Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights

David C. Hawkins*
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Abstract

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KEYWORDS: federalization, equal, right
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The state constitutional decisions of the Supreme Court of Florida have been overlooked as a survey topic for the past fifteen years.1 In the interim, the court has produced a substantial body of law. The court’s opinions confirm that state constitutional issues are litigated actively and attest to the vitality of the document. A comprehensive review of those opinions is long overdue.

The Bill of Rights, contained in article I of the Florida Constitution is eminently worthy of study, for it is the barrier between the liberties of the people and the powers and prerogatives of the state sovereign. The many amendments to the constitution during the decade of the 1980s indicate that this was an important period in the state’s constitutional development. In the main, the energies of the constitutional revisors and of the court itself focused upon the personal rights of Floridians guaranteed in article I. For these reasons, article I presents a particularly appropriate topic on which to begin anew the chronicle of state constitutional law. This survey undertakes a section-by-section analysis of article I as interpreted by the decisions of Florida’s highest court that were reported during the past decade.2

A. Background

1. Federalization and revival of state constitutional law

The hallmark of this country’s constitutional doctrine is that the people are the sole source of political power.3 Moreover, the central tenet of self-government acknowledges that the government exists for the people, not the reverse. Owing to a general distrust of government, the founders of the republic established for themselves certain rights and bestowed on the federal government certain powers, subject to specific constraints. Those rights, broad grants of power, and limitations upon that power are enshrined in the Bill of Rights of the United States.

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examined the topic exhaustively.

2. A deliberate effort was made to identify all opinions of the Supreme Court of Florida reported during this period which expressly considered article I. In profile, the opinion must confirm that article I was relied upon by the court, addressed by a lower court, or advanced by a litigant in support of a claim. Occasionally, the court cites to prior constitutional decisions as precedent without referring to the constitution itself. These decisions contribute to the body of constitutional law no less than those expressly citing to chapter and verse. To the extent research was successful in identifying those decisions, they were included in the survey. In all, the court considered 450 state constitutional issues. Over fifty percent of those issues addressed article I.

States Constitution. The constitutions of the constituent states declare many of the same rights, but primarily impose detailed limitations on the plenary power of state governments.

An attribute of federalism entitles the people to look both to the federal and state constitutions as sources of fundamental rights and protection from governmental excess. On the hierarchy of democratic interests, no higher order exists than fundamental rights. Generally, fundamental rights are beyond the reach of official orthodoxy and exist, in part, to prevent the people from becoming instruments of the state.

Beginning with the formation of the republic and continuing into the 1960s, the federal constitution, rather than the state constitutions, has proved to be the more dominant authority. The federal and state constitutions frequently express common aims in the area of personal rights, yet federal constitutional law has significantly influenced state constitutional law. Federalization of state organic law is explained not by the enormity of the federal powers or by force of the United States Constitution itself, but by the tendency of state courts to rely upon federal precedent when construing a state right that has a textual parallel in the United States Constitution or when the state law is not developed. The latter circumstance is likely to occur when the state

8. The Supreme Court of Florida often relies upon federal cases for guidance when it construes a state constitutional right which has no textual federal parallel. The 1968 revision to the constitution, as amended, includes several provisions with no express federal counterpart. See Fla. Const. art. I, § 2 (prohibition against deprivation of any right because of physical handicap); Fla. Const. art. I, § 6 (right to work) and (right of public employees to collectively bargain); Fla. Const. art. I, § 11 (prohibition against imprisonment for indebtedness); Fla. Const. art. I, § 14 (retirement release on reasonable conditions); Fla. Const. art. I, § 15(b) (offenses by juveniles, Fla. Const. art. I, § 21 (right of access to courts); and Fla. Const. art. I, § 23 (express right of privacy). Many of the decisions interpreting those sections are reviewed in Cooper, Beyond the Federal Constitution: The Status of State Constitutional Law in Florida, 18 STETSON L. REV. 241, 247-57 (1989).


10. See, e.g., Moran v. Burbine, 475 U.S. 412, 428 (1986); Lego v. Twomey, 404 U.S. 477, 489 (1972). Justice Brennan saluted state court activism for its protection of individual rights in the face of federal protections, which he described as “crippled.” "[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those ideologically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.” Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 495 (1977). See also Note, Stepping Into the Breach: Basing Defendants’ Rights on State Rather Than Federal Law, 15 AM. CRIM. L. REV. 339 (1978).

11. The supremacy clause of the United States Constitution prohibits state courts from interpreting their constitutions less stringently than the United States Constitution. U.S. Const. art. VI; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934). States are free to provide
Hawkins: Florida Constitutional Law: A Ten-Year Retrospective on the State Constitution, such as Florida's, is young and evolving. 6 Federalization is also explained by the more subtle influence of the incorporation doctrine. 8 State courts are disinclined to explore the limits of their independent constitutions when persuasive federal cases have spoken to the subject at hand. In so doing, state courts assure the dominance of the federal standards. For these reasons, understandably, federal and state bills of rights are often indistinguishable.

Since the early 1960s, there has occurred a renaissance in state constitutional doctrine. A revival has been spurred by decisions of federal courts openly challenging the states to expand the scope of personal protection, 10 subject of course to the limitation that the states may not provide less protection than the federal constitution. 11 Also,

6. Slobogin, State Adoptions of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment, 39 U. Fla. L. Rev. 653; 656-66 (1987) [hereinafter Slobogin]. Professor Slobogin observes that the trends and relative importance of federal and state law in the context of criminal procedure changed through four historical phases. In the 1960s, the United States Supreme Court's activism "significantly altered the pattern of state constitutional interpretation," making state constitutional decision making appear to be irrelevant. More recently, the Court has "constricted" the scope of the federal bill of rights, thereby leaving the states free to fill the vacuum. Id. at 660-62. See also Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977, 978-80 (1985).
7. See, e.g., Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 779 (Fla. 1979), rel'd g denied (1980).
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2. Florida's constitutional history

Florida's constitutional history traces its lineage from 1838 when delegates from throughout the Territory of Florida assembled in a convention for the purpose of organizing a state government. Following the adoption of three intermediate constitutions, the state adopted its longest-lived constitution, the Constitution of 1855. During the 1960s, however, it had become apparent that the document reflected the imperatives of an age gone by and was "in dire need of revision." Under the Constitution of 1885, the legislature was empowered to propose by joint resolution an amendment to the document. Toward that end, the 1965 Legislature created the Florida Constitutional Revision Commission to carefully study the constitution "for the purpose of eliminating obsolete, conflicting and unnecessary provisions as well as for framing an orderly and properly arranged constitution, based upon economic and social changes." The Commission submitted its initial proposed draft, which was reworked and adopted by the legislature and later ratified by the voters effective on January 7, 1969. The product of

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15. The Florida Constitutions of 1861, 1865, and the "Reconstruction" constitution of 1868.
16. Ch. 65-561 (Preamble), 1965 Fla. Laws 1776. Critics charged that the document had become inadequate to meet the changing social and economic needs of the state. Dauer & Havard, supra note 3, at 2. The political motivation for the Constitution of 1968 grew out of "the many dissatisfactions expressed by both citizens and government officials with the restrictions, gaps, and inadequate delegations of powers to government in the present Constitution of 1883." M. Dauer, C. Donovan, and G. Kammerer, Should Florida Adopt the Proposed Constitution? in PUB. ADMN. CLEARING SRV. OF THE UNIV. OF FLA. STUDIES IN PUB. ADMIN. No. 31 (1968).
17. FLA. CONST. art. 17, § 4 (1885 as amended in the 1964 general election).
19. See Sturm, Constitution Revision Symposium, the Procedure of State Constitutional Change—With Special Emphasis on the South and Florida, 5 FLA. ST. U.L. REV. 569, 592-96 (1977). At the time of its adoption, the 1968 revision to the Constitution of 1885 was virtually a rewrite of the entire Constitution of 1885, with the exception of the judiciary article which remained unaltered. FLA. CONST. art. V. Its most remarkable contribution was the addition of the constitutional commission as a formal method of initiating constitutional change, independent of the legislature. FLA. CONST. art. XI, § 2 (1968). Article XI provides for three additional methods of initiating constitutional change—proposal by the legislature, popular initiative, and constitutional convention called by the people. Florida became the first state to give constitut...
that effort often is referred to as the Constitution of 1968, although it is more precisely termed a revision to the Constitution of 1885.30

With respect to article I, the 1968 revision substantially reasserts the personal rights contained in the Declaration of Rights of the Constitution of 1885. The revision contributed to article I by improving word usage, by effecting minor drafting changes,24 and by relocating personal rights from the Declaration to a numbered article. In so doing, the adopters preserved the primacy of position enjoyed by personal rights while assuring that those rights would be regarded with at least equal dignity as powers created elsewhere in the constitution.25

3. The court

The decade witnessed the creation of new constitutional rights as well as changes to the composition of the court itself. Seven justices sit on the Supreme Court of Florida.23 Only two members sat during the entire ten years surveyed here.24 Five members were newly appointed to fill vacancies created by retirement and resignation.25

Despite its changing composition, the court has repeated on occasions a bold constitutional philosophy that casts the judiciary in an active role as the guardian of fundamental rights.30 In so doing, the court has assured that the courtroom will remain a receptive forum for vindicating those rights. Obviously, all is not certain victory for the claimant who asserts a right derived from article I. The personal rights of one claimant may conflict with the personal rights of another, or with powers created outside article I. Moreover, the right may be subject to state action, when, for instance, the court regards the infringement deferentially as a matter of legislative choice. Regardless of its constitutional perspective, there can be no doubt that the court is the last

23. Fla. Const. art. V, § 3(a). At decade’s end, the membership on the court included Chief Justice Erlich and Justices Overton, McDonald, Shaw, Barkett, Grimes, and Kogan. Five justices are necessary to a quorum. At times, the court issues opinions with five or six justices participating in a decision.

24. They are Justices Overton and McDonald.

25. Interview with Brian Polley, Librarian, Supreme Court of Florida (Sept. 23, 1989). At the outset of the decade, the court included Chief Justice England and Justices Atkins, Boyd, Overton, Sundberg, Alderman, and McDonald. Justices Boyd and Atkins retired in January 1987 and were succeeded by Justices Kogan and Grimes, respectively. Three other justices resigned, Justice England in August 1981; Justice Sundberg in September 1982; and Justice Alderman in January 1985. They were succeeded by Justices Erlich, Shaw, and Barkett, respectively. Aside from reporting the vote distribution on individual cases, this article makes no attempt to assign importance to the changing composition of the court or suggest how an individual jurist may have influenced the court’s decision making.

26. In Dade County Classroom Teachers Ass’n, Inc. v. Legislature, 269 So. 2d 684, 686 (Fla. 1972), Chief Justice Roberts wrote for a unanimous court:

We think it is appropriate to observe that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of the Constitution and the Constitution is the highest law. A Constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it . . . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

(cited approvingly in Satz v. Perlmutter, 379 So. 2d 359, 360-61 (Fla. 1980)). See also State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981)).
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tional status to a reform commission. Sturm, supra at 599. Constitutional commissions principally are intended to provide expert advice on constitutional issues and to propose solutions. Id. at 585. Professor Sturm argues that the procedures for constitutional change merit special consideration, for only through a well-reasoned amending process will the constitution achieve flexibility and stability essential to sound development.

20. In its complete form, the appellation of the current document appears: Constitution of 1885, as revised, and subsequently amended. That distinction is not hypertechnical, for it respects the substantive implications that the 1968 revision has upon provisions outside article I. See Fla. Const. art. XII, § 1 (“Articles I through IV, VII, and IX of the constitution of Florida adopted in 1885, as amended from time to time, are superseded by this revision except those sections expressly retained and made a part of this revision by reference”); Fla. Const. art. XII, § 10 (“All provisions of Articles I through IV, VII and IX through XX of the constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.”). For a listing of provisions of the constitution of 1885 which the legislature enacted into law, see D’Alemberte, supra note 14, vol. 26A at 154 (Supp. 1989).

21. Dauer & Havard, supra note 3, at 27. The constitution of 1885 followed the general pattern of the Bill of Rights, yet with some additions and with “a great deal more verbiage.” Id. Those rights were collected at the beginning of the document under the heading Declaration of Rights.

22. It is “significant,” Justice Brown wrote many years ago, that our constitution begins with the declaration of rights, “specifying those things which the state must do, before specifying certain things that it may do.” State ex rel. Davis v. City of Stuart, 97 Fla. 69, 101-02, 120 So. 335, 347 (1929). But see D’Alemberte, supra note 14, vol. 25A at 2 (location may only be of interest to historians, for the legislature has previously rejected the implication that location within the constitution provided any greater or less weight).

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word on the meaning of the Florida Constitution. This background section identifies two significant influences upon state constitutional decision making—federalization and the court's perception of its own role. Knowing when the court relies upon federal precedent to construe rights protected under article I and which role the court assumes in a particular case contribute immeasurably to one's understanding of the state Bill of Rights.

B. Declaration of Rights

1. Political power

All political power is inherent in the people. The enumeration herein of certain rights shall not be construed to deny or impair others retained by the people. Fla. Const. art. I, § 1.

Because political power is inherent in the people, only the people may decide how and when it may be relinquished. The 1968 revision to the constitution, the people reserved certain powers that enable them to pull directly on the levers of government. One such mechanism is the referendum. Historically, the initiative and referendum procedures have served the purpose of checking political corruption and encouraging legislative responsiveness. Through the referendum, there

27. Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988); In re Advisory Opinion to the Governor, 509 So. 2d 292, 302 (Fla. 1987): Although this survey does not attempt to collect the vast numbers of state constitutional decisions of the district courts of appeal, it is important to understand that district court decisions represent the law of Florida unless and until overruled by the supreme court. Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980). Until overruled, those decisions have statewide import. Florida trial courts are obliged to follow decisions of other district courts, absent conflicting precedent of its district court or the supreme court. Weinman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985).


29. The initiative is another method by which the people are able to influence government outside the traditional representative process. See, e.g., Fla. Const. art. XI, § 3 (permitting popular constitutional initiative); Note, Initiative and Referendum—Do They Encourage or Impair Better State Government?, 5 Fla. St. U. L. Rev. 925 (1977) (surveying states with initiative and referendum procedures) (hereinafter Initiative and Referendum).

exists the opportunity for popular veto of unpopular decisions. Florida Land Co. v. City of Winter Springs considered the source and extent of this reserved power. Florida Land Company purchased property which it sought to rezone from rural urban development to single family dwelling. The city council, following the recommendation of the zoning board, rezoned the property by ordinance and amended the comprehensive plan to reflect the change desired by the company. A citizens' committee initiated referendum proceedings under the city code to compel the city council to reconsider its decision, and failing that, to submit the ordinance to a popular vote. The company sought to enjoin the referendum as a violation of its due process rights under the state and federal constitutions.

The court noted that the Constitution of 1885 included the referendum as part of the amendatory process in specified sections, whereas the 1968 revision included the referendum as a general provision. Article I, section 1 need not expressly reserve the referendum because elsewhere the drafters provided that “[s]pecial elections and referendum shall be held as provided by law.” When read together, the two sections assured that the referendum remained “the essence of a reserved power” and “a keystone of self-government.” Thus, the citizens' committee was free to choose when to initiate the power, and its exercise of that power did not itself violate due process. The referendum extends beyond rezoning decisions of city government and greatly strengthens the voice of public interest groups, including environmentalists and consumer advocates.

2. Basic rights

Article I, section 2 makes three declarations. The first expresses the traditional equal protection guarantee. The second recognizes that persons have inalienable rights, and specifically acknowledges certain of those rights, although certain aliens may be prohibited from asserting

31. 427 So. 2d 170 (Fla. 1983) (unanimous).
32. Id. at 171-72.
33. Id. at 172 n.4.
34. Fla. Const. art VI, § 5.
35. Florida Land Co., 427 So. 2d at 172.
36. Id. at 174 (citing City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976)).
word on the meaning of the Florida Constitution. 27

This background section identifies two significant influences upon state constitutional decision making—federalization and the court's perception of its own role. Knowing when the court relies upon federal precedent to construe rights protected under article I and which role the court assumes in a particular case contribute immeasurably to one's understanding of the state Bill of Rights.

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28. Implicit in this right is the power to amend the constitution. D'Alene v. Mitchell, supra note 14, vol. 25A at 19. Compare FLA. CONST. art. III, § 1 ("The legislative power of the state shall be vested in a legislature . . . ").

29. The initiative is another method by which the people are able to influence government outside the traditional representative process. See, e.g., FLA. CONST. art. XI, § 3 (permitting popular constitutional initiative); Note, Initiative and Referendum—Do They Encourage or Impair Better State Government?, 5 FLA. ST. U. L. REV. 925 (1977) (surveying states with initiative and referendum procedures) [hereafter Initiative and Referendum].

30. Initiative and Referendum, supra note 29, at 925.

31. 427 So. 2d 170 (Fla. 1983) (unanimous).

32. Id. at 171-72.

33. Id. at 172 n.4.

34. FLA. CONST. art. VI, § 5.

35. Florida Land Co., 427 So. 2d at 172.

36. Id. at 174 (citing City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976)).

property rights. The third protects all basic rights against deprivation, by whatever form, but especially on account of race, religion, or physical handicap. Each of these three declarations will be treated in turn.

a. Equal protection clause

All natural persons are equal before the law . . . . FLA. CONST. art. I, § 2.

Equality, in a constitutional sense, generally means that the government may not treat similarly situated persons in a disparate manner. In cases decided this decade, the court sustained equal protection claims because the state treated differently from others members of classes based upon alienage, paternity, survivorship, and property ownership.

Two of those cases tested classifications based upon nationality. In the first case, Celestine Kelly, who was not a United States citizen, applied for a license to act as the business agent of the Palm Harbor Fire Fighters Union. The Palm Harbor Special Fire Control District opposed the application on the basis of Kelly’s lack of citizenship. The district relied upon section 447.04(1)(a), Florida Statutes (1985), which provided: “[n]o person shall be granted a license or permit to act as a business agent in the state: (a) Who is not a citizen of the United States.” By administrative order, the Florida Department of Labor and Employment Security granted the license, relying upon another statute which provided that “[n]o person shall be disqualified from practicing an occupation or profession regulated by the state solely because he is not a United States citizen.”

In *Palm Harbor Special Fire Control District v. Kelly,* a unanimous court held that section 447.04(1)(a) facially violated Kelly’s equal protection guarantees under the federal and Florida constitutions. The court set out the applicable standard: statutory classifications that treat persons differently must be rationally related to a legitimate state objective and statutory classifications that burden groups based upon a traditional suspect class, such as alienage, are subject to strict scrutiny analysis. Those statutory classifications will survive strict scrutiny analysis if the statute advances a compelling state interest by the least restrictive means available and if there is no exception which would otherwise permit the state to restrict “avenues of self-government to those persons who have become full members of the state’s political community.”

Federal cases allow an exception to strict scrutiny analysis if the class serves a political function. The court found that the political function exception could be harmonized with Florida’s equal protection guarantees, provided an alienage restriction satisfied two requirements. First, the restriction must be sufficiently tailored to avoid undercutting the state’s claim that “the classification serves legitimate political ends.” Second, the classification may be applied only to selected individuals—“persons holding state elective or important nonelective executive, legislative, and judicial positions,” those officers who “participate directly in the formulation, execution, or review of broad public policy” and hence possess “functions that go to the heart of representative government.” A class of business agents defined on the basis of alienage is overinclusive, the court held, and thus could never satisfy the second requirement of the political function exception. As such, the classification violated both the equal protection clauses of the fourteenth amendment and article 1, section 2.

38. The federal counterpart to § 2 appears in the fourteenth amendment, which provides in part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. 14, § 1. There is also an equal protection component in the fifth amendment. That amendment bars discrimination which is “so unjustifiable” as to violate due process. The approach taken by the United States Supreme Court under those amendments is identical. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).


40. 516 So. 2d 249 (Fla. 1987) (Barkett, J., McDonald, C.J., Overton, Ehrlich, Sh孰p, McCarthy, Vender, C.iden, C. , and Rove, Esq.

41. Id. at 251.

42. Id. (citing Graham v. Ramani, 383 So. 2d 634 (Fla. 1980) (holding as violative of the fourteenth amendment a statutory limitation that requires that notaries public be U.S. citizens)).

43. Id. (citing Bernal v. Faistner, 467 U.S. 216, 219 (1984) (permitting the states to exclude persons outside the political community from positions which are “closely bound up with the formulation and implementation of self-government”).

44. Id. at 252 (quoting Cabello v. Chavez-Salido, 454 U.S. 432, 440 (1982)).

45. Id.

46. The court explained that the agent’s contact with the public was indirect, at most, and responsibility was limited by statute to provide neither state authority nor policy making duties. Id. at 252-53.

47. *Palm Harbor’s* reliance upon two fourteenth amendment cases, Ramani and Bernal, appears to reflect an effort to harmonize § 2 with federal principles.
property rights. The third protects all basic rights against deprivation, by whatever form, but especially on account of race, religion, or physical handicap. Each of these three declarations will be treated in turn.

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47. Palm Harbor's reliance upon two fourteenth amendment cases, Ramani and Bernal, appears to reflect an effort to harmonize § 2 with federal principles.
In the second case, *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, the court considered whether that right prohibited the legislature from limiting workers' compensation death benefits payable to nonresident alien dependents of a resident alien who died in a work related accident. Maximiano De Ayala was killed in a motor vehicle accident while working for a Florida business. His survivors, all of whom were residents and citizens of Mexico, requested $100,000 under Florida's workers' compensation system. The policy administrator tendered only $1,000, in accordance with Florida law: "[c]ompensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents . . . provided that compensation to dependents [in any foreign country] shall in no case exceed $1,000." The survivors sought declaratory relief, claiming that the law was unconstitutional, in part, because it violated article I, section 2.

The insurance company argued that the petitioners as nonresident aliens lacked standing to challenge the statute. The majority rejected that claim, reasoning that the issue hinged not upon the constitutional rights of surviving dependents, but upon De Ayala's right as a worker in Florida.

*De Ayala* determined that the statute involved alienage, a traditionally suspect class, which subjected the statute to strict scrutiny. Six members of the court found that the statute facially violated article I, section 2. They added that the classification could not even satisfy the less demanding rational basis test, for common sense dictates that neither residence nor status of a worker's dependents is germane to the distribution of workers' compensation benefits.

In another case, *Kendrick v. Everheart*, the custodial father of five children born out of wedlock sought, in part, a declaration that Florida's paternity act violated federal and state equal protection guar-

50. Justice Overton argued that noncitizens and nonresidents have no standing to assert constitutional principles. Moreover, the judiciary had no business interfering with a policy that the legislature established within its constitutional power. *De Ayala*, 543 So. 2d at 208 (Overton, J., dissenting).
51. Id. at 207 (relying on Western Metal Supply v. Pillsbury, 172 Cal. 407, 156 P. 491 (1916)).
52. 390 So. 2d 53 (Fla. 1980) (Sundberg, C.J., Adkins, Overton, England, Alderman, and McDonald, JJ.).

The court allowed the paternity act to stand and turned to whether Mr. Kendrick was entitled to seek relief under Florida's declaratory judgment act. It determined that the declaratory judgment act did not bar a putative father from seeking a determination of paternity and reversed the trial court on this point. The majority said that the act must be liberally construed "to settle and afford relief from insecurity and uncertainty with respect to rights, status and other equitable legal relations," concluded that Mr. Kendrick was therefore free to pursue his claim, and added that he should not be denied a forum. In apparent qualification, the justices carefully noted that the state may require the unwed father to first demonstrate a "substantial concern" for the interests of the child before he may assert any interest regarding that child. Mr. Kendrick proved that he raised and supported his children and thereby demonstrated a present right that entitled him to establish.
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53.  *Fla. Stat. § 742.10 (1977).*
54. *Kendrick*, 390 So. 2d at 58.
55. *Id. at 57.* On this point, Justice Boyd would permit the act to apply to the father of children born out of wedlock, for he enjoys a liberty interest in his relation with his children to the same extent as the mother. *Id. at 61.* (Boyd, J., concurring, in part, and dissenting, in part).
56.  *Fla. Stat. ch. 86 (1977).* The state may discriminate to that extent because an unwed father may not be similarly situated with the unwed mother or the married father.
57. *Kendrick*, 390 So. 2d at 59 (citation omitted).
58. *Id. at 60.*
his paternity through a declaratory judgment action. In 
Vildibill v. Johnson, the parents of an adult single male who
was killed in an automobile-train collision brought an action under
Florida's Wrongful Death Act as the decedent's only survivors. The act
permits recovery by a variety of persons for a variety of damages. In
particular, section 768.21(6)(a)(1), Florida Statutes (1983), permits
the estate to recover loss of earnings and loss of prospective net
accumulations if the decedent is neither a minor nor has survivors as
defined in the act. A divided court decided that this statute violated
the parents' equal protection guarantees because it created an irrational
classification by barring recovery if the decedent was survived by par-
ents, yet permitting recovery if not survived by parents.

Finally, in Storer Cable T.V. of Florida, Inc. v. Summerlin's
Apartments Associates, Ltd., the tenants of an apartment complex
requested a cable television provider to install service to their apart-
ments. The landlord denied the provider access to the premises and
challenged a statute which provided that "no tenant ... shall unrea-
sonably be denied access to any available franchised or licensed cable
television service, nor shall such tenant or cable television service be
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under the equal protection clause. In most, the court applied the re-

60. Id. at 61. The court reversed the trial court's final order that denied Ken-

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65. As is clear from the court's reliance upon the "dispositive" reasoning of
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), Storer Cable
offers more forcible precedent as a "taking" and due process case than an equal protec-
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66. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla.
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the prevailing party's attorney fees was found to be "neither arbitrary nor unewlight-
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v. Thomas, 434 So. 2d 306 (Fla. 1983) (a classification which limited 44 the number
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organizational solicitors did not render the statute constitutionally infirm) (unanimous);
Glenenkamp v. State, 391 So. 2d 192 (Fla. 1980), cert. denied, 454 U.S. 818
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to stop at agricultural inspection stations does not violate equal protection because passen-
erg vehicles are exempted); Rolls v. Southern Bell Tel. & Tel. Co., 384 So. 2d 650
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cluded that there existed important differences between the classifications to warrant disparate treatment\(^7\) or that the challenged classification promoted "fairness, equality, and consistency" rather than denied equal protection.\(^8\) In others, the court appeared to regard certain classifications deferentially as matters of legislative choice\(^5\) or within an agency's statutory authority.\(^6\)

In conclusion, equal protection claims are frequently asserted, yet to date those claims have been seldom successful. In only four decisions, Palm Harbor, De Ayala, Vildibill, and Storer Cable, claimants were granted relief under the equal protection clause. Those decisions are of recent origin and reflect the court's willingness to consider article I, section 2 as an independent basis for relief. Palm Harbor and De Ayala required the court to apply the heightened strict scrutiny associated with classifications based upon alienage, a traditionally suspect class. Palm Harbor was also noteworthy because it applied the federal political function exception. In a fourth decision, Kendrick, the court let stand Florida's paternity act against a challenge brought by a natural father of children born out of wedlock because the legislature intended the act to be the exclusive remedy of natural mothers to establish paternity of the father. In the remaining cases, the vast majority of challenged statutes were deemed to bear a rational relationship to a proper legislative goal and thus survived the court's equal protection scrutiny.

b. Inalienable rights and deprivation clauses

All natural persons... have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property, except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. Fla. Const. art. I, § 2.

The second provision of the basic rights section declares the entitlement of natural persons to inalienable rights, provided that the legislature may regulate the bundle of real property rights claimed by certain aliens.\(^7\) The third provision is actually a limitation that prohibits the deprivation of any right, including the enumerated inalienable rights. The limitation, which expressly protects the suspect classifications of "race, religion or physical handicap" from deprivation, is a recent addition to the Florida Constitution.\(^8\)

Deprivation on account of "race" was the subject of several decisions. Tillman v. State\(^9\) concluded that the jury selection proceeding fell short of standards announced in State v. Neil,\(^10\) which requires the state to show that the challenged peremptory strikes were not exercised

\(^7\) No cases have considered the restriction imposed on property ownership by aliens.

\(^8\) "Race or religion" was added by the 1968 revision, D'Alemberste, supra note 14, vol. 25A at 23, and the prohibition against deprivation on account of "physical handicap" was added by the electors at the general election of November 1974. Id. at 2.

\(^9\) 522 So. 2d 14 (Fla. 1988) (per curiam) (Overton, Ehrlich, Shaw, Barkett, Grimes, and Kogan, JJ.; McDonald, C.J., concurred as to conviction but concurred in nullity only as to the sentence).

\(^10\) 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986). See infra note 519.
cluded that there existed important differences between the classifications to warrant disparate treatment\(^\text{69}\) or that the challenged classification promoted "fairness, equality, and consistency" rather than denied equal protection.\(^\text{70}\) In others, the court appeared to regard certain classifications deferentially as matters of legislative choice\(^\text{71}\) or within an agency's statutory authority.\(^\text{72}\)

In conclusion, equal protection claims are frequently asserted, yet to date those claims have been seldom successful. In only four decisions, Palm Harbor, De Ayala, Vildibill, and Storer Cable, claimants were granted relief under the equal protection clause. Those decisions are of recent origin and reflect the court's willingness to consider article I, section 2 as an independent basis for relief. Palm Harbor and De Ayala required the court to apply the heightened strict scrutiny associated with classifications based upon alienage, a traditionally suspect class. Palm Harbor was also noteworthy because it applied the federal political function exception. In a fourth decision, Kendrick, the court let stand Florida's paternity act against a challenge brought by a natural father of children born out of wedlock because the legislature intended the act to be the exclusive remedy of natural mothers to establish paternity of the father. In the remaining cases, the vast majority of challenged statutes were deemed to bear a rational relationship to a proper legislative goal and thus survived the court's equal protection scrutiny.

b. Inalienable rights and deprivation clauses

All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. Fla. Const. art. I, § 2.

The second provision of the basic rights section declares the entitlement of natural persons to inalienable rights, provided that the legislature may regulate the bundle of real property rights claimed by certain aliens.\(^\text{73}\) The third provision is actually a limitation that prohibits the deprivation of any right, including the enumerated inalienable rights. The limitation, which expressly protects the suspect classifications of "race, religion or physical handicap" from deprivation, is a recent addition to the Florida Constitution.\(^\text{74}\)

Deprivation on account of "race" was the subject of several decisions. Tillman v. State\(^\text{75}\) concluded that the jury selection proceeding fell short of standards announced in State v. Neil,\(^\text{76}\) which requires the state to show that the challenged peremptory strikes were not exercised

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\(^{70}\) See infra note 519.

\(^{71}\) No cases have considered the restriction imposed on property ownership by aliens.

\(^{72}\) "Race or religion" was added by the 1968 revision, D'Alemberge, supra note 14, vol. 25A at 23, and the prohibition against deprivation on account of "physical handicap" was added by the electors at the general election of November 1974. Id. at 2.

\(^{73}\) 522 So. 2d 14 (Fla. 1988) (per curiam) (Overton, Ehrlich, Shaw, Barkett, Griffin, and Kogan, JJ.; McDonald, C.J., concurring as to conviction but concurring in result only as to the sentence).

\(^{74}\) 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986).
solely on account of the juror’s race, and State v. Slappy,⁷⁷ which requires that the state’s explanation be neutral, reasonable, and supported by the record. Gary Tillman, a black defendant charged with first-degree murder, timely objected to the state’s use of peremptory strikes of black prospective jurors during the empaneling of the jury. Tillman’s prosecutor failed to advance racially neutral reasons to support his exercising peremptory challenges against black veniremen. For that reason, Tillman could successfully claim that the selection procedure was racially discriminatory and violated state and federal equal protection guarantees.⁷⁸

The court also considered an equal protection claim in Spencer v. State⁷⁹ based upon racial disparity of Palm Beach County’s jury selection procedures. Pursuant to law,⁸⁰ the trial court entered an administrative order that created two jury districts, an eastern district serving West Palm Beach and a western district serving Belle Glade. Under the order, crimes committed in the eastern district, where blacks comprised six percent of the population, were required to be tried there. Crimes committed in the western district, where blacks comprised fifty-two percent of the population, were automatically set for trial in the eastern district, provided that a defendant could opt to be tried in the western district.

The state charged Spencer, a black, with two counts of first-degree murder alleged to have occurred in the eastern district. A unanimous court determined that the county’s jury selection scheme violated article I, section 2 because a black defendant charged with a crime in the predominantly white eastern district must be tried there, whereas a white defendant charged with a crime in the predominantly black west-


⁷⁶ Neil and Slappy were decided under article I, section 16, which guarantees defendants the right to an impartial jury. Tillman’s reliance upon art. I, § 2 demonstrates that jury impartiality and race-neutral jury selection are coextensive interests designed to achieve a common end. Tillman harmonized Florida law with Basson v. Kentucky, 476 U.S. 79 (1986), which looked to the equal protection clause to establish the federal test. It bears noting, however, that the federal due process and equal protection clauses do not operate coextensively in all circumstances. See Nollan v. California Coastal Comm’n, 107 S. Ct. 3141, 3147 n.3 (1987) (earlier fifth amendment “taking” cases may lead to the incorrect assumption that due process and equal protection standards are the same).

⁷⁸ 545 So. 2d 1352 (Fla. 1989) (unanimous).

⁷⁹ Spencer, 545 So. 2d at 1355.

⁸⁰ 549 So. 2d 1005 (Fla. 1989) (Shaw, Overton, Barkett, Grimes, and Kogan, JJ.).


⁸² Ranger Ins., 549 So. 2d at 1005.

⁸³ Id. at 1007-08.
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Ranger Insurance Co. v. Bal Harbour Club, Inc. was the only case to address the protection against deprivation on account of religion. There, the prospective buyer of residential property asserted that a deed restriction prohibiting the seller from conveying to any person not a member of the Club was a sham to prevent Jewish persons from occupying the property. The owner, Bal Harbour Club, paid $25,000 to settle the claim. The Club’s liability insurance carrier, Ranger Insurance Company, refused to indemnify the Club and sought a declaratory decree that no coverage existed under its policy. The trial court entered final summary judgment for the Club. The district court affirmed, concluding that public policy did not preclude recovery, and it certified the following question to be of great public importance: “Does the public policy of Florida prohibit an insured from being indemnified for a loss resulting from an intentional act of religious discrimination?”

Five members of the court agreed to answer the question in the affirmative and quash the decision of the district court. The majority noted that Ranger represented a case of first impression and began by looking at two factors to determine whether a particular civil liability insurance policy violated public policy. The first considers the nature of the conduct and whether the existence of insurance will directly stimulate wrongful conduct. It is axiomatic, the court wrote, that one cannot insure against intentional misconduct. Substantial deterrents, independent of civil liability, operate to prevent criminal or even negligent conduct. Those deterrents do not similarly operate to prevent intentional religious discrimination. Indeed, human experience disproves that making intentional religious discrimination insurable does not encourage further discrimination.

The second factor considers the purpose served by the imposition of liability for the offending conduct and whether deterrence or compensation is preferred. Agreeing that deterrence and compensation were not incompatible in this context, the majority concluded that the primary purpose served by the imposition of liability for intentional
acts of wrongful discrimination was not to compensate the victims of discrimination but to deter future wrongful discrimination.44 Citing article 1, section 2, the majority wrote that deterrence of future wrongful discrimination advances Florida's "long-standing policy" of opposing religious discrimination.45 It noted numerous antidiscrimination statutes enacted by the legislature to advance that policy. Therefore, the justices concluded, whatever victim compensation occurs under those statutes is secondary to what is undeniably their primary purpose—deterrence.

Litigants in two cases asserted claims of deprivation due to "physical handicap." The first of those cases, Schreiner v. McKenzie Tank Lines, Inc.,46 considered a claim brought by James Schreiner, who worked for McKenzie Tank Lines, Inc., as a repairman operating motor vehicles. McKenzie discharged Schreiner after Schreiner's third epileptic seizure. Schreiner argued that he was deprived of employment due to his physical handicap, thus violating the inalienable rights and deprivation clauses of article I, section 2.

The court rejected Schreiner's claim of constitutional infringement. It began by noting that the fourteenth amendment's equal protection clause protects against discrimination by states, not individuals.47 The federal equal protection clause provides persuasive advice on construing Florida's counterpart. Schreiner argued that the inalienable rights and deprivation clauses were not similarly restricted, and pointed to provisions of other states comparable to article I, section 2. The court declined the invitation to expand the protections of that section to include infringement by private conduct, in particular because there was no record that the framers, the Constitutional Revision Commission, ever intended that result.48

In the final analysis, the court held that article I, section 2, "con-

84. Chief Justice Ehrlich charged that the majority's two-step analysis failed to support its answer to the certified question. In particular, he regarded its conclusions regarding the second step as "unreal:" society imposes liability to make the innocent injured party whole, not as a deterrence of future discrimination. Although there is a deterrent effect with the imposition of financial consequences for misconduct, it is merely secondary. Id. at 1010-12 (Ehrlich, C.J., dissenting).
85. Id. at 1008.
86. Id. at 1008-09. For examples of several antidiscrimination statutes, see id. at 1008 n.5.
87. 432 So. 2d 567 (Fla. 1983).
88. Id. at 568 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).
89. Id. at 569.
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sistent with" the fourteenth amendment, it was intended to protect against invasion of individual rights by government, not by individuals.49 To successfully prosecute a state constitutional cause of action under any of the three clauses of the basic rights section, a plaintiff must plead and prove state action.50

Then, the Florida Board of Bar Examiners Re: Applicant,51 a bar admissions applicant sought review of the Board's refusal to process his application until he executed a release and answered a questionnaire that asked, in part, whether he had received regular treatment for amnesia or mental disorder. The court summarily found as meritless the claim that the Board's action violated article I, section 2 because of the applicant's asserted physical handicap.52

As Schreiner and Florida Board of Bar Examiners illustrate, litigants have not yet presented the court with the opportunity to develop a working definition of "physical handicap" for purposes of this section.53 Very likely, the parameters of the prohibition against deprivation on account of physical handicap will be influenced as the complex of AIDS-related issues tests the strength of Florida's constitutional protection.54

Among the inalienable rights expressly protected under this sec-

90. Id. at 570.
91. Compare Human Rights Act of 1977, ch. 77-341, Fla. Laws 1461 (in which the Legislature created a statutory right of action to redress discrimination); Fla. Stat. § 760.02(6) (1987) (defines "employer," for purposes of the Act, to mean "any person employing 15 or more employees . . ."); Fla. Stat § 760.02(5) (1987) (in turn defines "person" as "an individual, association, corporation . . . the state; or any governmental entity or agency"). Thus, under the statutory right of action an aggrieved party may proceed against the state or its agents.
92. 443 So. 2d 71 (Fla. 1983).
93. Id. at 76. The inquiry focused not upon the asserted deprivation but upon the privacy infringement. This case is discussed more fully in the section on privacy.
94. Compare Fla. Stat. § 760.22(5) (West Supp. 1989) (defining "handicap" for purposes of the Fair Housing Act); ch. 89-350, § 14, 1989 Fla. Laws 2233, 2250 (to be codified at Fla. Stat. § 760.50(2)) (providing that "[a]ny person with or perceived as having acquired immune deficiency syndrome [AIDS], acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons").
95. For a discussion of handicap in this context, please refer to 1 R. Waters, AIDS AND FLORIDA LAW § 2.03, 16-28 (1989). In this pioneering work, Mr. Waters predicts that the disease will have a pervasive impact upon the legal system, affecting nearly every substantive area of law. He adds that nations will confront the disease largely through state law, which at present provides only a "bare-bones legal framework." Id. at § 1.01, 1-5.
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In the final analysis, the court held that article I, section 2, “consistent with” the fourteenth amendment, was intended to protect against invasion of individual rights by government, not by individuals. To successfully prosecute a state constitutional cause of action under any of the three clauses of the basic rights section, a plaintiff must plead and prove state action.

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the statute implicated this section. "One of the primary benefits that an
employee works for," the justices wrote, "is the satisfaction and well-
being of providing for his or her family." Each employee pays taxes
and contributes to the growth of the economy without regard to alien-
age. Thus, the state could not reduce benefits for Florida workers with
nonresident alien dependents simply because that worker was Mexican,
rather than Canadian.

On another occasion, the court expressed the view that the right to
pursue a lawful business is embraced within the rights protected by this
section. This right is inalienable, but subject to reasonable legislative
limitations. 68

To summarize, the inalienable rights and deprivation clauses, in
addition to the equal protection clause, comprise the bundle of protec-
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physical handicap provision because the claims sought relief for depriva-
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*Schreiner.*

3. Religious freedom

There shall be no law respecting the establishment of religion or
prohibiting or penalizing the free exercise thereof. Religious freed-

96. 543 So. 2d at 204. See supra notes 48-51 and accompanying text.
97. Id. at 207.
98. Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Department
of State, 392 So. 2d 1296, 1302 (Fla. 1980) (*dictum*) (citing Department of Business

Although the following case did not construe article I, section 3, it
suggests a position that the court may take in the future. The question
before the court in *Public Health Trust of Dade County v. Wons* was
whether a competent adult may lawfully refuse medical treatment
without which she may likely die. Norma Wons was hospitalized for
uterine bleeding. She refused a blood transfusion on the grounds that it
would violate her religious principles as a practicing Jehovah's Witness.
The Public Health Trust sought an order compelling her to undergo a
blood transfusion. The circuit court granted relief, whereupon doctors
administered a transfusion while she was unconscious. After she regained consciousness, the district court reversed. 69 The court later
approved the decision of the district court and held that the state's in-
terest in maintaining a home with two parents for the two minor chil-
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The court did not differentiate between the rights of privacy and
religion, but considered them collectively in the balance against the
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"Surely nothing," the district court suggested, "is more private or

99. Omitted from the 1885 version was the provision that one's religious opinion
could not render him or her incompetent to testify. Cross v. State, 89 Fla. 212, 103 So.
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101. Wons v. Public Health Trust of Dade County, 500 So. 2d 679 (Fla. 3d Dist.
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102. Wons, 541 So. 2d at 97-98.
103. Id. at 102 (Ehrlich, C.J., concurring specially).
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Schreiner.

3. Religious freedom

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution. Fla. Const. art. I, § 3.

Although the following case did not construe article I, section 3, it suggests a position that the court may take in the future. The question before the court in Public Health Trust of Dade County v. Wons was whether a competent adult may lawfully refuse medical treatment without which she may likely die. Norma Wons was hospitalized for uterine bleeding. She refused a blood transfusion on the grounds that it would violate her religious principles as a practicing Jehovah's Witness. The Public Health Trust sought an order compelling her to undergo a blood transfusion. The circuit court granted relief, whereupon doctors administered a transfusion while she was unconscious. After she regained consciousness, the district court reversed. The court later approved the decision of the district court and held that the state's interest in maintaining a home with two parents for the two minor children, though "important," was insufficient to override Mrs. Wons's constitutional rights of privacy and religion.

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102. Wons, 541 So. 2d at 97-98.

103. Id. at 102 (Ehrlich, C.J., concurring specially).
more sacred than one’s religion or view of life.” 104 Whether the Supreme Court of will regard religious freedom as the most cherished of article I rights remains an issue to be decided. 105

Article I, section 3 parallels the first amendment. 106 Although Wons sheds little light upon the possible areas of conformity between or divergence of the state and federal protections, the textual differences between those versions argue persuasively that Florida’s constitution must not be viewed as merely replicating federal standards. Indeed, the textual differences of section 3 provide fertile ground upon which to recognize religious protections that are uniquely Floridian.

4. Freedom of speech and press

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. Fla. Const. art. I, § 4. 107

The corresponding federal protections appear in the first amendment. 108 In Department of Education v. Lewis, 109 the court expressed

its belief that it “must apply the principles of freedom of expression as announced in the decisions of the Supreme Court of the United States.” 110 In Lewis, the legislature included a proviso within the appropriations bill adopted for the Department of Education and Commissioner of Education. The proviso prohibited the use of funds by any state-supported postsecondary school for “any group or organization that recommends or advocates sexual relations between persons not married to each other.” 111

The court held that the proviso violated the freedom of speech under article I, section 4 and the first amendment. It reasoned that students, teachers, and speakers alike enjoy the full protection of the first amendment and that once the state decided to open the doors of institutions of higher learning, the state may not then condition the privilege of attendance upon the surrender of that protection. 112 The history of the first amendment “shows a steady movement toward protecting the free-speech rights of persons of all political and moral views. Ours is a nation rich in diversity, and our strength has been in our practice of allowing free play to the marketplace of ideas.” 113 The reflection in Lewis is that of a broad national tradition and heritage that owes its religious protection to the first amendment. In the same regard, article I, section 4 offers protections necessary to the rich diversity of the state’s complex society.

Miami Herald Publishing Co. v. Ane 114 considered what standard of care a newspaper that publishes a defamatory statement owes to a private figure whose reputation was injured by the publication. Based upon information that it obtained from the Monroe County Sheriff’s Office, the newspaper reported that a beer truck owned by Ane contained marijuana. Ane, it turned out, had no connection with the truck. In its defense against Ane’s action for libel, The Miami Herald argued that matters of public or general concern were privileged and therefore it was free to comment under Florida law. The court disagreed and turned to Gertz v. Robert Welch, Inc., 115 which prohibited a

nance that prohibited female nudity. Del Percio found that the Florida Constitution provided no greater protection. 109 Lewis, 416 So. 2d 455, 461.
110 Id. at 458 (quoting proviso).
111 Id. at 462.
112 Id. at 463.
113 458 So. 2d 239 (Fla. 1984) (per curiam) (Boyd, C.J., and Atkins, Overton, Alderman, and Shaw, JJ.).
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Article I, section 3 parallels the first amendment. 105 Although the provisions of the State of Florida are narrower than the United States Constitution, it is generally accepted that the State of Florida's constitution is at least as protective of the rights of the people of Florida as the United States Constitution.

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In Lewis, the legislature included a proviso within the appropriations bill adopted for the Department of Education and Commissioner of Education. The proviso prohibited the use of funds by any state-supported postsecondary school for "any group or organization that recommends or advocates sexual relations between persons not married to each other." 108

The court held that the proviso violated the freedom of speech under article I, section 4 and the first amendment. It reasoned that students, teachers, and speakers alike enjoy the full protection of the first amendment and that once the state decided to open the doors of institutions of higher learning, the state may not then condition the privilege of attendance upon the surrender of that protection. 109 The history of the first amendment "shows a steady movement toward protecting the free-speech rights of persons of all political and moral views. Ours is a nation rich in diversity, and our strength has been in our practice of allowing free play to the marketplace of ideas." 110 The reflection in Lewis is that of a broad national tradition and heritage that owes its religious protection to the first amendment. In the same regard, article I, section 4 offers protections necessary to the rich diversity of the state's complex society.

Miami Herald Publishing Co. v. Ane 111 considered what standard of care a newspaper that publishes a defamatory statement owes to a private figure whose reputation was injured by the publication. Based upon information that it obtained from the Monroe County Sheriff's Office, the newspaper reported that a beer truck owned by Ane contained marijuana. Ane, it turned out, had no connection with the truck. In its defense against Ane's action for libel, The Miami Herald argued that matters of public or general concern were privileged and therefore it was free to comment under Florida law. The court disagreed and turned to Gertz v. Robert Welch, Inc., 112 which prohibited a

104. Wons, 500 So. 2d at 687.
105. U.S. Const. amend. I; Cantwell v. Connecticut, 310 U.S. 296 (1940) (applying same to states through the fourteenth amendment).
106. The term "defamation" contemplates both libel and slander. D'Alemberte, supra note 14, vol. 25A at 89.
107. The first amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Gitlow v. New York, 268 U.S. 652, 666 (1925), extended the protections of the first amendment to the states through the fourteenth amendment. The rights of free exercise, speech, and press—all protected by the first amendment—have been said to enjoy a "preferred position" in the hierarchy of rights. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). Whether the freedom of speech and press protected under article I, § 4 are regarded preferentially among other article I rights is a matter not yet expressly decided.
108. 416 So. 2d 455 (Fla. 1982) (unanimous). Justice Boyd authored the opinion in which the six other members of the court concurred. That view was echoed in City of Daytona Beach v. Del Percio, 476 So. 2d 10, 203 (Fla. 1985), where the court considered first amendment vagueness and overbreadth challenges to a municipal ordi

nance that prohibited female nudity. Del Percio found that the Florida Constitution provided no greater protection.
109. Lewis, 416 So. 2d 455, 461.
110. Id. at 458 (quoting proviso).
111. Id. at 462.
112. Id. at 463.
113. 458 So. 2d 239 (Fla. 1984) (per curiam) (Boyd, C.J., and Atkins, Overton, Alderman, and Shaw, JJ.).
private person from obtaining punitive damages from the publisher of a false and defamatory statement. The court interpreted the decision as treating "all matters published as matters of general or public interest and [rejecting] the proposition that these matters are qualifiedly privileged." Justice Powell phrased the controlling first amendment standard: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 118

Although the court expressed its commitment to "open and robust debate," it found that the standard of reasonable care encouraged responsible reporting, yet provided sufficient "breathing room" for the occurrence of reportorial mistakes. 119 Accordingly, it held that Ane, as a private individual, needed only to establish that the newspaper was negligent. 120 Most states have declined to elevate the standard of private plaintiff protection and some states have prohibited increased media protection altogether. 121

The Florida Constitution includes no nomenclature that expressly protects a person's reputation, 122 although Miami Herald Publishing Co. clearly acknowledges an implied textual basis exists in article I, section 4. 123 Article I, section 2 may also implicitly afford protection of personal reputation. Other states have declared that reputation, life, and property are basic rights protected by their respective constitutions. 124

The court struck down several statutes that implicated the liberty of speech. In one, Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State, 125 police associations and professional fund raisers sought to declare invalid the Law Enforcement Funds Act, 126 which imposed certain requirements upon professional solicitors, including registration, certification, bonding, and prohibition of practices which might mislead the public. The trial court concluded that petitioners' rights of free speech were not implicated because the regulated activities were entitled to no first amendment protection. 127 Without discussion, the Supreme Court of Florida affirmed the trial court and concluded that the act did not violate either the federal or state constitutions. 128

In the other cases, the court upheld statutes against article I, section 4 challenges because the freedom to speak one's sentiments were outweighed by competing personal rights of others. In State v. Elder, 129 the court held that a statute that proscribed the making of anonymous telephone calls "with intent to annoy, abuse, threaten, or harass any person at the called number" was not fatally overbroad. 130 Perhaps equally important to the constitutional vitality of the statute was the listener's privacy interest, which, on balance, was greater than the caller's asserted speech interest.

We conclude that whatever minimal free speech value may be associated with an unwanted, anonymous, abusive telephone call simply because it is effective through verbal means ... such value is clearly outweighed by the substantial privacy interests of the listener. These privacy interests constitutionally entitle the state to protect him from unwilling subjectation to verbal or nonverbal abuse. 131

Also, in State v. Newman, 132 the court upheld that portion of a statute which authorizes an in camera hearing, upon a showing of good cause, to consider a state's motion to reduce or suspend the sentence of

118. Id. Compare Fla. Stat. § 770.02 (1987) (establishing a good faith defense to civil actions for libel when publication was due to an "honest mistake" and there existed "reasonable grounds for believing" the truth of the published statements).
119. Developments in the Law, supra note 12, at 1405-06.
120. This was not always so. See Fla. Const. art. I, § 1 (1838), providing that "all freemen ... have certain inherent and indefeasible rights, among which are those of ... acquiring, possessing and protecting property and reputation."
123. 392 So. 2d 1296 (Fla. 1980) (unanimous).
125. Fraternal Order of Police, 392 So. 2d at 1301.
126. Id. at 1304.
127. 382 So. 2d 687 (Fla. 1980) (Justice Sundberg wrote for a unanimous court).
129. That holding was grounded upon the fact that the statute forbade conduct rather than communication of opinions or ideas, and because it was "clearly applicable to a whole range of activity which is easily identifiable." Elder, 382 So. 2d at 690.
130. Id. at 693 (footnote omitted).
131. 405 So. 2d 971 (Fla. 1981) (unanimous opinion with five Justices participating).
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In summary, only one decision, Lewis, struck down legislation that implicated interests protected under article I, section 4. Lewis leaves to doubt that the first amendment provides a helpful reference to resolving claims under this section, and indeed, that the religion clauses of the federal and state constitutions spring from common roots. Miami Herald Publishing Co. announced for Florida a standard of media liability that is equivalent to the first amendment standard of Gertz. This decision provides that a newspaper that publishes a statement on a matter of public concern about a private individual may be liable for injury to the individual's reputation if the newspaper is merely negligent. Elder and Newman show that the freedoms of speech and press are subject to restriction if failure to do so would defeat other personal rights.

5. Right to assemble

The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances. Fla. Const. art. I, § 5.

No decisions construed this section during the survey period.

6. Right to work

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a lab-

133. Newman, 405 So. 2d at 972-73.
134. This phraseology is patterned after the first amendment. The right to peaceably assemble and petition are protected by the first amendment, which applies to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925); DeJonge v. Oregon, 299 U.S. 353 (1937).

This section creates two independent rights—the right to work and the right of employees to bargain collectively. Each is a fundamental right that may be abridged only upon a showing of a compelling state interest. During the period surveyed, no decisions construed the right to work.

Florida became the first state to recognize a constitutional right of public employees to bargain collectively. The right is now commonplace and generally exists through state statutes that are patterned after the National Labor Relations Act. The constitutional right protects all employees, public and private. With the exception of the

135. This amendment prohibits "closed shops," union-only employment, and "agency shops," which impose union dues on non-union employees. D'Alemberte, supra note 15, at 102; see also Kennedy, Symposium on the Proposed Revisions to the Florida Constitution, Prohibiting Binding Arbitration: The Proposed Change in Article I, Section 6, 6 Fla. St. U.L. Rev. 1003-04 (1978) (briefly charting the history of this section).
136. Hillsborough County Gov't Employees Ass'n, Inc. v. Hillsborough County Aviation Auth., 522 So. 2d 358, 362 (Fla. 1988).
137. The right to work does not guarantee a job. Instead, the right is better understood as a prohibition against conditioning employment upon membership or payment of dues to a labor organization. Mack & Singer, Florida Public Employees: Is the Solution to the Free Rider Problem Worse Than the Problem Itself?, 6 Fla. St. L. Rev. 1347 (1978). Compare Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Department of State, 392 So. 2d 1296, 1302 (Fla. 1980) (acknowledging the right to pursue a lawful business as a fundamental right protected under article I, § 2).
138. United Teachers of Dade, FEA/United AFT, Local 1974, AFL-CIO v. Dade County School Bd., 500 So. 2d 508, 513 (Fla. 1986). See Williams, Alternatives to the Right to Strike for Public Employees: Do They Adequately Implement Florida's Constitutional Right to Collectively Bargain?, 7 Fla. St. U.L. Rev. 473, 477 (1979). Williams notes that in chapter 447, Florida Statutes (1977), public employees enjoy the right to organize, to be free from unfair labor practices, and to participate in the grievance process. She concludes that the statutory scheme undercut the constitutional right of collective bargaining by denying public employees the right to meaningfully bargain over terms and conditions of employment. Meaningful bargaining, she argues, is impossible when one of the parties is the final decision maker. Id. at 494-95.
140. Dade County Classroom Teachers' Ass'n, Inc. v. Ryan, 223 So. 2d 903, 905 (Fla. 1970).
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140. Dade County Classroom Teachers’ Ass’n, Inc. v. Ryan, 225 So. 2d 903, 905 (Fla. 1970).
right to strike, public employees enjoy the identical privileges of collective bargaining to which private employees are entitled.144

The constitutional provision is not self-executing and the primary duty to implement the collective bargaining rights of public employees falls upon the legislature.145 The legislative protections are substantially codified in chapter 447, Florida Statutes146 and are designed to accomplish the following ends:

to promote harmonious and cooperative relationships between government and its employees, both collectively and individually [by] requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees.147

The Public Employees Relations Commission (PERC) plays a central role in the statutory scheme.148 The first two decisions demonstrate that PERC is also effective in protecting the constitutional rights of public employees under article I, section 6. In Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College,149 the court considered whether the college could insist upon United Faculty’s waiving its right to bargain on conditions of employment. During contract negotiations between the college and United Faculty, the college proposed an “impact bargaining” addition to the existing management rights clause. The “impact bargaining” clause amounted to a waiver by United Faculty of its right to bargain during the term of the contract about management decisions that affected the

tsends and conditions of employment.147

Unable to reach an agreement, United Faculty declared an impasse.148 The Board of Trustees mandated that the disputed clause be included in the contract and United Faculty filed an unfair labor practice complaint with PERC. PERC reasoned that “issues which may not be bargained to impasse may not be resolved by the impasse procedure” and ordered the Board to rescind its decision.148 A unanimous court approved that conclusion as consistent with article I, section 6, explaining that the constitutional right of employees to collectively bargain could not be taken away legislatively.160

Federal courts had not then decided whether an employer could insist to impasse that an employee, during the course of contract negotiations, waive all “impact bargaining” on issues not provided for in the contract. Because a blanket “impact bargaining” waiver clause is a ‘drastic’ waiver of an employee’s rights secured by article I, section 6, the court held that such an employment practice was inconsistent with chapter 447 and was constitutionally prohibited: “it is an unfair labor practice for a public employer to insist to impasse on a blanket impact bargaining clause.”161

In the second decision, Public Employees Relations Commission v. Dade County Police Benevolent Association,162 the hearing officer considered whether the representative of the City of Homestead police officers acted within his general or special authority under principles of common law agency as a representative of the association when he called a wildcat police strike. There were no disputed facts. The hear-

147. Normally, public employees cannot waive their right to bargain on those issues absent a clear and unmistakable waiver. Id. at 1223 (citing Palowitz v. School Bd. of Orange County, 3 F.P.E.R. 280 (1977), aff’d, 367 So. 2d 730 (Fla. 4th Dist. Ct. App. 1979)).

148. In keeping with the impasse procedures provided in Fla. Stat. § 447.403 (Supp. 1980), the parties agreed to mediate. The College rejected United Faculty’s proposals. Thereafter, a special master appointed by the Public Employees Relations Commission recommended exclusion of the proposed “impact bargaining” clause. The College proposed two alternative clauses, which the United Faculty rejected. Palm Beach Junior College, 475 So. 2d at 1223 n.2 and accompanying text.

149. Id. at 1224 n.4.

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151. Id. at 1227. The court left for another day the question whether an employer could even attempt to enforce an impact bargaining clause, once bargained for. Id. at n.7.

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n.1 (Fla. 1969).
141. Id. at 905. See also City of Tallahassee v. Public Employees Relations Comm’n, 410 So. 2d 487, 490 (Fla. 1981) (rejecting the argument that the right of public employees to bargain collectively is different from those of private employees under federal labor laws).
142. Dade County Classroom Teachers Ass’n, Inc. v. Legislature, 269 So. 2d 684, 686 (Fla. 1972).
145. See also Fla. Stat. § 447.201 (1987) (providing, in part, that the policies of the Act are “best effectuated by . . . [creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers . . .].”)
146. 475 So. 2d 1221 (Fla. 1985).
147. Normally, public employees cannot waive their right to bargain on those issues without a clear and unmistakable waiver. Id. at 1223 (citing Palswich v. School Bd. of Orange County, 3 F. P.E.R. 280 (1977), aff’d, 367 So. 2d 730 (Fla. 4th Dist. Ct. App. 1979)).
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Four justices reinstated PERC's order. They agreed that PERC "is the ultimate authority to administratively interpret chapter 447 and article I, section 6, of the Florida Constitution . . . [and] has the authority to overrule a statutory interpretation made by one of its hearing officers." 154 Also, the majority agreed that a reviewing court was required to defer to an agency's interpretation of a statute, as long as it was consistent with legislative intent. 155

The remaining cases determined the extent to which public employees were free to bargain on the terms and conditions of their employment, including retirement, demotion and discharge, economic incentives, leave, and seniority. City of Tallahassee v. Public Employee Relations Commission 156 was the court's first occasion to review legislation that implemented the collective bargaining rights of public employees. At issue were two statutes that effectively prohibited collective bargaining by public employees on the subject of retirement. 157

A unanimous court held the two statutes unconstitutional as an abridgment of the right of public employees to collectively bargain. The court recognized that private employees enjoy the right to bargain over retirement benefits, 158 yet acknowledged that differences between the collective bargaining processes of private and public employees necessitated "variations in the procedures." The constitutional deficiency here may have been the result of the state's failure to demonstrate an interest that justified the abridgment. 159

City of Tallahassee exposes the tension between the rights protected under article I, section 6, and statutes intended to implement those rights. Tension also exists between those rights and the rights secured elsewhere in the Florida Constitution. The city argued that the statutory language excluding retirement matters from the bargaining rights was necessary under article X, section 14, which prohibits the increase in retirement or pension system benefits after January 1, 1977, unless funding for the increase is made "on a sound actuarial basis." The court determined that article I, section 6, does not compel an agreement to an actuarially sound proposal, but merely requires the city to negotiate on the subject. 160 Thus, the public employer "can agree to pension requests if those requests are within certain established bounds." 161

Other cases further illustrate potential sources of conflict. In City of Casselberry v. Orange County Police Benevolent Association, 162 the association, as the bargaining agent for certain of the city's police officers, proposed that all grievances that arose out of the collective bargaining agreement be submitted through a grievance procedure, having as its terminal step, final and binding arbitration. The association relied upon the statutory grievance procedure, which provides that parties "shall negotiate a grievance procedure to be used for the settlement of disputes . . . involving the interpretation or application of a collective


154. Dade County Police Benevolent Ass'n, 467 So. 2d at 989 (emphasis in original) (Overton, J. wrote the majority opinion. Boyd, C.J., and Alderman and Shaw, JJ., concurred. Justices Adkins, McDonald, and Ehrlich dissented without opinion).

155. The district court's dissent would have affirmed PERC's order, in part, because the result was "consistent with the constitutional prohibition against the right of public employees to strike." Dade County Police Benevolent Ass'n, 444 So. 2d at 477 (Nobis, J., dissenting) (dictum). The Supreme Court of Florida adopted the dissent opinion, and thereby rendered its only interpretation of the right to strike provision contained in article I, section 6.


157. Those sections provide:

Public employees shall have the right to be represented by any employee organization of their choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment, excluding any provisions of the Florida Statutes or appropriate ordinances relating to retirement.

FLA. STAT. § 447.301(2) (1979) (emphasis supplied).

Any collective bargaining agreement shall not provide for a term of existence of more than 3 years and shall contain all of the terms and conditions of employment of the employees in the bargaining unit during such term except those terms and conditions provided for in any Florida statute or appropriate ordinances relating to retirement . . .


159. See City of Tallahassee, 410 So. 2d at 491.

160. Id.

161. Id. (emphasis in the original).

162. 482 So. 2d 336 (Fla. 1986) (unanimous).
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The remaining cases determined the extent to which public employees were free to bargain on the terms and conditions of their employment, including retirement, demotion and discharge, economic incentives, leave, and seniority. City of Tallahassee v. Public Employees Relations Commission194 was the court’s first occasion to review legislation that implemented the collective bargaining rights of public employees. At issue were two statutes that effectively prohibited collective bargaining by public employees on the subject of retirement.197 A

154. Duke County Police Benevolent Ass’n, 467 So. 2d at 989 (emphasis in original) (Overtm, J. wrote the majority opinion. Boyd, C.J., and Alderman and Shaw, JJ., concurred. Justices Ackins, McDonald, and Ehrlich dissented without opinion).
155. The district court’s dissent would have affirmed PERC’s order, in part, because the result was “consistent with the constitutional prohibition against the right of public employees to strike.” Duke County Police Benevolent Ass’n, 444 So. 2d at 477 (Nesbitt, J., dissenting) (dictum). The Supreme Court of Florida adopted the dissenting opinion, and thereby rendered its only interpretation of the right to strike provision contained in article I, section 6.
157. Those sections provide: Public employees shall have the right to be represented by any employee organization of their choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment, excluding any provisions of the Florida Statutes or appropriate ordinances relating to retirement.

158. See City of Tallahassee, 410 So. 2d at 491 (agreeing with district court). See City of Tallahassee v. Public Employees Relations Comm’n, 393 So. 2d 1147, 1150 (Fla. 1st Dist. Ct. App. 1981).
159. See City of Tallahassee, 410 So. 2d at 491.
160. Id.
161. Id. (emphasis in the original).
162. 482 So. 2d 336 (Fla. 1986) (unanimous).

The unanimous court held the two statutes unconstitutional as an abridgement of the right of public employees to collectively bargain. The court recognized that private employees enjoy the right to bargain over retirement benefits,198 yet acknowledged that differences between the collective bargaining processes of private and public employees necessitated “variations in the procedures.” The constitutional deficiency here may have been the result of the state’s failure to demonstrate an interest that justified the abridgment.199

City of Tallahassee exposes the tension between the rights protected under article I, section 6, and statutes intended to implement those rights. Tension also exists between those rights and the rights secured elsewhere in the Florida Constitution. The city argued that the statutory language excluding retirement matters from the bargaining rights was necessary under article X, section 14, which prohibits the increase in retirement or pension system benefits after January 1, 1977, unless funding for the increase is made “on a sound actuarial basis.” The court determined that article I, section 6, does not compel an agreement to an actuarially unsound proposal, but merely requires the city to negotiate on the subject.200 Thus, the public employer “can agree to pension requests if those requests are within certain established bounds.”201

Other cases further illustrate potential sources of conflict. In City of Cassellberry v. Orange County Police Benevolent Association,202 the association, as the bargaining agent for certain of the city’s police officers, proposed that all grievances that arose out of the collective bargaining agreement be submitted through a grievance procedure, having as its terminal step, final and binding arbitration. The association relied upon the statutory grievance procedure, which provides that parties “shall negotiate a grievance procedure to be used for the settlement of disputes . . . involving the interpretation or application of a collective
bargaining agreement," and that binding arbitration shall be a final step in that procedure." The city, however, sought to resolve demotion and discharge matters through its civil service ordinance, which it was empowered to create under article III, section 14, of the Florida Constitution.

The city's reliance upon article III was misplaced, for that article dealt only with powers of state government and not local government. Rather, the city's authority to establish the system by ordinance was inherent in the broad grant of power found in article VIII, section 2(b), which provides that "[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." Thus, article VIII, section 2(b), limits the city's authority to establish dispute resolution procedures in that its ordinance must yield to a state statute that requires a city to bargain collectively on the issues of demotion and discharge.

With that restriction, neither the statute nor article I, section 6, unconstitutionally infringes upon the city's right to enact a civil service ordinance.

In United Teachers of Dade, FEA/United AFT, Local 1974, AFL-CIO v. Dade County School Board, the court considered a challenge by the United Teachers to the state's Master Teacher program. The program was implemented pursuant to provisions of article IX of the Florida Constitution to encourage instructional personnel who demonstrated superior ability to continue teaching in public schools.

The program sought to accomplish that aim by providing those employees with economic incentives. United Teachers argued that the award of economic incentives abridged article I, section 6, because such awards effectively were "wages" and consequently a subject over which they have the right to bargain.

The "essential question" was whether the economic incentives were wages. A divided court concluded that economic incentives were not wages. The majority reasoned that incentives were not wages within the commonly understood meaning of the term because a recipient was not required to perform additional services in exchange for those incentives. Moreover, because United Teachers was bound by bargained-for provisions of existing contracts, with which the incentives did not interfere, payments under the program did not violate article I, section 6.

The dissent perceived the "critical question" to be whether private sector employees have the right to bargain collectively for extra compensation. Money paid by an employer is always an incentive, whether called "salary, wages, compensation, remuneration, or pay." Merit pay is the subject of mandatory collective bargaining, and an employer who unilaterally changes a subject of the bargaining process effectively removes that subject from the process. For that reason, the dissent concluded, the program violated article I, section 6.

A third case, Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority, dealt with a request by the association to the Hillsborough County Civil Service Board to amend its rules to reflect an agreement between the association of education, which shall be a body corporate and have such supervision of the system of public education as is provided by law.

Fla. Const. art. IX, § 1; and

The governor and the members of the cabinet shall constitute a state board

164. Fla. Const. art. III, § 14 ("[b]y law there . . . may be created civil service systems and boards for county, district or municipal employees . . . .").
165. City of Casselberry, 482 So. 2d at 339.
166. Fla. Const. art. VIII, § 2(b) (emphasis supplied).
167. Id. at 340.
168. Id.
169. 500 So. 2d 508 (Fla. 1986).
171. The two sections provide:

Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

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172. United Teachers of Dade, 500 So. 2d at 514 (Ehrlich, J., McDonald, C.J., Adkins, Overton, and Shaw, JJ.) (citing with approval Fort Dodge Community School Dist. v. Public Employment Relations Bd., 319 N.W.2d 181 (Iowa 1982)).
173. Id.
174. Id. at 517 (Boyd, J., dissenting). Barkett, J., concurred in the dissent). The majority disposed of the dissent's concern by concluding as "highly unlikely" any prospect that an eleemosynary organization would award private employees as an incentive for their continued private sector employment. For that reason, the circumstances were unique and the court could not look to the private sector practice for guidance. Id. at 512.
175. Id. at 518.
176. 222 So. 2d 358 (Fla. 1988) (Kogan, Ehrlich, Shaw, Barkett, and Grimes, JJ.).
bargaining agreement," and that binding arbitration shall be a final step in that procedure.164 The city, however, sought to resolve demolition and discharge matters through its civil service ordinance, which it was empowered to create under article III, section 14, of the Florida Constitution.165

The city’s reliance upon article III was misplaced, for that article dealt only with powers of state government and not local government.166 Rather, the city’s authority to establish the system by ordinance was inherent in the broad grant of power found in article VIII, section 2(b), which provides that “[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law . . . .”167 Thus, article VIII, section 2(b), limits the city’s authority to establish dispute resolution procedures in that its ordinance must yield to a state statute that requires a city to bargain collectively on the issues of demolition and discharge. With that restriction, neither the statute nor article I, section 6, unconstitutionally infringes upon the city’s right to enact a civil service ordinance.168

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citation and aviation authority. The board refused, contending that the agreement conflicted with the rules pertaining to personal holidays, funeral leave, and seniority. The board relied upon a statute that provided that the agreement was not effective "unless and until" adopted. 177

Five members of the court interpreted the term "unless and until" as implicitly ending a governmental body with the power to reject a proposal. 178 The unbridled discretion of civil service boards to reject collective bargaining agreements denied public employees the right to bargain effectively and thus violated article I, section 6. 179 Because no compelling interest was shown for that abridgment, the majority held that "a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms and conditions of employment, despite the fact that such implementation may conflict with applicable civil service board rules." 180 The court was careful to limit its holding by expressing the point that section 447.309(3) had continuing vitality as it applied to conflicts between laws and agreements. 181

The board also argued that its decision was supported by article III, section 14, of the Florida Constitution, which authorizes the creation of civil service boards "to prescribe the qualifications, method of selection and tenure of [certain state] employees and officers." The court interpreted that provision as conferring a public benefit by requiring boards to ensure the uniform administration of personnel systems and equality of pay. Because article I, section 6, was similarly intended to benefit the public, there was "no real conflict." 182

Two justices in dissent regarded the majority's decision as a "death knell" for civil service systems by rendering article III, section 14, a nullity where collective bargaining exists. 183 By construing section 447.309(3) as requiring the public employees of a single entity to be treated alike, the right to bargain collectively could be harmonized with the requirement for a statewide civil service system. That would avoid having to decide that the former constitutional provision was superior to the latter. 184

In conclusion, article I, section 6, creates two rights, the right to work and the right of employees to bargain collectively. The entire focus of the court's energies was upon the latter right. Hillsborough County Governmental Employees Association illustrates the court's application of the compelling state interest test. Its decisions generally show great reliance upon state court precedent and little federal court influence, despite that state statutory schemes are patterned after the National Labor Relations Act.

The legislature enacted laws to protect the constitutional right to bargain collectively. Palm Beach Junior College Board of Trustees and Dade County Police Benevolent Association forcefully demonstrate that PERC is the centerpiece in the legislative scheme. Legislation and constitutional grants of authority to public entities frequently conflict with the right of public employees to bargain collectively. With a solitary exception, United Teachers of Dade, the right to bargain collectively was upheld in each instance, as the court struck down conflicting statutes in City of Tallahassee, harmonized conflicting constitutional provisions in City of Tallahassee and Hillsborough County Governmental Employees Association, Inc., and rejected claims that the constitutional grant of authority to civil service boards permitted those boards to limit the bargaining process in Palm Beach Junior College Board of Trustees and City of Casselberry.

These cases illustrate that the right to bargain collectively is implicated in the full panoply of personnel matters, including terms and conditions of employment, retirement, demotion, discharge, economic incentives, personnel leave, and seniority.

177. Fla. Stat. § 447.309(3) (1985), provides:
If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule, or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power a proposed amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or adopted and becomes effective, the conflicting provision of the collective bargaining agreement shall not become effective.
(emphasis supplied).

178. Hillsborough County Gov't Employees Ass'n, Inc., 522 So. 2d at 361.
179. Id. at 362.
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181. Id. at 362.
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184. Id. at 364.
the distinction provides a useful means of grouping the court's due process decisions.\textsuperscript{186}

(1) Substantive due process

No cases considered the substantive right to life, however, the following cases demonstrate a diversity of substantive liberty and property rights entitled to due process protection. Liberty and property are broad constitutional concepts that have evolved through social and economic experience.\textsuperscript{187} The sources of liberty interests that are protected by the fourteenth amendment are the due process clause itself and the state laws.\textsuperscript{188} Within the broad right of liberty may be found:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.\textsuperscript{189}

Freedom from bodily restraint is one liberty interest protected by the due process clause.\textsuperscript{190} Also, natural parents derive liberty rights from the parent-child relationship.\textsuperscript{190} However, there exists no funda-

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\textsuperscript{187} Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

\textsuperscript{188} Hewitt v. Helms, 459 U.S. 460, 466 (1983).

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\textsuperscript{190} See, e.g., Miller v. Toles, 442 So. 2d 177 (Fla. 1983) (five justices recognized that article I, § 9 protected the liberty interests of a parolee from automatic forfeiture following his arrest on felony charges and from the arbitrary imposition of a ten-day sentence by the Florida Parole and Probation Commission); State v. Arthur, 390 So. 2d 717, 719 (Fla. 1980) (a defendant charged with a capital offense or life felony enjoys a liberty interest that outweighs the "extremely important" interest of the state in assuring the defendant's presence at trial).

\textsuperscript{191} In re Adoption of Doe, 543 So. 2d 741, 749 (Fla. 1989) (Barkett, J., specially concurring, Kogan, J., concurring). The court held that the failure of an unwed natural father to provide prenatal assistance to a pregnant mother vested the mother with the sole parental authority to consent to the adoption of the minor child. Justice
7. Military power

The military power shall be subordinate to the civil. Fla. Const. art. I, § 7.

No decisions construed this section during the survey period.

8. Right to bear arms

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. Fla. Const. art. I, § 8.

No decisions construed this section during the survey period.

9. Due process

Florida's due process section combines three discrete categories of rights—the due process guarantees of life, liberty, and property; the protection against double jeopardy; and the protection against self-incrimination. Each reads virtually identically to the corresponding provision in the United States Constitution and, with few exceptions as noted below, is no more protective of individual interests. Those three categories will be addressed in turn.

a. Life, liberty, and property

No person shall be deprived of life, liberty, or property without due process of law... Fla. Const. art. I, § 9.

Due process of law may be viewed as having two analytically separate, yet interrelated, components. One is definitional and entitles an individual to the substantive rights of life, liberty, and property. The other consists of rules that safeguard those rights by assuring minimum procedural fairness when those rights are implicated. Although the dividing lines between substance and procedure are occasionally blurred...

185. The 1968 revision added the right to "keep" arms and is now consistent with the second amendment. D'Alemberte, supra note 14, vol. 25A at 110.

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- the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized... as essential to the orderly pursuit of happiness by free men.

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ment right of personal liberty in the decedent's next of kin that enables them to control the disposition of their decedent's remains when the state has authorized medical examiners to remove corneal tissue for transplantation.192

State laws are not only a source of liberty interests, but property interests as well.

[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.193

Once an individual satisfactorily demonstrates a liberty or property interest,194 the Florida and federal constitutions have been said to impose identical due process safeguards.195 To determine whether a regulation impermissibly restricts a private interest, the court looks to the nature of the private interest affected and the justification for the state's action.

In many cases, the court focused solely upon the first of those factors, the nature of the asserted interest. Some individual interests enjoy full due process protections,196 some are protected under certain cir-

Barkett wrote to emphasize that parents enjoy a liberty interest under the federal and state constitutions as a result of the parent-child relationship that they may not be lightly denied. In this case, the natural father actively abandoned his rights by his actions. Id. at 749.

192. State v. Powell, 497 So. 2d 1188, 1193 (Fla. 1986) (Overton, J., McDonald, C.J., Adkins, Boyd, Ehrlich, and Barkett, JJ.). However, Justice Shaw argued that the right of the next of kin to take control, possession, and custody was grounded on religious, moral, and philosophical principles that derived protection from article I, §§ 1, 3, 9, and 23. Id. at 1195 (Shaw, J., dissenting).

193. Roth, 408 U.S. at 577.

194. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id.


196. In re D.B., 385 So. 2d 83 (Fla. 1980), the court recognized that the right to counsel in juvenile dependency proceedings is grounded upon due process, and not upon sixth amendment concerns.

[A] constitutional right to counsel necessarily arises where the proceedings can result in permanent loss of parental custody. In all other circumstances

the constitutional right to counsel is not conclusive; rather, the right to counsel will depend upon a case-by-case application of the test adopted in Potvin v. Keller, 313 So. 2d 703 (Fla. 1975).

197. Tamarac Homeowners Ass'n, Inc. v. Tamarac Util., Inc., 460 So. 2d 347 (Fla. 1984). As a general principle, a utility may charge rates that permit it to successfully operate. However, an ordinance prohibiting compensation for depreciation of non-contributed assets does not unconstitutionally deprive the utility of property without due process if the utility fails to demonstrate that the depreciation is required to operate successfully. Id.

198. 379 So. 2d 633 (Fla. 1980) (Alderman, Boyd, Sundberg, and McDonald, JJ). See also Perlmutter, 379 So. 2d at 359 (recognizing "death with dignity" as constitutionally protected right).

199. Ch. 75-225, 1975 Fla. Laws 637.

200. Byron, Harless, 379 So. 2d at 635-36.
mental right of personal liberty in the decedent's next of kin that enables them to control the disposition of their decedent's remains when the state has authorized medical examiners to remove corneal tissue for transplantation.\footnote{183}

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No decision better reflects the court's search for the textual basis of an asserted property right under the state due process clause than the four sharply divided opinions in Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.\footnote{188} There, the Jacksonville Electric Authority employed Byron, Harless, an independent consulting firm, to conduct a search for the position of managing director. The authority advised the consultant that only its written report would become a public record.

Prior to production of the final report, the attorney general and others applied for a writ of mandamus to examine the consultant's papers. They asserted that the papers fell within the Public Records Law and were open to public inspection.\footnote{189} The circuit court granted relief, impounded and sealed the papers. The district court permitted those persons who were interviewed by the consultant to intervene. It determined that the Public Records Law applied but that the intervenors had a constitutionally protected right of "personhood," which included the right of disclosural privacy.\footnote{200} Upon that basis the district court reversed.

The attorney general petitioned for a writ of certiorari in the Flori...
ida Supreme Court. He argued that the Florida Constitution created no right of disclosural privacy. The consultant and intervenors argued, in part, that such a right could be found in the due process clause of article I, section 9. A majority of the court disagreed.

Four justices ruled that there is no authority in the state constitution or decisional law to support the assertion that applicants for governmental positions enjoyed a right of disclosural privacy in personal information communicated to a management consultant under an assurance of confidentiality. 203 Moreover, the district court’s reliance upon article I, section 12, was misplaced. That provision prohibits the interception of private communications and is limited to the search and seizure context. 204

The other justices criticized the majority’s categorical rejection of a constitutional right of disclosural privacy. Justice Overton argued, however, that such a right did not apply to the public records at issue. 205 Chief Justice England conceded that there existed no express general right of privacy, but that did not foreclose an examination of the state constitution to determine whether there existed an undefined general right. 206 Finally, Justice Adkins argued that protecting the applicants from involuntary disclosure was “sensible.” No compelling state interest could justify the intrusion into their intimate, personal lives which were revealed in the context of a confidential application process. He would have held that such a right against disclosure exists and remanded for a trial court determination of which public records, if any, are entitled to protection. 207

Interestingly, three months after Byron, Harless, a unanimous court in State v. Elder. 208 concluded that the recipient of a harassing anonymous telephone call enjoyed “substantial privacy interests.” Those interests protected the individual in the home from unwelcome views and ideas and outweighed any minimal free speech value asserted by the caller. Although the opinion notes that federal and state consti-

207. Id. at 692.
208. United Tel. Long Distance, Inc. v. Nichols, 546 So. 2d 717 (Fla. 1989) (affirming order of Public Service Commission because the commission, which granted certificate to provide long distance telephone service and required applicant to compensate parent corporation for intangible benefits realized, balanced the competing public interests); Tamaron Homeowners Ass’n, Inc., 460 So. 2d at 347 (upholding ordinance that prohibited the inclusion of capital assets contributed by customers in a utility’s rate base); Polk County v. Florida Public Service Comm’n, 460 So. 2d 370 (Fla. 1984) (upholding commission rule that permitted a municipal electric utility to impose a surcharge on customers outside the city limits equal to the tax service imposed on customers within the city limits because, as compared to the statutory percentage that the court had previously upheld in unrelated litigation, the surcharge was “more equitable”); State v. Yu, 400 So. 2d 762 (Fla. 1981) (concluding that the legislature has broad discretion to determine the measures required to protect the general welfare and may reasonably proscribe the sale or possession of cocaine based upon the presence of cocaine as a mixture or compound rather than based upon the pure drug), appeal dismissed, 454 U.S. 1134 (1982).
209. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). In holding the medical mediation act unconstitutional in its entirety, the court reasoned that the act conferred a valuable legal right, yet arbitrarily required that mediation proceedings under the act must be completed within ten months. Unavoidable delay caused by docket congestion prevented numerous claims from reaching conclusion and thus operated to deprive claimants of that right.
210. Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd., 493 So. 2d 417 (Fla. 1986) (if the legislature makes no finding of “public purpose” that would sustain an exercise of its condemnation powers under article X, § 6 of the Florida Constitution or it if otherwise fails to provide for the payment of just compensation when it acts assaultedly under its police power, a property owner may succeed in a claim for violation of article I, § 9).
211. Gluesenkamp v. State, 391 So. 2d 192, 198-99 (Fla. 1980), cert. denied, 454 U.S. 818 (1981) (statute that prohibited “any truck” from passing an agricultural inspection station was not vague because the persons of “common intelligence” could...
ida Supreme Court. He argued that the Florida Constitution created no right of disclosural privacy. The consultant and intervenors argued, in part, that such a right could be found in the due process clause of article I, section 9. A majority of the court disagreed.

Four justices ruled that there is no authority in the state constitution or decisional law to support the assertion that applicants for governmental positions enjoyed a right of disclosural privacy in personal information communicated to a management consultant under an assurance of confidentiality. Moreover, the district court's reliance upon article I, section 12, was misplaced. That provision prohibits the interception of private communications and is limited to the search and seizure context.

The other justices criticized the majority's categorical rejection of a constitutional right of disclosural privacy. Justice Overton argued, however, that such a right did not apply to the public records at issue. Chief Justice England conceded that there existed no express general right of privacy, but that did not foreclose an examination of the state constitution to determine whether there existed an undefined general right. Finally, Justice Adkins argued that protecting the applicants from involuntary disclosure was "sensible." No compelling state interest could justify the intrusion into their intimate, personal lives which were revealed in the context of a confidential application process. He would have held that such a right against disclosure exists and remains for a trial court determination of which public records, if any, are entitled to protection.

Interestingly, three months after Byron, Harless, a unanimous court in State v. Elder concluded that the recipient of a harassing anonymous telephone call enjoyed "substantial privacy interests." Those interests protected the individual in the home from unwelcome views and ideas and outweighed any minimal free speech value asserted by the caller. Although the opinion notes that federal and state constitutions tolerate greater limits upon certain forms of speech, there is no indication that the state constitution was the source of the recipient's privacy rights.

In other due process cases, the court focused upon the nature of the state action. The court determined that state action was reasonable and sufficient to override the claimant's asserted due process right that state action could not be sustained because it was arbitrary and capricious, or that state action served no public purpose.

Due process requires the legislature to narrowly draft laws to avoid the risk that they will be arbitrarily applied. Generally, penal statutes will withstand a vagueness challenge if there exists no danger of arbitrary application. However, a nuisance statute that declares:

207. Id. at 692.
208. United Tel. Long Distance, Inc. v. Nichols, 546 So. 2d 717 (Fla. 1989) (affirming order of Public Service Commission because the commission, which granted certificate to provide long distance telephone service and required applicant to compensate parent corporation for intangible benefits realized, balanced the competing public interests); Tamaron Homeowners Ass'n, Inc., 460 So. 2d at 347 (upholding ordinance that prohibited the inclusion of capital assets contributed by customers in a utility's rate base); Polk County v. Florida Public Service Comm'n, 460 So. 2d 370 (Fla. 1984) (upholding commission rule that permitted a municipal electric utility to impose a surcharge on customers outside the city limits equal to the service tax imposed on customers within the city limits because, as compared to the statutory percentage that the court had previously upheld in unrelated litigation, the surcharge was "more equitable"); State v. Yu, 400 So. 2d 762 (Fla. 1981) (concluding that the legislature has broad discretion to determine the measures required to protect the general welfare and may reasonably proscribe the sale or possession of cocaine based upon the presence of cocaine as a mixture or compound rather than based upon the pure drug), appeal dismissed, 454 U.S. 1134 (1982).
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"[a]ny nuisance which tends to the immediate annoyance of the citizens in general . . . may be removed and suppressed . . ." survived a vagueness claim because the legislature enjoyed "broad discretion" in defining a public nuisance.81

In the context of statutes that regulate first amendment activity, an assertion that the statute violates due process because it is impermissibly vague or overbroad requires slightly different analysis, as McKenney v. State811 illustrates. McKenney was prosecuted for assignation.812 The court upheld the crime against her claim of vagueness and overbreadth by engaging in a three-step inquiry.

First, a statute is impermissibly overbroad if it infringes upon rights protected by the first amendment.814 Unlawful action, such as assignation, however, receives no protection. Second, the statute must provide adequate notice to "persons of common intelligence" of the nature of the proscribed conduct.817 McKenney lacked standing to challenge the statute because her conduct fell clearly within its proscription.818 Third, a statute may not be worded so loosely that it permits arbitrary enforcement.819 McKenney presented no evidence of arbitrary or capricious enforcement. Thus, if there were a denial of the process due under article I, section 9, she failed to demonstrate her entitlement.

Judicial review of state economic legislation has a long history and deserves special mention. The United States Supreme Court developed the doctrine of substantive due process around the turn of the century to invalidate state economic regulations that offended laissee-faire capitalism.820 Over time, federal courts have applied the doctrine to non-economic state action.821 However, federal courts have now abandoned

217. McKenney, 388 So. 2d at 1233 (citing Connolly v. General Constr. Co., 269 U.S. 385 (1926)). Adequate notice may be communications which do not deserve first amendment protection. Carricarte, 384 So. 2d at 1263.

218. McKenney, 388 So. 2d at 1233 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

219. Id. at 1234 (citing Papachristou v. City of Jacksonville, 405 U.S. 576 (1972)).

220. The case most often cited as an example of that Court's application of substantive due process to economic regulation is Lochner v. New York, 198 U.S. 45 (1905). There, a majority held that a New York labor law that prohibited bakers from permitting its employees from working more than sixty hours in a single week violated the due process clause of the fourteenth amendment in that it infringed upon the right of the employer and employee to agree upon the terms of employment. Justice Holmes chided that Court for perverting the fourteenth amendment; "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissee-faire." Id. at 75 (Holmes, J., dissenting).

221. The propriety of a particular exercise of the state's police power in non-economic matters has been measured against the "sensibilities of civilized society," Moran v. Burbine, 467 U.S. 122, 433-34 (1986), and the "traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). State action will be struck down if the tactic "shocks the conscience," Rochin v. California, 342 U.S. 159, 172 (1952) (police forced an emetic solution through a tube to induce Rochin to vomit two capsules which he had swallowed), or when the state violates rights which are "implicit in the concept of ordered liberty." In Pink v. Nebraska, 302 U.S. 391, 324-25 (1937), Justice Cardozo argued that these rights exist as "essential parts of a "fair and enlightened system of justice" that apply against the states through the fourteenth amendment. These cases show that substantive due process derives from broad and lofty principles. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), demonstrates that asserted violations of property rights are measured by a functional means-end analysis. There, the owner of a private shopping center claimed that it may exclude persons from circulating petitions and distribi

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conclude from the "generally accepted definition" that the term "truck" includes van-

type vehicles designed to transport goods); Carriere v. State, 384 So. 2d 1261 (Fla.),
cert. denied, 449 U.S. 874 (1980) (holding as meritless a claim that the term "ma-
licious" in the statute prohibiting felonious extortion rendered the statute vague); State v.
Elder, 382 So. 2d 687 (Fla. 1980) (rejecting vagueness claim against statute that
prohibited the making of anonymous telephone calls with intent to annoy, abuse,
threaten, or harass any person); State v. Riley, 381 So. 2d 1359, 1360 (Fla. 1980) (statute
proscribing the falsification of police reports with "corrupt intent" to benefit
himself or harm another is not vague in light of narrowing definition provided in sub-
section that defines the term to mean "[k]nowingly falsifying, or causing another to falsify,
anymore official record or official document" (citations omitted)).

212. Thompson v. State, 392 So. 2d 1317 (Fla. 1981) (quoting FLA. STAT. §
823.01(2) (1979)).

213. Id. at 318 (citation omitted). The court did, however, strike down the stat-
ute as violating article I, section 9 because it improperly limited veniremen in nuisance
cases to "householders," thereby permitting a special segment of the community to
determine for the community at-large whether an annoyance is a nuisance.

214. 388 So. 2d 1232 (Fla. 1980). There is no greater protection under the Flor-
da Constitution than is provided under the United States Constitution when analyzing
vagueness and overbreadth. City of Daytona Beach v. Del Perico, 476 So. 2d 197, 203
(Fla. 1985).

215. FLA. STAT. § 796.07(3)(a) (1977). "Assignment" is defined to "include the
making of any appointment or engagement for prostitution or lewdness or any act in
furtherance of such appointment or engagement." FLA. STAT. § 796.07(1)(c) (1977).

216. McKenney, 388 So. 2d at 1233 (citing Grayned v. City of Rockford, 408
U.S. 104 (1972)). In Carriere v. State, 384 So. 2d 1261, 1262-63 (Fla.), cert. denied,
449 U.S. 874 (1980), the court clarified this inquiry. An overbreadth challenge may be
sustained if the statute applies to protected conduct, Dandridge v. Williams, 397 U.S.
471 (1970), or if the statute applies to protected speech and cannot be narrowly con-

Hawkins: Florida Constitutional Law: A Ten-Year Retrospective on the State

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its application to state economic regulation because they now view the doctrine as an inappropriate incursion into the prerogatives of the state legislatures to select economic programs necessary for the state's interests.\textsuperscript{222} Meanwhile, some state courts continue to apply the doctrine to laws with a direct economic impact. Florida is among them, although the court has only twice this decade relied upon substantive due process to strike down such laws.

A sharply divided court in \textit{Department of Insurance v. Dade County Consumer Advocate's Office}\textsuperscript{223} overturned two statutes that prohibited insurance agents from accepting from their customers a commission lower than that set by the insurer. The complaint filed by the Consumer Advocate's Office contended that the anti-rebate statute prevented price competition, thereby depriving consumers of their property in violation of article I, section 9. The trial court granted the department's motion for summary judgment,\textsuperscript{224} and the district court reversed, finding that the statutes were an invalid exercise of the state's police power.\textsuperscript{225} On appeal to the Supreme Court of Florida, the department argued that the statutes reasonably advanced economic protection of the consuming public, for instance, by establishing uniform

rates within a class and by avoiding different prices for the identical policy.

A majority of the court stated: “In considering the validity of a legislative enactment, this court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose.”\textsuperscript{226} Here, it found that there was no identifiable relationship between the statute and the protection of the general welfare, for agents' commissions affected neither the net insurance premium nor the actuarial soundness of the policy.\textsuperscript{227} Because the statutes failed to sufficiently advance the state's interest in protecting the consuming public, the statutes were found to be unconstitutional under article I, section 9.

The court characterized the state action as one which tested the legitimacy of its police power. Although its opinion made no mention of substantive due process, the majority effectively engaged in substantive due process analysis\textsuperscript{228} and for that reason drew criticism from Justice Boyd in a fiery dissent.\textsuperscript{229} He charged that there was no authority to support the conclusion that the standard for determining the constitutional validity of legislation under article I, section 9, was any different from that applied under the fourteenth amendment.\textsuperscript{230} The sole inquiry

\textsuperscript{222} \textit{Lochner} has long since been discredited and a majority of the United States Supreme Court has continued to embrace Justice Holmes's deferential view toward state economic legislation. Tarkington, \textit{Constitutional Limitations on Tori Reform: Has the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?}, 32 \textit{Vill. L. Rev.} 1299, 1309 n.32 (1987). See also \textit{Developments in the Law, supra note 12, at 1478-93} (arguing limited forms of state judicial review of economic regulation are appropriate in some cases).


\textsuperscript{224} \textit{Id. at 1035 n.2} (Boyd, C.J., dissenting).

\textsuperscript{225} Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495 (Fla. 1st Dist. Ct. App. 1984). The district court rejected the paternalistic approach taken by the legislature and believed that consumers were protected from unfair prices by the competitive forces of the marketplace. \textit{Id. at 498}.

\textsuperscript{226} Dade County Consumer Advocate's Office, 492 So. 2d at 1034 (citations omitted) (Overton, McDonald, Ehrlich, and Barkett, JJ).

\textsuperscript{227} \textit{Id. at 1035}.

\textsuperscript{228} An unrelated federal opinion noted the similarity between the federal doctrine of substantive due process and Florida's police power doctrine in that each asks whether there is a valid public purpose for the legislation and whether the means chosen are reasonably related to achieving that purpose. Patch Engrs., Inc. v. McCall, 447 F. Supp. 1075, 1081 (M.D. Fla. 1978).

\textsuperscript{229} Chief Justice Boyd began his dissent: [I]n explicit in the court's holding are the following propositions: that the courts of Florida have broad authority to determine whether acts of the legislature serve the public interest; that courts may generally scrutinize legislation to determine whether it achieves a stated legislative purpose with sufficient success or precision; and that the courts may nullify laws not shown to serve the public interest to the courts' satisfaction. These propositions are totally erroneous and their application in this case represents an aggrandizement of judicial power that is antithetical to the basic constitutional doctrine of separation of powers. Dade County Consumer Advocate's Office, 492 So. 2d at 1035 (footnote omitted) (Boyd, C.J., dissenting, Atkins and Shaw, JJ., concurring).

\textsuperscript{230} \textit{Id. at 1041}.
its application to state economic regulation because they now view the doctrine as an inappropriate incursion into the prerogatives of the state legislatures to select economic programs necessary for the state’s interests. Meanwhile, some state courts continue to apply the doctrine to laws with a direct economic impact. Florida is among them, although the court has only twice this decade relied upon substantive due process to strike down such laws.

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Using pamphlets unrelated to the commercial purposes of the center. It argued that the California constitutional protection of speech and petitioning in privately owned shopping centers denied its property without due process of law. The court rejected the owner’s claim because it failed to satisfy the following test: “must the law not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.” *Id.* at 95 (quoting *Nebbia v. New York*, 291 U.S. 502, 523 (1934)).

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223. *492 So. 2d 1032* (Fla. 1986).

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The court characterized the state action as one which tested the legitimacy of its police power. Although its opinion made no mention of substantive due process, the majority effectively engaged in substantive due process analysis and for that reason drew criticism from Justice Boyd in a fiery dissent. He charged that there was no authority to support the conclusion that the standard for determining the constitutional validity of legislation under article I, section 9, was any different from that applied under the fourteenth amendment. *Id.*

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is whether the legislation is absolutely arbitrary. In that analysis, Justice Boyd argued, a court may not sit as a superlegislature and strike down legislation which it determines to lack wisdom. He would have permitted the statute's validity, for the "economic complexities" of the insurance industry made regulatory statutes better left to debate in legislative chambers rather than courtrooms. Moreover, he would have placed the burden on the challenger to demonstrate the absence of a reasonable relationship to a legitimate state purpose.

A second substantive due process decision dealt with a criminal statute that negatively impacted legitimate business activities. In State v. Saez, the defendant was prosecuted under a statute making illegal the possession of embossing machines designed to reproduce credit cards. Six of the seven justices agreed that the statute violated substantive due process under both article I, section 9, and the fourteenth amendment.

The majority began by recognizing that the state acts through its police power when it sanctions the conduct of its citizens. The due process clauses impose two limitations upon the exercise of that power. The statute must serve the general welfare—that is, the health, safety, welfare, and morals of the public. Also, the means selected by the legislature must bear a rational relationship to that purpose. In sum, the basic test for analyzing a substantive due process claim is "whether the state can justify the infringement of its legislative activity upon personal rights and liberties . . . . It need only be shown that the challenged legislative activity is not arbitrary or unreasonable."

The statute challenged in Saez was intended to curtail credit card fraud. That purpose was legitimate and within the scope of the legislature's police power. However, the means selected and the purpose sought to be achieved were not reasonably related. The majority explained: "[i]t is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other non-criminal activities." By imposing an absolute ban on possession of credit card embossing machines, the state unreasonably intruded into the "sphere of personal liberty" protected by due process.

Other regulatory exercises survived substantive due process challenges. Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State recognized that there exists a fundamental right to engage in lawful business, but upheld statutory registration requirements imposed on fund solicitors as furthering a legitimate state interest of protecting the public from deceptive solicitation practices. Finally, Shevin v. Bocaccio, Inc., upheld Florida's "B-girl" statute, which forbade employees of establishments that sell alcoholic beverages from soliciting drinks from patrons. The statute rationally and reasonably promoted the public interest.

In summary, article I, section 9, affords protection of three sub-

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231. Id. at 1042-43.
232. Id. at 1041.
233. Id. at 1037.
234. Dade County Consumer Advocate's Office, 492 So. 2d at 1035. Justice Boyd contended that the majority impermissibly placed the burden on the Department to demonstrate a proper objective for the legislation.
235. 489 So. 2d 1125 (Fla. 1986) (Barkett, J., Boyd, C.J., and Adkins, Overton, Ehrlich, and Shaw, JJ., McDonald, J., concurred in result only).
236. The challenged section provides:
[A] person . . . possessing with knowledge of its character any machinery, plates or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards, violates this subsection and is subject to the penalties set forth in § 817.67(2) . . .

238. Id. at 1037.
239. Id. at 1127.
240. Id. at 1128.
241. Id. at 1129.
242. Id. at 1127.
243. Id. at 1122 (quoting City of Daytona Beach v. Del Percio, 476 So. 2d 197, 202 (Fla. 1985) (quotings Richards v. Thurston, 424 F.2d 1281, 1284 (1st Cir. 1970))).
244. 392 So. 2d 1296 (Fla. 1980).
245. 379 So. 2d 105 (Fla. 1979), rehe'd denied, (Feb. 18, 1980).
246. The court also rejected an equal protection claim that the statute unreasonably applied solely to alcoholic beverages licensees and omitted non-alcoholic beverage licensees. Fla. Const. art. I, § 2.
is whether the legislation is absolutely arbitrary.\textsuperscript{231} In that analysis, Justice Boyd argued, a court may not sit as a superlegislature and strike down legislation which it determines to lack wisdom.\textsuperscript{232} He would have presumed the statute’s validity, for the “economic complexities” of the insurance industry made regulatory statutes better left to debate in legislative chambers rather than courtrooms.\textsuperscript{233} Moreover, he would have placed the burden on the challenger to demonstrate the absence of a reasonable relationship to a legitimate state purpose.\textsuperscript{234}

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\textsuperscript{231} Id. at 1042-43.
\textsuperscript{232} Id. at 1041.
\textsuperscript{233} Id. at 1037.
\textsuperscript{234} \textbf{Dade County Consumer Advocate’s Office, 492 So. 2d at 1035.}

Justice Boyd contended that the majority improperly placed the burden on the Department to demonstrate a proper objective for the legislation.

\textsuperscript{235} 489 So. 2d 1125 (Fla. 1986) (Barkett, J., Boyd, C.J., and Adkins, Overton, Ehrlich, and Shaw, JJ., concurring in result only).

\textsuperscript{236} The challenged section provides: [A] person . . . possessing with knowledge of its character any machinery, plates or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards, violates this subsection and is subject to the penalties set forth in \textbf{Fla. Stat. § 817.63} (1983).

\textsuperscript{237} \textbf{Saiz, 489 So. 2d at 1127.}

\textsuperscript{238} Id. at 1127-28; accord \textbf{Department of Ins. v. Dade County Consumer Advocate’s Office, 492 So. 2d 1032, 1034 (Fla. 1986).}

\textsuperscript{239} Id. at 1128.

\textsuperscript{239} Id. at 1127.

\textsuperscript{239} Id. at 1127 (quoting \textit{City of Dayton Beach v. Del Pefco}, 476 So. 2d 197, 202 (Fla. 1983) (quoting \textit{Richards v. Thurston}, 424 F.2d 1281, 1284 (1st Cir. 1970))).

\textsuperscript{240} 392 So. 2d 1296 (Fla. 1980).

\textsuperscript{241} 379 So. 2d 105 (Fla. 1979), reh’g denied, (Feb. 18, 1980).

\textsuperscript{242} The court also rejected an equal protection claim that the statute unreasonably applied solely to alcoholic beverages licensees and omitted non-alcoholic beverage licensees. (Fla. 1980), article 1, § 2.

\textsuperscript{243} Id. at 1129 (quoting \textit{State v. Walker}, 444 So. 2d 1137, 1138-39 (Fla. 1984) (quoting Patch Enters., Inc. v. McCall, 447 F. Supp. 1075, 1081 (M.D. Fla. 1978)) (citations omitted)), \textit{aff’d and lower court opinion adopted}, 461 So. 2d 108 (Fla. 1984). In the context of substantive due process, courts have characterized the state’s power to regulate the conduct of its citizens as a “broad scope of discretion.” Id., and under certain circumstances, “absolute.” \textit{State v. G.D.M., 394 So. 2d 1017, 1018 (Fla. 1981) (describing the state’s power to determine whether a person charged with a traffic offense may be prosecuted as an adult or entitled to the protections of the juvenile justice system).}

\textsuperscript{244} \textit{Saiz, 489 So. 2d at 1128.}

\textsuperscript{245} Id. at 1129.

\textsuperscript{246} Id. at 1127 (quoting \textit{City of Daytona Beach v. Del Pefco}, 476 So. 2d 197, 202 (Fla. 1983) (quoting \textit{Richards v. Thurston}, 424 F.2d 1281, 1284 (1st Cir. 1970))).
substantive due process rights—life, liberty, and property. Persons may look to the state and federal constitutions and to state laws as sources of liberty and property rights. Liberty rights are most vividly implicated when the state physically restrains a person, although the personal rights of contract, employment, marriage, child rearing, worship, and privacy are no less constitutionally protected.

The vast majority of the court’s due process decisions concern property rights. Byron, Harless and Elder teach that due process affords no protection of a property right unless the claimant first establishes a textual basis for that right.

Typically, the court reviews due process claims by balancing the competing interests. If the state’s action is deemed reasonable, the action will be upheld. Conversely, if the state’s action is deemed arbitrary, capricious, or without public purpose, the action will not survive a due process challenge. However, state action that implicates protected first amendment interests will survive only a vagueness and overbreadth attack if there is no danger of arbitrary application, the threatened conduct is unlawful, and the state provides adequate notice of the conduct to be proscribed.

Dade County Consumer Advocate’s Office demonstrates the court’s reliance upon substantive due process to review state economic legislation. Sales may be regarded as an extension of that decision insofar as the particular statute under attack was criminal in nature, yet it operated to negatively impact legitimate business interests. Although two cases do not a trend make, these are noteworthy examples of the resurrection of a controversial doctrine that had fallen into disuse. The recent resort of Florida courts to substantive due process analysis and its expanded application from economic into non-economic matters suggests an increase in its future use.

(2) Procedural due process

Due process protects substantive rights by assuring that the procedures implicating those rights are fair. Procedural fairness generally requires that the holder of a right receive adequate notice and an opportunity for a meaningful hearing before the state may impinge that right. The following cases illustrate when procedural fairness was central to the decision.

In Florida Land Co. v. City of Winter Springs, the court said that the opponents of a referendum for a rezoning ordinance were not denied their opportunity to be heard even though the referendum process required them to present their objections directly to the electorate for popular vote, rather than debate before the council.

The two remaining cases addressed the procedural protections granted to defendants under criminal investigation and criminal prosecution. In the first, State v. Glosson, Glosson was charged with trafficking as the result of a reverse sting operation run through a paid informant. The parties stipulated in the trial court that Glosson had asserted an entrapment defense, that there existed an agreement between the informant and sheriff that the informant would receive a ten percent contingent fee on the value of all forfeitures arising out of successful prosecutions in which the informant participated, and that the informant’s testimony was required for there to be a successful prosecution. The trial court granted Glosson’s motion to dismiss the information.

In federal courts, the due process defense is unavailable to a defendant predisposed to committing a crime or is only available in the event of “the infliction of pain or physical or psychological coercion.” The court rejected those applications as “narrow” and concluded that article I, section 9, requires dismissal under the circumstances regardless of a defendant’s predisposition. The court held:

[A] trial court may properly dismiss criminal charges for constitutional due process violations in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.

The court’s acceptance of jurisdiction in Hunter v. State raises the possibility that Glosson may be applied to codefendants who were

247. Cooper, supra note 8, at 272-74.

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248. 427 So. 2d 170 (Fla. 1983).

249. 462 So. 2d 1082 (Fla. 1985).

250. Id. at 1084 (citing Hampton v. United States, 425 U.S. 484 (1976) (plurality opinion in which three justices agreed)).


252. Id.

253. Id. at 1085.

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247. Cooper, supra note 8, at 272-74.
not the direct target of the state’s agent.

In the second decision, State v. Green, the court revisited the subject of electronic media coverage of judicial proceedings. Florida’s experiment allowing media coverage of trial court proceedings began with In re Post-Newsweek Stations, Florida, Inc. There, the court noted that neither the fourteenth amendment nor article I, section 9, imposed a per se proscription of such coverage. Whether it is appropriate to prohibit electronic media coverage of a particular courtroom participant is a matter within the discretion of the trial judge. The judge may exclude electronic media coverage “only upon finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.”

Green had undergone psychiatric examinations to determine her competency to stand trial on the charge of grand larceny. After several months of postponement, the trial judge found that she was sane, despite the agreement of three psychiatrists that she continued to be mentally disturbed. Defense counsel moved to exclude the electronic media from the trial, asserting that she would be adversely affected by the appearance of the media and would be severely restricted in her ability to conduct a proper defense. The trial court heard argument, but refused to hold an evidentiary hearing, and denied the defense motion, whereupon the trial proceeded and she was convicted. The district court reversed, concluding that the trial court erred by denying the defense motion without first having conducted an evidentiary hearing.

The Supreme Court of Florida approved the district court decision and held that “a trial court’s evidentiary finding that actual in-court electronic coverage would render an otherwise competent defendant incompetent to stand trial meets the requirements of the ‘qualitatively different’ test” announced in Post-Newsweek. Although this test requires the trial court to exercise its discretion, Green’s motion properly brought into issue her right to a fair trial. Under the circumstances, the trial court was obliged to inquire into her competency.

In conclusion, the procedural component of due process may be viewed as requiring that rules affecting life, liberty, and property operate fairly. Glosson determined that a criminal conviction is not fairly obtained when the state pays an informant a fee contingent upon successful prosecution of the defendant, even though a federal prosecution could proceed if the defendant was predisposed to committing the crime. Green applied the federal standard to conclude that a criminal trial cannot proceed in the face of electronic media coverage if the effect of that coverage upon the defendant is qualitatively different from the effect on the general public.

b. Double jeopardy

No person shall . . . be twice put in jeopardy for the same offense . . . . Fla. Const. art. I, § 9.

Historically, the Florida Constitution has focused upon protecting the individual from the power of the state. The double jeopardy clause advances that purpose by seeking “to protect the citizens against the once-existing power of the State . . . to continue prosecutions and trials of the same person for the same offense unless a conviction is obtained . . . .”

The scope of these protections, and the corresponding protections of the fifth amendment, turn upon the meaning of the term “same off

228. 1990 So. 2d at 532 (Fla. 1991).
229. 1970 So. 2d 764 (Fla. 1979).
231. Post-Newsweek, 378 So. 2d at 779.
232. Green, 395 So. 2d at 535-36.
234. Green, 395 So. 2d at 535. That holding was “required under both article I, section 9 and the fourteenth amendment and was "mandated" by Droge v. Missouri, 420 U.S. 162 (1975) (reversing defendant’s conviction because his due process protections under the fourteenth amendment were violated when the trial court failed to ac

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c. Weight of evidence

cord proper weight to information that came to light during the trial, and which demonstrated that the defendant was no longer competent to stand trial.

262. Green, 395 So. 2d at 538.

263. Bizzell v. State, 71 So. 2d 735, 738 (Fla. 1954). Actually, the protection against being tried twice for the same offense includes three prohibitions: the prohibition against retribution for an offense and any offense embraced within, once a defendant is acquitted, Ball v. United States, 163 U.S. 662, 670-71 (1896); the prohibition against retribution for a lesser offense following conviction of the greater, Ex parte Nielsen, 131 U.S. 176, 186-87 (1889); and the prohibition against multiple punishments for the same crime, Ex parte Lange, 85 U.S. (18 Wall.) 163, 178 (1873). The corresponding fifth amendment provides: “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .” U.S. CONST. amend. 5. That provision applies with equal force to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793 (1969).
fense.” To determine whether two offenses are the same or separate under article I, section 9, the Supreme Court of Florida has relied upon two sources—state statutory rules of construction and federal case law.

The court’s reliance upon statutory rules of construction to determine whether two offenses are the same or separate begins with the principle that it is the prerogative of the legislature to define a crime and its punishment. There are a kaleidoscope of approaches that attempt to define whether two crimes are the same or separate. The Florida Legislature codified several of those approaches as rules of construction in section 775.021, Florida Statutes. During the decade, those rules aided the court in determining whether the legislature intended to prosecute or punish multiple offenses, yet the patchwork revisions to the criminal code made that process difficult.

This confusion invited clarification. Because of its perception that the legislature failed to provide “specific, clear and precise statements”

264. They include rules that define crimes which are “identical in law and fact”; crimes that arise out of the same “transaction,” “gist,” or “gravamen”; crimes requiring a “single intent” or the “same evidence”; and crimes with a “necessary element” as part of the prohibited conduct. Thomas, The Prohibits of Successive Prosecution for the Same offense: In Search of a Definition, 71 IOWA L. REV. 323, 329-35 (1986).

See also Carawan v. State, 515 So. 2d 161 (Fla. 1987) (crimes are the same if they address essentially the “same evil”); Bell v. State, 437 So. 2d 1057, 1059 (Fla. 1983) (recognizing the similar allegations test and similar evidence test).


266. See, e.g., State v. Emmund, 476 So. 2d 165 (Fla. 1985) (a defendant may be convicted of and sentenced for felony murder and the underlying felony); State v. Chapman, 486 So. 2d 566 (Fla. 1986) (applying Emmund to hold that the Florida Constitution bars conviction and sentencing for both the underlying felony and felony murder in a single proceeding); House v. State, 474 So. 2d 1193, 1196 (Fla. 1985) (only one homicide conviction and sentence may be imposed for a single death); State v. Gordon, 478 So. 2d 1063 (Fla. 1985) (applying Emmund to conclude that multiple prosecution and sentence for single death violates Florida Constitution); Bell v. State, 437 So. 2d 1057, 1058 (Fla. 1983) (article I, section 9 prevents multiple convictions and sentence for both the greater and the lesser included offenses, whether charged or not, and whether charged in a single or separate proceedings).

267. Florida double jeopardy law has been described as “curiouser and curiouser.” Carawan v. State, 495 So. 2d 239, 240 (Fla. 5th Dist. Ct. App. 1986) (quoting L. Carroll, Alice's Adventures in Wonderland, Vol. II (1865)) acknowledging confusion in the field and remanding on other grounds, 515 So. 2d 161 (Fla. 1987). See also State v. Smith, 547 So. 2d 613 (Fla. 1989) (Bartlett, J., concurring in part, dissenting in part) (describing the pre-Carawan standards as lacking coherence and marked by arbitrary application); Bell, 437 So. 2d at 1059 (describing the rules as leading to an ad hoc approach).

of intent, the court set out in Carawan v. State a method of construing criminal statutes. Carawan never reached the double jeopardy issue and is best understood as a statutory construction case, concerned with interpreting the legislature's intent in enacting sections 775.021(1) and (4), Florida Statutes (1985).

Carawan was convicted of attempted manslaughter and aggravated battery as a result of having shot Memphis Knighten with a shotgun. Although the parties conceded that more than 100 birdshot pellets struck Knighten, the record was inconclusive as to the number of shotgun blasts fired. The court concluded that both offenses were predicated upon a single, underlying act and each offense addressed essentially the "same evil." Reasoning that the rule of lenity required that all reasonable doubts be resolved in favor of a defendant, the court held that Carawan could not be sentenced for both offenses without violating section 775.021(1).

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270. The factual record is not without dispute. Justice Shaw, in dissent, argued that there were three shots fired, each of which may be separately punished. He added that the two offenses addressed separate evils. The primary evil addressed by aggravatedbattery is that it injures the victim physically; the primary evil addressed by attempted homicide is that it may result in death. Conviction of both crimes would support separate punishments under FLA STAT. § 775.021(4). Carawan, 515 So. 2d at 171-73 (Shaw, J., dissenting).

271. Carawan, 515 So. 2d at 170-71.

272. CBA 88-131, § 7, 1988 FLA LAWS 699, 709. The changes appear in FLA STAT. § 775.021(4) (Supp. 1988), which reads: (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal of-
State v. Smith, the court held that Carawan was overridden for offenses occurring after the effective date of the law, yet the override was not to be applied retrospectively. Briefly stated, deciding whether the legislature intended to permit prosecution or punishment of two offenses in a pre-Carawan setting are resolved by applying the rules of construction as they existed at the time of the offense. Carawan applies from December 10, 1987, when rehearing was denied, until July 1, 1988, the effective date of the amendment to section 775.021. Carawan has continuing viability for pipeline cases, that is, cases pending appeal at the time Carawan became final.

In addition to statutory rules of construction, the court relies upon federal constitutional precedent to resolve questions of double jeopardy. This reliance is consistent with the court's recognition that Florida pro-

sections “mirror” federal protections. For instance, the court has applied federal decisions to hold that article I, section 9, does not preclude consecutive sentences for violation of two separate statutes when the violations occurred in a single transaction. It does not preclude a five-year sentence of imprisonment following a violation of probation when the trial court accepted a plea agreement that the sentence would not exceed one year, nor does it prohibit retrial when the defendant's first trial ended in mistrial due to a hung jury. However, article I, section 9, does prohibit retrial following the acceptance of an unconditional plea even though the defendant did not timely raise a double jeopardy claim at the second trial.

Booth v. State presents the court's sharpest disagreement with the application of federal principles to article I, section 9. Booth had been convicted in federal court of various drug laws. He claimed that subsequent prosecution in the state court violated that section. Under the doctrine of dual sovereignty, federal prosecution does not bar a later state prosecution of the same individual for the same offense, nor does state prosecution bar a later federal prosecution.

Five justices agreed that subsequent prosecution in the Florida courts was a matter of prosecutorial discretion and reprosecution following a federal conviction did not violate double jeopardy. The court noted in dictum, however, that “sound policy reasons” urged the execu-

275. Carawan, 515 So. 2d at 164.


277. State v. Payne, 404 So. 2d 1055 (Fla. 1981) (applying North Carolina v. Pearce, 395 U.S. 711, 723 (1969) (there is no absolute bar to the imposition of a more severe sentence upon reconviction)); Roberts v. United States, 320 U.S. 264, 276-77 (1943) (Frankfurter, J., dissenting) (“to set a man at large after conviction on condition of his good behavior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice”).


279. State v. Johnson, 483 So. 2d 420 (Fla. 1986) (relying upon federal cases holding that a defendant's failure to timely object to retrial does not of itself amount to waiver). The court expressed the caveat that other circumstances may support a knowing waiver of double jeopardy rights. Id. at 423.


281. United States v. Wheeler, 435 U.S. 313, 316-17 (1978). Under the doctrine of dual sovereignty, a federal statute does not represent the same offense as the state statute and thus the fifth amendment is not implicated.
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tive branch to adopt a prosecutorial policy that would require a compelling state interest before initiating a later prosecution.

In dissent, Justice McDonald argued that the Florida Constitution provided greater protection against successive prosecutions than the federal constitution. This follows from the historical emphasis that Florida places upon individual rights. He also charged that the majority's reliance upon federal cases examining dual sovereignty was misplaced because those cases focus upon principles of federalism, without regard for the interests of the individual. "If double punishment is feared, it hurts no less for two Sovereigns' to inflict it than for one." 282

Justice McDonald's Booth dissent illustrates that the state and federal double jeopardy clauses may advance different policies. For that reason alone, it is incorrect to concede the independence of Florida double jeopardy law. Moreover, only state courts are empowered to determine whether a trial or punishment for violation of state laws implicates article I, section 9.

For example, the fifth amendment prohibits multiple prison sentences for the same crime and requires that a defendant be credited for the time served during the first prison sentence when a new sentence is imposed. 283 In Pennington v. State, 284 the defendant was sentenced to a three-year period of probation with the condition that she live in a drug rehabilitation program. She later violated probation and the trial court sentenced her to a five-year term of imprisonment. She claimed entitlement to credit for time spent in a rehabilitation center and argued that failure to credit that time violated her protections against being twice punished for the same offense.

The court concluded that the federal principle does not require sentence credit for restrictive conditions imposed in a probationary order, and, furthermore, the legislature limited sentence credit to time spent in county jail awaiting sentence. Although the court declined Pennington's invitation to extend the protections of article I, section 9, beyond the federal case law, the potential for independent decision making exists. For that reason, the Florida Constitution, rather than "mirroring" the United States Constitution, must be viewed independently.

282. 436 So. 2d at 40 (McDonald, J., dissenting; Adkins, J., concurring) (quoting Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting)).
284. 398 So. 2d 815 (Fla. 1981).

A specie of double jeopardy also demonstrates the independent character of Florida law. Florida subscribes to a variance theory that permits the state to reprosecute a defendant for the same crime under certain circumstances. Under the variance theory, when there exists a material disagreement between the accusations and the proof offered at trial, the "wisdom of the law" permits the state to renew prosecution. The state may correct the erroneous accusations by filing a second charging instrument which conforms to the evidence to be offered. 285 Although variance theory looks and smells like double jeopardy analysis, its distinction is that it focuses not upon the statutory elements of the crime but upon the allegations of the accusatory instrument. Predictably, the two approaches produce different results.

The most recent application of variance analysis appears in State v. Mars. 286 The state indicted Mars for first-degree murder. A bill of particulars alleged that the murder occurred "between 5:00 p.m. January 29, 1983 and 12:59 a.m. January 30, 1983." The trial court instructed the jury that the state was held to proof within the bill of particulars. During deliberations, the foreman expressed confusion about the time constraints. Realizing that the source of the jury's confusion was that the evidence tended to show that the murder occurred after 12:59 a.m., the state sought to amend the bill of particulars to conform to the proof presented. The motion was denied. The jury resumed deliberations and acquitted Mars of first-degree murder.

Once again, the state charged Mars with first-degree murder in an indictment which was identical in all respects with the first, except the bill of particulars alleged that the crime occurred "between 1:00 a.m. January 30, 1983 and 1:00 a.m. January 31, 1983." Mars moved to dismiss on double jeopardy grounds. The trial court granted that motion, and the state appealed. Relying upon an established line of decisions, five justices agreed that reprosecution was permissible. 287 They

285. The obedience to form is reflected in the common law practice which required precise correspondence to technical pleading rules. In a centuries-old decision, the King's Bench expressed the common law underpinning of variance theory: "[W]hen the offender is discharged upon an insufficient indictment, there the law has not had its end; nor was the life of the party, in the judgment of the law, even in jeopardy; and the wisdom of the law abhors that great offenses should go unpunished.

Van's Case, 4 Co. Rep. 444, 454 (King's Bench 1591).
287. Florida's theory of variance traces its lineage to Sanford v. State, 75 Fla. 393, 78 So. 340 (1918).
tive branch to adopt a prosecutorial policy that would require a compelling state interest before initiating a later prosecution.

In dissent, Justice McDonald argued that the Florida Constitution provided greater protection against successive prosecutions than the federal constitution. This follows from the historical emphasis that Florida places upon individual rights. He also charged that the majority’s reliance upon federal cases examining dual sovereignty was misplaced because those cases focus upon principles of federalism, without regard for the interests of the individual. “If double punishment is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one.”

Justice McDonald’s Booth dissent illustrates that the state and federal double jeopardy clauses may advance different policies. For that reason alone, it is incorrect to concede the independence of Florida double jeopardy law. Moreover, only state courts are empowered to determine whether a trial or punishment for violation of state laws implicates article I, section 9.

For example, the fifth amendment prohibits multiple prison sentences for the same crime and requires that a defendant be credited for the time served during the first prison sentence when a new sentence is imposed. In Pennington v. State, the defendant was sentenced to a three-year period of probation with the condition that she live in a drug rehabilitation program. She later violated probation and the trial court sentenced her to a five-year term of imprisonment. She claimed entitlement to credit for time spent in a rehabilitation center and argued that failure to credit that time violated her protections against being twice punished for the same offense.

The court concluded that the federal principle does not require sentence credit for restrictive conditions imposed in a probationary order, and, furthermore, the legislature limited sentence credit to time spent in county jail awaiting sentence. Although the court declined Pennington’s invitation to extend the protections of article I, section 9, beyond the federal case law, the potential for independent decision making exists. For that reason, the Florida Constitution, rather than “mirroring” the United States Constitution, must be viewed independently.

282. 436 So. 2d at 40 (McDonald, J., dissenting; Adkins, J., concurring) (quoting Barkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting)).
284. 398 So. 2d 815 (Fla. 1981).

A specie of double jeopardy also demonstrates the independent character of Florida law. Florida subscribes to a variance theory that permits the state to reprosecute a defendant for the same crime under certain circumstances. Under the variance theory, when there exists a material disagreement between the accusations and the proof offered at trial, the “wisdom of the law” permits the state to renew prosecution. The state may correct the erroneous accusations by filing a second charging instrument which conforms to the evidence to be offered. Although variance theory looks and smells like double jeopardy analysis, its distinction is that it focuses not upon the statutory elements of the crime but upon the allegations of the accusatory instrument. Predictably, the two approaches produce different results.

The most recent application of variance analysis appears in State v. Mars. The state indicted Mars for first-degree murder. A bill of particulars alleged that the murder occurred “between 5:00 p.m. January 29, 1983 and 12:59 a.m. January 30, 1983.” The trial court instructed the jury that the state was held to proof within the bill of particulars. During deliberations, the foreman expressed confusion about the time constraints. Realizing that the source of the jury’s confusion was that the evidence tended to show that the murder occurred after 12:59 a.m., the state sought to amend the bill of particulars to conform to the proof presented. The motion was denied. The jury resumed deliberations and acquitted Mars of first-degree murder.

Once again, the state charged Mars with first-degree murder in an indictment which was identical in all respects with the first, except the bill of particulars alleged that the crime occurred “between 1:00 a.m. January 30, 1983 and 1:00 a.m. January 31, 1983.” Mars moved to dismiss on double jeopardy grounds. The trial court granted that motion, and the state appealed. Relying upon an established line of decisions, five justices agreed that reprosecution was permissible. They...
reaffirmed Florida's test for determining whether successive prosecutions is permissible:

If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred.288

The second indictment alleged that Mars murdered the victim at a different time than that alleged in the first. There was no bar to the second prosecution because jeopardy had not yet attached. Moreover, Mars had failed to demonstrate prejudice. The majority concluded: "[t]he state permitted a typing error to go undetected at trial and has been severely chastised . . . We are not prepared to follow a rule that a non-prejudicial typing error bars society's right to prosecute offenses."289

Two justices dissented. To Justice Boyd, there is "[n]o right more precious" than the constitutional right against being twice placed in jeopardy. He believed that the federal and Florida constitutions barred reprosecution.

Mars went to federal court and filed for habeas relief. The federal district court agreed that Mars could not be tried a second time for the same murder of the same victim and granted his petition for habeas corpus.290

288. Mars, 498 So. 2d at 404 (quoting State v. Katz, 402 So. 2d 1184, 1186 (Fla. 1981)).
289. Id. at 405. Presumably, had Mars relied upon an alibi defense in his first trial to establish his presence away from the murder scene, he would be entitled to argue that reprosecution prejudiced his defense.
291. Mars v. Mounts, No. 87-8715-Civ-Kehoe (S.D. Fla. Oct. 26, 1988), aff'd, 895 F.2d 1348 (11th Cir. 1990). In the district court's Order Approving Magistrate's Report and Recommendation and Granting Writ of Habeas Corpus, the court adopted the report of the magistrate, who had determined that, as applied, the state's theory of variance was neither adequate nor independent to preclude federal review. The magistrate added that the state's failure to assert, in federal court, the independence of the state variance theory effectively waived the argument that it rested on independent state law grounds. Report and Recommendation at 12. The court rejected the state's variance theory altogether and disposed of Mars's double jeopardy claim on federal principles, relying on a strict application of Blockburger v. United States, 284 U.S. 299 (1932), and on the recognition that the jury verdict of acquittal was insulated from judicial second-guessing.
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c. Self-incrimination

No person shall . . . be compelled in any criminal matter to be a witness against himself. Fla. Const. art. I, § 9.

Defendants in criminal cases are protected from compelled self-incrimination by article I, section 9, and by the fifth amendment. Those provisions prohibit comment at trial on the defendant’s failure to testify and on the defendant’s silence. The cases indicate a shift in emphasis from an issue that asks whether an improper comment amounted to a violation at all to one that asks whether the impropriety affected the outcome. Several of the cases decided this decade illustrate this shift.

Historically, a comment by a state prosecutor on the defendant’s failure to testify was deemed harmful and required a per se reversal of the defendant’s conviction, as was comment on the defendant’s silence. However, when faced with a comment on the defendant’s failure to testify at trial in State v. Marshall, the court declined to automatically reverse the defendant’s conviction. With overwhelming evidence of guilt and an otherwise valid conviction, a rule of per se reversal is no longer needed. The court explained that comments on silence are not considered fundamental error, that harmless error analysis is consistent with the federal constitution, and “[i]t makes no sense to order a new trial, because of a nonfundamental error committed at trial, when we know beyond a reasonable doubt that the defendant will be convicted again.”

For those reasons, the court “adopted” the harmless error rule announced in Chapman v. California.

In Chapman, the United States Supreme Court concluded that not all federal constitutional errors require automatic reversal of the conviction. It held that the beneficiary of the error had the burden of showing that the error, based upon consideration of the entire record, was harmless beyond a reasonable doubt. However, it admonished courts against overemphasizing a finding of overwhelming evidence of guilt as a basis for concluding that error could not have affected the outcome. Yet, ten years later in Harrington v. California, the Court weighed the evidence and affirmed a state court conviction where direct evidence was so overwhelming that it held harmless a violation of the confrontation clause.

In State v. Kinchen, the court considered alternative standards following a comment by counsel of a codefendant on Kinchen’s failure to testify. Under Florida’s test, the offending comment amounted to reversible error if it was “fairly susceptible” of being interpreted by the jury as relating to the defendant’s failure to testify.

A divided court rejected the federal test and applied the state’s “fairly susceptible” test because it offered more protection to defendants at trial. It then remanded the case for consideration in light of Marshall. As to the application of the harmless error rule, the justices were again divided. Four justices agreed that the harmless error rule

297. Id. at 23-24. Alternatively stated, the issue is “whether there is a reasonable probability that the evidence complained of might have contributed to the conviction.”


299. 490 So. 2d 21 (Fla. 1985).

300. Id. at 22 (quoting David v. State, 369 So. 2d 943 (Fla. 1979)).

301. “[W]hether the remark was manifestly intended or was ‘of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.’” Id. (citations omitted).

302. Six justices agreed on this point—Justice McDonald, who authored the opinion, and Justices Adkins, Overton, and Shaw, who concurred. Justice Ehrlich concurred with an opinion in which Justice Overton joined. Justice Alderman dissented on this point, expressing the belief that the comment was not fairly susceptible of being interpreted as a remark on Kinchen’s silence. Id. at 23. He won the support of Chief Justice Boyd.
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297. Id. 298. 386 U.S. 18 (1967). 299. Id. at 23-24. Alternatively stated, the issue is "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." Id. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). 300. Id. 301. 395 U.S. 250 (1969). 302. 400 So. 2d 21 (Fla. 1985). 303. Id. at 22 (quoting David v. State, 369 So. 2d 943 (Fla. 1979)). 304. "[W]hether the remark was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Id. (citations omitted).

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applied and three dissent. Justice Ehrlich, dissenting on this point, expressed concern that the “fairly susceptible” test would permit equivocal comments on a defendant’s silence and thus invite prosecutorial overreaching. He would have relied upon article 1, section 9, to establish stronger protections, such as those previously assured through the per se rule of reversal.

Arguably, as a result of its reliance upon Marshall, the court in Kinchen adopted the harmless error test of Chapman as fundamental principle of Florida constitutional law. At least tacitly, the court has now said that comments on a defendant’s failure to testify, when made by a codefendant’s counsel, are subject to harmless error analysis.

The court further receded from a per se rule of reversal in State v. DiGullo, where it held that Chapman applied to testimony by a police officer on the defendant’s post-arrest silence. Looking to both the permissible and impermissible evidence, the court concluded that the state had failed to demonstrate beyond a reasonable doubt that “the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.” Significantly, DiGullo rejected the overwhelming evidence test, finding that the role of the appellate court should not be to substitute its view of the evidence for the trier of fact. DiGullo achieved a desirable effect reconciling federal and state standards and of effectively mooting the issue of what prosecutorial remarks constitute reversible error.


307. Id. at 23-24 (Ehrlich, J., dissenting; Overton, J., concurring). Justice Adkins dissented without opinion.

308. 491 So. 2d 1129 (Fla. 1986), on reh’g. Although DiGullo is not a state constitutional decision, it is important as the court’s first application of Chapman v. California, 386 U.S. 18 (1967), to improper comment on a defendant’s post-arrest silence. The harmless error doctrine, the court said, serves the unique function of conserving judicial labor by holding harmless those errors that do not deny a fair trial or require a new trial. DiGullo, 491 So. 2d 1135.

309. Id. at 1138 (citing Chapman, 386 U.S. at 24) (Shaw, J., and McDonald, C.J., and Boyd and Overton, JJ.). Justice Adkins concurred in the decision to reverse the conviction but dissented, in part, because the application of the harmless error rule “deprives defendants of a constitutional right.” Id. at 1139 (Adkins, J. Ehrlich and Barkett, J.J., concurring).

310. Id. at 1139.

311. DeFoor & Braccialarghe, Florida Reverses Its Per Se Reversal Rule on Improper Prosecutorial Comment on a Defendant’s Rights so Remain Silent, 13 Fla.

Like Marshall, DiGullo was decided without reference to the Florida Constitution. DiGullo’s formidable progeny, however, confirms that harmless error is very much a part of the court’s federal constitutional perspective. The court expressly has relied upon the decision to hold harmless a variety of errors and to reject claims of harmless error in others. On occasions, the doctrine itself has been applied without reference to DiGullo.

Not until State v. Smith did the court rely on DiGullo to decide an exclusively state constitutional issue. Smith concerned the suppression of evidence obtained by police through an ex parte order that compelled an accused already in custody to appear at a police lineup. Five members of the court noted that the state due process clause embodies two general concepts, “the right to adequate advance notice and a meaningful right to be heard before a tribunal takes action.” The justices sternly rebuked the state’s use of those procedures. “We cannot countenance an ex parte court hearing requesting a lineup against a criminal defendant already in custody. Such a procedure offends the most basic concepts of due process and ordered liberty em...
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St. L. Rev. 1119, 1140 (1986).


313. See, e.g., O’Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) (failure to instruct jury that it could consider disparate sentences of other persons involved in same offense); Ramirez v. State, 542 So. 2d 352 (Fla. 1989) (per curiam) (erroneous testimony of tool mark expert positively identifying defendant’s knife as murder weapon); State v. Lee, 531 So. 2d 133 (Fla. 1988) (improper collateral crime evidence).


315. 547 So. 2d 131 (Fla. 1989).


317. Id. at 134 (emphasis in the original).
bodied in article I, section 9, of the Florida Constitution.318

Smith adopted the principles of United States v. Wade319 and Gilbert v. California,320 for determining the legal consequences of an unconstitutional lineup. Under Gilbert, an unconstitutional pretrial lineup identification is per se inadmissible at trial. However, if admitted, the accused is entitled to a new trial unless the state shows that the error was harmless beyond a reasonable doubt.321 Florida's harmless error standard announced in DiGuilio provided the "proper method" of determining harmless error. However, in Smith, the court was unpersuaded that the improper lineup evidence was harmless, for there was a reasonable probability that it "contributed to the conviction."322 Along with the lineup evidence linking Smith to the crime, the state only produced the testimony of the codefendant, which was of "suspect nature," and of the victim, who had originally identified someone other than Smith as the culprit.323

There are limited instances when article I, section 9, though worded identically to the fifth amendment,324 provides greater protection against self-incrimination. Haliburton v. State325 illustrates the point. The facts showed that Haliburton was taken to the police station at about 6:30 a.m. in connection with a murder that had occurred earlier that morning. Police advised him about his rights and on two occasions questioned him about the murder. Thereafter, Haliburton submitted to a polygraph, during which his attorney called and requested that police cease the questioning. The attorney arrived at the station at approximately 4 p.m., but was prevented from seeing his client. Haliburton gave police a recorded statement in which he admitted breaking into the home and seeing the victim, although he did not ad-

318. Id.
319. 388 U.S. 218, 237 (1967) (abSENT an intelligent waiver, notice to both the accused and his counsel is a prerequisite to conducting a post-indictment, pretrial lineup). Wade listed various factors which help to establish whether the objected-to testimony came about by the state's exploiting the illegal lineup or by means sufficiently distinguishable to purge the primary taint. Id. at 241. The Smith court adopted this nonexclusive list as a matter of Florida law. Smith, 547 So. 2d at 135 n.6.
320. 388 U.S. 263, 272 (1967) (the admission of in-court identifications without first having determined that they were untainted by an illegal lineup but the product of independent origin was constitutional error).
321. Smith, 547 So. 2d at 135 (citing Gilbert, 388 U.S. at 274).
322. Id. at 135 (quoting DiGuilio, 491 So. 2d at 1135).
323. Id.
324. See supra note 292.
325. 514 So. 2d 1088 (Fla. 1987) (per curiam).
mit to the murder. The statement was introduced at his trial for burglary and first-degree murder, together with a subsequent admission that he made to his brother. The jury convicted him of both counts.

The Supreme Court of Florida reversed Haliburton’s convictions in a unanimous decision, concluding that the statement given to police was made without his having knowingly and voluntarily waived his right to counsel. The United States Supreme Court vacated that decision and remanded for reconsideration in light of Moran v. Burbine.

On remand, the Supreme Court of Florida held that “as a matter of state law” it is reversible error to fail to suppress a statement gained during custodial interrogation when police fail to notify an incarcerated defendant that his attorney was present and refuse to permit the attorney to visit his client. That holding is perhaps all the more noteworthy because the Court in Burbine expressly had declined an invitation to hold that the police “impropriety” was so offensive that it violated due process.

Other cases dealt with voluntariness of the defendant’s statements to police.Ordinarily, confessions are admissible against a defendant absent evidence of police coercion or overreaching.Brewer v. State reaffirmed Florida’s standard for determining admissibility of a defendant’s confession in a state prosecution. It is the same as that which

328. 475 U.S. 412 (1986). On similar facts, the court in Burbine determined that the defendant had validly waived his rights to silence and to the presence of counsel. Further, determined that his waiver was uncoerced and the voluntariness of his waiver was not in issue. Id. at 421-24. The Court expressed its unwillingness to expand the protection of the fifth amendment by construing Miranda v. Arizona, 384 U.S. 436 (1966), to impose upon police the additional handicap of advising a suspect that his attorney desired to meet with him. Burbine, 475 U.S. at 427. Nonetheless, the states are free to adopt different principles under their respective laws to govern official conduct. Id. at 428.
329. Haliburton, 514 So. 2d at 1090 (per curiam) (Ehrlich, Shaw, Grimes, and Kogan, JJ.). The dissent reasoned that because Haliburton’s statement was made voluntarily, there was no justifiable basis to interpret the due process clause of the Florida Constitution more broadly than that of the United States Constitution. Id. at 1091 (Overtone, J., dissenting; McDonald, C.J., concurring in the dissent).
331. 386 So. 2d 232 (Fla. 1980).
applies to federal prosecutions under the fifth amendment and requires the state to establish voluntariness of a statement by a preponderance of the evidence.

The Florida test to determine voluntariness of a custodial statement by a suspect under circumstances insufficient to invoke Miranda v. Arizona was set out several years ago. Inculpatory statements may not be admitted if, under the totality of the circumstances, the suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions. The court applied that test in DeConingh v. State to conclude that a murder suspect's hospital-bed statement was neither knowing nor voluntary and could not be used against her. Police took "impermissible advantage" of DeConingh as demonstrated by the personal friendship between herself and the policewoman who elicited her statement, her incapacity due to medication, and her distraught condition. Whether a defendant voluntarily offered his or her statement is a matter for the trial court to decide. Its finding must appear in the record.

332. Id. at 235 (citing Malloy v. Hogan, 378 U.S. 1 (1964)). Malloy does not impose an identical standard upon the states but permits the states to adopt a standard which is no less stringent than the standard applicable under the fifth amendment. Malloy, 378 U.S. at 10-11. This interpretation of Malloy is apparent from Lego v. Twomey, 404 U.S. 477, 489 (1972), where Justice White wrote: "The prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard." Id. at 489.

333. Brewer, 386 So. 2d at 236. See also Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989) (article I, § 9 requires that the state must demonstrate voluntariness by a preponderance of the evidence when the accused asserts that subnormal mentality prevented a full awareness of the nature of the rights being abandoned).


337. Id. at 503. After DeConingh had shot her husband, her physician hospitalized and sedated her. A deputy sheriff, who was also a friend, visited her in the hospital, asked her to sign a waiver form, and began asking questions. Questions ceased when DeConingh's attorneys arrived. The deputy resumed questioning two days later with the result that she gave a narrative statement. Id. at 502. In dissent, Chief Justice Alderman argued that Miranda had no application because DeConingh was not in custody. Moreover, it determined that DeConingh blurted the statement in narrative form and the statement was not the product of police interrogation. Accordingly, the statement was voluntary and should have been suppressed. Id. at 504 (Alderman, C.J., dissent). Hawkins, 1990


339. Id. at 897. That error is not fundamental error, however, where other evidence exists to sustain the conviction or where trial counsel did not preserve the point for appeal. Id. at 898.


341. DeConingh, 433 So. 2d at 503; Brewer v. State, 386 So. 2d 232 (Fla. 1980).

342. 549 So. 2d 661 (Fla. 1989) (unanimous).

343. Id. at 662. Hawkins, 1990

344. 442 So. 2d 944 (Fla. 1983) (Adkins, Boyd, McDonald, and Ehrlich, JJ.)(overton, J., dissenting with the explanation that such a rule unduly restricts the prosecution in proving a defendant's sanity; Alderman, C.J., concurred), cert. denied, 466 U.S. 931 (1984).

345. Id. at 948.
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Whether a defendant voluntarily offered his or her statement is a matter for the trial court to decide. Its finding must appear in the record with "unmistakable clarity," the court said in Smith v. State, where the trial court complied with that requirement by reading into the record on three occasions that the confession was made voluntarily. However, the trial court's failure to instruct the jury on the weight to be given that confession may be error.

When there is evidence of antecedent police illegality, overreaching, or misconduct, the state is required to show the voluntariness of a Miranda waiver by clear and convincing evidence. Otherwise, the state is required to show voluntariness by the less demanding preponderance standard. The court declined the opportunity in Balthazar v. State to require the state to meet the clear and convincing standard when the defendant asserts that a language deficiency impaired his ability to understandably waive his Miranda rights. The court said: "Obviously, the degree of a defendant's ability to adequately speak and understand English is a significant factor which must be considered in the totality of the circumstances . . . We see no difference between a language factor and other facts which might impinge upon a knowledgeable and voluntary waiver."

Due process also protects the right to remain silent by prohibiting the state from using a defendant's silence against him or her at trial. The rationale for this prohibition was explained in State v. Burwick. First, silence in a post-arrest, post-Miranda setting is inherently ambiguous and therefore of no probative value. Second, the Miranda warning implicitly advises a defendant that no penalty will befall the defendant who chooses to exercise his or her Miranda rights. For these reasons, the state may not rebuff the insanity defense by introducing testimony concerning the defendant's post-arrest, post-Miranda con-
duct—including his silence at the time of arrest or request for an attorney. It is "fundamentally unfair," the court wrote, "for the state to lure Burwick into remaining silent then impeach the man with this very same silence." 346

Finally, the court held that the protection against self-incrimination was not violated by the introduction of blood-alcohol test results taken in connection with police investigation of a vehicular manslaughter, 347 nor by the testimony of a store detective concerning the pre-arrest conduct of a detained shoplifter. 348

In summary, article I, section 9, protects persons from becoming compulsory witnesses against themselves in criminal proceedings. The protections bar state comment upon a defendant's failure to testify at trial or his silence before trial. The 1980s witnessed a significant shift in the court's perspective of violations of these protections. Originally, the rule required a per se reversal of a conviction obtained with the state's improper comment on the defendant's right to remain silent. The court has since rejected the per se rule.

In Marshall, the court adopted the federal harmless error rule announced in Chapman v. California, which declined to automatically reverse a conviction for a nonfundamental error when the error was harmless beyond a reasonable doubt. Arguably, Kinchen later adopted Chapman's harmless error rule as a principle of Florida constitutional law. Finally, in DiGullo, the court declined to reverse a conviction where "there was no reasonable possibility" that the police officer's testimony on the defendant's post-arrest silence "contributed to the conviction."

DiGullo has since been applied authoritatively as Florida's harmless error test in a vast range of criminal procedural errors. The most noteworthy application of that decision came in Smith, which applied DiGullo's harmless error rule to article I, section 9. Smith refused to hold harmless lineup evidence obtained as the result of the trial court's

346. Id.
347. State v. Adams, 466 So. 2d 1067 (Fla. 1985) (unanimous).
348. State v. Jones, 461 So. 2d 97 (Fla. 1984). Florida has long recognized the common law right of a property owner to protect his or her property by reasonable action, including detention of a suspected shoplifter. The legislature codified that right in part, to limit a merchant's exposure to liability for reasonable defensive action when there is probable cause to believe that a larceny has been committed. Id. at 98-99 (citations omitted). Legislative protection under those circumstances does not turn detention by a private merchant into detention by the state such that Miranda protections would be implicated.

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ex parte order compelling Smith to appear at a police lineup.

As demonstrated by Haliburton, article I, section 9, provides greater protection, than the federal constitutional counterpart when police fail to notify an incarcerated defendant that his attorney is present and refuse the attorney's requests to visit with his detained client. A conviction secured by a defendant's statement obtained under those circumstances requires reversal. Finally, the cases demonstrate that state must show voluntariness of a custodial statement by a preponderance of evidence, unless there is proof of police coercion or overreaching, in which event the showing must be by the higher clear and convincing standard.

10. Prohibited laws

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. Fla. Const. art. I, § 10.

The prohibition against passage of ex post facto laws prevents the legislature from imposing new burdens upon existing rights. The court considered three cases in which the legislature attempted to change the impact of certain criminal sentencing statutes upon defendants already convicted and sentenced for their crimes. The power to declare what punishment may be imposed for violation of criminal laws is a legislative function that is subject to the limits of this section.

In State v. Yost, 350 defendants challenged a statute that denied accrued gain time to prisoners who had not paid their court costs in full, and imposed a term of community service on indigents who were unable to pay court costs. 351 The court held that these penalty provisions violated the ex post facto clauses of both the Florida and United States constitutions because the defendants' crimes were committed before the effective date of the statute.

Ordinarily, Florida appellate courts lack the power to review the sentence imposed by a trial court as long as the sentence is statutorily allowed and not unconstitutional. 352 Booker v. State 353 considered the

349. No decisions construe the prohibition against bills of attainder. The cases discussed in this section address the other two prohibitions.
350. 507 So. 2d 1099 (Fla. 1987).
duct—including his silence at the time of arrest or request for an attorney. It is "fundamentally unfair," the court wrote, "for the state to lure Burwick into remaining silent then impeach the man with this very same silence."

Finally, the court held that the protection against self-incrimination was not violated by the introduction of blood-alcohol test results taken in connection with police investigation of a vehicular manslaughter, nor by the testimony of a store detective concerning the pre-arrest conduct of a detained shoplifter.

In summary, article I, section 9, protects persons from becoming compulsory witnesses against themselves in criminal proceedings. The protections bar state comment upon a defendant’s failure to testify at trial or his silence before trial. The 1980s witnessed a significant shift in the court’s perspective of violations of these protections. Originally, the rule required a per se reversal of a conviction obtained with the state’s improper comment on the defendant’s right to remain silent. The court has since rejected the per se rule.

In Marshall, the court adopted the federal harmless error rule announced in Chapman v. California, which declined to automatically reverse a conviction for a nonfundamental error when the error was harmless beyond a reasonable doubt. Arguably, Kinchen later adopted Chapman’s harmless error rule as a principle of Florida constitutional law. Finally, in DiGuilio, the court declined to reverse a conviction where "there was no reasonable possibility" that the police officer’s testimony on the defendant’s post-arrest silence "contributed to the conviction."

DiGuilio has since been applied authoritatively as Florida’s harmless error test in a vast range of criminal procedural errors. The most noteworthy application of that decision came in Smith, which applied DiGuilio’s harmless error rule to article I, section 9. Smith refused to hold harmless lineup evidence obtained as the result of the trial court’s

346. Id.
347. State v. Adams, 466 So. 2d 1067 (Fla. 1985) (unanimous).
348. State v. Jones, 461 So. 2d 97 (Fla. 1984). Florida has long recognized the common law right of a property owner to protect his or her property by reasonable action, including detention of a suspected shoplifter. The legislature codified that right, in part, to limit a merchant’s exposure to liability for reasonable defensive action when there is probable cause to believe that a larceny has been committed. Id. at 98-99 (citations omitted). Legislative protection under these circumstances does not turn detention by a private merchant into detention by the state such that Miranda protections would be implicated.

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constitutionality of a statute that provided "[t]he extent of departure from a guideline sentence shall not be subject to appellate review,"354 The court held the section unconstitutional because it operated retroactively by restricting appellate review of sentences imposed for crimes committed before its effective date. Also, the statute operated to the detriment of defendants convicted of those crimes by precluding appellate review even for sentences impermissibly imposed outside the statutory guidelines.355

In a third case, the trial judge sentenced a probation violator under a rule that authorized the court to "bump up" the sentence in certain circumstances. The probationer argued that the rule went into effect after commission of the crimes for which he had been placed on probation. In Peters v. State,356 the court rejected the claim that the rule violated Florida's ex post facto clause. Even before the rule went into effect, the court reasoned, the trial court possessed the power to exceed the guidelines sentence. Therefore, Peters could show no disadvantage from a rule that authorized an enhanced sentence.357

The prohibition against ex post facto laws was addressed in another context in Kaisner v. Kolb.358 Kaisner, the driver of a pickup truck, was stopped by deputies for a traffic violation. He parked the truck roadside as directed, exited, and was struck by a passing motorist. He named the deputies and sheriff's department as defendants. The trial court granted summary judgment in favor of the defendants. Preliminarily, the court decided that there existed a duty of care that the deputies violated by the manner in which they ordered the driver roadside. It then considered whether the public entity was immune from liability under the doctrine of sovereign immunity.359

In 1985, the legislature authorized state political subdivisions to secure insurance to cover liability for damages under certain circumstances and waived immunity to the extent of such insurance coverage.360 However, the legislature modified that law in 1987 to waive sover-

354. 514 So. 2d 1079 (Fla. 1987).
356. Booker, 514 So. 2d at 1084 (applying Weaver v. Graham, 450 U.S. 24 (1981)).
357. 531 So. 2d 121 (Fla. 1988).
358. Id. at 123-24.
359. 543 So. 2d 732 (Fla. 1989).
360. Id. at 736.
364. Kaisner, 543 So. 2d at 738.
365. Id. at 738-39.
366. The parallel federal provision appears in U.S. Const. art. I, § 10, cl. 1.
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In 1985, the legislature authorized state political subdivisions to secure insurance to cover liability for damages under certain circumstances and waived immunity to the extent of such insurance coverage. However, the legislature modified that law in 1987 to waive sovereign immunity for any act for which a private individual in similar circumstances could be held liable, provided that liability was not exceeds $100,000 or $200,000, depending upon the facts. The modification applied to all pending and later-filed causes of action, but excluded those causes of action not reduced to judgment by June 30, 1987. Kaisner's claim was excluded under this section.

The court determined that the latter section, which limited liability of political subdivisions to fixed dollar amounts, purported to clarify the intent of the legislature expressed in the former section, which limited liability to the extent of the subdivision's insurance. "[I]t would be absurd," the court concluded, "to construe the repeal of a statute . . . as a 'clarification' of original intent. Subsequent legislatures, in the guise of 'clarification,' cannot nullify retroactively what a prior legislature clearly intended." Kaisner had a "vested" right that entitled him to damages. If successful in proving damages, Kaisner could only be restricted by the limits of the entity's insurance. That right could not be qualified by the dollar limits later imposed by the legislative modification.

In conclusion, the ex post facto clause of the state constitution prohibits the legislature from enacting laws that enhance the severity of sanctions of crimes, once committed. However, a departure sentence imposed following a violation of probation implicates no rights protected under this section, even though the departure was imposed under sentencing guidelines enacted after commission of the original offenses. Kaisner determined that the claimant in a personal injury action enjoys an expectancy in the outcome of the litigation. Article I, section 10, it may be fairly concluded from that decision, protects an accrued claim from legislative attempts to later limit the exposure to liability of defendants.

A second prohibition of article I, section 10, bars the legislature from passing laws that impair the obligation of existing contracts. It has been described as "the wall of absolute prohibition" and a prohibition that is "virtually" without exception. Despite these impera-
tives, the ban is less than certain. Some degree of contract impairment is tolerable. To determine what level of impairment is constitutionally permissible, the court has with varying degrees of analysis engaged in a balancing process.366

Pomponio v. Claridge of Pompano Condominium, Inc.376 considered a claim by condominium owners that the legislature impaired their contract obligations in violation of the state and federal constitutions by requiring the parties to deposit rents into the registry of the court during litigation over condominium lease terms.377 Acknowledging that "virtually no degree of contract impairment is tolerable in this state,"378 the court looked to the "actual effect" of the statute on the owner's contractual right to receive bargained-for rents. How much impairment is constitutionally permissible required a weighing of the competing interests. Here, the degree of impairment (deprivation of court-retained rent monies) outweighed the source of authority (the state's police power) and the evil sought to be remedied. Because the evil was neither express in the statute nor plainly evident, the state could not justify the impairment of the owner's contract obligations.379

The court's balancing process is not always apparent from the four corners of an opinion. In Department of Transportation v. Edward M. Chadbourne, Inc.,384 the legislature was concerned with dramatic price increases of petroleum and petroleum products caused by the 1973 embargo of oil producing countries. To aid road contractors, the 1974 legislature enacted a statute that allowed a price adjustment on existing contracts where the bids were received but materials not used before specified dates.385 Unexpectedly, the statutory scheme permitted windfall profits. In response, the 1976 legislature amended its price adjust

376. FLA. STAT. § 337.143 (1977).
377. Justice Overton, viewed the legislative action as "reasonable and necessary to serve an important public purpose." Edward M. Chadbourne, Inc., 382 So. 2d at 298 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977) (Overton, J., dissenting; Adkins and Alderman, JJ., concurring)). He argued that the legislature's desire to prevent windfall profits was a justifiable public purpose that should be recognized as an exception to the prohibition against contract impairment.
378. Edward M. Chadbourne, Inc., 382 So. 2d at 297 (citing Pomponio, 378 So. 2d at 774 and Department of Transp. v. Cone Brothers Contracting Co., 364 So. 2d 482 (Fla. 2d Dist. Ct. App. 1978)).
379. 391 So. 2d 681 (Fla. 1980).
380. Id. at 683.
381. 453 So. 2d 1355 (Fla. 1984).
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371. Pomponio, 378 So. 2d at 700 (citing Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975)).
372. Id. at 780-81. In dictum, the court indicated that had the legislature attempted to mitigate the severity of impairment by including an out, such as a personal hard-ship provision, the statute may have survived constitutional scrutiny.
373. Id. at 293 (Fla. 1980) (per curiam).
374. FLA. STAT. § 337.143 (1975).
the character of the impairment to be appropriate to the ends sought to be achieved.\textsuperscript{383} By eliminating windfall profits, the legislature had responded to escalating insurance costs in a manner that was not "unreasonable" and that outweighed the "minimal" impairment of the carriers' contracts.\textsuperscript{384} In other cases, the justices addressed the prohibition against impairment of contracts without any apparent weighing. Statutes were upheld where they could identify a clear legislative prerogative.\textsuperscript{385} They struck down statutes where no justifiable interest existed to warrant interference.\textsuperscript{386}

In summary, the court in \textit{Pomponio} and \textit{Chadbourne} described the protection against impairment of existing contracts as absolute and declared that "virtually no degree of contract impairment is tolerable in this state." \textit{Pomponio} applied a balancing test to overturn a statute requiring litigants in condominium lease disputes to deposit rents into the court's registry. However, the state failed to justify to justify its infringement of existing condominium leases. \textit{Chadbourne} struck down the state's attempt to retrospectively reduce its obligations under existing road construction contracts. The state's action was unjustified, even though private contractors would enjoy windfall profits caused by unforeseen economic conditions were the action not taken. \textit{Park Benziger & Co.} also struck down a statute for which there was no clear purpose.

\textsuperscript{383} \textit{United States Fidelity & Guaranty Co.}, 453 So. 2d at 1360-61 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)).

\textsuperscript{384} Id. at 1361.

\textsuperscript{385} Gamble v. Wells, 450 So. 2d 850 (Fla. 1984) (legislature may limit attorney fee under private relief act without impairing standard contingent fee contract between attorney and the person benefited by the act, because the parties cannot by contract bind the exercise of the state's sovereign power); Florida Sheriffs Ass'n v. Department of Admin., 408 So. 2d 1033 (Fla. 1981) (legislature has the authority to prospectively alter the mandatory, noncontributory retirement benefits of active state employees, because binding successive legislatures to benefit plans arranged by predecessor legislatures without regard to the financial soundness of the state would lead to fiscal irresponsibility); Ruhl v. Perry, 390 So. 2d 353 (Fla. 1980) (legislature has the authority to modify existing remedies, including the statute of limitations, without impairing existing contracts, if a sufficient alternative remedy is available).

\textsuperscript{386} Fireman's Fund Ins. Co. v. Pohlmian, 485 So. 2d 418 (Fla. 1986) (invalidating statute that permitted stacking of uninsured motorist coverage); State Farm Mut. Auto. Ins. Co. v. Grant, 478 So. 2d 25 (Fla. 1985) (same); Rebolz v. MetroScare, Inc., 397 So. 2d 677 (Fla. 1981) (invalidating statute that declared agreements for maintenance or management of condominiums unenforceable if they failed to include certain specifications).

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Conversely, the court upheld statutes where there existed a clear legislative prerogative. For instance, \textit{United States Fidelity & Guaranty Co.} determined that the state's action responding to escalating insurance costs by eliminating windfall profits was reasonable, in part because the impairment was deemed to be minimal. The imperatives of \textit{Pomponio} and \textit{Chadbourne} suggest that this right deserves the protections of the compelling interest standard. However, other decisions confirm that a less demanding balancing approach is used to weigh the competing interests of the state and claimant.

11. Imprisonment for debt

\textit{No person shall be imprisoned for debt, except in cases of fraud.}

\textit{Fla. Const. art. I, § 11.}

In a 1941 decision, \textit{State ex rel. Cahn v. Mason},\textsuperscript{387} the court granted a writ of \textit{habeas corpus} to an ex-husband who was jailed for contempt when he failed to pay promissory notes of his former wife. A separation agreement approved by the trial court provided that the husband would assume the obligation on certain notes and make payment directly to the bank. After the husband defaulted on the notes, the wife initiated contempt proceedings.

The court noted that the decree simply required the husband to pay a debt to a third party, the bank, which he was already obligated to pay by virtue of the property settlement. The decree was not based upon a marital duty and amounted to nothing more than an adjudication of civil liability between the husband and the bank, which was not a party to the proceeding. Enforcement of the decree by contempt, the court concluded, violated the predecessor to article I, section 11.\textsuperscript{388}

\textit{Lanum v. Chapman}\textsuperscript{389} addressed this section in the context of a father who was jailed for contempt when he failed to pay child support to his ex-wife. The state asserted the mother's right to enforce child support and also sought reimbursement of public assistance funds paid to her. The state filed a motion for contempt under its authority to

\textsuperscript{387} 148 Fla. 264, 4 So. 2d 255 (1941).

\textsuperscript{388} Id. at 266, 4 So. 2d at 257-58.

\textsuperscript{389} 413 So. 2d 749 (Fla. 1982).
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\textsuperscript{389} 413 So. 2d 749 (Fla. 1982).
pursue civil enforcement of support obligations.390

The trial court found the father in willful contempt and sentenced him to jail. The district court reversed the contempt order because it imprisoned the father for money owing to the state in violation of article I, section 11.391 A majority of four justices affirmed the result reached by the district court.392 The court rejected the father’s argument that Cahn controlled. It reasoned that the husband’s liability in Cahn was a debt owed to a third party, a bank, that the wife could not enforce by contempt, whereas, the husband’s liability in Lamm was a “debt... in the broad sense,” which he will not be allowed to avoid simply because it was owed to a third party, the state.393 “The state is not the same as the third party bank,”394 for public policy has historically placed the state in a unique relation to the family unit in such matters as child welfare. By the acceptance of public assistance, the legislature deemed that the recipient implicitly authorized the state to stand in her shoes for the purpose of pursuing “all remedies available to the child’s custodian,” including contempt.395

Lamm comports with Florida’s long-standing recognition that alimony or maintenance from the husband to the wife is not a debt within the meaning article I, section 11.396 and section 11 does not prohibit imprisonment of an ex-husband for non-payment.

12. Searches and seizures

During the decade, Florida voters adopted an amendment to article I, section 12, pertaining to searches and seizures. The following two subsections of this survey divide the court’s cases into those that construed the constitutional provision as it existed during the first three

years of the decade and those that construed the amendment.

a. Pre-1983

The Florida Constitution protects people against unreasonable searches and seizures in much the same way as its fourth amendment counterpart.397 Even so, the version of article I, section 12 in effect during the first three years of the decade was construed independent of the fourth amendment.398 It was said to assure a level of protection that exceeded the protections found within the fourth amendment.399 Until 1983, the section read as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence obtained. Articles or information obtained in violation of this right shall not be admissible in evidence. FLA. CONST. art. I, § 12 (1968 revision).400

No decision more forcefully expresses the court’s constitutional philosophy under that section than State v. Sarmiento.411 A divided court in Sarmiento held that the warrantless interception of a conversa-

392. Lamm, 413 So. 2d at 753 (Overton, J., Adkins, Alderman, and McDaid, JJ.; Sundberg, C.J., concurring in part and dissenting from the majority’s decision construing article I, § 11). habeas relief was granted because the trial court could not properly commit the delinquent father to jail for contempt, in part, because the court failed to establish personal jurisdiction. Id. at 750.
393. Id. at 752. The term “debt” here derives from FLA. STAT. § 409.256(1) (1979), in which the legislature provided that “[a]ny payment of public assistance money made to, or for the benefit of, any dependent child creates a debt due and owing to the [state].”
394. Id. at 753.
395. Id. at 752-53 (emphasis in the original).
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tion in the defendant’s house trailer by an undercover sheriff’s detective equipped with a “body bug” violated article I, section 12.

Citing article I, section 12 and a single federal decision, four justices concluded that Sarmiento enjoyed a reasonable expectation of privacy that only those present in his home were listening to the conversation. “[T]o assume the risk that uninvited and unknown eavesdroppers might clandestinely participate in that conversation and later reveal its contents . . . proves too much.”

Justice Alderman dissented and concluded that United States v. White was dispositive. White had considered the same factual situation and held that no fourth amendment violation occurred when undercover police transmit conversations with a defendant. It makes little sense to exclude the more accurate tape recording when the police may otherwise offer unaudited testimony at trial regarding the substance of that conversation. The Sarmiento majority did not attempt to factually distinguish the, but reasoned that “surely [Justice Alderman] would concede that the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution.” The justices viewed the role of the judiciary as the guardian of those constitutional rights.

Sarmiento was grounded on two key facts—the conversation occurred in a home, and both parties to the conversation were personally present. In later cases, the court refused to extend the constitutional protections beyond those facts. If those facts were present, as in

403. Sarmiento, 397 So. 2d at 645 (Sundberg, C.J., and Adkins, Overton, England, and McDonald, JJ.).
405. Sarmiento, 397 So. 2d at 664-67 (Alderman, J., dissenting; Boyd, J., concurring in the dissent) (citing White, 401 U.S. 749-51).
406. Id. at 645.
407. See, e.g., State v. Williams, 443 So. 2d 932 (Fla. 1983) (tape recordings were lawful where only one of two conversants was in her home and she was simply the target of an investigation); Morningstar v. State, 428 So. 2d 220 (Fla. 1982), cert. denied, 464 U.S. 821 (1983) (constitutional protection of the home does not extend to the defendant’s office or place of business); Hill v. State, 442 So. 2d 816, 818 (Fla. 1982), cert. denied, 460 U.S. 1017 (1983) (refusing to extend Sarmiento “beyond the four walls of the home” and into the backyard). But see State v. Inciarano, 471 So. 2d 1277, 1276 (Fla. 1985) (Ehrlich, J., concurring in result only) (no murderer can cloak his communication in the privacy protection available to the victim in his own home).

Hoberman v. State, then the court reversed the defendant’s conviction. Harmless error then entered the inquiry in Odom v. State. There, the court declined to reverse the judgment because the taped conversation, though admitted in error, was “merely cumulative.”

Defendants whose cases were final at the time Sarmiento was issued could not look to the decision to support their claim for post-conviction relief. Conversely, defendants whose cases were then final could look to the decision retroactively.

Other decisions under the 1968 revision indicate that the court viewed the state’s exclusionary rule as resting solely upon state principles, without regard to federal case law, entirely upon federal principles, or upon principles that left federal and state law indistinguishable.
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(Shaw, J., concurring).

408. 400 So. 2d 758 (Fla. 1981) (per curiam).
410. Williams v. State, 421 So. 2d 512 (Fla. 1982).
411. See, e.g., Hoberman, 400 So. 2d at 758.
412. State v. Dodd, 419 So. 2d 333 (Fla. 1982) (unanimous) (article I, § 12, constitutionally mandates the exclusion of articles from evidence obtained in violation thereof, regardless of the nature of the proceeding; such evidence may not be introduced in probation revocation proceedings).
413. See, e.g., Moore v. State, 442 So. 2d 215 (Fla. 1983) (applying Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless administrative search of auto repair shop did not violate article I, § 12); Miller v. State, 403 So. 2d 1307 (Fla. 1981) (applying South Dakota v. Opperman, 428 U.S. 364 (1976) (plurality) (police inventory searches conducted in good faith and according to established practices do not violate article I, § 12, even though the driver or owner would have disapproved the search had he or she been available). Miller was later overruled by Robinson v. State, 537 So. 2d 95 (Fla. 1989), as the result of the amendment to section 12, and Colorado v. Bertine, 479 U.S. 367 (1987).
414. State v. Rickard, 420 So. 2d 303, 306 (Fla. 1982) (defendant demonstrated a protected privacy interest in contents of backyard hothouse under federal and state constitutions by virtue of a plywood partition that obstructed view and chain link fence which surrounded the yard); Gluesenkamp v. State, 391 So. 2d 192, 199 (Fla. 1980), cert. denied, 454 U.S. 818 (1981) (required vehicle stops at agricultural inspection stations do not amount to an unreasonable seizure under either the fourth amendment or article I, § 12); Norman v. State, 379 So. 2d 643, 646 (Fla. 1980) (initial entry onto farm and search of leased tobacco barn were improper, and the state failed to show by clear and convincing evidence that defendant consented to the search).
b. Conformity

Sarmiento became a catalyst for constitutional change two years later when the legislature, in reaction to the court's perceived activism, proposed to the voters an amended article I, section 12. Often referred to as the "conformity amendment," the section now provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution, FLA. CONSTIT. ART. I, § 12 (1968 revision as amended in 1982). 434

The chief purpose of the amendment is to assure conformity between it and the fourth amendment as interpreted by the United States Supreme Court. 435 The amendment had two immediate effects. It re-

434. Sarmiento is less an example of judicial activism than a faithful construction of the fourth amendment as it now exists. The principle contribution of this provision was to extend the warrant requirement to communications, thus foreclosing protecting personal conversations from governmental encroachment. The significance of this contribution is underscored by the absence of express protections in the pending search and seizure provision (§ 22 of the Declaration of Rights of the Constitution of 1853) and in the fourth amendment. See Toler v. State, 272 So. 2d 489, 493 (Fla. 1973) ("In Florida, at least, the protection of privacy in the area of communications is constitutionally mandated in express language. This court is not at liberty to rule this protection afforded by the State Constitution.").

435. The amendment was proposed by the legislature in House Joint Resolution No. 434-H to take effect on January 1, 1982. The proposal was approved in the general election of November 1982.

436. Groe v. Flinthome, 422 So. 2d 303 (Fla. 1982) (upholding the ballot summary as unambiguously and clearly stating that purpose). Justice Ehrlich's later observation was less charitable. The purpose of the amendment was "to instruct the Florida Supreme Court that it should follow the United States Supreme Court.

moved the exclusionary rule from organic, constitutional statute and reduced its significance to a rule of judicial construction that is procedural in nature. 436 This follows from the fact that the federal exclusionary rule is a judicial construct and not a part of the organic law. The amendment also laid vulnerable an entire body of state exclusionary law that could now be circumscribed or erased by decisions of the United States Supreme Court. 437

Less certain or predictable, however, are the precise circumstances under which the state will be obligated to follow United States Supreme Court decisions. Very likely, the issue of conformity will prove to be one of the most litigated constitutional issues of the coming decade as the Florida Supreme Court explores the limits of "forced linkage" between state and federal constitutions. 438

In one sense, the issue of conformity is itself a state law concern. As such, it is beyond the scope of federal scrutiny. 439 However, the practical effect of conformity analysis is to expose the court's decision


438. See v. Lavaquero, 434 So. 2d 321, 323 (Fla. 1983).

439. See, e.g., State v. Wells, 539 So. 2d 464, 469 (Fla. 1989) (per curiam), on rel'y acknowledging that Colorado v. Bertine, 479 U.S. 367 (1987), superseded Miller v. State, 403 So. 2d 1307 (Fla. 1981), and Sanders v. State, 403 So. 2d 973 (Fla. 1981), 401 So. 2d 1632 (Fla. 1981). But see State v. Walker, 516 So. 2d 2017 (Fla. 1988) (considering the reason behind a federal rule that predates the amendment to article I, § 12, before deciding to adopt it in favor of the prevailing Florida rule).

430. See Black's Law Dictionary, supra note 4, at 653. Professor Black's conclusion that the conformity amendment is an "unreasonable surrender of state court prerogatives and independence" and argues for its repeal. Meanwhile, he urges effectively that the Supreme Court of Florida should be circumspect in its decision to follow federal fourth amendment cases. Id. at 732. See also Gormely, Ten Adventures In State Constitutional Law, 1 Emerging Issues in Co. BY. 29, 48 n.375 and accompanying text (1988) (charging that the conformity amendment had the effect of upholding many of the court's more progressive decisions and regarding it as consistent with a "traditionalistic political culture").

421. There is no federal question presented when the court construes article I, section 12, to determine which decisions require conformity. That inquiry is entirely a state law matter into which federal courts are not likely to intrude. Michigan v. Long, 443 U.S. 1032 (1983); Herbst v. Pinellas, 324 U.S. 117 (1944).

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mary as unambiguously and clearly stating that purpose). Justice Ehrlich’s later obser-
vation was less charitable. The purpose of the amendment was “to instruct the Florida State Supreme Court that it should follow the United States Supreme Court exclusion of evidence . . . .” Bernie v. State, 524 So. 2d 988, 993 n.1 (Fla. 1988) (Ehrlich, J., concurring) (quoting M. Dauer & D. McElfresh, Florida State Constitutional Amendments to be on Ballot at November 1982 General Election, 8 Pub. Admin. Clearing Serv., Univ. of Fla. Series No. 65, 1982)); cf. State v. Garcia, 547 So. 2d 628 (Fla. 1989) (unanimous) (declining to apply the good faith exception announced in United States v. Leon, 468 U.S. 897 (1984), to the exclusionary rule mandated in Florida’s writ of habeas corpus statute).

418. State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983).

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making to federal scrutiny. This is so because the court must construe federal decisions to decide whether conformity is required under the facts presented.

To date, the cases indicate that conformity itself raises three discrete constitutional concerns—deciding the retroactivity of state law and of federal law, deciding whether cases compel conformity and when the court may fashion independently Florida’s search and seizure law, and interpreting the interrelationship between the privacy rights protected by Article I, section 12 and Article I, section 23.

The first retroactivity concern required the court to decide which of its own earlier cases it might rely upon as precedential. State v. Lavazzoli spoke to that question. It asked whether State v. Dodd held that the exclusionary rule of the 1968 revision to article I, section 12 applied to probation revocation proceedings, was binding upon pending cases. Six members of the court held that Dodd had continuing effect and the amendment could not be retroactively applied. As a matter of constitutional construction, amendments affecting existing rights are presumed to operate prospectively. This is especially so where there is no indication that the amendment is intended to operate retroactively. The court said: “[w]hen faced with constitutional amendments not clearly expressing an intent to the contrary, this court has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law.”

It is also a matter of retroactivity whether Florida courts are required to conform to decisions of the United States Supreme Court that predated the amendment. That issue was addressed in the four separate opinions of Bernie v. State, where a majority of the justices construed the amendment as requiring conformity with United States Supreme Court decisions rendered before and after the amendment.

422. 434 So. 2d 321 (Fla. 1983).
423. 419 So. 2d 333 (Fla. 1982).
424. Lavazzoli, 434 So. 2d at 324 (Ehrlich, J., Adkins, Boyd, Overton, McDonald, and Shaw, J.): In dissent, Chief Justice Alderman argued that the amendment changed procedural rather than substantive rights and its retroactive application would therefore not offend the ex post facto clause. Furthermore, he disagreed with the majority because the effect litigants are bound by the law in effect at the time of their appeal. Id. at 324-25 (Alderman, C.J., dissenting).
425. 524 So. 2d 988, 991 (Fla. 1988) (per curiam) (McDonald, C.J., Shaw, J., Willis (Ret.), Assoc. J.). Justice Ehrlich concurred separately in an opinion in which Chief Justice McDonald and Justice Shaw joined. Justice Overton believed that the court was bound to prospective decisions of the United States Supreme Court but that

Deciding which of the United States Supreme Court’s fourth amendment cases requires conformity identifies a second concern. The facts of a case are central to the Supreme Court of Florida’s decision to conform, or alternatively, to rely upon independent reasoning. There is no question that the voters, in effect, intended to overrule Sarmiento when they amended article I, section 12, yet it was not until 1987 that the court revisited the precise legal question that it had earlier addressed in Sarmiento. In State v. Hume, four of the five justices participating in the decision concluded that United States v. White established “clear precedent” to hold that the recording of conversations between an undercover agent and the defendant in the defendant’s home does no violence to the fourth amendment, nor to the amended article I, section 12. Justice Alderman’s dissent in Sarmiento had become the order of the day.

Although federal precedent is not always so “clear,” the court has displayed no hesitation in applying federal precedent when the “factual circumstances... are similar...” when federal precedent announces controlling law “under these circumstances...” or amounts to

prior cases were “only persuasive.” Id. at 994 (Overton, J., concurring in judgment). Justice Kogan would have followed prospective decisions as well as decisions already rendered that are “on point.” Id. at 997, 999 (Kogan, J., concurring in part, dissenting in part). Justice Barkett believed that Florida should be bound only to those decisions that were not inconsistent with other provisions of the Florida Constitution. Id. at 1000 (Barkett, J., dissenting).
426. 512 So. 2d 185 (Fla. 1987) (Overton, J., McDonald, C.J., and Ehrlich and Shaw, J.).
428. Hume, 512 So. 2d at 188; accord Stewart v. State, 549 So. 2d 171, 173 (Fla. 1989).
429. See, e.g., Hume, 512 So. 2d at 190 (Barkett, J., dissenting). Justice Barkett regarded White as the closest case factually, but as a plurality decision with an equivocal ruling, White was of dubious precedential value. See also Wells, 539 So. 2d at 464, aff’d, 110 S. Ct. at 1632 (the majority relied upon Colorado v. Bertine, 479 U.S. 367 (1987), to uphold the impoundment and subsequent search of the car’s interior but the dissent would have relied upon South Dakota v. Opperman, 428 U.S. 364 (1976), to reach the opposite result). The problem of interpreting plurality opinions was addressed in Slobogin, supra note 6, at 691-95.
430. Bernie, 524 So. 2d at 992 (five justices applied Illinois v. Andreas, 463 U.S. 765 (1983), and concluded that neither the federal nor Florida Constitutions requires the issuance of a warrant to conduct an “anticipatory search”).
431. State v. Riley, 462 So. 2d 800, 801 (Fla. 1984) (applying Segura v. United States, 468 U.S. 796 (1984), and finding that police may enter and secure a premises for which a search warrant has been issued but before the warrant is physically availa-
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a "definitive statement" on the subject; when the issue makes conformity "particularly appropriate; and when the rule "should" be followed because its reasoning is persuasive.

*State v. Wells* illustrates the court's discrete application of federal precedent to certain facts while relying on article I, section 12 to resolve the issue presented by other facts. Wells had been stopped in a borrowed car for speeding and agreed to accompany the Florida Highway Patrol (FHP) trooper to the station to take a breathalyzer test. The trooper noticed cash lying on the car's floorboard. He asked for and received permission to open the trunk. Unsuccessful in that effort, the trooper advised Wells that he was required to impound the car. Wells gave permission to force open the trunk if necessary but gave no permission to search the passenger compartment. Following impoundment, a search revealed marijuana cigarette butts in the ashtray. FHP then unlocked the trunk and found a locked suitcase that they pried open. Inside the suitcase, they found a garbage bag of marijuana.

ble at the premises for execution); Kight v. State, 512 So. 2d 922, 927 (Fla. 1987), cert. denied, 108 S. Ct. 1100 (1988) (citing Bell v. Wolfish, 441 U.S. 520 (1979)); United States v. Chadwick, 433 U.S. 1 (1977), and concluding that neither constitutional provision protects a defendant against the custodial inspection of his clothing); Robinson v. State, 537 So. 2d 95 (Fla. 1989) (applying Bertine, 479 U.S. at 367, and holding that police are no longer required to provide the owner of a vehicle an alternative to impoundment if they act in good faith).

432. State v. Dilyerd, 467 So. 2d 301, 303 (Fla. 1985) (applying Michigan v. Long, 463 U.S. 1032 (1983), and permitting police to order passengers from car that trespassed onto an orange grove at night and permitting police to search under the passenger seat for weapons after one of the occupants made a furtive movement which objectively indicated an attempt to conceal a weapon).

433. Dean v. State, 478 So. 2d 38, 41 (Fla. 1985). The court adopted Rakas v. Illinois, 439 U.S. 128 (1978), and held that a trial court must take into account the substantive fourth amendment issue as well as the movant's standing to contest the legality of a search or seizure. Dean also applied Mancusi v. DeForte, 392 U.S. 364 (1968), and held that the defendant, a corporate officer charged with conspiracy to appropriate corporate funds, had standing to oppose the state's subpoena of corporate records and should be permitted to demonstrate whether he had a reasonable expectation of privacy in the corporate records produced and the offices searched.

434. State v. Welker, 536 So. 2d 1017 (Fla. 1988) (reciting from Tollent v. State, 272 So. 2d 490 (Fla. 1973), and adopting United States v. White, 401 U.S. 745 (1971)) (White, J. (plurality). Welker concluded that a deputy's testimony that an informant consented to an electronic intercept sufficed to establish consent to the taping of a conversation, thereby permitting the introduction of taped recordings.


436. Id. at 465-66.

A four-justice majority turned to *Colorado v. Bertine,* which established the requirements for opening sealed containers during an inventory search. Under Bertine, the Court said, there can be no room for police discretion, and either all containers must be opened or none opened. None of the standard procedures followed by FHP in this instance were the result of established mandatory policy. For that reason, the Supreme Court of Florida held that the opening of the locked suitcase violated the fourth amendment. The court in *Wells* also determined that Bertine did not require the suppression of the marijuana cigarette butts. Because the butts were not found inside a locked container and impoundment was a reasonable alternative to leaving the car at roadside with cash lying on the floorboard, article I, section 12 permitted the seizure of the marijuana cigarette butts as a lawful seizure incident to a proper impoundment.

In a series of cases that involved routine police searches of boarded bus passengers, the court relied upon federal principles to fashion an independent result after finding no factually analogous precedent upon which it was bound to rely. The lead case in this regard is *Bostick v. State.* The Broward County Sheriff's Department engaged in a drug interdiction procedure by boarding buses during scheduled terminal stops. The procedure involved officers, who were dressed in clearly-marked raid jackets, beginning at the rear of each bus and working their way toward the front by asking passengers for identification and permission to search their carry-on luggage. Boardings would occur routinely without permission of the driver, without a search warrant,


438. Wells, 539 So. 2d at 468-69 (Ehrlich, C.J., and Barkett, Grimes, and Kogan, J.J.). Justice Shaw charged that the majority misapplied Bertine. In his view, the Highway Patrol Procedures Manual required an inventory for all impounded cars and thus no discretion was permissible. Moreover, Bertine did not compel suppression of the marijuana found in the suitcase because the Patrol legitimately impounded the car and adhered to its procedures. Id. at 470-72. (Shaw, J., dissenting; Overton and McDonald, JJ., concurring). Five justices in *Florida v. Wells,* thought that the Supreme Court of Florida's all-or-nothing interpretation of Bertine misconstrued the decision. Regardless of the existence of a police container policy, "[t]he police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." Wells, 110 S. Ct. at 1635.

439. Id. at 469. The dissent did not dispute this issue.

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438. Wells, 539 So. 2d at 468-69 (Ehrlich, C.J., and Barkett, Grimes, and Kogan, JJ.). Justice Shaw charged that the majority misapplied Bertine. In his view, the Highway Patrol Procedures Manual required an inventory for all impounded cars and thus no discretion was permissible. Moreover, Bertine did not compel suppression of the marijuana found in the suitcase because the Patrol legitimately impounded the car and adhered to its procedures. Id. at 470-72. (Shaw, J., dissenting. Overton and McDonald, J., concurring). Five justices in Florida v. Wells, thought that the Supreme Court of Florida's all-or-nothing interpretation of Bertine misconstrued the decision. Regardless of the existence of a police container policy, "its police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." Wells, 110 S. Ct. at 1635.
439. Id. at 469. The dissent did not dispute this issue.

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Hawkins: Florida Constitutional Law: A Ten-Year Retrospective on the State

A four-justice majority turned to Colorado v. Bertine, which established the requirements for opening sealed containers during an inventory search. Under Bertine, the Court said, there can be no room for police discretion, and either all containers must be opened or none opened. None of the standard procedures followed by FHP in this instance were the result of established mandatory policy. For that reason, the Supreme Court of Florida held that the opening of the locked suitcase violated the fourth amendment. The court in Wells also determined that Bertine did not require the suppression of the marijuana cigarettes. Because the butts were not found inside a locked container and impoundment was a reasonable alternative to leaving the car at roadside with cash lying on the floorboard, article I, section 12 permitted the seizure of the marijuana cigarettes as a lawful seizure incident to a proper impoundment.

In a series of cases that involved routine police searches of boarded bus passengers, the court relied upon federal principles to fashion an independent result after finding no factually analogous precedent upon which it was bound to rely. The lead case in this regard is Bostick v. State. The Broward County Sheriff's Department engaged in a drug interdiction procedure by boarding busses during scheduled terminal stops. The procedure involved officers, who were dressed in clearly-marked raid jackets, beginning at the rear of each bus and working their way toward the front by asking passengers for identification and permission to search their carry-on luggage. Boardings would occur routinely without permission of the driver, without a search warrant,
and without suspicion of criminal activity on the bus.\textsuperscript{441}

Bostick boarded a bus in Miami and took the rearmost seat. While enroute to Atlanta, the bus made a scheduled stop in Ft. Lauderdale. Two officers approached him. One officer, according to Bostick's testimony, carried a pouch containing a gun. They stood in the aisle as Bostick produced identification and a ticket in response to their request. The officers asked for permission to search his carry-on luggage. Predictably, the testimony was in dispute concerning whether Bostick gave his consent to search. The search produced contraband that led to Bostick's arrest.\textsuperscript{442}

A four-justice majority determined that Bostick had been "seized" within the meaning of the fourth amendment and section 21. The justices reasoned that the traveling public has protected privacy interests in the luggage it carries and in continuing its travels unimpeded by the state.\textsuperscript{443} Moreover, the setting in which a police-citizen encounter occurs may provide strong evidence of a seizure. Bostick was a ticketed passenger en route to Atlanta, unable to leave a bus due to its imminent departure. Bostick's only opportunity to leave was limited to the confines of the aisle within the bus itself. The aisle, however, was partially blocked by the officers who stood over him with all the indicia of governmental authority. Significantly, no reasonable person under the circumstances would have believed that he was "free to leave."\textsuperscript{444}

The department's drug interdiction practice created the functional equivalent of detention, which the state was required to justify.\textsuperscript{445} How-

\textsuperscript{441} The practice is carried on by the Broward County and Palm Beach County Sheriffs' Departments and has generated substantial judicial labor. See Mendez v. State, 554 So. 2d 1161 (Fla. 1989); McBride v. State, 554 So. 2d 1160 (Fla. 1989); Serpa v. State, 555 So. 2d 1210 (Fla. 1989); Shaw v. State, 555 So.2d 351 (Fla. 1989).

\textsuperscript{442} Bostick, 554 So. 2d at 1154.

\textsuperscript{443} Id. at 1156-57 (citations omitted).

\textsuperscript{444} Id. at 1155 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)) (plurality) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

\textsuperscript{445} Id. at 1157.

ever, the state conceded that it lacked any suspicion that Bostick or anyone aboard the bus was engaged in wrongdoing. Detention under those circumstances is unjustified.\textsuperscript{446}

The state argued that Bostick consented to the subsequent search of his luggage, thereby overcoming any previous state impropriety. Indeed, the trial judge had determined precisely that. The justices rejected that finding particularly because the judge had likewise considered the "whole picture ... very intimidating even if there is consent."\textsuperscript{447} The trial court had erred by using a less exacting standard of proof than required under the facts presented. These "very intimidating" circumstances required the state to demonstrate by clear and convincing evidence, rather than by the lesser preponderance standard, that Bostick's consent overcame the antecedent police misconduct.\textsuperscript{448}

The Bostick majority drew criticism from two dissenting opinions. Both would have left the trial court's finding undisturbed that Bostick had voluntarily consented to the search. The dissenters charged that the majority produced the unwarranted result that consent was found to be per se coerced under the circumstances.\textsuperscript{449}

In the future, the state must demonstrate at least a reasonable suspicion that a passenger aboard a bus is involved in wrongdoing before confronting that passenger and seeking permission to search luggage. There is no reason to doubt that boared passengers on other common carriers—aircraft, trains, taxis, and the like—could equally assert the protections of article I, section 12.

\textsuperscript{446} Id. at 1158.

\textsuperscript{447} Bostick, 554 So. 2d at 1158 (quoting record).

\textsuperscript{448} Id. at 1158-59.

\textsuperscript{449} Id. at 1159 (McDonald, J., dissenting; Overton and Grimes, JJ., concurring in the dissent); Id. at 1159 (Grimes, J., dissenting) (Overton and McDonald, JJ., concurring). Justice McDonald added that the war on drugs requires society to accept some "minimal inconvenience and minimal incursion on their rights of privacy in that fight."

Rather than creating a per se rule which disposes all police consensual encounters of boarded passengers, Bostick may be read to hold that under its facts, the police acted improperly (that is, without justification to confront) and thus the state was required to show that the misconduct did not vitiate any consent to search. The existence of the antecedent misconduct required that the state meet the clear and convincing standard and not the less demanding preponderance standard. The task of the trial courts on remand is not to simply reverse convictions obtained in the bus cases, but to entertain motions which look to the sufficiency of consent in light of the Bostick facts and the more demanding evidentiary burden placed upon the state.
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The department’s drug interdiction practice created the functional equivalent of detention, which the state was required to justify. How-
It is self-evident that conformity is not required when there are no decisions to which the court may conform. This is so when the United States Supreme Court "has not ruled on the issue" presently before the Supreme Court of Florida. For that reason, the court in State v. Cross448 decided that it need not interpret the "conformity amendment" and thereby assured the continuing vitality of State v. Dodd.449 Dodd had held that the exclusionary rule of the earlier version of article I, section 12 applied to probation revocation proceedings.

The right of privacy is the underpinning of the warrant and reasonableness clauses of the fourth amendment, and necessarily article I, section 12. The right of privacy is also the fundamental right protected in article I, section 23.448 The third issue raised by the conformity amendment requires the court to establish the interrelationship between the traditional search and seizure privacy protections of article I, section 12 and the general right of privacy of article I, section 23. To date, only three opinions demonstrate that the court was presented arguments implicating both sections. At best, those opinions only suggest that the two sections may be harmonized in some but not all circumstances.

Riley v. State450 was the first to address the two sections in the same opinion. A unanimous court found that Riley had a reasonable expectation that a greenhouse located within the curtilage would remain free from surveillance by police who hovered in a helicopter above the yard but below the navigable airspace.444 Police surveillance amounted to a search for which the fourth amendment and article I,

450. 487 So. 2d 1056 (Fla.), cert. dismissed, 479 U.S. 805 (1986).
451. 419 So. 2d at 333. See supra note 412. See also State v. Pearson, 487 So. 2d 1054 (Fla. 1986); State v. Pina, 487 So. 2d 1055 (Fla.), cert. denied, 479 U.S. 870 (1986); State v. Cabbagestalk, 487 So. 2d 1055 (Fla. 1986).
452. The general right of privacy is addressed more completely in section B21 and sections to follow.
453. 511 So. 2d 282 (Fla. 1987) (unanimous) (Barkett, J., McDonald, C.J., Olson, Ehrlich, and Jaw, J.J., and Adkins, J. (Ret.)).
454. Riley demonstrated an expectation of privacy that required police to secure a warrant before searching his greenhouse. First, the opacity of the structure itself, the surrounding fence, and the posting of "KEEP OUT" signs showed Riley's subjective expectation that his greenhouse would remain private. Its location within the curtilage assured fourth amendment protection as well. Second, the court could not find an unreasonable expectation that the greenhouse would not be viewed by a helicopter hovering below the minimum altitude prescribed for fixed-wing aircraft. Riley, 511 So. 2d at 287-88.
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452. The general right of privacy is addressed more completely in section B2 and sections to follow.
453. 511 So. 2d 282 (Fla. 1987) (unanimous) (Barkett, J., McDonald, C.J., Overton, Ehrlich, and Shaw, J.J., and Atkins, J., Ret.)
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section 12 required a warrant.**

Riley also was entitled to rely upon the protection of the privacy amendment. The purpose of article I, section 23 was "to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques."** The court explained:

We cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken the extraordinary steps required to protect against all types of aerial surveillance. The right to be let alone includes not only the right to be free from surveillance within the confines of four walls and a roof but also the right to enjoy outdoor activities in private in one's own backyard.***

For those reasons, Riley enjoyed a reasonable expectation that the interior of his greenhouse would remain free from aerial observation.

Five justices on the United States Supreme Court in Florida v. Riley**** were unpersuaded that the fourth amendment sustained Riley's claim of privacy and the Court reversed. All nine justices agreed that the defense claim of reasonableness lacked factual support, although they disagreed over whether the defendant had the burden of proving the reasonableness of the claim or that the state had the burden of disproving reasonableness.**** The message of Florida v. Riley is

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455. Id. at 289.
456. Id. at 288.
457. Id. at 288-89 (emphasis in the original).
458. 109 S. Ct. 693 (1989). Justice White emphasized that conclusion by reasoning that the helicopter flew within Federal Aviation Administration regulations. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Justice White's opinion. Justice O'Connor concurred in the judgment but argued that it was inappropriate to define the parameters of the fourth amendment through Administration regulations.
459. Justice White wrote for the plurality: "[T]here is no indication that [helicopter overflights at an altitude of 400 feet] are unheard of in Pasco County" and implied that Riley had the burden of proving the reasonableness of his claim. Id. at 696. Justice O'Connor expressed the opinion that there was considerable public use of the airspace above 400 feet; consequently, Riley's expectation that his greenhouse would remain free from aerial view was not reasonable. Id. at 696-97. She argued that Riley could have demonstrated the reasonableness of his expectation by introducing evidence that the police helicopter was in the airspace at an altitude where the public did not travel with "sufficient regularity." Id. at 698. Two dissenting opinions imposed upon the prosecution the burden of proving the unreasonableness of the expectation. Justice Brennan argued that the prosecution's access to customary flight patterns made it better able to demonstrate unreasonableness. Id. at 704 (Brennan, J., dissenting;
inescapable. If article I, section 23 is to survive federal scrutiny in the context of a fourth amendment claim, two conditions must occur. Article I, section 23 must establish a level of protection greater than that provided by the fourth amendment. Also, the Supreme Court of Florida must make the section a principled part of its state law logic.\textsuperscript{460} The latter condition is not evident in Riley.

Riley’s procedural history suggests a very likely reason why article I, section 23 played a secondary role in the state court opinion. Neither the trial court nor the district court addressed the privacy amendment. The district court’s certified question to the Supreme Court of Florida was couched in fourth amendment phraseology.\textsuperscript{461} Even the court’s restated question limits the issues to state and federal search and seizure law.\textsuperscript{462} Perhaps more importantly, the record confirms that the stated basis of Riley’s claim was that the police overflight violated his reasonable expectation of privacy under search and seizure principles. Riley placed no reliance upon article I, section 23 as a source of protection.

What State v. Riley suggests for the interplay between article I, section 12 and article I, section 23 is unclear. There is no doubt that the Supreme Court of Florida decided the reasonableness of Riley’s expectations upon search and seizure principles. It is apparent that the discussion of article I, section 23 was added to emphasize that the section endowed Riley with privacy protections that were at least coequal to those assured under article I, section 12.\textsuperscript{463}

State v. Humen,\textsuperscript{464} decided two months after Riley, was the second case to address both sections in the same opinion. The court in Humen concluded that police recording of a conversation between a defendant and an undercover agent in the defendant’s home does not offend the fourth amendment, “and, accordingly, does not violate the newly adopted article I, section 12.”\textsuperscript{465} With regard to the interplay between the two sections, a single sentence of dictum expressed the position of four justices.

We also agree with the state that our right-of-privacy provision, article I, section 23, of the Florida Constitution, does not modify the applicability of article I, section 12, particularly since the people adopted section 23 prior to the present section 12.\textsuperscript{466}

Hume’s dictum does not lay the matter to rest. Nor does Masden v. State,\textsuperscript{467} where the justices rejected a claim that article I, section 23 protected conversations with a police undercover officer in the defendant’s home that were determined to be admissible under article I, section 12.\textsuperscript{468} Riley, Humen, and Masden suggest that the real issue of the interrelationship between the two constitutional provisions has yet to be fully addressed.

Bostick raises interesting implications for this issue. The opinion was decided entirely upon search and seizure principles of article I, section 12 and the fourth amendment. The opinion makes no mention of article I, section 23, yet it is clear that the general right of privacy embodied therein influenced the court’s thinking. The majority began:

We start with the premise that every natural person has the inalienable right to live his or her life unimpeded by others. Each individual has the right to choose whether and with whom he or she will share personal information, conversation, or any other interaction personal to oneself. This right of personal autonomy or privacy, however, is forfeited when an individual acts to harm another.\textsuperscript{469}

The notion of self-determination expressed by this excerpt has yet to appear in any of the court’s garden variety search and seizure cases.
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465. Id.
466. Id. In a lone dissent, Justice Barkett argued that there is no bright line between the privacy protections provided under those sections. She disparaged of the majority’s reasoning and argued that “[w]e cannot interpret the conformity amendment as negating, by implication, rights that the voters of this state have designated to be of constitutional stature.” Id. at 190 (Barkett, J., dissenting).
468. Id.
469. Bostick, 554 So. 2d at 1155.

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Instead, it is distinctively general privacy phraseology in tone and reflective of earlier privacy decisions. 470 It may be fairly inferred that several justices are of the mind that the general right of privacy embodied in article I, section 23 is of equal dignity with article I, section 12 privacy and that the latter does not protect interests which are different in kind from the former. Moreover, the interests protected by article I, section 12 privacy may be regarded as subsumed within article I, section 23 protections.

In conclusion, article I, section 12 expressly incorporates two principles of search and seizure jurisprudence not found in its fourth amendment counterpart. This section expressly includes an exclusionary rule, whereas the federal exclusionary rule is a judicial construct. Also, the section expressly safeguards “private communications” from “unreasonable interception,” thus emphasizing that personal communication in Florida deserves greater protection from intrusion than protection implied in the fourth amendment.

Sarmiento confirmed that Florida envisioned strong protections from intrusion into “private communications” by the state, especially those occurring in the home. Sarmiento’s conviction was secured by the warrantless use by police of a body bug to record a conversation in his house trailer. The court rejected the controlling federal precedent, which would have permitted Sarmiento’s conviction to stand, and reversed the conviction under article I, section 12.

In 1983, Floridians adopted an amendment to article I, section 12 that required Florida courts to conform to the search and seizure case law of the United States Supreme Court. The amendment had two immediate consequences. First, it weakened Florida’s exclusionary rule by removing it from a rule of constitutional stature to one which exists by implication through federal case law. Second, it cast doubt about the continuing viability of Florida’s search and seizure case law that predated the amendment. Although Lavazoli confirmed that the amendment had no retroactive application, Florida decisions before the amendment are subject to extinction to the extent federal case law develops less protective measures.

The conformity requirement itself presents an issue of constitutional dimension. On the one hand, the requirement of conformity is a matter of state law. As such, it is beyond review of federal courts. On the other hand, the requirement of conformity raises a question of federal law. It asks whether a particular decision of the United States Supreme Court determines the outcome of an interest asserted under the amendment. By requiring the Supreme Court of Florida to interpret federal case law, its conformity decisions are no longer independent, but provide fair opportunity for a reviewing federal court to draw another conclusion. At risk are those decisions that interpret article I, section 12 more protective of personal rights than a reviewing federal court believes is warranted under controlling federal case law. Bostick presents the precise concern raised here.

Where the United States Supreme Court’s fourth amendment jurisprudence provides “clear precedent,” conformity dictates that Floridians march in “lock-step” with federal decision making. However, where the federal cases are less clear or have not yet spoken to the facts presented, the court is free to construe article I, section 12 independently. In those instances, the privacy amendment contained in article I, section 23 has proved to be influential.

Riley demonstrates and Bostick hints at a judicial perception that state intrusions into private lives that violate the reasonableness or warrant requirements of article I, section 12, may also run afoul of the broad privacy protections of article I, section 23. Also of interest in defining the interrelationship between the “zones” of privacy afforded protection by two amendments is the standard by which the court measures state encroachments. To date, it may be argued, the court has viewed, with less scrutiny, state encroachments into a zone of privacy safeguarded by the former amendment. Requiring the state to demonstrate probable cause to justify a search or arrest is a less demanding standard than requiring the state to demonstrate a compelling state interest that was advanced through the least intrusive means.

13. Habeas corpus

The writ of habeas corpus shall be granted of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety. Fla. Const. art. I, § 13.

The writ of habeas corpus provides one method of testing the legality of a particular detention. Its constitutional dimension was the focus of two opinions.

470. Decisions recognizing the right of self-determination provide the strongest illustrations of this point. See In re T.W., 551 So. 2d 1186 (Fla. 1989); Public Health Trust of Dade County, 541 So. 2d 96 (Fla. 1989); John F. Kennedy Memorial Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Perlmutter, 379 So. 2d at 359.
Instead, it is distinctively general privacy phraseology in tone and reflective of earlier privacy decisions.\(^\text{470}\) It may be fairly inferred that several justices are of the mind that the general right of privacy embodied in article I, section 23 is of equal dignity with article I, section 12 privacy and that the latter does not protect interests which are different in kind from the former. Moreover, the interests protected by article I, section 12 privacy may be regarded as subsumed within article I, section 23 protections.

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In *State v. Bolyea*, the defendant was convicted of practicing dentistry without a license and was ordered to serve five years’ probation. He filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in which he alleged ineffective assistance of counsel. The state responded that the defendant was no longer “in custody” and therefore was no longer entitled to seek relief under the rule. The court disagreed.

Rule 3.850 is virtually identical to the federal statutory habeas corpus provision that permits a federal prisoner to challenge his or her sentence. Federal courts interpreted the federal statute as providing a remedy “exactly commensurate” with that available through the writ of habeas corpus. For that reason, a federal probationer was deemed to satisfy the “in custody” requirement and entitled to seek relief under that section. Applying the rationale of the federal courts, the court determined that a rule 3.850 motion is an equally appropriate procedural device by which Bolyea, a state probationer, could challenge the lawfulness of his conviction or sentence. In so doing, the justices reaffirmed the policy expressed in article I, section 13 that “habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty to any degree.”

Also, in *Johnson v. State*, the defendant under a sentence of death sought relief by filing a motion under rule 3.850. The trial court denied his motion as untimely. The majority approved the trial court’s decision because concern for fairness and finality require that collateral claims be filed within the time limitations imposed in the rule. In dissent, Justice Barkett argued that the writ should be available to a defendant in a capital case to raise “potentially serious errors and omissions by trial counsel” that would otherwise be denied as procedurally barred. The constitution prohibits denial of a claim because a party sought an improper remedy. For that reason, she would have considered the rule 3.850 motion as a petition for writ of habeas corpus and remanded for an evidentiary hearing.

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471. 520 So. 2d 562 (Fla. 1988) (unanimous).
473. Bolyea, 520 So. 2d at 563-64 (citations omitted).
474. Id. at 564. This result comports with Carafas v. LaVallee, 391 U.S. 234 (1968) (release of a prisoner does not terminate federal habeas jurisdiction if “collateral consequences” flow from his or her conviction).
475. 536 So. 2d 1009 (Fla. 1988) (per curiam).
477. Johnson, 536 So. 2d at 1012-13 (Barkett, J., dissenting; Kogan, J., concur-
In *State v. Bolyea*, the defendant was convicted of practicing dentistry without a license and was ordered to serve five years' probation. He filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in which he alleged ineffective assistance of counsel. The state responded that the defendant was no longer "in custody" and therefore was no longer entitled to seek relief under the rule. The court disagreed.

Rule 3.850 is virtually identical to the federal statutory *habeas corpus* provision that permits a federal prisoner to challenge his or her sentence. Federal courts interpreted the federal statute as providing a remedy "exactly commensurate" with that available through the writ of *habeas corpus*. For that reason, a federal probationer was deemed to satisfy the "in custody" requirement and entitled to seek relief under that section. Applying the rationale of the federal courts, the court determined that a rule 3.850 motion is an equally appropriate procedural device by which Bolyea, a state probationer, could challenge the lawfulness of his conviction or sentence. In so doing, the justices reaffirmed the policy expressed in article I, section 13 that "habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty to any degree.

Also, in *Johnson v. State*, the defendant under a sentence of death sought relief by filing a motion under rule 3.850. The trial court denied his motion as untimely. The majority approved the trial court's decision because concern for fairness and finality require that collateral claims be filed within the time limitations imposed in the rule. In dissent, Justice Barkett argued that the writ should be available to a defendant in a capital case to raise "potentially serious errors and omissions by trial counsel" that would otherwise be denied as procedurally barred. The constitution prohibits denial of a claim because a party sought an improper remedy. For that reason, she would have considered the rule 3.850 motion as a petition for writ of *habeas corpus* and remanded for an evidentiary hearing.

**14. Pretrial release and detention**

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption of guilt is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained. *Fla. Const. art. I, § 14.*

There is no absolute right to bail, under either this section or the eighth amendment. The plain language of article I, section 14 indicates that the adopters intended to grant additional personal rights not recognized in the Constitution of 1885, rather than to limit an accused's right to obtain release once charged with a capital offense. For that reason, a unanimous court in *State v. Arthur* held that a trial court may consider evidence from an accused to grant or deny bail...
even though proof is evident or the presumption great that the accused committed a capital offense or life felony. On balance, the state's interest in assuring the accused's presence at trial, though "extremely important," was outweighed by the accused's liberty interest.

Before Arthur, Florida followed a line of cases that placed on the accused the burden of showing that he or she was entitled to bail. Arthur rejected those cases and held that the state must show that an accused is not entitled to bail because the presumption of an accused's innocence is implicit within article I, section 14. This is consistent with the predominant view among states with constitutional provisions similar to that section.

This section was also addressed in LaRue v. State, where the court overturned a statute that provided for the assessment of a five percent surcharge on bail bonds. The surcharge was to be deposited in a fund to compensate victims of crimes. The court reasoned that the sole purpose of bail is to assure the accused's attendance at trial and the statute was unrelated to that purpose. It added that the statute also failed to further the operation of the bail bond system and imposed an unjustified expense upon defendants later proved to be innocent.

15. Prosecution for crime; offenses committed by children

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law. FLA. CONST. art. I, § 13.

482. Id. at 718-19.
483. Id. at 719.
484. Id. at 720.
485. 397 So. 2d 1136 (Fla. 1981).
487. LaRue, 397 So. 2d at 1137.
488. Subsection (a) generally follows the 1885 version. Subsection (b) has no counterpart in the 1885 version. D'Alembert, supra note 14, vol. 25A at 337.
489. This section is closely related to the sixth amendment, which is made obligatory on the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).
490. FLA. CONST. art. I, § 16(b) (amended 1988). The court has had no occasion to construe this amendment. The legislative scheme to implement the provisions of this section appears in FLA. STAT. § 960.001 (1989). It is a matter of "moral responsibility," the legislature has declared, that "aid, care, and support be provided by the state" to victims of crimes. FLA. STAT. § 960.02 (1989).
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16. Rights of accused and victims

Article I, section 16 was amended during the decade. Initially, the section read:

[(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law. FLA. CONST. art. I, § 16 (1968 revision).]

In the general election of November 1988, article I, section 16 was amended to add the following subsection:

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Article I, section 16(a) spells out many of the substantive and procedural guarantees afforded to persons accused of crimes. The cases called into question many of the specific guarantees.

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490. FLA. CONST. art. I, § 16(b) (1968) (amended 1988). The court has had no occasion to construe this amendment. The legislative scheme to implement the provisions of this section appears in FLA. STAT. § 960.001 (1989). It is a matter of "moral responsibility," the legislature has declared, that "aid, care, and support be provided by the state to victims of crimes. FLA. STAT. § 960.02 (1989).
a. Confrontation

Like its sixth amendment counterpart, the right “to confront at trial adverse witnesses” assures the opportunity to cross-examine opposing witnesses. In Glendening v. State,\textsuperscript{491} the defendant was charged with sexual battery upon his daughter, who was nine-and-one-half years old. The state wanted to videotape the daughter’s testimony and the trial court granted the state’s motion, relying on a statute that permits the videotaping of a victim in a sexual abuse or child abuse case, who is under the age of sixteen, if there is “a substantial likelihood . . . [of] at least moderate emotional or mental harm” that would occur by requiring the victim to testify in open court.\textsuperscript{492} The court concluded that statute did not violate the right of confrontation under the Florida Constitution because the videotape permitted the jury to view the witness, to judge demeanor, and to decide his or her believability. Moreover, the defendant was permitted a full cross-examination during the deposition, thus functionally serving the purpose of the confrontation clause.\textsuperscript{493}

b. Representation

The right “to be heard in person, by counsel or both” was topic of four opinions. Those opinions teach that right to self-representation is qualified, not absolute. Once counsel has been appointed, an accused is not entitled to represent himself,\textsuperscript{494} yet a criminal defendant is entitled to have access to his or her attorney during a trial recess, “no matter how short the duration.”\textsuperscript{495} Once adversary proceedings have begun, an accused is entitled to assistance of counsel. For that reason, deputys who elicited an ununcounsel statement from an indicted defendant during his extradition to Florida violated that right and the statement was inadmissible.\textsuperscript{496}

Finally, a defendant in a criminal proceeding is entitled to effective legal representation. To succeed upon a claim that counsel was not effective, the defendant must file an effective pleading. That pleading must allege the specific omission or commission and demonstrate that the error fell below professional standards and worked to his or her prejudice.\textsuperscript{497}

c. Trial by jury

A majority of the justices has twice agreed that the right to a trial by jury is not absolute. In Whirley v. State,\textsuperscript{498} the court adopted the federal petty crime exception\textsuperscript{499} and found that violations of the state’s drunk driving law did not entitle the accused to a jury trial. This was so because the legislature had not provided for a sentence exceeding six-months’ imprisonment. Justice Shaw concurred specially to hypothesize that the right to a jury trial under the corresponding provision of the sixth amendment should entitle an accused to a trial by jury regardless of the length of incarceration.\textsuperscript{500} Justice Boyd dissented and adopted a literal interpretation of the state constitution which would have extended the unqualified right to trial by jury in all criminal prosecutions.\textsuperscript{501}

The following year, in Reed v. State,\textsuperscript{502} the court reaffirmed the established principle that the right exists in those cases in which the right was recognized at the time Florida’s first constitution was

\textsuperscript{491} 536 So. 2d 212 (Fla. 1988).
\textsuperscript{492} Fla. Stat. § 92.53 (1985).
\textsuperscript{493} Glendening, 536 So. 2d at 217, cert. denied, 108 S. Ct. 1234 (1988) (citing Kentucky v. Stincer, 482 U.S. 730 (1987)). It bears noting that the statute under review requires an individualized determination that video taping was necessary to avoid the child witness’ suffering emotional or mental harm. Id. at 218.
\textsuperscript{494} State v. Tait, 387 So. 2d 338, 340 (Fla. 1980) (unanimous) (recognizing that the sixth amendment does not guarantee an accused the right to personally defend against prosecution and equally have assistance of counsel).
\textsuperscript{495} Bova v. State, 410 So. 2d 1343 (Fla. 1982). The court went on to conclude that the error was harmless due to the overwhelming evidence of Bova’s guilt. Id. at 1345.
\textsuperscript{496} Anderson v. State, 420 So. 2d 574 (Fla. 1982) (per curiam). Anderson was decided upon sixth amendment grounds, although the solitary reference to article I, section 16 clearly reflects that an accused is entitled to counsel after adversarial proceedings have began. The opinion also suggests that admitting the statements into evidence violate the protections of article I, section 9 against compelled self-incrimination. Id. at 577 (McDonald, J., concurring).
\textsuperscript{497} Christopher v. State, 416 So. 2d 450, 453-54 (Fla. 1982) (unanimous) (applied standard for ineffectiveness adopted in Knight v. State, 394 So. 2d 997 (Fla. 1981)).
\textsuperscript{498} 450 So. 2d 836 (Fla. 1984).
\textsuperscript{499} Baldwin v. New York, 399 U.S. 66 (1970) (differentiated serious and petty offenses by looking to the severity of the possible penalty. If the potential penalty exceeded six-months’ imprisonment, then the crime could not be regarded as petty and the offender was entitled to a jury trial.).
\textsuperscript{500} Whirley, 450 So. 2d at 840 (Shaw, J., specially concurring).
\textsuperscript{501} Id. (Boyd, J., dissenting).
\textsuperscript{502} 470 So. 2d 1382 (Fla. 1985).
Like its sixth amendment counterpart, the right "to confront at trial adverse witnesses" assures the opportunity to cross-examine opposing witnesses. In Glending v. State, the defendant was charged with sexual battery upon his daughter, who was three-and-one-half years old. The state wanted to videotape the daughter’s testimony and the trial court granted the state’s motion, relying on a statute that permits the videotaping of a victim in a sexual abuse or child abuse case, who is under the age of sixteen, if there is "a substantial likelihood . . . [of] at least moderate emotional or mental harm" that would occur by requiring the victim to testify in open court. The court concluded that statute did not violate the right of confrontation under the Florida Constitution because the videotape permitted the jury to view the witness, to judge demeanor, and to decide his or her believability. Moreover, the defendant was permitted a full cross-examination during the deposition, thus functionally serving the purpose of the confrontation clause.

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d. Speedy trial

The right to a "speedy" trial under article I, section 16 is neither unwavering nor self-executing. In Johnson v. State, the court rejected Johnson's claim that the trial court should have dismissed the murder charges against him because he was not brought to trial within the 120-day limits specified under the Interstate Agreement on Detainers. Johnson had agreed to a continuance of his original trial date and failed to raise the issue in the trial court.

e. Public trial

The right to a "public" trial may yield to the right to a fair trial, which is said to be "the most fundamental of all freedoms." Florida Freedom Newspapers, Inc. v. McCrary considered whether the trial court violated the first and sixth amendments by prohibiting the public disclosure of certain court records and public comment on the evidence. One order prevented disclosure of pretrial discovery information that was furnished by the state attorney to two jailers who were charged with criminal mistreatment of prisoners. The court held that there was "cause" to restrict public access to judicial public records and there existed no first amendment right of access to those materials. The other order prevented comment by counsel, which the court held was an acceptable alternative to restraint.

503. Id. (citing State v. Webb, 335 So. 2d 826, 828 (Fla. 1976)).
504. Id. at 1385-87 (Shaw, J., concurring specially).
505. Id. at 1387 (Boyd, J., concurring in result).
507. Id. at 196.
509. 520 So. 2d 32 (Fla. 1988).
510. Id. at 35 (applying Fla. R. Crim. P. 3.220(h)).
511. Id. (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).
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f. Venue

The right to be tried "in the county where the crime was committed" makes venue an essential element of any criminal charge. Failure to allege venue in the indictment renders the instrument fundamentally defective and void, even though the allegation is subsequently supplied by a bill of particulars and the defendant is not prejudiced by the omission.

A defendant's entitlement to a trial in the county of the crime does not require that the court select jurors from the county at-large. This section is not violated when prospective jurors are selected from a jury district within the county. The court's approval of jury districts under article I, section 16 operates with the caveat that the jury selection procedures may not systematically exclude an identifiable racial group.

g. Impartiality

Most often litigated among the article I, section 16 decisions are those relating to the exercise of peremptory challenges in criminal cases. Construing the right to "trial by impartial jury," the court in Thomas v. State found that the trial court twice violated Thomas's right to an impartial jury. First, the parties had stipulated to sixty-six

503. Id. (citing State v. Webb, 335 So. 2d 826, 828 (Fla. 1976)).
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511. Id. (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).
512. Id. at 37 (Barkett, J., concurring in result only).
513. 405 So. 2d 971 (Fla. 1981).
514. State v. Black, 385 So. 2d 1372 (Fla. 1980).
516. Id. The court upheld an equal protection challenge to Palm Beach Country's jury districting procedure. See supra notes 77-79 and accompanying text.
peremptory challenges in exchange for which Thomas agreed not to move for severance of the consolidated offenses. The stipulation was accepted by the presiding judge at the pretrial conference. At trial, before another judge, Thomas was limited to sixteen peremptory challenges, the amount permitted in the rules after the offenses had been consolidated. The reduction of the number of peremptories under these circumstances was reversible error. In addition, the exhaustion of peremptories prevented Thomas from challenging a juror who admitted that he could not “recommend any mercy” during the penalty phase of the capital trial. The juror’s refusal to weigh the mitigating factors evidenced bias and the court’s subsequent failure to excuse for cause violated Thomas’s right to an impartial jury under section 16.\textsuperscript{168}

Peremptory challenges are primarily intended to aid the selection of an impartial jury, but have no constitutional basis. Nonetheless, a party may not exercise peremptories to remove prospective jurors solely on account of race. In \textit{State v. Neil},\textsuperscript{169} a black defendant was convicted by a jury after the state had used its peremptories to remove the first three blacks called. By a four-to-three split decision, the justices remanded for a new trial because they could not determine from the record whether the state’s exercises were improperly motivated. The majority announced the following test as necessary to protect a defendant’s rights to an impartial jury under article I, section 16:

\begin{quote}
the initial presumption is that peremptories will be exercised in an nondiscriminatory manner. A party concerned about the other side’s use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective juror’s race.\textsuperscript{169}
\end{quote}

\textsuperscript{168} Id. at 375.

\textsuperscript{169} 457 So. 2d 481 (Fla. 1984) (McDonald, J., Overton, Ehrlich, and Shaw, JJ.).

In so doing, the court enhanced Florida’s protections beyond those provided under the equal protection clause of the fourteenth amendment. \textit{Swain v. Alabama} stated the then-prevaling federal standard, which prohibited the state from purposefully or deliberately denying to blacks for reasons of race their participation as jurors without violating the equal protection guarantees of a black defendant.\textsuperscript{168} Under \textit{Swain}, the prosecution was presumed to have exercised challenges in an impartial manner and the defendant was required to show that the prosecutor systematically used peremptory challenges to strike blacks over a period of time.\textsuperscript{168}

Although \textit{Neil} was held to be non-retroactive,\textsuperscript{169} the court later clarified in \textit{State v. Castillo}\textsuperscript{170} that defendants whose cases were pending on direct appeal at the time \textit{Neil} became final were entitled to rely on its holding.

Refinements to the \textit{Neil} test were fashioned in the several decisions that followed. \textit{Blackshear v. State}\textsuperscript{171} concluded that a \textit{Neil} hearing must be conducted timely, during \textit{voir dire}. Only in so doing does the trial judge have the ability to observe and place on the record matters relevant to the charge of discrimination.\textsuperscript{171} The concern for procedural regularity was also the focus of \textit{State v. Sloppy}.\textsuperscript{172} There, defense counsel objected after the prosecutor used four of the six peremptories

\begin{itemize}
\item 521. 380 U.S. 202, 203-04 (1965).
\item 522. Id. at 227. The Court revisited \textit{Swain v. Alabama}, 380 U.S. 202 (1965), in \textit{Baton v. Kentucky}, 476 U.S. 79 (1986), and overruled its test. In its place, \textit{Baton} announced the \textit{prima facie} requirements for showing discriminatorily exercised peremptory challenges. The defendant must show that he or she is a member of a cognizable racial group and that the prosecutor exercised peremptories to remove prospective jurors within that group. These facts, together with other relevant circumstances, raise an inference that the prosecutor excluded veniremen on account of race. Once the defendant makes a \textit{prima facie} showing, the burden shifts to the prosecution to articulate a neutral explanation related to the particular case to be tried. \textit{Id. at 96-98 (citations omitted)}. In the clashes between state and federal constitutional jurisprudence, \textit{Baton} represents a victory for the states. \textit{Id. at 82 n.1} (acknowledging that the decisions of five state courts, \textit{Neil} among them, helped to convince the Court that the use of peremptories to strike black jurors may violate the sixth amendment). For other illustrations of state court “experimentation” accepted by federal courts, see \textit{Gormley, Ten Adventures in State Constitutional Law, 1 EMERGING ISSUES ST. CONST. L. 29, 46-50 (1988).}
\item 523. \textit{Neil}, 457 So. 2d at 488.
\item 524. 486 So. 2d 365 (Fla. 1986) (unanimous).
\item 525. 521 So. 2d 1083 (Fla. 1988).
\item 526. Id. at 1084. \textit{See also} \textit{Stokes v. State}, 548 So. 2d 188, 196 (Fla. 1989).
\item 527. 522 So. 2d 18 (Fla.)), cert. denied, 108 U.S. 2873 (1988).
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518. Id. at 375.
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520. Id. at 486-87.

In so doing, the court enhanced Florida's protections beyond those provided under the equal protection clause of the fourteenth amendment. Swain v. Alabama stated the then-prevailing federal standard, which prohibited the state from purposefully or deliberately denying to blacks for reasons of race their participation as jurors without violating the equal protection guarantees of a black defendant.91 Under Swain, the prosecution was presumed to have exercised challenges in an impartial manner and the defendant was required to show that the prosecutor systematically used peremptory challenges to strike blacks over a period of time.92

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522. Id. at 227. The Court revisited Swain v. Alabama, 380 U.S. 202 (1965), in Batson v. Kentucky, 476 U.S. 79 (1986), and overruled its test. In its place, Batson announced the prima facie requirements for showing discriminately exercised peremptory challenges. The defendant must show that he or she is a member of a cognizable racial group and that the prosecutor exercised peremptories to remove prospective jurors within that group. These facts, together with other relevant circumstances, raise an inference that the prosecutor excluded veniremen on account of race. Once the defendant makes a prima facie showing, the burden shifts to the prosecutor to articulate a neutral explanation related to the particular case to be tried. Id. at 96-98 (citations omitted). In the clashes between state and federal constitutional jurisprudence, Batson represents a victory of sorts for the states. Id. at 82 n.l. (acknowledging that the decisions of five state courts, Neil among them, helped to convince the Court that the use of peremptories to strike black jurors may violate the sixth amendment). For other illustrations of state court "experimentation" accepted by federal courts, see Gormley, Ten Adventures in State Constitutional Law: 1 EMERGING ISSUES ST. CONF. L. 29, 46-50 (1988).
523. Neil, 457 So. 2d at 488.
524. 486 So. 2d 565 (Fla. 1986) (unanimous).
525. 521 So. 2d 1083 (Fla. 1988).
526. Id. at 1084. See also Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989).
to strike black veniremen. The prosecutor explained that two of the jurors were teachers, which assertedly indicated a degree of "liberalism" unfavorable to the state.

To permit the strikes to stand, four justices agreed that the trial judge was required to conclude that the proffered reasons advanced by the prosecutor are both reasonable and not pretextual.88 They also agreed that one or more of the following factors tended to show a strong "likelihood" of racial discrimination under the Neil test, in that the prosecutor's reasons lack record support or were a pretext:

(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to [a] juror who [was] not challenged.88

The court conceded that the prosecutor's explanation was both race-neutral and reasonable. However, it found that there was no record support for the explanation because the prosecutor failed to ask questions that would demonstrate that the asserted "liberalism" actually existed.88

In another decision, the court rejected the prosecutor's explanation because it was not based on the facts of the case and was unrelated to the parties or witnesses.88 Similarly, "unsupported speculation" that the actual venireman harbored prejudice due to the general circumstances of blacks during the 1950s lacks the required racial neutrality to sustain the strike.88

Black defendants are not the only individuals with standing to object to discriminatory selection of veniremen. In Kibler v. State,88 a white defendant challenged the trial court's refusal to dismiss the jury because the prosecutor struck all three blacks from the venire. The court held that it is unnecessary that the defendant be of the same race as the jurors challenged by the state. It was careful to note, however, that the respective races of the defendant and jurors may be relevant to ascertain group bias.88 Kibler's conviction was reversed and the case remanded because the court was unable to determine whether the trial judge had found that the challenges were exercised solely on account of racial bias.

In another standing decision, the court decided in Torres v. State88 that a white defendant represented by a black attorney could challenge the prosecution's exercise of peremptories to strike blacks from the panel.

Then in Cook v. State,88 the defendant in a capital trial sought to have excused for cause two jurors who expressed an inability to fully comprehend the English language. A majority of the court determined that the trial judge was satisfied that each had an adequate comprehension of English and added that "[w]e are in no position to say that he was wrong."88 In Cook, however, there is support for the view that the right to an impartial jury embraces any characteristic that might affect a juror's ability to function as a reasonable juror, such as linguistic competence.88 For that reason, Justice Barkett argued that Florida ought to adopt the identical standard used to gauge juror bias—whether "there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced."88 If there is reasonable doubt, the defendant is entitled to the benefit of the doubt and the juror should be excused for cause.

Neil, Blackshear, and Slappy all determined that a defendant's right to an impartial jury assured under article I, section 16 prohibited the prosecution from exercising peremptories in a racially discriminatory manner. Batson v. Kentucky, upon which Slappy partially relied, determined that a defendant's protections against the state's racially discriminatory selection practices was rooted in the equal protection

528. Id. at 22 (Barkett, Ehrlich, Shaw, and Grimes, JJ.).
529. Id. (citation omitted).
530. Id. at 23-24. Contra Holland v. Illinois, 110 S. Ct. 803 (1990) (holding that the sixth amendment's "right to be tried by a representative cross section of the community" does not protect a defendant against the prosecution's racially motivated use of peremptories).
533. 546 So. 2d 710 (Fla. 1989).
534. Id. at 712.
535. 548 So. 2d 660 (Fla. 1989).
536. 542 So. 2d 964 (Fla. 1989) (per curiam).
537. Id. at 970.
538. Id. at 972 (Barkett, J., concurring in part and dissenting in part) (Shaw and Kogan, JJ., concurring).
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clause of the fourteenth amendment. In Tillman v. State, the court decided that a defendant was likewise protected under Florida's equal protection clause.

The trial judge is integral to an "impartial jury." Whether the trial may proceed in the absence of the judge was the subject of two cases. During its deliberations, the jury in Brown v. State requested a transcript of certain witness' testimony. At the time, the judge was absent from the courthouse and both counsel contacted the judge by telephone. They agreed to deny the jury's request and that the judge need not return to the courtroom. The court found that communication with the judge during the judge's absence was reversible error under article I, section 16. It added that waiver of the judge's presence cannot be implied from the defendant's failure to timely object and that the judge could not leave the proceedings in the face of a defendant's objection.

Brown recognized that courts have permitted a defendant could waive the judge's presence during voir dire, if the waiver was knowingly and intelligently made. State v. Singletary directly addressed waiver during voir dire. The justices agreed that the trial judge's role is indispensable to the selection of a jury, and therefore all juror questioning and all exercises of peremptories must occur under judicial supervision. The judge's presence during voir dire is nonwaivable.

In review, the rights protected by article I, section 16 offer a cluster of protections to persons accused of crimes. Two decisions illustrate where the protections are equivalent to those afforded under the federal constitution—Whirley adopted the federal petty crimes exception, thereby declining to extend the right to a jury trial to crimes punishable by less than six-months' incarceration; and Florida Freedom Newspapers, Inc. applied federal precedent to uphold a trial court gag order on comment by counsel.

The centerpiece of this section is the court's 1984 decision Neill v. State. A majority of four justices agreed that an essential component of a defendant's right to trial by an "impartial jury" was a racially unbiased jury selection procedure. The series of cases that followed assured Neil's continuing import.

In 1988, the voters amended article I, section 16 to elevate to constitutional stature the right of victims of crime "to be informed, to be present, and to be heard" during the course of criminal proceedings.

17. Excessive punishments

Excessive fines, cruel or unusual punishment, attainer, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. Fla. Const. art. I, § 17.

The federal protection against cruel or unusual punishment appears in the eighth amendment. In capital cases, the eighth amendment requires an individualized sentencing determination that takes into account "the character and record of the individual offender and the circumstances of the particular offense." In noncapital cases, individualized sentencing reflects an enlightened policy rather than a constitutional imperative. As most claims of "cruel and unusual punishment" are waged on eighth amendment grounds, it is no surprise that only two decisions expressly addressed the nature of Florida's constitutional protection. The state may require a person convicted of a capital felony to serve a minimum twenty-five years before becoming eligible for parole. There is no constitutional violation because the statutory authority operates without regard to the circumstances of the crime or character of the defendant. Likewise, the court held in State v. Benitez that a minimum mandatory sentence imposed in a drug trafficking statute is not invalid because it eliminates the exercise of discretion by the sentencing judge. Although the penalties imposed

540. 522 So. 2d 14 (Fla. 1988) (per curiam).
541. 538 So. 2d 833 (Fla. 1989) (unanimous).
542. Id. at 834. The presence of the judge is a fundamental right that can be waived "only in limited circumstances and then only by a fully informed and advised defendant, and not by counsel acting alone." Id. at 835.
543. Id.
544. Id. (citing Carter v. State, 512 So. 2d 284 (Fla. 3d Dist. Ct. App. 1987)).
545. 549 So. 2d 996 (Fla. 1989).
546. Id. at 999.
547. See also Fla. Const. art. I, § 10 (prohibiting the legislature from passing a bill of attainder).
549. The eighth amendment's prohibition against cruel and unusual punishment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660, 666 (1962).
550. McArthur, 351 So. 2d at 975-76 (construing Fla. Stat. § 775.021(I) (1973)).
551. 395 So. 2d 514 (Fla. 1981) (construing Fla. Stat. § 893.135 (1979)).
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under that statute were “severe,” they were not cruel and unusual under either the state or federal constitutions. Left for another day was the issue whether in an extreme case a mandatory minimum sentence could be so “grossly disproportionate to the severity of the crime” as to be cruel and unusual.844

A second reference to the prohibition against “cruel and unusual punishment” appears in Justice Barkett’s dissent in LeCroy v. State.848 LeCroy, who was seventeen at the time he murdered a husband and wife on a camping trip, had his death penalties affirmed by a six-member majority of the court. Justice Barkett concurred as to guilt but dissented as to the death penalty for the reason that it violated both article I, section 17, and the eighth amendment. She pointed to Florida statutory protections of persons under the age of seventeen, noting for instance, that they are considered minors and may not be sued. As a result of their lack of mature judgment, the state withholds corresponding benefits and privileges, such as the right to vote, to serve on a jury, to possess alcoholic beverages, to contract, and to wager. The rationale for those restrictions, she argued, equally compels withholding the imposition of the ultimate penalty.849

She added that the statute authorizing the death penalty for juvenile offenders848 lacked constitutionally required standards. There is no objective means to distinguish between cases when execution is presumed proper and those when no such presumption exists.848 The LeCroy dissent does not suggest that article I, section 17 creates protections beyond those derived from the eighth amendment.

This section also prohibits courts from sentencing defendants to terms of “indefinite imprisonment.” Harmon v. State850 addressed this protection. The trial court had sentenced Harmon to six consecutive one hundred year sentences, and retained jurisdiction over one-third of each sentence. The total retention period was two hundred years. Harmon argued that the retention of jurisdiction for a third of a life sentence violated the prohibition against indefinite sentences. There was nothing indefinite about the term of imprisonment, the court deter-

552. Id. at 518 (emphasis in the original).
554. Id. at 758-59 (Barkett, J., concurring in part, dissenting in part).
555. Fla. Stat. § 39.02(5)(a) (1987) (provides that a child of any age who is charged with a capital offense “shall be tried and handled in every respect as if he were an adult.”).
556. LeCroy, 533 So. 2d at 760.
557. 438 So. 2d 369 (Fla. 1983).

mined, because the trial court actually imposed consecutive sentences of definite terms of imprisonment while retaining jurisdiction over a third of that total.

Harmon also contended that a two-hundred-year sentence was greater than if the trial court had imposed a life sentence, and thus violated the statutory maximum. A person’s life expectancy does not establish the outer limit of a permissible sentence. The court explained that one who commits several first-degree capital felonies has no ground to complain about expiring in prison.844

18. Administrative penalties

No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law. Fla. Const. art. I, § 18.868

The court never directly addressed this section during the survey period, however, it approved a district court opinion that did. The district court in Broward County v. La Rosa869 considered the Broward County Human Rights Ordinance that created an administrative board to hear and determine complaints of illegal discrimination. Upon a finding of “discriminatory practice,” the board was authorized to “take such affirmative action as in the judgment of the board or panel will carry out the purposes of [the ordinance],” such as the “[p]ayment to the complainant of actual damages for injury including compensation for humiliation and embarrassment suffered as a direct result of a discriminatory practice.”

The board found La Rosa, an apartment owner, in violation of the ordinance for refusing to rent to a prospective black tenant, and ordered him to pay $4000 as compensation for humiliation and embarrassment. La Rosa appealed to the circuit court, which granted summary judgment in his behalf and declared the ordinance invalid under article I, section 18. The district court agreed. The court applied a broad definition of “penalty” to bring within the scope of protection the board’s assessment of compensation: “The term penalty involves the

558. Id. at 370-71.
559. The power to imprison rests within the exclusive province of the judicial branch. D’Alemberte, supra note 14, vol. 25A at 410.
560. 484 So. 2d 1374 (Fla. 4th Dist. Ct. App. 1986).
561. Id. at 1375 (citation omitted).
under that statute were "severe," they were not cruel and unusual under either the state or federal constitutions. Left for another day was the issue whether in an extreme case a mandatory minimum sentence could be so "grossly disproportionate to the severity of the crime" as to be cruel and unusual.\(^{552}\)

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idea of punishment and its character is not changed by the mode in which it is inflicted, whether by civil action or criminal prosecution.

Although it commended the county's moral commitment to eliminate invidious discrimination, the district court held that the county's ordinance violated article I, section 18 because local governments were powerless to create administrative agencies to award money damages in the absence of legislative agency. The Supreme Court of Florida approved the opinion of the district court and then held that the ordinance violated both article I, section 22 (right to jury trial) and article II, section 3 (separation of powers). Except for an acknowledgement that the district court had struck down the ordinance under article I, section 18, there is no mention in the court's opinion of the administrative penalties provision of the Florida Constitution. The omission may have been inadvertent. It is also possible that court regarded the infringement of La Rosa's right to a jury trial and the violation of the separation of powers provision to be the more compelling constitutional infirmities.

19. Costs

No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final. Fla. Const. art. I, § 19.

No decisions construed this section during the survey period.

20. Treason

Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court. Fla. Const. art. I, § 20.

562. Id. at 1376 (quoting United States v. Chouteau, 102 U.S. 603 (1880)).
563. Id. at 1377-78. Without expressly relying upon article I, section 22 (right to a jury trial) and article II, section 3 (separation of powers), the opinion fairly supports the conclusion that the district court also found the challenged ordinance to be in violation of those sections as well.
564. Broward County v. La Rosa, 505 So. 2d 422 (Fla. 1987) (unannounced).
565. See also U.S. Const. art. I, § 3, cl. 1 (treason against the United States).

567. There are various sources of the federal right of access to courts, including the provision permitting petition for redress of grievances in the first amendment, the due process clauses of the fifth and fourteenth amendments, the speedy and public trial guarantees in the sixth amendment, and the privileges and immunities and equal protection clauses of the fourteenth amendment. Id. at 871-72. Noteworthy among the federal decisions is Boddie v. Connecticut, 401 U.S. 371 (1971), in which a class of welfare recipients challenged a Connecticut statute that imposed certain costs upon the filing of divorce actions. The Court concluded that the state's refusal to admit those individuals to its courts, the exclusive means for obtaining a divorce in the state, denied them an opportunity to be heard under the due process clause of the fourteenth amendment. Id. at 381-82. Although article I, section 21, has not yet been held to prohibit the state's denial of access to an exclusive judicial procedure on account of inability to pay, the section would support such a holding. Doe, supra note 11, 617-18.
idea of punishment and its character is not changed by the mode in which it is inflicted, whether by civil action or criminal prosecution. 567

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568. Broward County v. La Rosa, 505 So. 2d 422 (Fla. 1987) (summarized).

569. See also U.S. Const. art. 3, § 3, cl. 1 (treason against the United States).

No decisions construed this section during the survey period.

21. Access to courts

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. Fl. Const. art. I, § 21.

The framers of the federal constitution gave no expression to the right of access to the courts. Express incorporation was unnecessary because they perceived it as an integral part of the common law. 567 The lack of an express textual basis has proved to be no impediment to finding the right implied within the various amendments, although the precise nature and source are subject to debate. 568

With the exception of the “Reconstruction” Constitution of 1868, Florida has incorporated an express, freestanding right of access in each of its constitutions. 569 An expressly declared right offers the immediate advantage of avoiding debate over its source and the level of protection that it deserves. The court regards article I, section 21 as a “constitutions mandate,” deserving an “exacting standard” that reflects no federal counterpart, and derives its scope and meaning solely from Florida caselaw. 570

The vast majority of cases this decade dealt with legislative tort reform strategies directed at Florida’s insurance liability crisis. On the legislative agenda were reforms to laws involving insurance, medical
malpractice, and workers' compensation. The 1973 seminal decision, Kluger v. White, was central to many article I, section 21 cases, in those broad areas of reform. Kluger and the cases that followed it are treated in the upcoming subsection. The legislature also focused upon product liability, in particular, by establishing a time bar on recovery. The statute of limitation and statute of repose were the object of the court's attention this period and the topic deserves treatment in a separate subsection.

a. Kluger v. White

Kluger was injured in an automobile accident, and sought damages from her insurance carrier and the driver of the other car. The trial court dismissed her claim under Florida's no-fault insurance law. That law effectively abolished the right to sue in tort for property damage in automobile accident cases and required claimants to look to their own insurance carriers for recovery of property damage claims unless they had declined to purchase property damage insurance and had suffered property damage in excess of $550. By establishing a minimum threshold of $550, the no-fault law left Kluger without a remedy—although Kluger had declined property damage protection, she was unable to satisfy the statute's second requirement because her damages were limited to the $250 fair market value of her car.

On appeal, Kluger presented a novel argument and claimed that the legislature could not bar the constitutional guarantee of a "redress of any injury" without providing an alternative protection. A four-justice majority agreed, and crafted a heightened level of judicial scrutiny to be applied to legislation that eliminates an established tort recovery.

We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abatement of such right, and no alternative method of meeting such public necessity can be shown.

The negligence cause of action, the court wrote, was an enduring tradition that predated the 1968 constitutional revision and traced its lineage to English common law. Even so, the demands of society and the "ever-evolving character of the law" may on occasion justify the abolition of such an established right of action. However, the legislature here provided no "reasonable alternative" protection to plaintiffs whose damages were less than $550. Moreover, the legislature failed to demonstrate an "overpowering public necessity" for totally abolishing Kluger's right of access and there existed "no alternative method of satisfying a necessity if one existed."

As it had in Kluger, the court in Chapman v. Dillon addressed whether Florida's no-fault insurance law provided a "reasonable alter-

570. 281 So. 2d 1 (Fla. 1973).
573. Florida has applied the common law of England since November 6, 1829. "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." Fla. Stat. § 2.01 (1987).
574. Kluger, 281 So. 2d at 4.
575. Id. at 4-5. Not all states share Florida's high regard for their respective access to courts provisions and accord lesser levels of protection through less demanding levels of judicial scrutiny. See Comment, State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 Wash. L. Rev. 203, 208-11 (1989).
576. 415 So. 2d 12 (Fla. 1982) (Boyd, Overton, Alderman, and McDonald, JJ; Sundberg, C.J., concurred in part and dissented in part).
malpractice, and workers’ compensation. The 1973 seminal decision, *Kluger v. White*,749 was central to many article I, section 21 cases, in those broad areas of reform. *Kluger* and the cases that followed it are treated in the upcoming subsection. The legislature also focused upon product liability, in particular, by establishing a time bar on recovery. The statute of limitation and statute of repose were the object of the court’s attention this period and the topic deserves treatment in a separate subsection.751

a. *Kluger v. White*

*Kluger* was injured in an automobile accident, and sought damages from her insurance carrier and the driver of the other car. The trial court dismissed her claim under Florida’s no-fault insurance law.752 That law effectively abolished the right to sue in tort for property damage in automobile accident cases and required claimants to look to their own insurance carriers for recovery of property damage claims unless they had declined to purchase property damage insurance and had suffered property damage in excess of $550. By establishing a minimum threshold of $550, the no-fault law left Kluger without a remedy—although Kluger had declined property damage protection, she was unable to satisfy the statute’s second requirement because her damages were limited to the $250 fair market value of her car.

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We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to Fla. Stat. § 2.01, F.S.A. [753] the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. 754

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570. 281 So. 2d 1 (Fla. 1973).


572. FLA. STAT. § 627.738(5) (1971) (“an owner who has elected not to purchase insurance with respect to property damage to his motor vehicle may maintain an action in tort therefore against the owner, registrant, operator or occupant of a motor vehicle causing such damage if such damage exceeds five hundred and fifty dollars . . . .”).

573. Florida has applied the common law of England since November 6, 1829. “The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.” FLA. STAT. § 2.01 (1987).

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575. Id. at 4-5. Not all states share Florida’s high regard for their respective access to courts provisions and accord lesser levels of protection through less demanding levels of judicial scrutiny. See Comment, State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 WASH. L. REV. 203, 208-11 (1989).

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tangible injuries for which the legislature had provided no reasonable alternative.\textsuperscript{159}

Smith v. Department of Insurance\textsuperscript{160} addressed whether the Tort Reform and Insurance Act of 1986 could permissibly limit noneconomic damages to $450,000.\textsuperscript{160} The parties agreed that at the time that "the current" Florida Constitution was adopted, there was no upper limit placed upon the recovery of noneconomic damages. The department argued that the legislature did not abolish a cause of action, but merely capped the damages. Finding that there was no distinction between the legislature's establishing a minimum threshold on economic damages, as in Kluger, and its establishing a ceiling for noneconomic damages, as in Smith, the court determined that Kluger directly controlled the outcome.

The justices rejected the department's argument for two reasons. First, the legislature's ceiling on noneconomic damages failed to survive Kluger in that there was neither a showing of an "overpowering public necessity" nor an "alternative method of meeting such public necessity."\textsuperscript{161} Moreover, the ceiling on recovery was arbitrary. The court reasoned that a plaintiff who receives a jury verdict greater than $450,000 will not, under the legislature's cap, be assured redress for injury as guaranteed under article I, section 21 and the cap therefore violates that section. At the same time, the plaintiff would be denied the coordinate right to a jury trial, assured under article I, section 22.\textsuperscript{162}

Smith next addressed whether the act's modification to the doctrine of joint and several liability violated article I, section 21.\textsuperscript{163} The act provided that the court was to enter judgment on the basis of a party's percentage of fault, not on the basis of the doctrine of joint and several liability. The act provided three categories of exceptions that

\textsuperscript{157} FLA. STAT. § 627.737(2) (1979):

\begin{itemize}
  \item A plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:
    \begin{itemize}
      \item Significant and permanent loss of an important bodily function.
      \item Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
      \item Significant and permanent scarring or disfigurement.
      \item Death.
    \end{itemize}
\end{itemize}

\textsuperscript{158} Chapman, 415 So. 2d at 17 (quoting Lasky v. State Farm Ins. Co., 296 So. 2d 9, 14 (Fla. 1974)). Lasky upheld a provision of the no-fault law that created an exemption from tort liability for intangible injuries in those circumstances where the claimant failed to reach a $1,000 threshold amount of "reasonable and necessary medical expenses." Lasky, 296 So. 2d at 14-15. The results in Kluger and Lasky are explained in part because the offending statute in Kluger denied all right of recovery for certain property damage, whereas Lasky denied recovery for a limited class of intangible damages. Id.

\textsuperscript{159} Chapman, 415 So. 2d at 19 (Overton, J., concurring).

\textsuperscript{160} Id. (Sundberg, C.J., concurring in part and dissenting in part; Adkins, J., concurring).

\textsuperscript{161} 507 So. 2d 1080 (Fla. 1987) (per curiam).

\textsuperscript{162} Ch. 86-160, § 59, 1986 Fla. Laws 695, 755 ("In any action to which this part applies, damages for noneconomic losses to compensate for pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonepecuniary damages may be awarded to each person entitled thereto. Such damages may not exceed $450,000.").

\textsuperscript{163} Smith, 507 So. 2d at 1089 (quoting Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)).

\textsuperscript{164} Id. at 1088-89.

\textsuperscript{165} Ch. 86-160, § 60, 1986 Fla. Laws 695, 755-56.
native" to the traditional tort action. At issue was the legislature’s restriction on recovery for pain and suffering, caused by a vehicular accident, to those injuries resulting in permanent loss or death. Dillon sought damages for pain and suffering for his nonpermanent injuries and argued that the threshold requirements of permanence denied him of the right of access. The court disagreed.

Under the tort scheme, later replaced by the no-fault insurance law, recovery for intangible losses was limited to situations where the injured plaintiff could prove fault. Under the no-fault law, all motor vehicle owners were required to maintain security for payment, regardless of fault. The court was satisfied that the legislature, by requiring vehicle owners to maintain no-fault security, provided a "reasonable alternative" to the traditional tort action. Conceding that not all economic losses under the no-fault law, the justices noted that the "essential characteristic" of the no-fault law was that "the injured party is assured of [prompt] recovery of his major and salient economic losses from his own insurer." 1990

Justice Overton described the no-fault law as having reached "the absolute outer limits of constitutional parameters." 1990 In a failed effort, two other justices argued that Kluger "compelled" the conclusion that the section violated Dillon’s right of access. This was so, they believed, because there existed a common law right to redress nonpermanent intangible injuries for which the legislature had provided no reasonable alternative. 1990

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583. Smith, 507 So. 2d at 1089 (quoting Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)).
584. Id. at 1088-89.
significantly modified the abrogation. The court held that the modifications violated neither due process nor access to the courts under article I, section 21, because "that right does not include the right to recover for injuries beyond those caused by the particular defendant." The plaintiffs in Pinillos v. Cedars of Lebanon Hospital Corp. and Purdy v. Gulf Breeze Enterprises, Inc., attempted to extend Kluger by arguing that statutory set-off requirements on the limits of recovery under the Medical Malpractice Reform Act violated article I, section 21.

Pinillos involved a set-off provision in the Medical Malpractice Reform Act that required any medical malpractice judgment be reduced by amounts received from collateral sources. The act was designed to abate the professional liability insurance crisis, which was marked, in part, by escalating premiums of healthcare professionals, a retreat of insurance carriers from the industry, and spiraling costs of medical services.

The Pinillos plaintiffs argued that the classification that distinguished medical practitioners from others was arbitrary and unreasonable. The court identified the "primary question" as whether the statute violated equal protection. Because the plaintiffs failed to show that no rational basis existed to support the legislature's special consideration for healthcare providers, there was no equal protection violation. The court also rejected without discussion plaintiffs' section 21 claim. The likely rationale for that decision appears in Purdy, which was released the following month.

Four justices in Purdy agreed that the legislature could reduce the amount of damages that plaintiffs were entitled to recover from tortfeasors by the amount of the benefits that "have been paid" or that are "paid or payable" from collateral sources. Plaintiffs un-

Successfully argued that those sections abolished the common law collateral source rule that permitted recovery of the full amount of the damages regardless of the source. The court explained that at common law, the right of full recovery was subject to the insurer's equitable right of subrogation. That right was incorporated into the act to prevent double recovery. The sections, therefore, require set-off merely to prevent plaintiffs from recovering monies that "equitably speaking, belong to their insurers." The court found Kluger inapplicable because the challenged sections did not abolish any previous right of access.

Feldman v. Glucrof decided a certified question dealing with the medical practice mediation statute. It asked whether a cause of action for defamation was totally abolished by a statute that provided no cause of action for damages shall arise "if the [medical review] committee member or health care provider acts without malice or fraud." Four justices said no to the question and on grounds of mootness declined to address a second question, which asked whether the statute violated the access provision of the constitution.

Two justices would have responded to the constitutional issue. Justice Grimes was not convinced that the access to courts provision was not implicated simply because no cause of action was abolished. At the most, he wrote, the legislature conferred upon certain persons under certain circumstances an absolute privilege against liability. The provision could be sustained under Kluger because the legislature perceived an "overwhelming need" that such committees function without fear of retaliation. Justice Shaw dissented out of the belief that Feldman created an absolute bar to defamation actions and as such violated article I, section 21.

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586. Smith, 507 So. 2d 1091.
588. 403 So. 2d 1325 (Fla. 1981).
589. Fla. Stat. § 768.50 (1979). At common law, the payment for some of the costs of an accident by a source other than the defendant does not reduce the damages owed by the defendant. This is known as the collateral source rule and has been criticized as permitting a windfall to the plaintiff. Turkington, Symposium, Tort Reform: Will It Advance Justice In the Civil System?, 32 Vill. L. Rev. 1211, 1212 n.4 (1987).
590. Pinillos, 403 So. 2d at 367.

593. Purdy, 403 So. 2d at 1325. Justice Boyd wrote for the majority. He received the agreement of Justices Overton, McDonald, and Alderman on this point.
594. Id. at 1327-28.
595. Id. at 1329.
596. Id. at 1327. See also Casley v. City of Jacksonville, 403 So. 2d 379, 384-85 (Fla. 1981) (citing Kluger, 281 So. 2d at 4) (rejecting plaintiff’s claim that statutory cap on municipal liability for identified proprietary functions violated § 21 because there existed no statutory right to recover for a municipality’s negligence before the adoption of the declaration of rights).
597. 522 So. 2d 798 (Fla. 1988).
598. Id. at 799 (quoting Fla. Stat. 768.404(4) (1983) (emphasis omitted)).
599. Id. at 802 (Grimes, J., specially concurring).
600. Id. (Shaw, J., dissenting).
tion statute in Aldana v. Holub. The decision rested upon the access to courts provision and the coextensive right of due process. The statute established unalterable, jurisdictional time limitations to the end that mediation cases were to terminate ten months after the claims were filed. The problem presented by the case was the press of business in the courts prevented such claims from reaching a judicial tribunal within that time interval. As such, the statute violated article I, section 21’s guarantee of “speedy” access. Furthermore, it was “[e]qually clear” to the court that fundamental fairness required that aggrieved persons have “the right and opportunity to remedy that unfairness.” The statutory time period arbitrarily operated to deprive persons of that right. The court held the act unconstitutional in its entirety as a violation of federal and state due process protections. Aldana illustrates that a denial of the right of access may also deny the right to be heard.

Another legislative effort at tort reform, the workers’ compensation law, withstands Kluger analysis. The court decided that the law affords a reasonable alternative to tort litigation even though the law provides only a partial remedy, disadvantages some workers and no others, and might afford less compensation than would be realized in an independent tort claim.

In summary, article I, section 21 preserves a person’s right to liti-

gate in court those claims that were recognized by statute or common law when the state constitution was adopted. Kluger acknowledged that changing societal demands will occasionally require the legislature to abridge that right. When the legislature seeks to abolish or limit an established cause of action, its scheme will be measured against the “exact standard” announced in Kluger.

Kluger begins with the proposition that the legislature may not abolish a cause of action without providing a reasonable alternative. In this regard, the legislature may not place a minimum threshold on recovery of damage claims if by so doing it denies a forum to persons whose damages fail to satisfy the threshold. Chapman may have reached the “outer limits of constitutional parameters” by approving the legislature’s no-fault insurance scheme. The scheme abolished tort recovery for intangible damages, yet did no violence to article I, section 21 because the no-fault act’s requirement that vehicle owners maintain security was deemed to provide a reasonable alternative to tort recovery.

Kluger next acknowledges that the legislature may abolish an established cause of action only upon the occurrence of two factors: the legislature must show an “overpowering public necessity” for its action and there is no alternative method of meeting that necessity. Smith illustrates a legislatively attempt to limit recovery of noneconomic claims that failed to satisfy either of those two factors.

The right of access is closely allied to the right to a trial by jury. Smith, and to due process notions, as evidenced by Aldana, that recognize unfairness of depriving a person of the opportunity to vindicate a protected right. To be effective, access to the courts must be “speedy.”

b. Bauld-Overland-Battila-Pullum

The statute of limitation and the statute of repose were the object of the legislature’s tort reform efforts in the mid-1970s. They are two fundamentally different affirmative defenses. A statute of limitation establishes a time limit within which an action must be commenced, bars enforcement of an accrued cause of action, and runs from the date the cause of action accrues. In contrast, a statute of repose cuts off a right of action after a specified time, such as the completion of work or delivery of goods; and not only bars an accrued action, but also prevents accrual where the final element essential to accrual occurs beyond the
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601. 381 So. 2d 231 (Fla. 1980).
602. Id. at 236.
603. Id. at 238.
604. Cf. Lamar v. Universal Supply Co., 479 So. 2d 109 (Fla. 1985). The owner sought to recover property replevied by the state. The controlling statute prevented the owner from initiating suit and was designed to force the state to file an immediate forfeiture action, prior to the completion of its investigation. The court decided that the article I, section 21, claim lacked merit, and added that the owner’s due process rights were “adjudically protected” under this “extraordinary situation” because the state attorney was required to file a forfeiture proceeding “promptly following seizure.” Id. at 110-11.
606. Action v. Fort Lauderdale Hosp., 440 So. 2d 1282 (Fla. 1983). But see De Ayala v. Florida Farm Bureau Casualty Ins. Co., 543 So. 2d 204 (Fla. 1989) (legislature may not limit the payment of workers’ compensation benefits to $1000 to deceased worker’s family who were residents of Mexico when non-resident Canadian aliens are entitled to the same benefits as provided to United States residents).
period established by the statute.\textsuperscript{606}

Generally, Kluger presents no obstacle to these statutes because they do not abolish any right of access. The statute of limitation merely shortens the time for bringing suit\textsuperscript{606} and the statute of repose "merely [lays] down conditions upon the exercise of such a right."\textsuperscript{616} Nonetheless, there is a stir in this area, as is evident from a series of decisions, including Baud v. J. A. Jones Construction Co.,\textsuperscript{611} Overland Construction Co., Inc. v. Sirmons,\textsuperscript{616} Battilana v. Allis Chalmers Manufacturing Co.,\textsuperscript{613} and Pullum v. Cincinnati, Inc.\textsuperscript{614} For this reason, statutes of limitation and repose merit separate treatment under article I, section 21.

A brief review of pre-1980 legislative activity is helpful to an understanding of the more recent court decisions. Before 1974, negligence and product liability actions were governed by a four-year statute of limitations.\textsuperscript{616} The 1974 legislature substantially revised the statute relating to limitations of liability and required, in part, that an action founded on negligence must be commenced within four years,\textsuperscript{616} and established a twelve-year statute of repose for product liability actions provided that actions must be commenced within the period prescribed, "but in any event within twelve (12) years after the date of delivery of the completed product to its original purchaser."\textsuperscript{617} A savings clause permitted any action that would have been barred on the January 1, 1975, effective date, and that would not have been barred previously, must be commenced by January 1, 1976.\textsuperscript{618}

In 1978, Bauld v. J. A. Jones Construction Co.\textsuperscript{618} considered a cause of action that accrued before the effective date of the 1974 revision. A hospital employee, who was injured by a pneumatic message conveyor on July 8, 1972, sued the hospital’s general contractor that installed the conveyor on August 16, 1961. At the time of her injury, the employee was only required to abide by the four-year statute of limitations; however, the intervening adoption of the twelve-year statute of repose operated to bar her action. Four justices determined that a litigant is entitled to claim no vested right to the benefit of the statute of limitations, and that the one-year savings clause provided a reasonable time after the effective date of the revision before it operated to bar a product liability claim.\textsuperscript{600}

In 1979, the court departed from the general principle that Kluger does not prevent time bars on tort claims. Overland Construction Co., Inc. v. Sirmons\textsuperscript{616} considered a section providing that "[a]n action founded on the design, planning or construction of an improvement to real property [must be commenced within four years of] the date of actual possession by the owner . . . but in any event within twelve (12) years after the date of actual possession."\textsuperscript{618}

Overland completed construction of a building in 1961. In 1975, more than twelve years later, Sirmons was injured in the building and later sued the owner and builder. The trial court granted its motion for summary judgment and declared that the statute violated article I, section 21. There existed at common law a right of third parties to bring suit for damages against contractors with whom they were not in privity. The court viewed the statute as creating an absolute immunity from suit for certain professionals connected with the construction of and improvements to real property.\textsuperscript{619}

The statute violated article I, section 21, the court held, insofar as it operated to absolutely bar lawsuits brought more than twelve years after events connected with the construction of improvements to real property.\textsuperscript{620} Moreover, there was no public necessity for the legisla-
period established by the statute.608

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608. See Bauld v. J. A. Jones Constr. Co., 357 So. 2d 401, 402 (Fla. 1978); Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th Dist. Ct. App. 1987), aff'd, 541 So. 2d 92 (Fla. 1989).
609. Park v. Federal Press Co., 387 So. 2d 354, 357 (Fla. 1980) (unanimous)
610. Bauld, 357 So. 2d at 402.
611. Id.
612. 369 So. 2d 572 (Fla. 1979).
613. 392 So. 2d 874 (Fla. 1980) (per curiam)
616. Ch. 74-382, § 7, 1974 Fla. Laws 1207, 1210 (codified at F.L.A. STAT. § 95.11(3) (1975)).
617. Id. at § 3, 1974 Fla. Laws 1207, 1208 (codified at F.L.A. STAT. § 95.03(3) (1975)).
618. Id. § 36, 1974 Fla. Laws 1207, 1222 (codified at F.L.A. STAT. § 95.022 (1975)).

In 1978, Bauld v. J. A. Jones Construction Co.,619 considered a cause of action that accrued before the effective date of the 1974 revision. A hospital employee, who was injured by a pneumatic message conveyor on July 8, 1972, sued the hospital's general contractor that installed the conveyor on August 16, 1961. At the time of her injury, the employee was only required to abide by the four-year statute of limitations; however, the intervening adoption of the twelve-year statute of repose operated to bar her action. Four justices determined that a litigant is entitled to claim no vested right to the benefit of the statute of limitations, and that the one-year savings clause provide a reasonable time after the effective date of the revision before it operated to bar a product liability claim.620

In 1979, the court departed from the general principle that Kuger does not prevent time bars on tort claims. Overland Construction Co., Inc. v. Sirmons621 considered a section providing that "[a]n action founded on the design, planning or construction of an improvement to real property [must be commenced within four years of] the date of actual possession by the owner . . . but in any event within twelve (12) years after the date of actual possession."622

Overland completed construction of a building in 1961. In 1975, more than twelve years later, Sirmons was injured in the building and later sued the owner and builder. The trial court granted his motion for summary judgment and declared that the statute violated article I, section 21. There existed at common law a right of third parties to bring suit for damages against contractors with whom they were not in privity. The court viewed the statute as creating an absolute immunity from suit for certain professionals connected with the construction of and improvements to real property.623

The statute violated article I, section 21, the court held, insofar as it operated to absolutely bar lawsuits brought more than twelve years after events connected with the construction of improvements to real property.624 Moreover, there was no public necessity for the legisla-
ture’s abolishing a cause of action for injuries under these circumstances.866

Overland distinguished Bauld in the following manner. Mrs. Bauld’s cause of action accrued before the effective date of the 1974 enactment. Her right of access was not abolished altogether, but the time for bringing suit was abbreviated from four years to three and one-half years. The court said that was an ample and reasonable period within which Mrs. Bauld could advance her claim. In contrast, Mr. Sirmone’s cause of action was already barred by the twelve-year limitation when his injuries occurred. Consequently, no judicial forum was available in which he could seek redress of his injuries.868

Overland was relied upon in two product liability cases, Battilla v. Allis Chalmers Manufacturing Co.869 and Diamond v. E.R. Squibb & Sons, Inc.,870 in which the statute of repose was again declared unconstitutional. Battilla sought compensation for personal injuries assertedly caused when the bucket assembly of a front-end loader fell on him. Battilla was injured on or about July 1, 1976, and filed suit on October 27, 1976. Allis Chalmers delivered the loader on February 25, 1966.871 On authority of Overland, a majority of four justices held that, as applied, the twelve-year statute of repose denied Battilla access to courts.

625. The court acknowledged the difficulty of exposing construction industry professionals to potential liability for an indefinite period of time after completion of an improvement; however, it reasoned that those problems are not unique to the construction industry. Indeed, the problems affect all litigants and are not sufficiently compelling to justify the abolition of a cause of action without providing an alternative means of redress. Id. at 574. of note, the court also rejected the argument that the section might survive federal constitutional analysis. “[T]he unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this statute of repose may be valid under state or federal due process or equal protection clauses.” Id. at 575.

626. id. at 574-75. Universal Eng’g Corp. v. Perez, 451 So. 2d 463 (Fla. 1984) (per curiam), considered the claims of workers who had become seriously ill with manganese poisoning in 1972 through operation of rock crusher machines that had been installed between 1952 and 1958. The workers filed suit in 1975. It was undisputed that their cause of action accrued after the twelve-year statute of repose had run. However, the record did not disclose the exact date of diagnosis, that is, when the workers knew or should reasonably have known that their illnesses were occupational. The court remanded for further proceedings because it was unable to resolve the essential inquiry—whether the cause of action accrued before the effective date of the revised statute or after, in which event the plaintiff might invoke the savings clause. Id. at 465-67.

627. 392 So. 2d 874 (Fla. 1980) (per curiam).

628. 392 So. 2d 671 (Fla. 1981).

629. Initial Brief for Appellants at 1-2, Battilla, 392 So. 2d at 874.

630. Id. (Sundberg, C.J., and Adkins, Boyd, and England, JJ.).


632. Battilla, 392 So. 2d at 874-75 (McDonald, J., dissenting).

633. Diamond, 397 So. 2d at 672 (McDonald, J., specially concurring).


636. Plaintiffs in that class, the argument goes, must initiate their claims between one and four years, depending upon when the product was delivered. Those persons injured beyond the twelve-year statute of repose, however, are only subject to the four-year statute of limitations. Plaintiffs in the latter class have up to four years

under article I, section 21.880

In the second product liability suit, Diamond brought an action for personal injuries on April 1, 1977 upon the theory that E.R. Squibb and Sons had sold a drug between 1955 and 1956 that injured the then-untborn child. Diamond learned in May 1976 that teenage girls whose mothers had been treated with the drug during pregnancy were developing cancerous conditions. The justices concluded, as in Overland, that the statute of repose barred the cause of action before it ever accrued. Therefore, the statute was held to violate section 21 as applied.881

Justice McDonald disputed Battilla and Diamond in separate opinions and charged that Overland swept too broadly. He perceived a rational and legitimate basis for the legislature’s limitation of liability on manufactured products and would have distinguished the limitation of liability as to buildings, for structures have a useful life longer than most manufactured products.882 He also rejected Overland as an unwarranted curb on the power of the legislature.883

Justice McDonald’s Battilla dissent became the majority position in Pullum v. Cincinnati, Inc.884 Pullum was injured in April 1977 while operating a press brake machine that had been delivered to the original purchaser in November 1966. He filed suit in November 1980, beyond the twelve-year statute of repose but within the four-year statute of limitations. The trial court granted summary judgment for the manufacturer upon the strength of the statute of repose.885

Pullum on appeal conceded that the enactment did not violate article I, section 21 and advanced an equal protection argument that the legislature discriminated irrationally against a class of plaintiffs who were injured by products delivered to the original purchaser between eight and twelve years before the injury.886 The court never reached the
turing's abolishing a cause of action for injuries under those circumstances.628

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634. 478 So. 2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986) (Al-


635. F.A. STAT. § 95.031(2) (1979).

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Instead, five justices, Justice McDonald among them, agreed to recede from Battaila and held that the statute did not violate article I, section 21. They reasoned that the legislature reasonably had decided that manufacturers were unduly burdened by the threat of perpetual exposure to liability and agreed that Justice McDonald's Battaila dissent correctly expressed that position.**

In two cases, the court was asked to decide the effect of Pullum on claims that accrued during the Battaila-Pullum interval but beyond the twelve-year statute of repose. Pullum was silent on the question of retroactivity. The general rule provides that a decision that overrules another decision is entitled to both retrospective and prospective application unless the decision declares itself to have prospective effect only. Adhering to that general rule, the court in Melendez v. Dreis & Krump Manufacturing Co.*** wrote that Pullum applied retrospectively and cut off a cause of action that accrued during the Battaila-Pullum interval and twelve years beyond delivery of the product to the original purchaser.

The plaintiff in Brackenridge v. Ametek, Inc.**** argued that he relied upon Battaila's declaration that the statute of repose was unconstitutional and thereby missed the twelve-year filing deadline. The justices rejected the plaintiff's reliance argument, reasoning that the accident was fortuitous and could not have occurred as the result of conduct prompted by Battaila.**** The plaintiff also sought to invoke an exception to the general rule.

The exception provides:

where property or contract rights have been acquired under and in accordance with a previous statutory construction of the supreme court, such rights should not be destroyed by giving the retrospective operation to a subsequent overruling decision.**

within which to their initiate claims.

*** Pullum, 476 So. 2d at 659-60.

**** 515 So. 2d 735 (Fla. 1987) (en banc) (Grimes, J., and McDonald, C.J., and OVERTON, EHRlich, SHAW, BARKETT, and Kogan, JJ.).

The court in Pullum reasoned that the legislature could permissibly limit the exposure to liability of product manufacturers for claims filed beyond twelve years of delivery.

Pullum left unresolved the rights of claimants whose injuries occurred during the Battaila-Pullum interval. In the aftermath, the court focused more upon retroactivity than upon the right of access. Melendez held that Pullum cut-off the claim of a plaintiff who was

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By applying the Pullum retroactivity test, the court in Pullum applied retrospectively and cut off a cause of action that accrued during the Battaila-Pullum interval and twelve years beyond delivery of the product to the original purchaser.

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515 So. 2d 735 (Fla. 1987). Battaila was overruled by Pullum, 476 So. 2d 659 (Fla. 1980) (en banc), and the court in Pullum applied retrospectively to bar Battaila's cause of action.

Brackenridge's tort claim was not an acquisition of a property or contract right that would enable him to successfully invoke the exception. Accordingly, Pullum applied retrospectively to bar Brackenridge's cause of action.

The latest retroactivity issue to reach the court was framed in Frazer v. Baker Material Handling Corporation, where the claimants were injured before the expiration of the twelve-year statute of repose, but during the Battaila-Pullum interval. The district court affirmed the trial court's grant of summary judgment in favor of the manufacturer, reasoning that the twelve-year statute of repose time barred Frazer's claims, and certified conflict with two other district court decisions. The court's acceptance of jurisdiction to resolve the conflict will determine whether Frazer could rely upon Battaila's declaration that the twelve-year statute was invalid so that he need only have complied with the four-year statute of limitations to successfully defeat any time bar.

In review, the legislature may limit exposure to liability of persons who make products and build buildings. Broadly stated, the legislature may require that plaintiff file personal injury claims within a prescribed period of the date when the cause of action accrues (statute of limitations) and prohibit those claims if not filed within a prescribed period following delivery of the product to the original purchaser (statute of repose). Those limitations do not offend article I, section 21 because they abolish no right of access. Instead, they are viewed as establishing conditions upon the exercise of the right of access. Battaila held that the twelve-year statute of repose, as applied, violated article I, section 21. There, the plaintiff's cause of action accrued after the statute became effective and approximately twelve years and four months after delivery of the product. The court in Pullum receded from Battaila, reasoning that the legislature could permissibly limit the exposure to liability of product manufacturers for claims filed beyond twelve years of delivery.

Pullum left unresolved the rights of claimants whose injuries occurred during the Battaila-Pullum interval. In the aftermath, the court focused more upon retroactivity than upon the right of access. Melendez held that Pullum cut-off the claim of a plaintiff who was...
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The plaintiff in Brackenridge v. Ametek, Inc.649 argued that he relied upon Battilla’s declaration that the statute of repose was unconstitutional and thereby missed the twelve-year filing deadline. The justices rejected the plaintiff’s reliance argument, reasoning that the accident was fortuitous and could not have occurred as the result of conduct prompted by Battilla.650

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640. Id. at 669.
642. 540 So. 2d 205 (Fla. 3d Dist. Ct. App. 1989).

Brackenridge’s tort claim was not an acquisition of a property or contract right that would enable him to successfully invoke the exception. Accordingly, Pullum applied retroactively to bar Brackenridge’s cause of action.

The latest retroactivity issue to reach the court was framed in Frazier v. Baker Material Handling Corporation,644 where the claimants were injured before the expiration of the twelve-year statute of repose, but during the Battilla-Pullum interval. The district court affirmed the trial court’s grant of summary judgment in favor of the manufacturer, reasoning that the twelve-year statute of repose time barred Frazier’s claims, and certified conflict with two other district court decisions.645

The court’s acceptance of jurisdiction to resolve the conflict will determine whether Frazier could rely upon Battilla’s declaration that the twelve-year statute was invalid so that he need only have complied with the four-year statute of limitations to successfully defeat any time bar.

In review, the legislature may limit exposure to liability of persons who make products and build buildings. Broadly stated, the legislature may require that plaintiffs file personal injury claims within a prescribed period of the date when the cause of action accrues (statute of limitations) and prohibit those claims if not filed within a prescribed period following delivery of the product to the original purchaser (statute of repose). Those limitations do not offend article I, section 21 because they abolish no right of access. Instead, they are viewed as establishing conditions upon the exercise of the right of access. Battilla held that the twelve-year statute of repose, as applied, violated article I, section 21. There, the plaintiff’s cause of action accrued after the statute became effective and approximately twelve years and four months after delivery of the product. The court in Pullum receded from Battilla, reasoning that the legislature could permissibly limit the exposure to liability of product manufacturers for claims filed beyond twelve years of delivery.

Pullum left unresolved the rights of claimants whose injuries occurred during the Battilla-Pullum interval. In the aftermath, the court focused more upon retroactivity than upon the right of access. Melendez held that Pullum cut-off the claim of a plaintiff who was
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c. Miscellaneous

Several cases presented a variety of other contexts in which to measure the strength of article I, section 21. Florida Public Service Commission v. Triple “A” Enterprises, Inc. 644 considered a challenge to the state’s venue statute, which requires that actions must be brought in the county of defendant’s residence, where the cause of action accrued, or where the property in litigation is located. The commission sought to change venue from Martin County, where action was commenced, to Leon County, its headquarters. The commission asserted a common law privilege to be sued in the county of its residence. The trial court regarded the venue change to Leon County as unduly burdensome on the plaintiff and would have delayed resolution of the suit. It held the statute unconstitutional as a violation of article I, section 21 and the fourteenth amendment due process clause.

The Supreme Court of Florida disagreed. The common law venue privilege allows for the uniform interpretation by one court with the goal of economizing public resources. No delay would have occurred. Instead, the Leon County sheriff could have served process on the commission more rapidly. Neither the statute nor the common law privilege were unreasonable or arbitrary. 645

In Iglesias v. Floran, 646 the court upheld Florida’s guest statute, which granted immunity from tort liability to employees whose negligence injured a fellow worker. Under the statute, one employee could avoid liability provided that the co-employee acted without willful and wanton disregard, unprovoked physical aggression, or gross negligence.

644. 387 So. 2d 940 (Fla. 1980) (unanimous).
645. Id. at 943.
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Acknowledging that the legislature has “broad powers” in enacting legislation, the court concluded that the guest statute did not impermissibly abolish the right to sue, but merely established the degree of negligence necessary to sustain a cause of action. 647

Finally, the court denied claims under this section where it determined that the statute, rather than deterring litigation, encourages the initiating party to carefully consider the merits before bringing suit. 648 Similarly, plaintiffs cannot succeed when they pursue a cause of action that is not recognized or when the challenged statute does not “unreasonably restrict” that access. 649

22. Trial by jury

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law. Fla. Const. art. I, § 22.650

In deciding whether a party can successfully assert a right to trial by jury under this section, the court has addressed three concerns: whether the action is triable before a jury, whether the legislature may impose limitations on this right, and whether the jury’s decision itself is subject to review.

This section preserves the right to a jury trial in those classes of

647. Id. at 946 (citing McMillan v. Nelson, 149 Fla. 334, 5 So. 2d 867 (1942)).
648. Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) (rejecting contention that statute requiring the unsuccessful litigant to pay reasonable attorney’s fee to prevailing party in medical malpractice action deters the pursuit of malpractice claims and therefore denies access to the courts).
649. DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980) (per curiam) (no cause of action for interference with the exercise of any right protected under article I, § 21 when an employer discharges an at-will employee after the employee brings suit against the employer for injuries occurring to employee’s daughter); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980) (no cause of action for wrongful death of stillborn fetus).
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651. Presumably, the right to trial by jury applies to citizens and noncitizens alike. D’Alemberte, supra note 14, vol. 25A at 428. The right may not be suspended; compare Fla. Const. art. I, § 13 (providing that the writ of habeas corpus may be suspended “in case of rebellion or invasion when essential to preserve the public safety).
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cases that were triable before a jury when Florida adopted its first constitution in 1838. For instance, at common law, a person was entitled to a jury trial in forfeiture proceedings. In re Forfeiture of 1978 Chevrolet Van VIN CGD1584167859 presented the court with the opportunity to consider whether a property owner was entitled to a jury trial in an in rem proceeding initiated under Florida's Contraband Forfeiture Act. The state, as amicus, argued that the proceeding was brought not under common law, but under statutory law under which no right existed. The court rejected the state's distinction. Because there existed a common law right to trial by jury under the territorial law of Florida as of 1829, article I, section 22 preserved that right and forbade the legislature from abrogating it by statute.

Also at common law, a person was entitled to bring a claim for unliquidated damages before a jury. For that reason, the court in Broward County v. La Rosa determined that a property owner who was prosecuted under Broward County's Human Rights Ordinance for denying a lease to a prospective black tenant, assertedly for impermissible racial reasons, may not be denied the opportunity to be tried by a jury on the issue of damages for humiliation and embarrassment.

Several cases illustrate limitations upon the right to trial by jury. At common law there existed no right to litigate attorney's fees before a jury and no right was preserved by article I, section 22. Cheek v. McGowan Electric Supply Co. reconfirmed that principle and held that proof of attorney's fees, whether provided for by statute or contract, may be presented to the jury for the first time only after final judgment. In addition, the legislature may restrict the introduction of evidence at trial without infringing a party's right to a jury trial. McCarthy v. Mensch held that Florida's medical malpractice act did no violence to article I, section 22, even though it prohibited the plaintiff from calling members of the mediation panel to testify at trial. That prohibition presented no constitutional impediment because the parties were free to present to the jury the identical evidence that they had presented at the mediation hearing.

Protecting the right to a jury trial necessarily requires an understanding of the role of the jury itself. The determination of liability in civil cases is within the province of the jury, although the verdict under limited circumstances is subject to review by the trial court. In the context of a remittitur, Rowlands v. Signal Construction Co. considered the nature of the jury's function in protecting the right of trial. After the jury returned a verdict in favor of Rowlands and awarded $300,000 in damages, the trial court granted Signal's motion for a remittitur to reduce the total award to $25,000. The court expressed shock at the liability percentages and explained that it "just felt that $300,000 was just [too] far out of line." The Supreme Court of Florida remanded to permit the trial court to reassess the jury verdict. Remittitur is the proper procedural device to bring excessive damage awards within the bounds of the law when liability "clearly exists," but may not be used to substitute the judge's opinion on damages for the jury's award. This view comports with federal case law, which requires the trial court to order a new trial on all issues if the jury's determination of liability is "wholly insupportable."

The trial court erred not simply because it objected to the excessiveness of the verdict, but also because it disapproved the jury's apportionment of liability. Through remittitur, the trial judge may subtract from the total dollar amount awarded, but may not otherwise mathematically adjust the award. This conclusion is compelled by three factors. First, it is supported by the clear weight of authority. Second, apportionment is within the province of the jury, not the trial judge. Third, determination of liability falls within the right to a trial by jury assured by article I, section 22.

652. State v. Webb, 335 So. 2d 826 (Fla. 1976).
653. 493 So. 2d 433 (Fla. 1986).
654. Id. at 437.
655. 505 So. 2d 422 (Fla. 1987) (unanimous, five justices participating). La Rosa is discussed more fully under article I, section 18. See supra note 560-64 and accompanying text.
656. Id. at 424.
657. Mid-Continent Casualty Co. v. Giuliano, 166 So. 2d 443 (Fla. 1964).
658. 511 So. 2d 977 (Fla. 1987).
659. 412 So. 2d 343 (Fla.), cert. denied, 459 U.S. 833 (1982).
660. 549 So. 2d 1380 (Fla. 1989).
661. The jury found Signal 90% negligent and Rowlands 10% negligent. Id. at 1381.
662. Id.
663. Id. at 1383 (Barkett, J., and Ehrlich, C.J., and Overton, McDonald, Grimes, and Kogan, JJ.).
664. Id. at 1382 n.1.
665. Rowlands, 549 So. 2d at 1382.
666. Id.
667. Id. at 1382-83.
cases that were triable before a jury when Florida adopted its first constitution in 1838.\textsuperscript{660} For instance, at common law, a person was entitled to a jury trial in forfeiture proceedings. \textit{In re Forfeiture of 1978 Chevrolet Van VIN CGD158416758}\textsuperscript{666} presented the court with the opportunity to consider whether a property owner was entitled to a jury trial in an \textit{in rem} proceeding initiated under Florida's Contraband Forfeiture Act. The state, as \textit{amicus}, argued that the proceeding was brought not under common law, but under statutory law under which no right existed. The court rejected the state's distinction. Because there existed a common law right to trial by jury under the territorial law of Florida as of 1829, article I, section 22 preserved that right and forbade the legislature from abrogating it by statute.\textsuperscript{644}

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23. Right of privacy

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. Fla. Const. art. I, § 23.***

Before the adoption of article I, section 23, there was no express right of privacy in the Florida Constitution. Although the court acknowledged that the state constitution protected persons within the privacy of the home,*** litigants' efforts to invoke an implied state constitutional right of privacy met with failure.***

With the adoption of the privacy amendment, Florida became the fourth state to create an express textual basis for the right of privacy.*** In so doing, Floridians demonstrated a "deeply protectionistic" attitude and assured themselves an "independent, freestanding [and] fundamental" right of privacy.*** The importance of an expressly declared right is underscored by a comparison with the right of privacy that exists by implication in the federal constitution.

The framers of the United States Constitution understood the significance of protecting an individual's right to be let alone.*** Despite their conviction, however, the framers declared no express right of privacy, and instead relied upon the various amendments as implying necessary protection. The party who seeks to invoke the privacy protections of that document must preliminarily demonstrate that a particular amendment or its emanation is the source of protection.*** The lack of


672. Florida Bar v. Schreiber, 407 So. 2d 595, 598 (Fla. 1981), vacated on other grounds, 420 So. 2d 599 (Fla. 1982).


674. Olmstead v. United States, 277 U.S. 438, 478 (1928), overruled sub. nom Katz v. United States, 389 U.S. 347 (1967) (Brandeis, J., dissenting). In a five-to-four decision, the court in Olmstead concluded that the fourth amendment did not protect petitioners whose telephone lines were tapped by federal prohibition officers. There was no fourth amendment violation, the majority reasoned, because the intercepted telephone messages were not "things to be seized" nor was there an entry into the home that would have amounted to a search. Id. at 464-66. Justice Brandeis charged that the majority was "unduly literal" in its construction of the fourth amendment. The court had disregarded the historical premise of the fourth amendment:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478. Justice Brandeis's contribution to Florida's right of privacy cannot be overstated, for his eloquent comment has been quoted approvingly by the Supreme Court of Florida in many of its privacy decisions. It is noteworthy that this reliance extends beyond the fourth amendment context in which Olmstead was decided and that it expresses a position about which the Florida justices are in complete agreement. See in re T.W., 551 So. 2d at 1186. Taken literally, it serves to elevate privacy atop the individual's most cherished constitutional rights protected under article I of the state constitution. This is no novel constitutional analogy deriving from the right of privacy for the common law has long held that there is "[n]o right of the right of privacy, for the common law has long held that there is "[n]o right

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141 U.S. 250, 251 (1891).

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\textbf{a. The concept}

Article I, section 23 defines privacy as the "right to be let alone." Simply stated, "the right to be let alone" expresses the power of the individual to define the boundary of his or her private life. The right establishes a correlative limitation upon the state that bars it from encroaching into that boundary by attempting to standardize personal behavior or identity.

The concept of privacy is inherently subjective. The difficulty in accounting for the universe of personal choices may explain why the right is varied in definition and vast in scope,\textsuperscript{677} and why the heart of which have penumbras, formed by emanations from those guarantees. The various guarantees of the first, third, fourth, fifth, and sixth amendments, he wrote, created "zones of privacy." Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing a privacy interest of married persons to use contraceptives). See, e.g., Warden v. Hayden, 387 U.S. 294, 304 (1967) (recognizing that the principle object of the fourth amendment is the protection of privacy rather than property). Surveys of the federal constitutional decisions dealing with the right of privacy appear in C. TRUBOW, PRIVACY LAW AND PRACTICE § 19.01-03, 19.3-19.14 (1989); Note, Interpreting Florida's New Constitutional Right of Privacy, 33 U. FLA. L. REV. 565, 582-83 (1981); Getrey, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 239 n.25 (1977) [hereinafter Getrey]; Note, Toward a Right of Privacy, supra note 671, at 634-35, 659-90. 676. See, e.g., Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 564-592 (1986) (searching for a lynch-pin to reconcile federal constitutional decisions in the context of personal autonomy and decision making). The problem of reconciling the body of federal privacy law is, to the mind of one legal writer, the product of the court’s "severe case of ephorobia." Seng, The Constitutional and Informational Privacy, or How So-Called Conservatice Coundenance Governmental Intrusion Into a Person’s Private Affairs, 49 J. MARSHALL L. REV. 871, 875-76 (1985). Seng explains that this is the result of "the court’s ambivalence about its role in a democratic society,"湿 and about the post-Civil War nationalization of individual rights. Thus, he posits, it is entirely consistent that individuals must look to state tort law for protection of privacy. Id. (citation and footnotes omitted).

677. The variety of definitions within the following commentaries illustrates the breadth of the term "privacy." See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1304 (2d ed. 1988) (describing privacy as preserving "‘those attributes of an individual which are irreducible in his selfhood’" (quoting Freund, 52nd ALI Ann. Mgr 624 (1975)) [hereinafter L. TRIBE]; A. WERTHEIN, PRIVACY AND FREEDOM 7 (1967) ("privacy is the claim of individuals... to determine for [themselves] when, how, and to what extent information about [themselves] is communicated to others").
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The process of shaping an express privacy philosophy began with
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Attorney solicitation is a form of commercial speech that is pro-
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683. Winfield, 544 So. 2d at 548; Wines, 541 So. 2d at 102 (Ehrlich, C.J., un-
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are said to be the guarantors of the broad protections of the right of privacy. Justice
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684. 407 So. 2d 595 (Fla. 1981), vacated on other grounds, 420 So. 2d 598 (Fla.
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685. Id. at 599-600. Justice Overton agreed that the Bar could regulate attorney
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criminal standards—beyond a reasonable doubt—impose a more exacting evidentiary
burden on the state.

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b. Standard of review
Of necessity, the justices agreed upon a standard of review in the early privacy decisions. Significantly, they characterized the right of
privacy as a fundamental right, deserving of the protections afforded by
the compelling state interest standard. There are two components to
that standard. First, it requires the state to justify its intrusion by
showing a need that is compelling. Second, it requires the means
selected to be the least intrusive of the options available to the state. In
so doing, the standard assures that the right will remain "as strong as
possible."689 To date, the court has applied the standard in civil,690 ad-
ministrative,691 and criminal contexts.692

c. Categories of privacy

Privacy rights are implicated wherever there exists the opportunity for interacts between the government and the governed. For purposes
of organization, it is useful to group privacy claims into three categories
of activity, recognizing that a particular government action may
implicate interests in several categories. Those categories are grouped
under the rubrics discoursal or informational privacy (how, when, and
to what extent a person allows private information to be communicated
to others); traditional search and seizure contexts (the privacy pro-
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amendment); and decisional autonomy or self-determination (control
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\textsuperscript{688} See also Barnett v. Florida Freedom Newspapers, Inc., 531 So. 2d 133, 139 (Fla. 1988) (Barkett, J., specially concurring); 533 So. 2d 596, 999 (Fla. 1989) (Barkett, J., specially concurring).

\textsuperscript{689} Id at 513 (blood donors who were the source of consent). Interests in privacy are implicated wherever there exists the opportunity for interaction between the government and the governed. For purposes of organization, it is useful to group privacy claims into three categories of activity, recognizing that a particular government action may implicate interests in several categories. Those categories are grouped under the rubrics of search or informational privacy (how, when, and to what extent a person allows private information to be communicated to others); traditional search and seizure contexts (the privacy protected by article I, section 23 that is similarly protected by the warrant and reasonableness requirements of article I, section 12 and the fourth amendment); and decisional autonomy or self-determination (control over one’s character, identity, and associations).

\textsuperscript{690} See, e.g., In re T.W., 551 So. 2d at 1186; Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d at 741.

\textsuperscript{691} See, e.g., Winfield, 477 So. 2d at 548 (the fundamental privacy right “demands” the compelling state interest standard).

\textsuperscript{692} See, e.g., Wells, 539 So. 2d at 464 (Fla. 1989), 118 S. Ct. 3183 (1990). Only the minimal standard—beyond a reasonable doubt—imposes a more exacting evidentiary burden on the state.

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(1) Disclosural privacy

In the first privacy category, Winfield v. Division of Pari-Mutuel Wagering addressed the right of an individual to keep his private bank records free from governmental scrutiny. Winfield, a licensed horse owner, was under investigation by the division for various rule and statutory violations, including the concealment of his son’s ownership interest in horses. The division subpoenaed Winfield’s bank records from several banks. Winfield attempted to restrain the public disclosure of the records. The trial court issued a restraining order in which it concluded that the division acted with probable cause in obtaining the records by subpoena, but that public disclosure of the records may violate Winfield’s right of privacy. The district court reversed and certified the following issue to the Supreme Court of Florida: whether article I, section 23 prevented the division from subpoenaing bank records without notice.

In language often repeated in later cases, the court described article I, section 23 as “an independent, freestanding constitutional provision” that assured “more protection from governmental intrusion” than the federal constitution. The drafters intended the privacy right created therein to be “as strong as possible.”

Giving effect to the drafters’ intent, the court began with the premise that an individual has a “legitimate” expectation that private financial institution records will remain private. Without ado, the court then found that “the state’s interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest and that the least intrusive means was employed to achieve that interest.”

Despite Winfield’s analytical abruptness, the decision supports several important conclusions. First, the state has a compelling state interest when an administrative agency with probable cause seeks to investigate private bank records that are necessary to the fulfillment of the agency’s mission. Second, interference with a protected privacy interest will satisfy the least intrusive means requirement when the interference is accomplished through at least minimal compliance with applicable procedural requirements.

693. 477 So. 2d 544 (Fla. 1985) (Adkins, J., and Boyd, C.J., and Overton, Hrebich, and Shaw, JJ. Justice McDonald concurred in result only).
694. Winfield, 443 So. 2d at 457.
695. Winfield, 477 So. 2d at 548.
696. Id.

The court supplied needed refinement to its application of the compelling state interest test in Shaktman v. State. Shaktman, like Winfield, dealt with the protections against public disclosure of private information. Shaktman and others were prosecuted for violations of the state’s gambling laws. Law enforcement agencies had installed pen registers to record the numbers dialed or transmitted from telephone lines terminating in a co-defendant’s Miami Beach apartment. They were able to determine a high incidence of activity around the start of various sports events and ultimately used that information to secure wiretaps on those lines.

The trial court denied Shaktman’s motion to suppress. The district court affirmed and posed two certified questions that asked whether the installation of a pen register by a law enforcement agency implicated rights protected under article I, section 23, and if so, whether the compelling state interest is satisfied when the agency has founded suspicion and complies with statutory procedural requirements for the approval of the pen register applications.

The “central concern,” the court wrote in Shaktman, “is the inviolability of one’s own thought, person, and personal action. The inviolability of that right assures its preeminence over ‘majoritarian sentiment’ and thus it cannot be universally defined by consensus.” Within that “zone of privacy” is the right of persons “to determine for themselves, how and to what extent information about them is communicated to others.” The telephone numbers that a person dials or transmits, unless communicated to a third party, represent personal information afforded protection under article I, section 23. The court determined that Shaktman could look to article I, section 23 as a source of protection when the state gathers pen register information.

698. 553 So. 2d 148 (Fla. 1989) (unanimous) (Barkett, Overton, McDonald, Shaw, Grimes, and Kogan, JJ.; Ehrlich, C.J., concurred specially).
699. Id. at 149 n.3. Because pen registers only record dialing and transmission activity on telephone terminations, they are less invasive than wiretaps, which permit the overhearing of telephone conversations.
701. Shaktman, 553 So. 2d at 151 (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW 1311 (2d ed. 1988)).
702. Id. at 150 (quoting A. Westin, PRIVACY AND FREEDOM 7 (1967)). This particular aspect of privacy was recognized before the adoption of section 23 in Byron, Harless, 360 So. 2d at 92.
703. Id. at 152. In footnote 8, the court added that the search and seizure protections of section 12 were not implicated.
(1) Disclosural privacy

In the first privacy category, *Winfield v. Division of Pari-Mutuel Wagering* addressed the right of an individual to keep his private bank records free from governmental scrutiny. Winfield, a licensed horse owner, was under investigation by the division for various rule and statutory violations, including the concealment of his son’s ownership interest in horses. The division subpoenaed Winfield’s bank records from the banks. Winfield attempted to restrain the public disclosure of the records. The trial court issued a restraining order in which it concluded that the division acted with probable cause in obtaining the records by subpoena, but that public disclosure of the records may violate Winfield’s right of privacy. The district court reversed and certified the following issue to the Supreme Court of Florida: whether article I, section 23 prevented the division from subpoenaing bank records without notice. In language often repeated in later cases, the court described article I, section 23 as “an independent, freestanding constitutional provision” that assured “more protection from governmental intrusion” than the federal constitution. The drafters intended the privacy right created therein to be “as strong as possible.”

Giving effect to the drafter’s intent, the court began with the premise that an individual has a “legitimate” expectation that private financial institution records will remain private. Without ado, the court then found that “the state’s interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest and that the least intrusive means was employed to achieve that interest.”

Despite *Winfield’s* analytical abruptness, the decision supports several important conclusions. First, the state has a compelling state interest when an administrative agency with probable cause seeks to investigate private bank records that are necessary to the fulfillment of the agency’s mission. Second, interference with a protected privacy interest will satisfy the least intrusive means requirement when the interference is accomplished through at least minimal compliance with applicable procedural requirements.

693. 477 So. 2d 544 (Fla. 1985) (Adkins, J., and Boyd, C.J., and Overton, Ehrlich, and Shaw, JJ. Justice McDonald concurred in result only).
695. *Winfield*, 477 So. 2d at 548.
696. Id.
697. Id.
698. 553 So. 2d 148 (Fla. 1989) (unanimous) (Barkett, Overton, McDonald, Shaw, Grimes, and Kogan, JJ.; Ehrlich, C.J., concurred specially).
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703. Id. at 152. In footnote 8, the court added that the search and seizure protections of section 12 were not implicated.

Next, the court addressed the two components of the compelling state interest test. “[A] legitimate, ongoing criminal investigation satisfies the compelling state interest test when it demonstrates a clear connection between the illegal activity and the person whose privacy would be invaded.” For an intrusion to be justified, the state must show a “reasonable founded suspicion” that the target telephone was the vehicle of criminal wrongdoing. A “crucial component” of the second prong requires that the state adhere to applicable procedural requirements. Here, the state obtained judicial approval for the lease lines before conducting the pen register surveillance.

Chief Justice Ehrlich wrote separately to emphasize that an individual’s subjective expectation of privacy is not dispositive of an article I, section 23 claim. Especially relevant to the determination that an individual’s claim is legitimate under all the circumstances are the “objective manifestations” of his or her expectation.

In another disclosural privacy case, Rasmussen v. South Florida Blood Service, Inc., six justices agreed that blood donors enjoy privacy rights that are protected by the federal and state constitutions. Nonetheless, they declined to engage in the stricter scrutiny “mandated” by the constitution.

Rasmussen had contracted the Acquired Immune Deficiency Syndrome from a contaminated blood transfusion and ultimately died as a result. His estate subpoenaed the names and addresses of fifty-one of the service’s blood donors in an attempt to identify the donor of the contaminated blood donor. Although Rasmussen was entitled to resort to discovery procedures as a means of vindicating his interest in obtaining full recovery for his injuries, on balance, the blood donors enjoyed a greater right to informational privacy. The discovery sought by Rasmussen would do little to promote his interest and thus offered, at best, only dubious probative value.

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704. Id.
705. Id. (footnote omitted).
706. Shaktman, 553 So. 2d at 153. Shaktman noted that the legislature had since imposed more stringent procedural requirements upon law enforcement agencies than those in force at the time the instant applications were approved. Therefore, it argued, more restrictive means were possible. The court concluded that the state showed procedural compliance with then-existing laws.
707. Id. (Ehrlich, C.J., concurring specially).
708. 500 So. 2d 533 (Fla. 1987) (Barkett, J., and McDonald, C.J., and Atkinson, Overton, Ehrlich, and Shaw, JJ.; Justice Boyd concurred in result only).
709. Hawkins, 443 So. 2d 71 (Fla. 1983).
710. 443 So. 2d 71 (Fla. 1983).
711. 142 Nova Law Review, Vol. 14, Iss. 3 [1990], Art. 6
712. Hawkins, 835
713. Compare Atwell v. Sacred Heart Hosp., 520 So. 2d 30 (Fla. 1988) (right of an adopted person to obtain hospital birth records is controlled by statute and does not implicate privacy rights of natural parents under § 23); Wood v. Marston, 442 So. 2d 934, 942 (Fla. 1983) (McDonald, J., dissenting) (Florida’s public meeting law should not apply to a state university search committee because it requires applicants for position of dean to discard the rights of privacy which they enjoy under § 23).
714. 443 So. 2d 71 (Fla. 1983).
715. Id. at 74.
716. The court explained that the state has a compelling interest in assuring that only qualified applicants are admitted to the practice of law. Moreover, the psychological information sought by the board is vital to the evaluation of an applicant’s fitness. The means selected to acquire that information could not be narrowed without imping-
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Rasmussen was decided not upon constitutional grounds, but upon principles of discovery. However, there is reason to believe that the court would have reached the identical result were it to have decided the issue under article I, section 23.

Other cases recognize that public records are frequently sources of information that an individual seeks to keep private. Those records, if declared by law to be public, are subject to public inspection. In two cases, Forsberg v. Housing Authority and Michel v. Douglas, the justices relied upon limiting language in article I, section 23 to conclude that there is no constitutional right of privacy that would prevent the public's right of access to public records when permitted by law.

In Florida Board of Bar Examiners Re: Applicant the Bar applicant objected to the board's requests for information concerning treatment for mental disorders, claiming that the requests violated his right of privacy. The court outlined an analytical framework for considering the merits of the claim. Initially, it looks to whether the challenged action is state action. If the action is state action, it asks whether that action implicated a person's right of privacy in light of the fact that the right is "circumscribed and limited by the circumstances" in which the right is asserted. Finally, it measures the action against the "highest" standard—the compelling state interest test.

The court found that the board's action was state action, that the applicant's right of privacy was implicated, and that the board's action satisfied the compelling state interest test. Thus, the board was free...
to require applicants to provide certain psychological history information as a condition of the admission process without impermissibly infringing upon article I, section 23.

Public proceedings, like public records, are a source of public information. *Barron v. Florida Freedom Newspapers, Inc.* presented the court with a request by the newspaper to set aside a trial court order sealing a file in a dissolution proceeding after the defendant had answered but before the final hearing. The court held that civil and criminal proceedings are public events, subject to a presumption of openness. There is no justification to extend special consideration to dissolution proceedings. Nor is there an absolute right of privacy to seal the file because the dissolution involves minor children or includes medical reports pertaining to a party’s medical condition.

*Barron’s* significance for purposes of the amendment appears elsewhere in the opinion. The majority opinion indicates that the trial court must be guided by five factors in deciding whether to close a civil proceeding, among which is the recognition that the content of the subject matter, rather than the status of the party, determines whether an asserted privacy interest is sufficient to warrant closure. In *dicta*, the majority speculated that the right of privacy under article I, section 23 “could form a constitutional basis for closure . . . to avoid substantial injury to innocent third parties . . . [or] to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.”

*Barron’s* two concurring opinions also add insight. Chief Justice Ehrlich expressed the view that article I, section 23 can never afford a basis for closure of a judicial proceeding. Justice Barkett would accord special consideration to dissolution proceedings because they involve inherently significant privacy rights. For instance, the personal rights of litigants and third parties are exposed to “grave danger” by

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Briefly summarizing, the five cases that considered whether article I, section 23 protects private information from public disclosure were decided adversely to the person. Winfield determined that an agency is entitled to subpoena private bank records if it has probable cause. Shaktman permits law enforcement to collect pen register information, identifying telephone dialing activity, if it has reasonable founded suspicion. Forsberg and *Michel* entitle the public to inspect records that the legislature has declared to be in the public domain. Florida Board of Bar Examiners Re: Applicant determined that the board may delve into an applicant’s psychological history.

Two other cases, *Rasmussen* and *Barron*, involved claims of disclosure privacy, but did not reach the constitutional question. Those decisions suggest that article I, section 23 is available to protect persons not party to, but affected by, litigation when disclosure of private information about them may cause substantial injury.

(2) Traditional search and seizure contexts

The second category of privacy rights, those arising in traditional search and seizure contexts that involve governmental investigation, are protected by the reasonableness and warrant requirements in article I, section 12 and the Fourth Amendment. Several cases presented the court with opportunities to measure the strength of the protection against intrusions by law enforcement.

Four justices in *State v. Wells* agreed that the Florida Highway Patrol (FHP) could not rely upon an arrestee’s general permission to look inside a trunk as consent to then pry open a locked suitcase found inside. On fourth amendment grounds, they determined that the act of unlocking a suitcase manifested a denial of consent to open it and created a zone of privacy inside the container. The FHP intruded into that zone of protection when it broke into Wells’s locked luggage without probable cause to search.

722. *Barron*, 531 So. 2d at 120 (Barkett, J., specially concurring).
723. 539 So. 2d 464 (Fla.) (per curiam), on reh’g, cert. granted, 109 S. Ct. 3183 (1989) (Ehrlich, C.J., and Barkett, Grimes, and Kogan, J.J., concurring).
724. Id. at 468.
725. Id. Shaktman also noted that the individual has a “zone of privacy” into which the state may not venture without justification. Shaktman, 533 So. 2d at 153 (Ehrlich, C.J., concurring specially). The notion that article I, § 23, protects a zone suggests that the amendment has a spatial component. Whether the federal amend-
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Wells’s brief reference to article I, section 23 indicates that the majority regards the state privacy amendment and the federal fourth amendment as providing coextensive protection within a zone of privacy. The decision supports the conclusion that the probable cause necessary to justify a fourth amendment search implicitly satisfies the compelling state interest standard that in turn justifies an intrusion under article I, section 23.

In Riley v. State, all six justices who participated in the decision concluded that the right of privacy, as embodied in the fourth amendment, sections 12 and 23 of article I, protects an individual from police helicopter surveillance of his or her backyard. The helicopter overflight implicated article I, section 23, because that constitutional provision, in particular, was designed to protect against “governmental encroachments . . . made possible by increasingly sophisticated investigative techniques.”

Relying upon fourth amendment grounds, the United States Supreme Court agreed to reverse the Supreme Court of Florida in Florida v. Riley. Five justices said that society was not prepared to accept as reasonable Riley’s expectation that his backyard would remain free from aerial surveillance. Although the plurality in Florida v. Riley had no need to address the import of article I, section 23, the decision is an instructive example of the interplay between state and federal courts.

First, the decision is not fatal to Florida’s “independent, freestanding constitutional provision.” There is no doubt that the Supreme Court of Florida primarily viewed the police overflight in light of the protections against unreasonable search and seizure assured under the fourth amendment and article I, section 12. To bolster its holding that the overflight violated privacy interests under those provisions, the court added that Riley could also rely upon article I, section 23 as a source of protection. Thus seen, article I, section 23 was not central to the decision and provided neither an adequate nor independent state court basis that would cause the United States Supreme Court to decline to review the federal question.

Second, whether article I, section 23 privacy will be dispositive of an asserted privacy claim when fourth amendment interests are equally at stake is another matter. It is likely that article I, section 23 may only afford incidental protection against governmental action when that action equally implicates the search and seizure provision of article I, section 12 and the United States Supreme Court has announced controling precedent. The conformity requirement in article I, section 12 renders article I, section 23 incapable of assuming an active role in checking governmental encroachment into private lives when that particular action has already withstood fourth amendment scrutiny of the United States Supreme Court.

Wells and Riley support the conclusion that the state must have probable cause before it may permissibly search a space protected by the privacy amendment. Although the court has not so stated as much, a showing of probable cause required to justify an intrusion under search and seizure analogies will also satisfy the state’s burden under article I,
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section 23's compelling interest standard and justify the intrusion.

(3) Self-determination

The third privacy category, self-determination or personal autonomy, concerns whether decisions of a purely personal nature may be made independent of state influence. Privacy under this rubric includes matters about the family institution, marriage, contraception, sexual conduct, and personal health. The cases decided this decade focused specifically on two issues: the right of the terminally ill to refuse or discontinue medical intervention, and the right of a female to terminate her pregnancy.

The constitutional right of privacy embraces the right to choose or refuse medical intervention. Logically, the right of choice implies the right to discontinue intervention once commenced. To what extent the state may impose medical procedures upon a patient who desires to exercise his or her right to decline such intervention is the subject of three decisions this decade. A careful reading of those decisions shows that none construed the rights of the terminally ill specifically under article I, section 23, and therefore left the vistas of Florida's privacy amendment unexplored. Those cases, however, provide reliable indications of how the court will view this topic as litigants directly draw its attention to state constitutional rights in the future.

The first two decisions to consider the rights of the terminally ill, Sats v. Perlmuter and John F. Kennedy Memorial Hospital v. Bludworth, were premised upon federal privacy principles.

734. The right to choose or refuse broadly refers to the right of an individual to decide for himself or herself matters involving personal identity. As illustrated by the following cases, the right includes the familiar but less precise terms, "death with dignity" and "right to die."

735. 379 So. 2d 359 (Fla. 1980) (Sandra evelopment, J., Eng, C.J., and Boyd, Overton, and Alderman, J., Justice, joined in result only).


737. Griswold v. Connecticut, 381 U.S. 479 (1965), is often cited as the genesis of the federal constitutional right of privacy. The United States Supreme Court has yet to decide the parameters of that right in the context of removal of life-support. The Court, however, did conclude that a competent person has a "constitutionally protected liberty interest in refusing unwarranted medical treatment" that may be inferred from its decisions and that derives from the fourteenth amendment. Cruzan v. Harmon, 467 S.W.2d 408 (1988) (en banc), aff'd sub nom. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1989) (U.S. June 25, 1990) (No. 88-1503).


740. Perlmuter, 379 So. 2d at 360.

741. Perlmuter, 362 So. 2d at 160.

742. Id. at 161.

743. Id. at 162 (quoting Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 426 (1977)).

744. Id. at 162-64 (adopting Saikewicz, 370 N.E.2d at 425). Saikewicz had sur-
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Neither decision considered Florida’s privacy amendment. In particular, section 23 could not have affected the outcome in Perlmuter because the claim predated adoption of the amendment.738 Perlmuter and Bludworth are no less important, however, for they represent the court’s initial judgment in resolving issues in this controversial and emerging topic. The decisions strongly suggest the horizon lines of the state constitutional right of privacy.739

Perlmuter asked whether a competent but terminally ill adult, with no minor dependents, has a constitutional right to refuse extraordinary medical treatment when the family so consents.740 The court adopted the opinion of the district court741 and said that he does, but cautioned that the decision was limited to its facts. The district court’s opinion reports the following essential facts. Seventy-three-year-old Abe Perlmuter suffered from incurable Lou Gehrig’s disease. He was virtually incapable of movement and unable to breathe without a mechanical respirator. The prognosis was that death would follow “within a short time.” Mr. Perlmuter was fully aware that removal of the respirator would probably result in a life expectancy of less than one hour. At a bedside hearing, “with full approval of his adult family” he urged removal of the respirator.742 Upon those facts, the trial court restrained the hospital from interfering with that decision.

The district court determined that Mr. Perlmuter had the right to refuse or discontinue treatment based upon “the constitutional right to privacy [which is] an expression of the sanctity of individual free choice and self-determination.”743 It concluded that the state could show no compelling interest to justify interfering with the patient’s right to discontinue life-support.744 “It is all very convenient to insist on
continuing Mr. Perlmuter’s life,” the district court explained, “so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient’s sole expense and against his competent will . . . .”

In Bludworth, a terminally ill patient was hospitalized and placed on a mechanical ventilator. He was diagnosed as irreversibly comatose and essentially in a vegetative state. The trial court declared him incompetent and appointed his wife as guardian. She presented the treating physician a “living will” executed by her husband in which he expressed the desire not to be kept alive through the use of extraordinary life-support equipment.

Bludworth posed the following question: whether the court-appointed guardian of a comatose, terminally ill patient, who had executed a “living will” must obtain judicial approval before terminating extraordinary life support in order to relieve the physicians and hospital of liability. By answering the question in the negative, four members of the court extended Perlmuter and agreed that an incompetent terminally ill person has the same right to refuse life-saving measures as a competent person. The “primary concern” of these cases is that the right to choose should not be lost because a lack of cognition prevents a conscious choice to refuse extraordinary treatment. To require prior court approval is “too burdensome,” unnecessary to protect either the interests of the state or patient, and could nullify the privacy rights of an incompetent.

Bludworth held that “the right of a patient, who is in an irreversibly comatose and essentially vegetative state to refuse extraordinary medical intervention cannot be taken away by his family or the state.”

Veyer’s court opinions which considered personal decisions of patients refusing medical intervention and identified four state interests: preservation of life, protection of interest of third parties, prevention of suicide, and maintenance of the ethical integrity of the medical profession.

743. Id. at 164.
746. A “living will” is essentially a directive from the individual to the physicians and family declaring preferences regarding future health care, particularly as it relates to the use of life support in contemplation of illness or death. Living Will, supra note 739, at 445 n.1; Changing Attitudes, supra note 734, at 382-83. Some states, Florida included, have adopted legislation that recognizes the validity of “living wills,” otherwise known as “natural death acts.” Id.
747. Bludworth, 452 So. 2d at 922.
748. Id. at 921 (Alderman, C.J., and Boyd, Overton, and Ehrlich, JJ.; McDonald and Shaw, JJ., concurred in result only).

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Life-sustaining measures, may be exercised either by his or her close family members or by a guardian of the person of the patient appointed by the court.” The “focal point” of the decision to terminate artificial life-support is whether there exists a “reasonable medical expectation” of the patient’s recovering cognition rather than continuing the vegetative existence. The court respects the integral role of the family and physician in the decision making process involving an incompetent patient:

If there are close family members . . . who are willing to exercise [the right to refuse extraordinary life-sustaining measures] on behalf of the patient, there is no requirement that a guardian be judicially appointed. However, before either a close family member or legal guardian may exercise the patient’s right, the primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function and that his existence is being sustained only through the use of extraordinary life-sustaining measures. This certification should be concurred in by at least two other physicians with specialties relevant to the patient’s condition.

Perlmuter and Bludworth each involved the decision of the terminally ill to reject the use of a mechanical respirator as a means to prolong the natural dying process. The court has since expressed the view that there exists no decision of greater personal or intimate significance than that of the terminally ill to discontinue necessary medical treatment.

The right of choice is not limited to decisions regarding the use of mechanical respirators, but includes decisions to forego forced feeding. The first opportunity for a Florida appellate court to address this topic was reported in Corbett v. D’Alessandro. To date, the Supreme Court of Florida has not considered the constitutional parameters of forced-feeding. The decision of the Second District Court of Appeal is included here to illustrate one method of analysis. Corbett expressly
continuing Mr. Perlmutter's life," the district court explained, "so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient's sole expense and against his competent will."

In Bludworth, a terminally ill patient was hospitalized and placed on a mechanical ventilator. He was diagnosed as irreversibly comatose and essentially in a vegetative state. The trial court declared him incompetent and appointed his wife as guardian. She presented the treating physician a "living will" executed by her husband in which he expressed the desire not to be kept alive through the use of extraordinary life-support equipment. Bludworth posed the following question: whether the court-appointed guardian of a comatose, terminally ill patient, who had executed a "living will" must obtain judicial approval before terminating extraordinary life support in order to relieve the physicians and hospital of liability. By answering the question in the negative, four members of the court extended Perlmutter and agreed that an incompetent terminally ill person has the same right to refuse life-saving measures as a competent person. The "primary concern" of these cases is that the right to choose should not be lost because a lack of cognition prevents a conscious choice to refuse extraordinary treatment. To require prior court approval is "too burdensome," unnecessary to protect either the interests of the state or patient, and could nullify the privacy rights of an incompetent.

Bludworth held that "the right of a patient, who is in an irreversibly comatose and essentially vegetative state to refuse extraordinary life-sustaining measures, may be exercised either by his or her close family members or by a guardian of the person of the patient appointed by the court." The "focal point" of the decision to terminate artificial life-support is whether there exists a "reasonable medical expectation" of the patient's recovering cognition rather than continuing the vegetative existence. The court respects the integral role of the family and physician in the decision making process involving an incompetent patient:

If there are close family members ... who are willing to exercise [the right to refuse extraordinary life-sustaining measures] on behalf of the patient, there is no requirement that a guardian be judicially appointed. However, before either a close family member or legal guardian may exercise the patient's right, the primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function and that his existence is being sustained only through the use of extraordinary life-sustaining measures. This certification should be concurred in by at least two other physicians with specialties relevant to the patient's condition.

Perlmutter and Bludworth each involved the decision of the terminally ill to reject the use of a mechanical respirator as a means to prolong the natural dying process. The court has since expressed the view that there exists no decision of greater personal or intimate significance than that of the terminally ill to discontinue necessary medical treatment.

The right of choice is not limited to decisions regarding the use of mechanical respirators, but includes decisions to forego forced-feeding. The first opportunity for a Florida appellate court to address this topic was reported in Corbett v. D'Alessandro. To date, the Supreme Court of Florida has not considered the constitutional parameters of forced-feeding. The decision of the Second District Court of Appeal is included here to illustrate one method of analysis. Corbett expressly

745. Id. at 164.
746. A "living will" is essentially a directive from the individual to the physicians and family declaring preferences regarding future health care, particularly as it relates to the use of life-support in contemplation of illness or death. Living Wills, supra note 739, at 445 n.1; Changing Attitudes, supra note 734, at 382-83. Sixteen states, Florida included, have adopted legislation that recognizes the validity of "living wills," otherwise known as "natural death acts." Id.
747. Bludworth, 452 So. 2d at 922.
748. Id. at 921 (Alderman, C.J., and Boyd, Overton, and Ehrlich, JJ.; McDonald and Shaw, J.J., concurred in result only).
749. Id. at 924-25.
750. Id. at 926.
751. Id.
752. In re T.W., 551 So. 2d at 1193 (citing Thonsburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).
753. 487 So. 2d 368 (Fla. 2d Dist. Ct. App. 1986).
addressed whether article I, section 23 would sustain a husband's decision to withhold nasogastric forced-feeding of his wife who was in a "permanent vegetative state with no reasonable prospect of regaining cognitive brain function." Relying upon Perlmuter and Blidworth, the district court concluded that the right of self-determination permits the removal of artificial life-sustaining measures under those circumstances. 754

Corbett confronted Florida's Life-Prolonging Procedure Act, 755 which permits any competent adult to "make a written declaration directing the withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition." 756 Notably excluded from the definition of "life-prolonging procedure," 757 is the "provision of sustenance," 758 so that the act does not extend a statutory right to those patients whose lives are sustained through feeding tubes, even though they are otherwise "terminal." 759 The district court saw no distinction between "the multitude of artificial devices that may be available to prolong the moment of death." Thus, whether Mrs. Corbett's life was sustained by mechanical artifice or forced sustenance through a tube, the statute could not defeat her constitutional right to remove a nasogastric tube under the circumstances, provided that the patient complied with procedural safeguards established in Blidworth and Perlmuter. 760

Corbett notwithstanding, the law regarding the removal of feeding tubes in Florida is unsettled. 761 The court is free to define the limits of protection afforded by article I, section 23 regarding the right of persons to chart their own medical course. Whether the court will apply the general privacy standards announced in Perlmuter and Blidworth to specifically shape the contours of the privacy amendment is likely to be decided in the near future.

The decision to accept jurisdiction in In re Guardianship of Browning 762 holds the promise of development in this area. In Browning, the district court held that the guardian of a comatose patient, for whom death was not imminent, was entitled as a surrogate decision maker to withdraw a nasogastric tube from the patient under article I, section 23. Significantly, the patient had executed a "living will," declaring her wishes that her life not be prolonged by artificial means, including the use of feeding tubes. The court required the guardian to comply with procedures that it fashioned to protect the patient's right of privacy. 763 Concluding that the issue was one of great public importance, the court certified the following question to the Supreme Court of Florida: "Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable,
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but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube. 676

The hard choices of the dying are not limited to accepting or rejecting medical intervention in the form of mechanical respirators and feeding tubes, but also include life-saving blood transfusions. In Public Health Trust v. Wong, 666 the court held a competent adult has a lawful right to refuse a blood transfusion without which she may well die. Mrs. Wong, a competent adult and practicing Jehovah's Witness, was admitted to the hospital with a condition known as dysfunctional uremia bleeding. She was "absolutely at the edge, and at any instant or within hours... could die from lack of oxygen delivering capacity due to loss of red blood cells," unless she received a blood transfusion. 666 Mrs. Wong refused on the basis of her religious beliefs to accept a blood transfusion. 666

The circuit court held an emergency hearing with the attending physician and the patient's family, including her husband and two sons. The court denied Mrs. Wong's petition, reasoning that the state's interest in having her two children reared by two parents override her interest "guaranteed by the privacy right of the constitution of this state." 667 Upon the strength of the trial court's order, Mrs. Wong underwent the blood transfusion. 667

On appeal to the Third District, Mrs. Wong argued that she had a constitutional right to refuse medical treatment. 670 The district court reversed the trial court's final order, stating that "there is no showing of abandonment of minor children, and, consequently, Mrs. Wong's constitutional right to refuse a blood transfusion is not overridden under the circumstances of this case." 670 Five members of the Supreme Court of Florida agreed that Mrs. Wong had a right to refuse a blood transfusion necessary to save her life. The justices held that the right of privacy, together with the free exercise of religion, outweighed the state's interest in maintaining a home with two parents for two minor children.

Neither of the two reported Wong decisions construes article I, section 23. Both were premised upon Perlmutter, which clearly could not have been decided upon that section. 771 Nonetheless, there is support for the position that Florida's general right of privacy embraces the decision of an individual to reject the offer of a blood transfusion. Chief Justice Ehrlich regards the decision as resting equally upon state constitutional grounds. 772

In State v. Powell, 773 parents, whose son's corneal tissue was removed during the autopsy, sought to declare unconstitutional a statute that authorized medical examiners to remove corneal tissue for later transplant. The court began with the premise that a person's constitutional rights terminate at death, although residual rights may survive to the decedent's next of kin. 774 The parents argued that decisions fundamental to the importance of the family have historically enjoyed federal privacy protection. The court distinguished federal cases as recognizing a freedom of choice among personal matters involving ongoing relationships between living, but not deceased, persons. 775

The justices rejected the parents' claim that the property right of the next of kin to possession of the body for the purpose of burial created a constitutional entitlement. "Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life, especially when a statute addresses public health interests." 776

Justice Shaw, in dissent, believed that article I, section 23 was inapplicable because the court was not implanting a right to refuse medical treatment. 777

771. See supra note 682 and accompanying text.
772. Wong, 541 So. 2d at 99-105 (Ehrlich, C.J. concurring specially, joined by Grimes, J., concurring). Chief Justice Ehrlich wrote to dissent with the dissenting opinion in which Justice Overton charged that the majority substantially broadened and thereby misconstrued Perlmutter. The Chief Justice emphasized that Wong was not inconsistent with Perlmutter. Perlmutter rested upon federal constitutional and common law principles. With the adoption of article I, section 23, Floridians voted for greater privacy protection than that provided in the federal constitution and that fact alone could justify broadening the scope of Perlmutter. Id. at 100-102.
773. 497 So. 2d 1188 (Fla. 1986) (Overton, J., McDonald C.J., Adkins, Boyd, Ehrlich, and Barkett, JJ.).
774. Id. at 1190 (citations omitted).
775. Id. at 1193.
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but not terminal condition, may exercise the patient’s right of self-determination to forego sustenance provided artificially by a nasogastric tube.\(^\text{764}\) The hard choices of the dying are not limited to accepting or rejecting medical intervention in the form of mechanical respirators and feeding tubes, but also include life-saving blood transfusions. In Public Health Trust v. Wons,\(^\text{765}\) the court held a competent adult has a lawful right to refuse a blood transfusion without which she may well die. Mrs. Wons, a competent adult and practicing Jehovah’s Witness, was admitted to the hospital with a condition known as dysfunctional uterine bleeding. She was “absolutely at the edge, and at any instant or within hours … could die from lack of oxygen delivering capacity due to loss of red blood cells” unless she received a blood transfusion.\(^\text{766}\) Mrs. Wons refused on the basis of her religious beliefs to accept a blood transfusion.\(^\text{767}\)

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\(^{764}\) Id. at 274.

\(^{765}\) 541 So. 2d 96 (Fla. 1989) (Kogan, McDonald, Shaw, Barkett, and Grimm, JJ; Ehrlich, C.J. concurred specially in opinion in which Grimes, J. concurred).

\(^{766}\) Wons, 500 So. 2d at 681 (quoting record).

\(^{767}\) Id. at 681.

\(^{768}\) Id. at 683 (quoting record).

\(^{769}\) Id. at 684. Mrs. Wons relied upon St. Mary’s Hosp. v. Ramsey, 463 So. 2d 666 (Fla. 4th Dist. Ct. App. 1985), which upheld the right of a patient under similar emergency circumstances to refuse a life-saving blood transfusion. The district court in turn relied upon Perlmuter and made no reference to Florida’s privacy amendment.

\(^{770}\) Wons, 500 So. 2d at 688.

\(^{771}\) See supra note 682 and accompanying text.

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plicated when the state seeks to regulate the care and disposition of dead bodies. He viewed the taking of control, possession, and custody of a deceased family member as a duty required of the next of kin since time immemorial. That duty was predicated upon religious, moral, and philosophical grounds, all of which enjoyed constitutional stature under article I.777 In particular, he regarded the right to be let alone as:

simply a constitutional affirmation of common law rights and customs surrounding the exercise of private, as contrasted to public, liberties. The right to possess and control the body of a deceased loved one and to honor and celebrate the decedent's life and death through appropriate commemoration is a quintessential privacy right.778

The final case under the rubric of self-determination asked whether the state may require an unmarried fifteen-year-old in the first trimester of pregnancy to obtain parental consent, or in the alternative, court approval before undergoing the medical procedure to terminate pregnancy. The legal battle was waged over uncharted terrain. From the dispute emerged the landmark decision In re T.W.779

T.W. challenged Florida's statute that required the physician to obtain the written informed consent of a pregnant minor female who desires to terminate her pregnancy.780 The section provides:

1. If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court . . . authorizing, for good cause shown, such termination of pregnancy.781

“Good cause” under the judicial bypass procedure included factual findings that the minor is “sufficiently mature to give an informed consent,” that the parent, custodian, or guardian “unreasonably withheld consent,” that the minor has “fear of physical or emotional abuse” were she to request consent from one of those individuals, or “any other

777. Powell, 497 So. 2d at 1195 (Shaw, J., dissenting).
778. Id. at 1196.
779. 551 So. 2d 1186 (Fla. 1989).
782. Id.
784. Justice Shaw wrote the opinion of the court. Justices Barkett and Kogan concurred and Chief Justice Ehrlich concurred specially with an opinion. In separate opinions, Justices Overton and Grimes concurred in parts I and II, but dissented from the holding in part III. Justice McDonald dissented but expressed agreement with the majority's discussion relative to adults in part I. Each part is addressed in turn.
785. In re T.W., 551 So. 2d at 1193 (quoting Thorburn v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)). Only the decision of the terminally ill to continue or terminate “necessary medical treatment,” the majority suggested, was more personal.
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T.W. sought relief under the judicial bypass provision. The trial
court appointed counsel for T.W. and separate counsel as guardian ad
litem for the fetus. Following a hearing, the trial court struck down the
bypass provision and required T.W. to obtain parental consent. The dist-
ric court declared the entire parental consent statute invalid, quashed
the trial court’s order requiring parental consent, and ordered the peti-
tion dismissed. 783 T.W. lawfully terminated her pregnancy and the at-
torney general was permitted to appeal on behalf of the state on
appeal.

In part I of the majority opinion, the court analyzed the parental
consent statute under article I, section 23 rather than the less restric-
tive federal constitutional provisions. 784 The court reaffirmed that Win-
field’s compelling state interest imposed upon the state a “highly string
ient standard,” observing that no government intrusion into the area of
personal autonomy had yet survived scrutiny. The court wrote that
there were few more “personal and intimate” decisions about one’s digni-
ity and autonomy than a woman’s decision to continue or terminate
pregnancy. The right to make that decision “freely” is fundamen-
tal. 785 Because minors are “natural persons” within the meaning of ar-
ticle I, section 23, there could be no differentiation between adults and
minors with respect to privacy rights. Minor females were similarly en-
dowed with the privacy protections of that section. 786

Part II establishes a framework within which to measure the rela-
tive strength of the state’s interest in regulating a woman’s decision to
terminate pregnancy. The court turned to Roe v. Wade, 787 which ruled
that the fourteenth amendment protected a woman’s decision to termi-
nate her pregnancy. Roe considered two state interests implicated by

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that decision. First, the state has an important and legitimate interest in maternal health, which becomes compelling at the end of the first trimester of pregnancy. The T.W. majority adopted the end of the first trimester as the time when the state’s interest in maternal health becomes compelling under Florida law. Before that time, the state must leave the abortion decision to the woman, although the state may intervene to the extent that it imposes no “significant restrictions.”

Second, Roe recognized that the state has an interest in potential life of the fetus, which becomes compelling at “viability,” that is, the point at which the fetus has the “capability of meaningful life outside the mother’s womb.” Viability under Florida law, the majority agreed, was that point in time when the fetus becomes “capable of meaningful life outside the womb through standard medical measures.” That point occurs, under “current standards,” generally upon completion of the second trimester.

Having decided that the state’s interest in the health of the female only becomes compelling at the completion of the first trimester, the court concluded that the statutory scheme impermissibly interfered with a female’s freedom to choose. The legislature’s attempt to regulate her decision making extended beyond the first trimester into the entire term of pregnancy.

Florida’s test for determining fetal viability merits discussion. The addition of “standard medical measures” appears to be gratuitous. The majority cites to Webster v. Reproductive Health Services, where Justice Blackmun argued that the “threshold of fetal viability” remains constant, regardless of advances in medical technology. If medical science has not pushed forward the occurrence of fetal viability, precisely what the addition of “standard medical measures” contributes to the time-tested trimester system of Roe is unclear. Two justices disputed the majority’s addition of the phrase for other reasons. Chief Justice Ehrlich charged that the point was not litigated and the court should not alter Roe’s standard without record evidence. Justice McDonald argued that it was unnecessary to reach the issue of viability because the constitutionality of the parental consent law was at issue, not fetal viability.

On closer inspection, it was necessary for the court to have reached the viability issue. Viability represents that point when the state’s interest in the potential life of the fetus is weighed in the balance of interests, and once achieved, permits the state to impose regulations designed to promote that interest. Necessarily, those regulations may impinge upon the “inextricably intertwined” interests of the pregnant female. Under federal law, that point generally occurs upon completion of the second trimester, but that does not foreclose state courts from reaching a more restrictive conclusion. Seen in this light, it was essential that the court reach the issue of fetal viability and establish for state constitutional purposes the point when the state may intervene to protect the fetus. Having decided the issue, it was then entirely appropriate to conclude that T.W.’s decision implicated no compelling interest of the state in potential life because she sought to terminate her pregnancy during the first trimester.

The addition of “standard medical measures” may signal the willingness of three justices to directly challenge the traditional notions of fetal viability, leaving open for later cases the opportunity to adjust the legal definition of viability as scientific and medical advances bring new understandings to current notions of human reproduction.

T.W.’s standard suggests another interesting component. The requirement of “meaningful life” implies that quality of fetal life may be relevant to fetal viability. Whether fetal life is capable of a meaningful existence outside the womb also connotes that some authority must render a value judgment on the worth of human life throughout the course of gestation. Numerous state courts have addressed such value judgments in the context of choices by the terminally ill to discontinue life-supporting measures. Predictably, state courts have reached opposing views on whether such qualitative considerations in that context are

788. Id. at 163.
789. In re T.W., 551 So. 2d at 1193.
790. Roe, 410 U.S. at 163-64.
791. In re T.W., 551 So. 2d at 1194 (emphasis supplied).
792. Id. (citing Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3075 n.9 (1989) (Blackmun, J., concurring in part, dissenting in part)).
793. Webster, 109 S. Ct. at 3075 n.9 (Blackmun, J., concurring in part, dissenting in part).
794. In re T.W., 551 So. 2d at 1197 (Ehrlich, C.J., concurring specially).
795. Id. at 1205 n.2 (McDonald, J., dissenting).
796. Id. at 1193.
797. The Roe trimester system offers ease of administration as its primary advantage. The hybrid developed by the majority leaves much to be litigated. For instance, what measures are standard may vary according to the medical services available from one facility to another, from one geographic area to another, and from one medical specialty to another. In re T.W. offers no guidance on resolving this definitional problem.
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On closer inspection, it was necessary for the court to have reached the viability issue. Viability represents that point when the state's interest in the potential life of the fetus is weighed in the balance of interests, and once achieved, permits the state to impose regulations designed to promote that interest. Necessarily, those regulations may impinge upon the "inextricably intertwined" interests of the pregnant female. Under federal law, that point generally occurs upon completion of the second trimester, but that does not foreclose state courts from reaching a more restrictive conclusion. Seen in this light, it was essential that the court reach the issue of fetal viability and establish for state constitutional purposes the point when the state may intervene to protect the fetus. Having decided the issue, it was then entirely appropriate to conclude that T.W.'s decision implicated no compelling interest of the state in potential life because she sought to terminate her pregnancy during the first trimester.

The addition of "standard medical measures" may signal the willingness of three justices to directly challenge the traditional notions of fetal viability, leaving open for later cases the opportunity to adjust the legal definition of viability as scientific and medical advances bring new understandings to current notions of human reproduction.

T.W.'s standard suggests another interesting component. The requirement of "meaningful life" implies that quality of fetal life may be relevant to fetal viability. Whether fetal life is capable of a meaningful existence outside the womb also connotes that some authority must render a value judgment on the worth of human life throughout the course of gestation. Numerous state courts have addressed such value judgments in the context of choices by the terminally ill to discontinue life-supporting measures. Predictably, state courts have reached opposing views on whether such qualitative considerations in that context are

788. Id. at 163.
789. In re T.W., 551 So. 2d at 1193.
790. Roe, 410 U.S. at 163-64.
791. In re T.W., 551 So. 2d at 1194 (emphasis supplied).
792. Id. (citing Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3075 n.9 (1989) (Blackmun, J., concurring in part, dissenting in part)).
793. Webster, 109 S. Ct. at 3075 n.9 (Blackmun, J., concurring in part, dissenting in part).
794. In re T.W., 551 So. 2d at 1197 (Ehrlich, C.J., concurring specially).
795. Id. at 1205 n.2 (McDonald, J., dissenting).
796. Id. at 1193.
797. The Roe trimester system offers ease of administration as its primary advantage. The hybrid developed by the majority leaves much to be litigated. For instance, what measures are standard may vary according to the medical services available from one facility to another, from one geographic area to another, and from one medical specialty to another. In re T.W. offers no guidance on resolving this definitional issue.

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least intrusive means of furthering its interest. For those reasons, Florida's parental consent law violated article I, section 23's privacy protections accorded a minor female to freely decide whether to terminate her pregnancy.

Of the decisions surveyed under the heading self-determination, only In re T.W. definitively construed article I, section 23. In unequivocal terms, the court held that Florida's parental consent law violated the right of an unmarried, fifteen-year-old female to decide for herself whether to terminate her pregnancy during the first trimester. The decision advances the central premise of this privacy category—the state may not impose its orthodoxy to standardize an individual's identity unless it shows a compelling need for its action.

Other decisions under this heading relied upon a right of privacy grounded in the common law or emanating from the amendments of the federal constitution. They forecast the court's view that the state constitutional right of privacy safeguards the opportunity of persons to determine their own medical destiny. Perlmutter and Bludworth permitted patients to disconnect life-sustaining mechanical respirators. Wons permitted a patient to refuse a life-saving blood transfusion. Cottrell and Browning, two district court decisions, relied upon article I, section 23 to uphold the right of patients to refuse force-feeding.

There is utility in grouping the court's decisions under the privacy amendment into the categories of disclosural privacy, search and seizure contexts, and self-determination. For one, the categories contribute to the definition of the term "privacy," a term that is concep-
appropriate.798

In part III, the court considered whether a different conclusion was warranted when the state sought to regulate the choices of minor females. Two additional state interests are implicated where parental rights over their children are concerned: protection of the immature minor and preservation of the family unit. In the context of parental consent statutes, the federal protections will sustain state conditions imposed upon abortion decisions of minors that are found to be "important,"799 "legitimate,"800 or "significant."801

The state’s interests in T.W., measured against the "compelling" standard of the Florida Constitution, were insufficient to justify the parental consent requirement.802 This conclusion was premised upon two points. First, the legislature permitted a minor to consent to any medical procedure involving her pregnancy or child, in the absence of parental approval.803 The court was unable to discern any qualitative difference between the state’s requiring parental consent for the pregnancy termination decision, yet permitting the minor to consent without parental approval to undergo a different, more dangerous procedure. The selective approach chosen by the legislature exposed the limited nature of the state’s interest.804 Second, the parental consent statute’s numerous procedural deficiencies confirmed that the state had not crafted the least intrusive means of furthering its interest.805 For those reasons, Florida’s parental consent law violated article I, section 23’s privacy protections accorded a minor female to freely decide whether to terminate her pregnancy.806

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There is utility in grouping the court’s decisions under the privacy amendment into the categories of disclosures, privacy, and search and seizure contexts, and self-determination. For one, the categories contribute to the definition of the term “privacy,” a term that is concept-

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798. See, e.g., In re Quinlan, 70 N.J. 10, 26, 355 A.2d 647, 663 ("We have no hesitancy in deciding ... that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life.") cert. denied, 429 U.S. 922 (1976); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1142, 225 Cal. Rptr. 304, rev. denied, (Cal. 1986) (holding that a patient in a public hospital, whose life has been diminished to the point of "hopelessness, uselessness, unenjoyability and frustration," has the right to forego life-support); cf. Czuran v. Harmon, 760 S.W.2d 408, 422 (Mo. 1988) (en banc) (quoting Alexander, Death by Directive, 28 SANTA CLARA L. REV. 67, 82 (1988) "Quinlan subtly recast the state's interest in life as an interest in quality of life (cognitive and sapient).").


802. In re T.W., 551 So. 2d at 1195.


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ually as broad as the person intends. For another, the categories facilitate an understanding of the relative importance of the human activities protected under each. The court's decisions confirm that it views all personal privacy rights as deserving identical protection.

The state may intrude into a person's privacy protected under article I, section 23 only by showing a compelling state interest. Significantly, no decision involving an infringement of a person's right of self-determination found the state's asserted interests sufficient to satisfy this burden. 

Wons characterized the state's interest in assuring that a child be nurtured and supported by two parents as "important." Only In re T.W. acknowledged that the state could assert compelling interests, albeit under facts not before the court. The state's interest in maternal health becomes compelling at the end of the first trimester and its interest in potential fetal life becomes compelling at viability, which generally corresponds to the end of the second trimester.

The failure of the state to demonstrate a compelling interest in regulating matters of purely personal choice thus far serves as one basis for distinguishing this category of privacy cases from the others. To date, the state's interests prevailed in each decision involving asserted disclosural privacy. The state has a compelling interest in conducting effective investigations into the pari-mutuel industry when it has probable cause, and may compel disclosure of private bank records when necessary to advance that interest. The state has a compelling interest in investigating violations of state gambling laws when it has a "reasonable founded suspicion," and may seize through application of a pen register the telephone company's dialing activity of its private, residential subscribers. Also, the state's compelling interest in ascertaining that only qualified applicants are admitted to the practice of law, and may require a bar applicant to reveal private psychological history as a condition to the application process.

In the search and seizure context, the state has a legitimate interest in enforcing criminal laws. However, conduct by state agents that runs afoul of the warrant and reasonableness requirements of article I, section 12 necessarily abridges privacy rights protected under article I, section 23. It must be assumed that a showing of probable cause, or consent by the defendant, to a search or seizure will satisfy the compelling state interest standard and justify an infringement of rights protected under the privacy amendment. The court has not yet considered whether a seizure by a state agent armed with probable cause may in certain instances violate that amendment. In the final analysis, the strength of the protections under article I, section 23 is rendered less certain by the conformity requirement of article I, section 12, which compels the court to peg its privacy decisions in the search and seizure context to federal precedent.

C. Conclusion

This article surveyed the decisions of the Supreme Court of Florida that construed the state Bill of Rights during the decade of the 1980s. The Bill of Rights in article I of the Florida Constitution reaffirms enduring principles that were first made part of the constitutional fabric when Florida declared statehood. Among them are the right to access to a judicial forum and the right to a jury trial. Other rights are newly created and attest to the vitality of the state charter as it adjusts to the changing values of Florida citizens. The most recent declarations are the right to be free from discrimination on account of physical handicap, the right of employees to bargain collectively, the right of victims of crimes to participate in all crucial stages of criminal proceedings, and the express right of privacy.

The court's decisions also document the vitality of the Bill of Rights and reveal several important characteristics. First, article I creates a hierarchical order of personal rights. The various rights declared in article I are not of equal dignity for the simple reason that the court relies upon qualitatively different standards to determine when a particular right is entitled to protection or must yield to a countervailing interest. The more demanding the standard, the more protected the right, and correspondingly, the greater the justification required to support its infringement. Thus, the strength of a particular right is dependent entirely upon the standard used to measure the justness of the competing values.

At first blush, the strongest rights appear to be those that are said to be absolute. To regard article I rights as absolute might be theoretically appealing, but it ignores the record. The prohibition against legislative impairment of existing contracts, once declared to be absolute, now may tolerate a degree of legislative impairment if the legislative scheme is reasonable and the impairment minimal. Also, a prosecutor's comment on the defendant's failure to testify formerly brought automatic reversal. Today, comments on the defendant's silence are admissible if they are not "fairly susceptible" to being interpreted by the jury as relating to the defendant's failure to testify. The court rejected a literal interpretation of the right to trial by jury by holding that the right does not extend to petty criminal offenses. Moreover, as the court
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employee association agreement concerning leave and seniority.

There is no question that the federal case law is a significant source of guidance to state courts shaping state constitutional doctrine. There exist numerous areas of coincidence between federal and state charters, yet article I must be viewed in the first analysis as unique and independent of the corresponding federal Bill of Rights. Many state constitutional rights were cut from different cloth. They attest to Florida’s innovation and experimentation and have no federal parallel. Those sections include the prohibition against deprivation because of physical handicap, the right to work, the right of public employees to collectively bargain, the prohibition against imprisonment for indebtedness, pretrial release on reasonable conditions, offenses by juveniles, the rights of victims of crimes, the right of access to courts, and the express right of privacy.

Although many personal state rights have a federal counterpart, textual differences make inappropriate the replication of federal principles as a matter of state law. As example, the first amendment broadly expresses the principle that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” The analogous Florida provision, however, imposes a variety of directly targeted, specific limitations on the power of the state. The two provisions are linguistically dissimilar. The drafters and adopters of the state provision plainly meant to provide an independent source of protection, a protection that would be defeated by the mere adoption of federal precedent without a principled basis for so doing. Litigants should not allow freedom of religion issues to become first amendment issues without first considering a state constitutional basis for their claims.

The autonomy of the state Bill of Rights is most forcefully shown by those exceptional instances when the state protections eclipse federal standards. On five occasions, the court recognized that the state Bill of Rights provided greater protection than the prevailing federal minimum. The protection against unreasonable searches required police to obtain a warrant before electronically recording a conversation between an undercover officer and a defendant in the defendant’s home. Due process protects a defendant against state misconduct in the form of informants who are paid a fee contingent upon a conviction, regardless of the predisposition of a defendant to commit a crime. The protection against compelled self-incrimination bars testimony that is “fairly susceptible” of being interpreted by the jury as a comment on the defendant’s failure to testify, and bars the introduction of a defendant’s state-
expands application of the harmless error doctrine, the mere violation of protections extended to defendants in criminal cases no longer brings certain vindication.

Rather than declaring certain rights to be absolute, it is more precise to regard the Bill of Rights as qualified. All personal rights are entitled to protection against the competing interests of other persons and of the state, but all personal rights are subject to countervailing interests once adequately demonstrated. Within that framework exists a hierarchical order.

The highest order of article I rights are those protected by the compelling state interest standard. That standard protects personal rights against encroachment unless the state shows a compelling need for its action and that it advanced its action through the least intrusive alternative available. Protected by this standard are the right of persons in a suspect class to equal protection before the law, the right of employees to collectively bargain, the right of access to the courts in the event the legislature abolishes a right to a judicial forum assured at common law, and the express right of privacy.

Less demanding standards protect the remaining article I rights. A competing interest need not be compelling to justify an abridgment of a protected right if, under the facts presented, its value may be said to outweigh that of the personal right. The court engaged in a form of balancing when it upheld a statute that eliminated windfall insurance profits because the means chosen was not unreasonable and only minimally impaired the existing contracts of insurance carriers. Also, a defendant’s right to a fair trial may outweigh the right of access enjoyed by the media and require closure of judicial proceedings. Other standards applied to this order of rights measure the justness of the infringement. The court will strike down state action determined to be unreasonable, arbitrary, capricious, or serving no public purpose.

Although the hierarchical order may suggest the relative strength of personal rights should two rights come into conflict, it suggests nothing of the interrelationship between personal rights at odds with provisions outside article I. During the survey period, only the right to bargain collectively clashed with other constitutional provisions. In three of the four cases that tested competing constitutional provisions, the personal right of employees to bargain collectively prevailed. That right prevailed over the city’s attempt to forego bargaining on the subject of retirement, the city’s attempt to resolve demotion and discharge disputes through its civil service ordinance, rather than through collective bargaining, and the refusal of a civil service board to acknowledge an employee association agreement concerning leave and seniority.

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ment made during the custodial interrogation when police fail to notify an incarcerated defendant that his attorney desired to interview him. Finally, the right to trial by an impartial jury requires retail if the prosecutor exercises peremptory challenges to remove a prospective juror solely on account of race.

The court also demonstrated restraint in resorting to federal principles, as illustrated by its sparing application of the traditional appellate standard of harmless error analysis to article I violations. A conviction obtained by the introduction of a taped conversation, though admitted in error, will not be reversed if the evidence was merely cumulative. However, the court overturned one conviction because it could not find as harmless, improper lineup evidence admitted at trial. Finally, it remanded a lower court decision to determine whether a comment on the defendant’s failure to testify was harmless. Significantly, Florida rejected the federal standard that would permit a harmful error to go unsanctioned if there exists overwhelming evidence of guilt.

In retrospect, several innovative and creative efforts of the Constitutional Revision Commission and adopters have pointed Florida on a progressive course toward constitutional reform. The court’s state constitutional jurisprudence offers convincing encouragement to litigants to explore the limits of Florida’s constitutional imperatives. Peering through the looking glass, the upcoming decade bodes well for those who favor the revival of the state Bill of Rights as a source of personal protection against state excess and the power of the sovereign.

Juvenile Law
Michael J. Dale*

The general societal problem of what to do about children giving birth to children, and about mothers, with and without husbands, who cannot, because of mental, social, financial and other reasons, adequately physically provide the necessary care for the children is very, very serious, and one that should be openly considered by organized society and, specifically, by the legislature. Apparently, society cannot, or will not, do what is necessary to prevent the problem from occurring and will not openly seek the wisest solution to the problem. The problem is such that the public and media are little aware of it because it is handled in juvenile court proceedings which are confidential. Apparently the immediate solution is for H.R.S. to take control of the children and to throw the problem into the court on the questionable legal theories of “prospective neglect,” “prospective abuse,” “constructive abandonment” or some other theory or name.2

I. Introduction

The growing frustration of Florida’s appellate courts with the seeming inability of the “system” to respond to the needs of dependent and delinquent children is evident from written opinions of the district courts of appeal and the Florida Supreme Court over the past year.3 The courts’ concern is not only apparent in the area of abuse and neglect as demonstrated by Judge Cowart’s dissent in Manuel v. Department of Health and Rehabilitative Services,4 but in other areas as well.

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2. This survey will cover the time period from Oct. 1, 1988, to Sept. 30, 1989.
3. Appellate issues involving generic evidentiary issues are beyond the scope of this survey article unless the issue is unique to a juvenile case.
4. Manuel, 537 So. 2d at 1024.