause of the Florida Constitution.[73] *T.W.* and *Browning* involved the Florida constitutional privacy provision—which few other state constitutions include.[74] *Traylor*, conversely, involved Florida due process rights,[75] rights to counsel and confrontation,[76] and the equal protection clause.[77] The rights to due process,[78] equal protection,[79] confrontation,[80] and counsel[81] also comprise substantial portions of the United States Constitution's Bill of Rights. *Traylor* decisively concluded that the primacy model adopted in *T.W.* and *Browning* applied to more than just Florida constitutional provisions that differed substantially from the United States Constitution. After *Traylor*, the primacy model applies even where the words of Florida Constitution are similar to those of a federal constitutional provision.

The *Traylor* court's use of the primacy model differed from the *T.W.* and *Browning* approach in a more significant way. The *Traylor* court developed an explicit methodology for construing the Florida Bill of Rights provisions which require Florida's courts to primarily focus on factors unique to the Florida state experience.[82] The *Traylor* court never listed

68. *Id.* at 960.
69. *Id.* at 970-73.
70. FLA. CONST. art. I.
71. *Traylor*, 596 So. 2d at 961-70.
72. *See id.* at 962; *see also* Robert F. Williams, *Review Essay: A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS U. L. REV. 133, 142-43 (1992).
73. *Traylor*, 596 So. 2d at 962-63.
74. *See supra* notes 62-64 and accompanying text.
75. FLA. CONST. art. I, § 9.
76. *Id.* § 16.
77. *Id.* § 2.
78. U.S. CONST. amend. V.
79. *Id.* amend. XIV, § 1.
80. *Id.* amend. VI.
81. *Id.*
82. *Traylor*, 596 So. 2d at 962.

some of the factors which demonstrated the uniqueness of the Florida experience. Those factors listed were:

1. Express language of the constitutional provision.
2. The formative history of a constitutional provision.
3. Preexisting and developing state law.
4. Evolving customs, traditions, and attitudes within the state.
5. The general history of Florida.
6. External influences that may have shaped state law.[83]

This utilization of factors involving the Florida experience differed markedly from the court's approach in *T.W.* and *Browning*, where the court utilized at most the last factor listed by the *Traylor* court (external influences that may have shaped state law) to the exclusion of all other factors. The *T.W.* and *Browning* courts focused exclusively on federal constitutional, national privacy policy, and non-Florida based common law analyses.[84]

The *Traylor* court rationalized its adoption of a comprehensive primacy application of the Florida Constitution by providing a federalistic, philosophical context for its decision. The Florida Supreme Court conceived of state constitutions in classical textbook federalism terms.[85] The court observed that the federal constitution provides the floor for basic freedoms, while state constitutions represent the ceiling.[86] The federal constitutional floor allows the United States to find an individual rights common ground or common denominator, facilitating homogeneity in a pluralistic polity.[87] The state constitutional ceiling provides the opportunity for each state to express a deeper commitment to freedom and individual rights.[88] The state constitutions allow for flexibility and elasticity unavailable in a constitution which protects people uniformly throughout the fifty states.[89] Because the states provide a wider spectrum of individual rights opportunities, state protected individual rights must be the primary rights for Americans, especially when American government is conceived as a limited government which maximizes individual freedom and minimizes government interfer-

83. *Id.*
84. *See supra* notes 29-57 and accompanying text.
85. *See* William F. Swindler, *Minimum Standards of Constitutional Justice: Federal Floors and State Ceilings*, 49 MO. L. REV. 1 (1984).
86. *Traylor*, 596 So. 2d at 962.
87. *Id.*
88. *Id.*
89. *Id.* at 961.

ence.[90]

The court in *Traylor* remained true to its federalist philosophy and its own primacy model when it analyzed whether the state had violated the due process and equal protection rights of the convicted murderer in *Traylor*. The *Traylor* court stayed close to the factors developed by the court to reflect the unique Florida experience in a Florida constitutional analysis.[91] The court thoroughly toured Florida legal history to investigate the scope of Florida confession law utilizing cases from 1853,[92] 1889,[93] 1898,[94] and 1925[95] in an attempt to explore the common law roots of the law. Common law principles governing Florida confession law became subsumed in 1896 under the Florida constitutional protection against compelled self-incrimination.[96] The *Traylor* court also focused on the simple and direct language of the right to counsel provision, recognizing historical contexts for the Florida language.[97] The court looked to historical and modern state legislation to understand right to counsel policy in Florida, finding such policy reflected in the right to counsel provision.[98] Even court promulgated rules were utilized by the *Traylor* court to find evidence of basic Florida policy reflected in the equal protection clause of the Florida Constitution.[99]

Traylor provided substance to the application by the *T.W.* and *Browning* courts of a primacy model for individual protection under the Florida Constitution. Whether the *Traylor* court established an enduring and meaningful primacy role for the Florida Constitution will have to be tested.

IV. PRIMACY AFTER *TRAYLOR*: JOHN DOE: BACK TO THE FUTURE OR ON TO THE FUTURE?

The *Traylor* court mandated that the Florida courts utilize the Florida Constitution, specifically the Bill of Rights, in a comprehensive fashion.[100] The Florida constitutional analysis model adopted by the *Traylor* court

90. *Id.*
91. *Traylor*, 596 So. 2d at 962.
92. Simon v. State, 5 Fla. 285 (1853).
93. Coffee v. State, 6 So. 493 (Fla. 1889).
94. Green v. State, 24 So. 537 (Fla. 1898).
95. Nickels v. State, 106 So. 479 (Fla. 1925).
96. *See Ex parte* Senior, 19 So. 652 (Fla. 1896).
97. *Traylor*, 596 So. 2d at 967.
98. *Id.*
99. *Id.* at 969.
100. *Id.* at 962-63.

included the in-depth utilization of factors that developed the unique Florida policy interests reflected in and by the Florida Constitution. Five months after *Traylor* was decided, the Florida Supreme Court tested its new commitment to the comprehensive Florida constitutional primacy model when the court decided *Post-Newsweek Stations, Florida Inc. v. Doe*.[101]

Doe involved criminal charges against an alleged prostitute and her deputy sheriff husband who were charged with prostitution,[102] living off of the proceeds of prostitution,[103] and illegal wiretapping.[104] As part of the investigation of the criminal defendants, the police raided the accused's home, seizing cassette tapes containing recorded telephone conversations, business cards of alleged customers, and a Rolodex with names and addresses of customers in it.[105] When the state decided to disclose the seized information to the accused in accordance with discovery rules, individuals, John Does, mentioned or listed in the cassette tapes, business cards, or Rolodex, moved to deny public access to the pretrial discovery materials.[106] The John Does had not been charged with any crimes and moved to deny public access because criminal investigative information becomes public information when the state provides requested information to a defendant.[107] The John Does lost their fight to keep their names and addresses from becoming public.[108] The Florida Supreme Court affirmed the decisions of the courts below, allowing the names and addresses of the John Does who did not face criminal charges to become public.[109]

The Florida Supreme Court in *Doe* utilized a primacy approach focusing almost exclusively on the Florida constitutional right to privacy as the basis of the individual rights analysis.[110] The court applied some federal constitutional law principles involving privacy,[111] but the court spent most of its efforts discussing Florida common law principles and

101. 612 So. 2d 549 (Fla. 1992).
102. *Id.* at 550; *see also* FLA. STAT. § 796.07 (1991).
103. *Doe*, 612 So. 2d at 550; *see also* FLA. STAT. § 796.05 (1991).
104. *Doe*, 612 So. 2d at 550; *see also* FLA. STAT. § 934.03 (1991).
105. *Doe*, 612 So. 2d at 550.
106. *Id.*
107. *See* FLA STAT. § 119.011(3)(c)(5)(1991); Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32 (Fla. 1988).
108. Doe v. State, 587 So. 2d 526, 528 (Fla. 4th Dist. Ct. App. 1991).
109. *Doe*, 612 So. 2d at 553.
110. *Id.* at 552.
111. *Id.* at 552-53 n.3.

Florida public policy considerations.[112] The court's analysis involved Florida public policy balancing of conflicting interests. The court balanced the policy impacts of allowing criminal discovery to be utilized by the press to gather information against the Florida tradition of open records.[113] The court expressed concern that allowing the media to utilize criminal discovery to gather news information could dissuade witnesses and victims from divulging investigatory information to law enforcement authorities in an effort to avoid personal information from being publicly disclosed.[114] The court opted to give the greater weight to legislative policy involving open records, finding that in camera inspections by trial judges would be sufficient to protect private information.[115]

The court utilized its Florida public policy analysis to support its finding that the names and addresses failed to be protected by the Florida constitutional right to privacy.[116] The John Doe's privacy rights, at least in terms of names and addresses, were not implicated when the information involved their own criminal activity.[117] The Florida Supreme Court followed the primacy model that the court developed in *Traylor*, but the court failed to utilize extensively the factors indicating unique Florida interests.[118] Overall, the court's analysis was curt and conclusory, overlooking factors such as the language of and the formative history of the state constitutional right to privacy. The court overlooked the following important indicators of Florida policy:

1. The language of the Florida constitutional privacy provision states explicitly that the privacy provision "shall not be construed [by the courts] to limit the public's right of access to public records and meetings as provided by law."[119] Those words need to be read within the context of the historical developments of that provision.

2. The legislative history[120] for the current privacy provision placed on the 1980 ballot[121] is sparse, but does indicate that the privacy

112. *Id.* at 552 (citing Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988).

113. *Id.* at 552-53.

114. *Doe*, 612 So. 2d at 553.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. FLA. CONST. art. I, § 23 (1980).

120. Conference Comm. Rep. on Fla. CS for HJR 386 (1980 Sess.) (on file with committee)

121. *See* FLA. CONST. art. XI, § 5.

provision created a general right to be let alone from government interference[122] that is experimental in scope.[123] The privacy provision embarked Florida into uncharted territory for privacy protection. The people of Florida took the opportunity to provide themselves with a broad and general privacy protection. The *Doe* court failed to take the broad and experimental nature of the privacy provision into consideration in its policy balancing analysis.[124] The court gave preference to public record policy.[125] This was clearly required, given the explicit words in privacy provision concerning public records. However, the court neglected the strong privacy concerns implicated in the privacy provision.

3. The court also overlooked formative history of the privacy provision.[126] The privacy provision was first considered by the 1977-78 Constitutional Revision Commission where concerns about increasing governmental encroachment on private information were expressed. The principal aim of the privacy provision was to afford individuals protection against collection, retention, and use of information about personal information.[127] The privacy provision reflected the fears of citizens about potentially abusive powers of the State of Florida to invade and expose private lives.[128] The *Doe* court minimized such concerns. *Doe* involved the sex lives of individuals not charged with sex crimes. The sensitive nature of a name, which had been included in a prostitute's records, was overlooked by the *Doe* court when it focused on the alleged criminal activity of the John Does. The court implied that involvement in criminal activity somehow ended the protection against public exposure, but the court neglected to recognize that the John Does remained uncharged at the time of the disclosure. In the context of the early supporters' concerns for a Florida constitutional privacy provision, such an oversight by the court

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122. *See* Staff of Fla. H.R. Comm. on Gov'tl Ops. for CS/HJR 387 (Feb. 7, 1980) (on file with committee).

123. *See* Staff of Fla. H.R. Comm. on Com., CS for HJR 387 (1980) Staff Analysis and Memorandum from S. Staff to S. President (Oct. 22, 1980) (on file with committee).

124. *Doe*, 612 So. 2d at 551.

125. *Id.* at 552.

126. *See generally* Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right to Privacy*, 6 FLA. ST. U. L. REV. 673 (1978); Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 633 (1977); Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565 (1981).

127. *See* Rasmussen v. South Fla. Blood Serv. Inc., 500 So. 2d 533, 536 (Fla. 1987).

128. *See, e.g.*, 1978 Fla. Constitution Revision Comm'n proceedings at 6387, vol. 26 (March 8, 1978) (comments by Commissioner Douglas about 1984 approaching).

seems odd. The *Doe* court concluded that the mere appearance of an individual's name in records of an accused places the individual beyond Florida constitutional privacy protection.[129] Such a result runs counter to earlier concerns by privacy provision supporters about the prevention of a "1984" governmental information collection environment, because those charged with crimes become information collectors for Florida government on behalf of the media.

4. The *Doe* court also neglected to read the Florida provision within the context of policies reflected in other sections of the Florida Constitution. By allowing the names and addresses of the John Does to be exposed as public information, the court allowed individuals to be characterized through court proceedings as clients of a prostitute. The John Does would be branded as participating in criminal activity without being afforded the right to be free of such taint until the state proved wrongdoing. The formalities involved in the right to due process,[130] confrontation,[131] and counsel[132] remained overlooked by the supreme court as the court viewed the state right to privacy.

V. CONCLUSION

The future of the primacy model which evolved in *T.W.*, *Browning*, and *Traylor* remains unclear. The *Doe* court applied the basics of the *Traylor* state constitutional interpretive model, but overlooked significant aspects of the model. The comprehensive nature of the *Traylor* court's thinking failed to be reflected in *Doe*. As the Florida Constitution of 1968 heads toward its thirtieth anniversary, doubt about the role of the Florida Constitution in protecting basic human rights of Floridians continues to exist.

129. *Doe*, 612 So. 2d at 553.
130. FLA. CONST. art. I, § 9.
131. *Id.* § 16, cl. (a).
132. *Id.*