

STATE CONSTITUTIONAL LAW

Cases and Materials



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Preface and Acknowledgments

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) has long been known for its descriptive and evaluative research on American federalism and for its consistent and reliable dissemination of data on intergovernmental functions and finance. During the past 29 years, the Commission's reports and data have played crucial roles in pinpointing problems, highlighting new issues, and helping private citizens and public officials to shape new directions for the federal system.

With this report, the Commission seeks to highlight yet another new, but not widely known development in American federalism: the revival of interest in state constitutions and state constitutional law.

As it has done so often in the past, the Commission presents here a body of information not otherwise readily available to private citizens and public officials. This report is the first major collection of multistate cases and materials on issues of state constitutional law affecting the 50 states ever to be made available. The report covers a wide range of issues likely to arise under any state constitution and, through cases and other materials, shows how these issues are addressed in similar and different ways by the several states.

This report would not have been possible without the generous efforts of Professor Robert F. Wil-

liams at the Rutgers University School of Law, Camden, NJ. While teaching state constitutional law, Professor Williams assembled much of the material that forms the basis for this report, and a research leave from Rutgers University enabled him to put the materials into the form in which they appear here.

A number of people contributed to the preparation and publication of this report. Professor Williams would like to acknowledge the constant assistance over the years of Professor L. Harold Levinson of Vanderbilt University and Professor Frank P. Grad of Columbia University. Ideas generated by Elaine S. Williams in her law practice provided many insights into the "real world" of state constitutional law.

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John Kincaid
Executive Director

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Introduction

The study of American constitutional law has been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation. Legal scholars and political scientists have contributed to this by their preoccupation with constitutional matters as defined by the U.S. Supreme Court. In fact, however, the federal Constitution is “incomplete”¹ in the sense that it relies extensively on mechanisms established in state constitutions, and leaves nearly all matters within the sphere of state power to be regulated by state constitutions and laws.

We have, however, experienced a “constitutional revolution”² in the judicial interpretation of individual rights provisions of state constitutions since the early 1970s. The era of major state constitutional innovation prior to the turn of this century³ was concerned primarily with changes in constitutional texts.⁴ Similarly, the wave of state constitutional revision that took place between 1945 and 1970 dealt with revisions to, and modernization of, the constitutions themselves.⁵ The rediscovery of state constitutional law in the past decade, however, involves judicial interpretation of state constitutions.⁶

Although state constitutional interpretation always has been important in areas of civil litigation, such as state taxation and eminent domain, and in areas of criminal procedure, such as bail rights, a broader spectrum of the private bar and a growing number of law professors, political scientists, and students now are discovering state constitutional law for the first time. This is attributable directly to the many “evasion cases”⁷ of the past two decades; that is, state supreme courts have relied on their own constitutions (1) to provide greater civil liberties protections for their citizens than are required by United States Supreme Court interpretations of the federal Constitution and (2) to insulate their decisions from Supreme Court review.⁸

These events have captured the attention of the legal and political community in a way that a state constitutional convention’s increase in gubernatorial powers or modernization of fiscal and budgetary provisions never could. Such structural or political reforms were relegated to the domain of a few political scientists.⁹ Their interests have included the structure and power allocations of state and local government, as well as the ways in which such powers actually are exercised. Lawyers and law teachers, by contrast, tend to be concerned with the extent and limit of governmental powers and with the interpretation of constitutional provisions in litigation. It is no surprise, therefore, that the state bill of rights “explosion” of recent decades has captured the attention of lawyers and legal scholars. This new attention, however, has generally been limited to state constitutional protection of individual liberties as an alternative to federal constitutional protections.

The field of state constitutional law, like federal constitutional law, is by no means limited to cases involving the application of state bills of rights. The structure and power of state and local governments, state-local relations, the state judicial system, taxation and public finance, and public education all are affected by the state constitution and its interpretation. Furthermore, the issues governed by state constitutions do not differ significantly from one state to another.¹⁰ State constitutional law, however, has not been treated as a matter of political or legal theory or as a subject for comparative treatment; rather, it usually is thought of as a parochial matter. However, the recurring themes and issues found throughout state constitutional law make it susceptible to treatment on a comparative or “all states” basis.

All 50 states have constitutions. These documents, although varying widely as to detail and length, perform the same general function in our fed-

eral system of law and government. This function is very different from that of the Constitution of the United States—the constitution usually thought of when we refer to “constitutional law.”

A state constitution serves as a charter of law and government for each state—the supreme law of the state—and prescribes in more or less detail the structure and functions of government. Further, state constitutions serve as limitations on the otherwise plenary, sovereign power of states to make law and govern themselves. At the outset, this fundamental point regarding the legal and political function and effect of state constitutions must be understood. By contrast, the federal Constitution is a grant of enumerated powers, upon which all exercises of federal power must be based. The states delegated to the federal government certain powers and agreed to restrain themselves with respect to other powers and functions. Such restraints are found in the federal and state constitutions.

A study of state constitutional law, while pointing out similarities, also highlights the diversity in the legal and governmental systems of our 50 states. In the famous words of Justice Louis Brandeis:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹¹

Many common themes appear in the constitutional law of all states. They share many of the same issues, despite differences in how such issues may be resolved in each state. It is the purpose of this book to focus on these common themes and issues, which are likely to arise in any jurisdiction. This will, in turn, accent the importance of the unique language and interpretation of the constitutions of the states in the resolution of specific issues.

In recent years educators in law and political science have noted the absence of state constitutional law in the curriculum and called for courses and materials on the subject.¹² This gap has been acknowledged by judges as well as by educators. Justice Charles G. Douglas of the Supreme Court of New Hampshire observed: “The fact that law clerks working for state judges have only been taught or are familiar with federal cases brings a federal bias to the various states as they fan out after graduation from ‘federally’ oriented law schools.”¹³ Justice Douglas deplored the “lack of . . . textbooks developing the rich diversity of state constitutional law.”¹⁴ Justice Hans A. Linde of the Oregon Supreme Court observed:

[T]he law schools have nationalized legal education, and constitutional law books deal with the opinions of the United States Supreme Court. Perhaps, if we could develop more constitutional law courses that are built around the issues and the choices which exist throughout our fifty-one constitutions and that would treat the opinions of judges as historic but not infallible struggles with those issues and choices. . . .¹⁵

This coursebook is intended to fill a major gap in the teaching of American constitutional law, and contribute to the following process identified by Justice Shirley S. Abrahamson of the Wisconsin Supreme Court:

State constitutions are coming out of the archives into the legal literature and into the classroom. They are coming out of the literature and the classroom into the courtroom. State constitutions will go from the courtroom back into the legal literature and into the classroom, and maybe back to the courtroom, through the lawyers trained in the 1980’s.¹⁶

Invaluable sources of information concerning each state’s constitution can be found in William F. Swindler’s 11-volume *Sources and Documents of U.S. Constitutions* (Dobbs Ferry, N.Y.: Oceana Publications, 1973-1979); and the Legislative Drafting Research Fund, Columbia University, *Constitutions of the United States: National and State* (Dobbs Ferry, N.Y.: Oceana Publications, various dates), 7 vols. See also Thomas C. Marks, Jr., and John F. Cooper, *State Constitutional Law in a Nutshell* (St. Paul: West Publishing Co., 1988).

For a new, up-to-date, excellent treatment of many of the issues that arise in state constitutional law, see “Symposium on the Arizona Constitution,” *Arizona State Law Journal* 20 (Spring 1988): 1. The range of issues that can arise under any state’s constitution, as illustrated by the materials in this compilation, is treated in Robert F. Williams, “State Constitutional Law Processes,” *William and Mary Law Review* 24 (Winter 1983): 169.

ENDNOTES

¹Donald S. Lutz, “The Purposes of American State Constitutions,” *Publius: The Journal of Federalism* 12 (Winter 1982): 38-42; Lutz, “The United States Constitution as an Incomplete Document,” *Annals of the American Academy of Political and Social Science* 496 (March 1988): 23.

²This may be contrasted with what Professor Howard refers to as the so-called ‘Constitutional Revolution’ of the 1930s. A.E. Dick Howard, “State Courts and Constitutional Rights in the Day of the Burger Court,” *Virginia Law Review* 62 (June 1976): 880. Professor Swindler asked whether the

1970s would see state courts “make a massive intellectual reversal of poles analogous to the reversal of federal constitutional law after 1937.” William F. Swindler, “State Constitutions for the 20th Century,” *Nebraska Law Review* 50 (Summer 1971): 596. Certainly massive change has occurred in the area of state constitutional protections of individual liberties.

³See generally Swindler, “State Constitutions,” 583-85.

⁴Much of that movement and the legislative change accompanying it was frustrated by the United States Supreme Court. *Ibid.* at 585-86.

⁵See generally Charles R. Adrian, “Trends in State Constitutions,” *Harvard Journal on Legislation* 5 (March 1968): 311-41; John E. Bebout, “Recent Constitution Writing,” *Texas Law Review* 35 (October 1957): 1071-89; W. Brooke Graves, “State Constitutional Law: A Twenty-five Year Summary,” *William and Mary Law Review* 8 (Fall 1966), 1-48; W. Brooke Graves, “Current Trends in State Constitutional Revision,” *Nebraska Law Review* 40: (No. 4, 1961), 560-74.

⁶This “new” use of state constitutions will be detailed in Chapters 3 and 4.

⁷Donald E. Wilkes, “More on the New Federalism in Criminal Procedure,” *Kentucky Law Journal* 63 (No. 4, 1975): 873 n. 2.

⁸Thus there are both substantive and procedural aspects to this rediscovery of state bills of rights. See Chapter 3, Section B.

⁹Political scientists have done a great deal of work on state constitutional law. See Joseph A. McClain, Jr., “Foreword,” *Washington University Law Quarterly* 27 (April 1942): 311. Between the 1920s and the late 1940s, the *American Political Science Review* published annually an article on state constitutional law. See, for example, Jacobus Tenbroek and Howard J. Graham, “State Constitutional Law in 1945-1946,” *American Political Science Review* 40 (August 1946): 703-28. See also Swindler, “State Constitutions,” 587 n.54 (“[T]his excellent twenty-year series of annual surveys was discontinued in 1949. The present writer has hopes of seeing the series revived in the near future.”) Unfortunately, Swindler’s hopes have not been fulfilled, but *Rutgers Law Journal* has announced plans to publish a survey and analysis of state constitutional law developments in 1989.

¹⁰Professor Frank P. Grad noted: “In spite of their enormous diversity, it is probably safe to say that the similarities between governmental structure in different states are considerably greater than their differences. . . .” Frank Grad, “The State Constitution: Its Function and Form for Our Time,” *Virginia Law Review* 54 (June 1968): 941. This similarity was present from the beginning:

The general similarity of all these early state constitutions is another circumstance worthy of remark. The ready acceptance of closely parallel institutions, formulas, and political ideas, by communities so unlike each other in the life and habits of their people and in their industrial and commercial interests, was beyond the expectation of some of the best minds of the day.

Henry Campbell Black, “The Formation of the First State Constitutions,” *Constitutional Review* 7 (January 1923): 31.

¹¹*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Oliver Wendell Holmes referred to “social experiments . . . in the insulated chambers afforded by the several states” *Truax v. Corrigan*, 257 U.S. 312, 344 (Holmes, J., dissenting).

¹²See, for example, Jefferson B. Fordham, “Some Observations Upon Uneasy American Federalism,” *North Carolina Law Review* 58 (January 1980): 293 (“state constitutional law is both a substantial component of the constitutional system and something of very real professional significance to lawyers.”)

¹³Charles G. Douglas, “State Judicial Activism—The New Role for State Bills of Rights,” *Suffolk University Law Review* 12 (Fall 1978): 1147.

¹⁴*Ibid.*

¹⁵Hans A. Linde, “First Things First: Rediscovering the States’ Bills of Rights,” *University of Baltimore Law Review* 9 (1980): 379, 392-93. See also Stanton S. Faville, “Dissecting a Constitution,” *Wayne Law Review* 13 (No. 3, 1967): 549 (calling for required course in state constitutional law); Lester J. Mazor, “Notes on a Bill of Rights in a State Constitution,” *Utah Law Review* 1966 (September 1966): 328. (No treatise exists on state constitutional law, nor one on the subject of civil liberties under state constitutions).

¹⁶Shirley S. Abrahamson, “Reincarnation of State Courts,” *Southwestern Law Journal* 36 (November 1982): 971.

Chapter 1

The History, Nature and Function of State Constitutions

A. The Evolving State Constitutions During the Founding Decade¹

The State Constitutions are the oldest things in the political history of America, for they are continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created. . . . Their interest is all the greater, because the succession of Constitutions and amendments to Constitutions from 1776 till today enables the annals of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities.²

One might almost say that the romance, the poetry and even the drama of America politics are deeply embedded in the many state constitutions promulgated since the publication of Paine's *Common Sense*, the Declaration of Independence, and the Virginia Bill of Rights.³

In its resolution of May 10 and 15, 1776,⁴ the Second Continental Congress recommended that in colonies "where no government sufficient to the exigencies of their affairs have been hitherto established" they should "adopt such Government as shall, in the Opinion of the Representatives of the People, best conduce to the Happiness and Safety of their Constituents in particular and America in general."⁵ During the ensuing decade after Independence, the cardinal question in discussions about the proper constitutional structure of the new state governments concerned the nature and powers of the legislative and executive branches, and their relationship to each other.⁶ By the time the Constitutional Convention met in the summer of 1787, the 13 independ-

ent states had debated, framed, adopted, rejected, modified, and continued to debate at least 20 state constitutions in the period since 1775. During the decade following Independence, therefore, the states, in the words of Jackson Turner Main, "became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries."⁷ John Adams' boast, "I made a Constitution for Massachusetts, which finally made the Constitution of the United States," while seriously oversimplifying the matter, contains an important element of truth.⁸

The founding decade of 1776-1787 witnessed the internal political struggle over "who should rule at home" as well as the larger revolutionary struggle for "home rule."⁹ The principal controversies over the first state constitutions had little to do with "rights." What was primarily at stake was how the new state governments would be structured and what groups in society would have the dominant role in making policy under the new governments.

It is now apparent that there was much greater diversity of opinion and interest reflected in the state constitution-making processes during the founding decade than was earlier thought. The ultimate outcomes of the constitutional battles in the states were also much closer and more contingent than has been commonly recognized. In this sense, the general consensus in favor of "republican" government was "a consensus that promoted discord rather than harmony."¹⁰

Obviously, the stakes surrounding the question of who was to rule at home were very high. Independence, coupled with drastic change in the political system of the past, was feared by those who had held power under the colonial regimes. To those who sought power, independence without real change in the political system was not worth the effort. This

tension would form the basis for the struggles over the framing and implementation of the state constitutions between 1776 and 1787.

The need for separation of powers was a priority in the minds of the framers of the new state constitutions because of the nature of the colonial dispute over England's arbitrary exercise of power and because of abuses arising from dual officeholding in the colonies. Therefore, these early constitution drafters were led to include statements of the principle of separation of powers within the texts of the constitutions. Because many of the first state constitutions contained what seemed to be explicit statements concerning separation of powers,¹¹ it is easy to assume that concerns about the proper balance of power and relationships among the branches had been worked out by 1776. Nothing could be further from the truth.¹² Also, merely stating the principle of separation of powers did nothing to establish any firm mechanism of checks to prevent, or at least remedy, encroachments of one branch into the proper domain of the others. Struggles over government structure and power occurred throughout the founding decade. The evolution of state constitutions during this period reflects a transition from early recognition of separation of powers to a later emphasis on checks and balances.

Historians and political scientists have identified two major "waves" of state constitution making during the founding decade.¹³ The key point in the first wave was the Pennsylvania Constitution of 1776; the Massachusetts Constitution of 1780 was the central feature of the second wave.

The First Wave

The first wave of state constitutions generally includes those adopted during the first year after Independence. These were drafted quickly at the beginning of the Revolution, usually by legislative bodies, and did not differ much from the colonial charters except with respect to weakened executive power and the inclusion of Declarations of Rights. Little consideration was given to structural mechanisms to check the dominant legislatures, although South Carolina's 1776 constitution contained an absolute gubernatorial veto (in effect only until 1778) and most of the constitutions created upper houses. Pennsylvania's 1776 constitution does not fit this description in a number of respects, but represents the culmination of the first wave and the direct stimulus for the second wave.

Pennsylvania's radical 1776 constitution was drafted by a separate convention elected for the purpose and followed Thomas Paine's recommendation in *Common Sense* that "simple" governments be established.¹⁴ Under the Frame of Government, legis-

lative power was placed in a unicameral assembly (often attributed to Benjamin Franklin's influence)¹⁵ with virtually no structural checks, such as a veto power for the weak, albeit elected, plural executive (headed by a "president" chosen by the assembly). Similarly, members of the supreme court could be removed by the legislature for "misbehavior." The constitution contained provisions aimed at making the assembly an open, deliberative body, accountable to the voters. Bills had to be enacted by two successive legislative sessions before becoming law. Legislators served one-year terms, and could serve no more than four out of seven years. Such legislative accountability provisions were virtually unknown in other state constitutions, and generally would not appear until well into the nineteenth century. These provisions relating to the otherwise dominant legislative branch could be seen as a form of popular "check" on legislative authority.

The Pennsylvania Constitution established the principle of apportionment by "the number of taxable inhabitants," with regular reapportionment. Property requirements for voting were eliminated, and the much broader requirement that a voter simply pay taxes was substituted in its place.¹⁶ Finally, a Council of Censors was to be elected by the people every seven years to review legislative actions for conformity "to the principles of the constitution" and to propose amendments to the constitution.

From the moment it was implemented, controversy raged over whether the constitution should be changed. This controversy dominated most elections in Pennsylvania until a new constitution was substituted 14 years later in 1790 as part of the overall movement leading to the federal Constitution.¹⁷ This split in Pennsylvania between what came to be known as the Constitutionist and Republican "parties"¹⁸ reflected in a general sense the controversies that would surround the new constitutions in other states and carry over into legislative politics in the lawmaking branches created by the new constitutions.

Almost immediately after *Common Sense* was published, John Adams published his *Thoughts on Government*¹⁹ as, among other things, a response to Paine. Adams set forth an alternative, more traditional vision of how the new state governments should be constituted. He proposed a model based on "balanced government," or separation of powers backed by checks, to which bicameralism and executive power were central. He also advocated property requirements for officeholding and voting.

The contending visions in the state constitution making of the founding decade were, therefore, generally delineated as early as 1776. The opposing visions of the proper structure of state government were embraced by contending factions in each of the

states where, with some variations, the visions collided throughout the decade of 1776-1787. As Edward Countryman has noted: "The dominant and ultimately triumphant [view] was toward constitutional stability. The other, weaker but still noteworthy, was toward some form of popular council democracy."²⁰

After what happened in Pennsylvania, which was watched with great interest and concern in other colonies,²¹ traditional leaders in a number of colonies adopted a strategy of delay. In North Carolina, for example, this delay was a defensive response to a radical faction in the Provincial Congress, and has been described as a defeat for the "democratic faction."²²

The November 1776 Orange and Mecklenburg County instructions to their Provincial Congress delegates reflected the same notions of a simple popular government as those espoused by Paine and the Pennsylvania Constitutionists.²³ The outcome in North Carolina, however, was a compromise, including, for example, a bicameral legislature but a wider franchise.

The Second Wave

The state constitutions of the second wave were adopted in a more deliberate fashion, often by specially elected conventions. These constitutions reflected a direct concern with mechanisms to check actions by the dominant legislative branches. The second wave was much longer than the first, lasting from 1777 through 1784, when New Hampshire finally revised its 1776 constitution.

The New York experience leading to its 1777 constitution marked the beginning of the second wave of state constitution making during the founding decade. The committee drafting the New York Constitution stretched out the process for eight months.²⁴ The convention avoided an earlier suffrage proposal for all white-male taxpaying freeholders,²⁵ but did agree to annual assembly elections, improved apportionment and the gradual elimination of voice voting (a crucial change in a tenant state like New York). On the other hand, the constitution provided for a senate and for an executive veto, exercised together by the governor, chief justice and chancellor acting as the Council of Revision. The victory achieved by the radicals in Pennsylvania was transformed into, at best, a compromise in New York.²⁶ The experience of Massachusetts with constitution making from 1776 to 1780, however, represents the best example of the second wave. In contrast to most of the other states, the processes leading to the well-known Massachusetts Constitution of 1780 are very well documented.²⁷

The pressure for a legitimate state constitution to replace the modified colonial charter led to the un-

successful legislatively proposed constitution of 1778,²⁸ and ultimately to the famous Massachusetts Constitution of 1780, the oldest American constitution still in effect, and a document bearing the personal mark of John Adams. The Massachusetts Frame of Government created a bicameral legislature consisting of a senate and house of representatives, "each of which shall have a negative on the other." The governor was given the veto power, subject to being overridden by a two-thirds vote in the legislature. Property requirements were imposed for voting and officeholding. Judges served during good behavior, and advisory opinions could be requested from the Supreme Judicial Court by either branch of the legislature, as well as by the governor and council.

Thus, in the period from 1776 to 1780, the clash of ideas in state constitutional conventions resulted in the development of opposing visions of government structure and power. After an initial, resounding victory in Pennsylvania in 1776, the radical vision slowly lost ground until, in 1780, it was completely rejected in Massachusetts, and in the later state constitutions.

Legislative Dominance

The primary focus of the radical democrats had been on the legislative branch. Issues relating to broader suffrage, fairer apportionment, annual elections, elimination of property requirements for officeholding, unicameralism, and elimination of executive interference with legislative policy were raised in virtually all of the states. Most of the early state constitutions, although some contained express recognition of the doctrine of separation of powers, "tended to exhalt legislative power at the expense of the executive and the judiciary."²⁹ This increased legislative dominance came primarily at the expense of the executive (identified with the British Crown),³⁰ against which the colonial assemblies had struggled but never succeeded in achieving anything but shared power.

In 1787 James Madison told the federal Constitutional Convention that state legislatures had become "omnipotent" because, "Experience had proved a tendency in our governments to throw all power into the Legislative vortex."³¹ Even though only three states created unicameral legislatures, the radical democrats' constitutional platform in the other states advocated unicameralism as a central feature. They knew that a unicameral legislature was susceptible to vices, but they sought, according to Jesse Lemisch, to "check if from below—with more democracy—rather from above, with less."³² Lemisch was referring primarily to the continued use of extralegal conventions and congresses (the people "out of doors") and binding instructions for represen-

tatives, but the legislative accountability provisions in Pennsylvania's 1776 Constitution could also be seen as examples of such checks from below.

The two basic factions that developed in each of the states during the battles over the state constitutions, and which contended over the franchise, legislative structure, and executive powers, carried over into the legislative politics of the founding decade. In virtually all of the states, two "parties," described by Jackson Turner Main as the "Localists" and the "Cosmopolitans,"³³ clashed again and again over the key legislative issues of the founding decade. These issues included the treatment and punishment of loyalists, price regulation, issuance of paper money, payment of the public debt, taxation policy, debtor/creditor relations, public spending, and a range of social and cultural issues.³⁴

In the majority of states, even though bicameral legislatures were created, the lower houses were clearly the most important. Not only did the membership in the lower houses expand to include "new men" through reapportionment and lower suffrage and officeholding requirements, but at the same time, these bodies took on new powers formerly exercised by the colonial magistracy. Those persons who had been accustomed to controlling the colonial governments, at least within their scope of authority,³⁵ were extremely uncomfortable sharing with, or even losing power to, new, inexperienced, lower-class representatives. For example:

Francis Kinloch found it "dreadful" to be mixed up with "butchers, bakers [and] blacksmiths," and Henry Laurens denounced inexperienced and unqualified representatives: They thought business could be "completed with no more words than are necessary in the bargain and sale of a cow."³⁶

There were also serious criticisms of the legislative product of the newly powerful state legislatures. It was the new state legislatures' substantive records, both on their merits and in terms of the sheer volume of laws and amendments, that drew the most sustained criticism from traditional leaders and ultimately served as a powerful stimulus for the federal Constitutional Convention in 1787.

In those states with bicameral legislatures, the upper houses, or senates, had been intended to serve as a buffer or check on the popular lower houses. The upper houses in the Revolutionary state constitutions were the direct descendants of the colonial governors' councils,³⁷ which performed both executive and legislative functions. The members of the pre-Revolutionary councils, however, owed their positions to the British Crown. Independence brought a dramatic change to these governmental bodies. The senators

no longer owed their seats to the Crown. After the Revolution, the senators were responsible to the expanded electorate.

Donald Lutz described the general picture:

The overall result was that senates were somewhat more conservative than lower houses and protected property more carefully; but they failed to provide a consistent check on lower houses, as had been intended.³⁸

The senators began to respond to the electorate in basically the same way that members of the lower house were responding.

Gubernatorial Power

The governorship underwent a profound transformation from an instrument of British policy exercising prerogative powers including an absolute veto of legislative acts during the colonial period, to a legislatively appointed office almost totally beholden to the newly dominant state legislatures. After struggling so long against powerful governors, it would have been impossible for the newly independent states to adopt a strong governorship. This was true even though at the time of Independence, there was great need for the exercise of decisive power, particularly in the context of the war.³⁹ A number of states initially did not even use the title "governor," preferring instead "president."

Although, as a general matter, the early state constitutions reflected a weak, legislatively dominated governor, this result was not approved unanimously. Pennsylvania, in its radical 1776 constitution, provided for no executive veto. By contrast, South Carolina, in its conservative 1776 constitution, provided its president with an absolute veto over legislation. However, the presidential veto in South Carolina became a target for reformers⁴⁰ and was eliminated in the 1778 revised constitution adopted by the legislature. John Rutledge had served as president under the 1776 South Carolina Constitution. He tried unsuccessfully to exercise that constitution's absolute veto to block the 1778 instrument that eliminated that very power. Rutledge also opposed the change in electing the upper house (the Legislative Council) from the assembly to the electorate.

Despite the relative weakness of most Revolutionary executives, which led James Madison to characterize the branch as "the grave of all useful talents,"⁴¹ a number of distinguished leaders in addition to Rutledge served in the post. Among them were Patrick Henry, Thomas Jefferson, and Benjamin Harrison in Virginia, John Hancock in Massachusetts, John Dickinson in both Pennsylvania and Delaware, William Livingston in New Jersey, and

Joseph Reed in Pennsylvania. Partly as a result of the stature of these governors, and partly because they exercised a wide range of statutorily granted powers beyond those formally reflected in the state constitutions, it has now been recognized that the governors were more important, and stable, during the founding decade than it was once thought. Governors generally opposed the legislatures' popularly inspired measures to delay taxes and permit payment of debts and taxes in other than hard money. They used the medium of their annual messages to the legislature to set the agenda of public issues. For example, Edward Countryman describes the importance of the governor's constitutionally mandated message to the legislature in New York:

Clinton took that charge seriously, recommending policy after policy in his messages to the legislature. The editor of those messages finds that some 170 laws were passed and 40 other actions taken during the Confederation period in response to the governor's suggestions.⁴²

New York provided for the first popularly elected governor,⁴³ beginning a trend toward a republican executive—elected by, and responsible to, the electorate. Also, New York began a trend toward stronger executive power. The New York Council of Revision went on to veto 58 legislative enactments prior to the federal Constitutional Convention.⁴⁴

The question of whether a state constitution should include a gubernatorial veto became a crucial one in the processes leading to the Massachusetts Constitution of 1780. An early committee report on the rejected 1778 constitution proposed a veto power, but it did not appear in the final version rejected by the people of the towns.⁴⁵ John Adams' draft of the 1780 constitution provided for an absolute gubernatorial veto. The constitutional convention, after initially rejecting the veto on a close vote,⁴⁶ ultimately modified Adams' proposal to permit a legislative override of gubernatorial vetoes, a change which Adams later said was made "to my sorrow."⁴⁷

Conclusion

The clearly established pattern during the founding decade was a gradual transition from legislative dominance or "omnipotence" toward an increased role for the executive and judicial branches. In the early years of the Revolution, the judiciary had almost been forgotten. If anything, it was considered part of the executive power that was the target of such hostility in the early state constitutions. As experience continued, however, with the dominant state legislative branches, the judiciary, along with the ex-

ecutive, came to be viewed as a check upon legislative encroachments on the rights guaranteed by the constitutions and the prerogatives of the other branches.⁴⁸ The new executive and judicial powers operated as a check on recognized legislative power, rather than a sharing of legislative power. It is in this sense that public concern evolved from a focus on separation of powers, which responded to grievances against the Crown before the Revolution, toward practical mechanisms of checks and balance, in response to experiences with legislatively dominated republican governments from 1776 to 1787.

In 1776 and the years immediately following, virtually all of the newly independent constitution makers' trust was placed in the legislative branch, albeit usually with two houses. As Gordon Wood has observed, at this time "a tyranny by the people was theoretically inconceivable."⁴⁹ The legislative branch had been identified with the people themselves, and viewed as a safeguard against executive abuses rather than a possible source of abuses itself. Under these circumstances, the 1776 brand of legislative supremacy, although not supported unanimously, was not surprising. Effective checks on this legislative power were not viewed, by many, as necessary. Executive and judicial power were recognized as important and distinct from legislative power, but not as serving as a check on exercises of legislative power that might either encroach on individuals' rights or upon the prerogatives of the other two branches. The 1776 Pennsylvania Constitution is the purest example of this early American constitutional thinking recognizing the separation of powers but not checks and balances.⁵⁰

This philosophy soon began to change, however, as experience under the new legislative supremacy began to be felt. More traditional leaders in the states framed arguments against the simple republicanism of the first wave and argued that, for example, increased executive veto power was not inconsistent with popular sovereignty but, rather, was a necessary mechanism to control legislative power. Further, these conservatives were able to begin to separate government from "the people" or society and to demonstrate the need for protections from abuses by the government. In this way, even within revolutionary republican rhetoric with its absence of reliance on hierarchical social structure which had justified "balanced government," the case could be made for checks on the misuse of power by government officials.⁵¹ As early as 1777, in the New York Constitution, there is evidence of a distrust of the legislative branch's willingness to stay within the confines of the legislative power and to honor the limits of the state Declarations of Rights. The transition begun in New York was, in effect, completed with the approval of

the 1780 Massachusetts Constitution. In Gordon Wood's words, "the Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures."⁵²

This transition in constitutional philosophy, design and structure was not purely a question of ideology.⁵³ In the eyes of the participants, there were immediate, practical consequences to the outcome of the debate over who should rule at home. Legislative supremacy proved to be extremely unpopular with the more traditional leaders in the states. They worked very hard to overcome the "omnipotence" of the state legislative branch—the "vortex" into which virtually all political authority was initially thrown, and later, dragged. These leaders finally succeeded in surrounding the legislative branch with various checks and balances.

As indicated earlier, many of the early state constitutions were neither framed by a convention specially elected for that purpose nor submitted to the electors for ratification. When the 1776 New Jersey Constitution was challenged on this basis in an 1802 case (not reported until 1828), Justice Kirkpatrick observed:

Whatever might be said upon theoretical principles, considering that the constitution was framed by a convention never delegated for the purpose, and therefore never vested with competent authority therefor; and considering also that it was not even by that convention intended or meant to be a perpetual law, but only to answer the pressing exigency of the times, as is manifest from its being made before the declaration of independence, as well as from many badges of colonial distinction which it still wears upon it; yet, notwithstanding these considerations, it has by general consent been received, and used ever since as the legitimate constitution of the state. Without looking, therefore, into the spuriousness of its origin, we must receive and treat it as such, until the people shall think proper to lay it aside, and to establish a better in its place.⁵⁴

In the 1793 Virginia case *Kemper v. Hawkins*,⁵⁵ a similar result had been reached. Judge Nelson stated that, with respect to Virginia's legislatively drafted and unratified Constitution of 1776, "The people have felt its operation and acquiesced."⁵⁶ St. George Tucker concluded that the people had authorized the drafting of a constitution in 1776: "It would therefore have been an absurdity in the extreme, in the people

of Virginia, to authorize the convention to absolve them from the bonds of one government, without the power to unite them under any other. . . ."⁵⁷ The Massachusetts Constitution of 1780 was the first to be drafted by a convention specially elected for that purpose and then ratified by the electors.⁵⁸

Thus, the state constitutions of the founding decade reflected a wide range of substantive content, and were promulgated through a variety of procedures. These early state constitutional experiments represent a process that has continued for over two centuries and is going on in state constitutional law even today.

ENDNOTES

¹This section draws extensively on Robert F. Williams, "Evolving State Legislative and Executive Power in the Founding Decade," *Annals of the American Academy of Political Science* 496 (March 1988): 43. See also Robert F. Williams, "'Experience Must Be Our Only Guide:' The State Constitutional Experience of the Framers of the Federal Constitution," *Hastings Constitutional Law Quarterly* 15 (Spring 1988): 403.

²James Bryce, *The American Commonwealth* (rev. 2d. ed.; New York: Macmillan 1891), vol. 1, pp. 413, 434.

³James Quayle Dealey, *Growth of American State Constitutions* (1915; reprint, New York: DaCapo Press, 1972), p. 11. Dealey also referred to state constitutions as a cinematoscope of the times. p. 2.

⁴The resolution was adopted May 10, 1776, and a preamble was added on May 15, 1776. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1980), p. 61.

⁵Ibid.

⁶For summaries of this decade of state constitution making, see Jackson Turner Main, *The Sovereign States, 1775-1783* (New York: Franklin Watts, 1973), pp. 143-95; Willi Paul Adams, *The First American Constitutions*, pp. 63-93; Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980); Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), pp. 125-255; Elisha P. Douglass, *Rebels and Democrats: The Struggle for Equal Political Rights and Majority Rule During the American Revolution* (Chapel Hill: University of North Carolina Press, 1955).

⁷Jackson Turner Main, "The American States in the Revolutionary Era," in *Sovereign States in an Age of Uncertainty*, eds. Ronald Hoffman and Peter J. Albert (Charlottesville: University of Virginia Press, 1981), p. 23.

⁸John Adams to Mercy Warren, July 28, 1807, quoted in Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: University of Massachusetts Press, 1978), p. 14. Adams was a little more accurate when he said "What is the Constitution of the United States, but that of Massachusetts, New York and Maryland! There is not a feature of it which can not be found in one or the

other." Quoted in Catherine Drinker Bowen, *Miracle at Philadelphia* (Boston: Little, Brown, 1966), p. 199.

⁹Carl Lotus Becker, *The History of Political Parties in the Province of New York, 1760-1776* (Madison: University of Wisconsin Press, 1909), p. 22.

¹⁰Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly* 3d ser. 29 (January 1972): 72.

¹¹See, e.g., Mass. Const. of 1780, Declaration of Rights, section XXX:

The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.

Quoted in William Clarence Webster, "Comparative Study of the State Constitution of the American Revolution," *Annals of the American Academy of Political and Social Science* 9 (January 1897): 389. For an in-depth discussion of the implications of this provision, see Peters, *The Massachusetts Constitution of 1780*, pp. 163-76.

¹²Webster, "Comparative Study," 403. See also Edward S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review* 30 (April 1925): 514 (separation of powers in early state constitutions "was verbal merely").

¹³Wood, *The Creation of the American Republic*, p. 435; Lutz, *Popular Consent and Popular Control*, pp. 44-45.

¹⁴Philip S. Foner, ed., *The Complete Writings of Thomas Paine* (New York: The Citadel Press, 1969), vol. 1, pp. 4-46.

¹⁵Rosalind A. Branning, *Pennsylvania Constitutional Development* (Pittsburgh: University of Pittsburgh Press, 1960), p. 14.

¹⁶Paine supported an even broader franchise. See Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford University Press, 1976), pp. 142-43.

¹⁷See generally Richard Alan Ryerson, "Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionist Party," in *Sovereign States in an Age of Uncertainty*, eds. Hoffman and Albert, p. 95. Robert L. Brunhouse, *The CounterRevolution in Pennsylvania 1776-1790* (Harrisburg: Pennsylvania Historical Commission, 1942), p. 17.

¹⁸Robert Kelley, *The Cultural Pattern in American Politics: The First Century* (New York: Knopf, 1979), p. 79-80; Ryerson, "Republican Theory"; J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Philadelphia: University of Pennsylvania Press, 1936), pp. 173-74; Brunhouse, *The CounterRevolution*.

¹⁹George A. Peek, Jr., ed., *The Political Writings of John Adams* (Indianapolis: Bobbs-Merrill, 1954), pp. 83-92.

²⁰Edward Countryman, "Some Problems of Power in New York 1777-1782," in *Sovereign States in an Age of Uncertainty*, eds. Hoffman and Albert, pp. 158-59.

²¹Selsam, *The Pennsylvania Constitution of 1776*, p. 215. A North Carolina delegate to the Continental Congress wrote that "The Pennsylvania Constitution has made more Tories than the whole treasury of Britain." Elisha Douglass, "Thomas Burke, Disillusioned Democrat," *North Carolina Historical Review* 26 (1950): 159 n.34.

²²Douglass, *Rebels and Democrats*, pp. 121, 129. See also p. 123 (delay helped conservatives).

²³Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), vol. 1, pp. 56-58. See also M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p. 141.

²⁴Alfred F. Young, *The Democratic Republicans of New York: The Origins 1763-1797* (Chapel Hill: University of North Carolina Press, 1967), p. 18; Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York 1773-1777* (Lexington: University of Kentucky Press, 1966), pp. 219-20.

²⁵Staughton Lynd, *Class Conflict, Slavery and the United States Constitution* (Indianapolis: Bobbs-Merrill, 1967) p. 38; Young, *The Democratic Republicans*, pp. 18-19.

²⁶Young, *The Democratic Republicans*, pp. 20-21. Bernard Mason concluded that the 1777 New York Constitution was a compromise, but weighted on the conservative side. Mason, *The Road to Independence*, p. 243.

²⁷See, for example, Oscar and Mary Handlin, *Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Harvard University Press, 1966); Robert J. Taylor, *Massachusetts, Colony to Commonwealth: Documents on the Formation of its Constitution, 1775-1780* (Chapel Hill: University of North Carolina Press, 1961).

²⁸This document is found in Handlin and Handlin, *Popular Sources of Political Authority*, p. 190. This constitution and its rejection is discussed in Stephen E. Patterson, *Political Parties in Revolutionary Massachusetts* (Madison: University of Wisconsin Press, 1973), pp. 171-96.

²⁹William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: Cornell University Press, 1972), p. 21.

³⁰For a summary of the powers of the colonial executive, see Main, *The Sovereign States*, pp. 99-103. On the transitions in executive power under the first state constitutions, see Charles Thach, Jr., *The Creation of the Presidency, 1775-1789* (Baltimore: Johns Hopkins University Press, 1969), p. 27.

³¹Max Farrand, ed., *The Records of the Federal Convention of 1787*, ed. (New Haven: Yale University Press, 1966), vol. 2, p. 35.

³²Jesse Lemisch, "The American Revolution Seen From the Bottom Up," in *Towards a New Past: Dissenting Essays in American History*, ed. Barton J. Bernstein (New York: Pantheon, 1968), pp. 14-15.

³³Jackson Turner Main, *Political Parties before the Constitution* (Chapel Hill: University of North Carolina Press, 1973), p. 24.

³⁴Main, *Political Parties*, pp. 44-79. See also Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University of Kansas Press 1985), pp. 143-79.

³⁵Merrill Jensen makes the important point that in colonial times the elites actually relied on British authority to overrule unwelcome colonial decisions. Merrill Jensen, *The American Revolution within America* (New York: New York University Press, 1974), pp. 107-08.

³⁶Jerome J. Nadelhaft, "The Snarls of Invidious Animals": The Democratization of Revolutionary South Carolina," in *Sovereign States in an Age of Uncertainty*, eds. Hoffman and Albert, p. 65. See also Lynd, *Class Conflict*, pp. 109-32 (describing entry of "new men" into New York politics during the founding decade).

³⁷Jackson Turner Main, *The Upper House in Revolutionary America 1763-1788* (Madison: University of Wisconsin Press, 1967).

³⁸Lutz, *Popular Consent and Popular Control*, p. 92. See also Wood, *The Creation of the American Republic*, pp. 503-04.

³⁹Margaret Burham MacMillan, *The War Governors in the American Revolution* (New York: Columbia University Press, 1943), p. 14.

⁴⁰Nadelhaft, "The Snarls of Invidious Animals," p. 69; Richard Walsh, *Charleston's Sons of Liberty: A Study of the Artisans, 1763-1789* (Columbia: University of South Carolina Press, 1959), pp. 81-82.

⁴¹Irving Bryant, *James Madison: The Virginia Revolutionist* (Indianapolis: Bobbs-Merrill, 1941), vol. 1, p. 316, quoted in Emory G. Evans, "Executive Leadership in Virginia 1776-1781: Henry, Jefferson and Nelson," in *Sovereign States in an Age of Uncertainty*, eds., Hoffman and Albert, p. 186.

⁴²Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981), p. 210.

⁴³Main, *The Sovereign States*, p. 174. Main concludes, however, that the New York Governor was not a "democratic creation," pp. 174-75. See also Wood, *The Creation of the American Republic*, p. 448. Pennsylvania's 1776 Constitution provided for an elected executive, but it was a weak plural Executive Council.

⁴⁴Thatch, *The Creation of the Presidency*, p. 39. The veto messages are contained in Charles Z. Lincoln, ed., *Messages*

from the Governors (Albany, N.Y.: J.B. Lyon Co., 1909), vol. 2.

⁴⁵Main, *The Sovereign States*, p. 178; Thatch, *The Creation of the Presidency*, p. 49.

⁴⁶The vote in the convention was 44-32 to reject the veto. Two days later the compromise proposal carried on a vote of 44-24. Oscar and Mary Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (Cambridge: Belknap Press, Rev. Ed. 1969), p. 25 nn. 73, 77.

⁴⁷Douglass, *Rebels and Democrats*, p. 197.

⁴⁸Wood, *The Creation of the American Republic*, p. 452. On the rise of judicial power during the founding decade, see generally *ibid.*, pp. 453-463; M.J.C. Vile, *Constitutionalism*, pp. 157-58.

⁴⁹Wood, *The Creation of the American Republic*, p. 62.

⁵⁰M.J.C. Vile, *Constitutionalism*, pp. 134-143.

⁵¹Peter S. Onuf, "State Politics and Ideological Transformation: Gordon S. Wood's Republican Revolution," *William and Mary Quarterly* 3d ser. 44 (July 1987): 614.

⁵²Wood, *The Creation of the American Republic*, p. 409.

⁵³For Gordon Wood's most recent discussion of the interrelationship of ideology and human behavior, see Gordon S. Wood, "Ideology and the Origins of Liberal America," *William and Mary Quarterly* 3d ser. 44 (July 1987): 628-34. See also Jay M. Feinman, "The Role of Ideas in Legal History," *Michigan Law Review* 78 (March 1980): 722.

⁵⁴State v. Parkhurst, 9 N.J.L. 427, 442-43 (1828).

⁵⁵3 Va. 20 (1793).

⁵⁶*Ibid.*, at 28.

⁵⁷*Ibid.*, at 72. See generally A.E. Dick Howard, "'For the Common Benefit': Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker," *Virginia Law Review* 54 (June 1968): 832-38.

⁵⁸See Symposium, "Massachusetts Constitution of 1780," *Suffolk University Law Review* 14 (Summer 1980): 41; Ronald M. Peters Jr., *The Massachusetts Constitution of 1780: A Social Compact*.

B. State Constitution-Making after the Original States

The following section reflects, without going into great detail, the major legal and political principles applicable to the admission of new states to the Union, and approval of their state constitutions.

Article IV, Section 3, Clause 1, U.S. Constitution

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

FIFTIETH CONGRESS. SESS. II.
CH. 180. 1889.

Chap. 180. An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced

due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors and said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to

such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all rights and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that 'until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the or-

dinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

SEC. 5. That the convention which shall assemble at Bismarck shall form a constitution and State government for a State to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and State government for a State to be known as South Dakota: Provided, That at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "for the Sioux Falls constitution" it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at the election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed State, to the re-apportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the State of South Dakota shall be admitted as a State in the Union under said constitution as hereinafter provided; but the archives, records, and books of the Territory of Dakota shall remain at Bis-

marck, the capital of North Dakota, until an agreement in reference thereto is reached by said States. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at the election shall be "against the Sioux Falls constitution," then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and State government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

SEC. 6. It shall be the duty of the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said Territory, and agree upon an equitable division of all property belonging to the Territory of Dakota. . . .

SEC. 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions as provided for in this act, the Territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the Territory so rejecting its proposed constitution shall continue under the Territorial government of the present Territory of Dakota, but shall, after the State adopting its constitution is admitted into the Union, be called by the name of the Territory of North Dakota or South Dakota, as the case may be: Provided, That if either of the proposed States provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the Territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution or to amend the rejected constitution, and shall submit such new constitution or amended constitution to the people of the proposed State for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed State.

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

* * * * *

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889.

Discussion Notes

1. Carefully reread the first and fourth clauses of section 4 of this Enabling Act. Why would the Congress require the states to include these provisions in their constitutions? See Frank J. Conklin and James M. Vache, "The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court," *University of Puget Sound Law Review* 8 (Winter 1985): 431-33, 436-42; Robert F. Utter and Edward J. Larson, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution," *Hastings Constitutional Law Quarterly* 15 (Spring 1988): 451.

2. On the admission of new states generally, see Jack E. Eblen, *The First and Second United States Empires, Governors and Territorial Govern-*

ment, 1784-1912 (Pittsburgh: University of Pittsburgh Press, 1968).

3. Joint Resolution No. 8, Approved Aug. 21, 1911 (*37 Statutes at Large* p. 39) admitted New Mexico and Arizona as states, provided that the "admission herein provided for shall take effect upon the proclamation of the President of the United States, when the conditions explicitly set forth in this joint resolution shall have been complied with . . . and also after evidence shall have been submitted to him in compliance with the terms and conditions of this resolution." The joint resolution went on to require New Mexico to amend its constitution with respect to the process of amending the constitution and its section on recall of public officers. See *State ex rel Watt v. State Canvassing Bd.*, 437 P. 2d 143, 145-46 (N.M. 1968).

**By the President of
the United States of America,**

A Proclamation.

January 6, 1912

WHEREAS the Congress of the United States did by an Act approved on the twentieth day of June, one thousand nine hundred and ten, authorize the people of the Territory of New Mexico to form a constitution and State government, and provide for the admission such State into the Union on an equal footing with the original States upon certain conditions in said Act specified:

AND WHEREAS said people did adopt a constitution and ask admission into the Union:

AND WHEREAS the Congress of the United States did pass a joint resolution, which was approved on the twenty-first day of August, one thousand nine hundred and eleven, for the admission of the State of New Mexico into the Union, which resolution required that the electors of New Mexico should vote upon an amendment of their State Constitution, which was proposed and set forth at length in said resolution of Congress, as a condition precedent to the admission of said State, and that they should so vote at the same time that the first general election as provided for in the said Constitution should be held:

AND WHEREAS it appears from information laid before me that said first general State election was held on the seventh day of November, one thou-

sand nine hundred and eleven, and that the returns of said election upon said amendment were made and canvassed as in section five of said resolution of Congress provided:

AND WHEREAS the Governor of New Mexico has certified to me the result of said election upon said amendment and of the said general election:

AND WHEREAS the conditions imposed by the said Act of Congress approved on the twentieth day of June, one thousand nine hundred and ten, and by the said joint resolution of Congress have been fully complied with:

NOW, THEREFORE, I, WILLIAM HOWARD TAFT, President of the United States of America, do, in accordance with the provisions of the Act of Congress and the joint resolution of Congress herein named, declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this sixth day of January, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America the one hundred and thirty-sixth.

Wm H Taft

By the President:

P. C. Knox

Secretary of State.

**Coyle v. Smith,
Secretary of State of the
State of Oklahoma
221 U.S. 559 (1911)**

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the State providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the State for the purpose of carrying out the act by the erection of the necessary state buildings. (Act of Oklahoma, December 29, 1910) not yet published.

* * * * *

The question reviewable under this writ of error, if any there be, arises under the claim set up by the petitioners, and decided against them, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the State at Oklahoma City was void as repugnant to the Enabling Act of Congress of June 16, 1906, under which the State was admitted to the Union. 34 Stat. 267, c. 3335. The act referred to is entitled "An act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The second section is lengthy and deals with the organization of a constitutional convention and concludes in these words: "The capital of said State shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the legislature; provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during said period."

Other sections of the act require that the constitution of the proposed new State shall include many specific provisions concerning the framework of the government. . . . The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admis-

sion, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may deprive a State of any power which it *possesses*, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. The contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to "every State in this Union a republican form of government." This position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original States."

The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." They only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States."

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other

as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted "as a new and *entire member* of the United States of America." 1 Stat. 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be "one of the United States of America," "on an equal footing with the original States in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original States."

The power is to admit "new States into this Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has to merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one antirepublican, — *Minor v. Happersett*, 21 Wall, 162, 174, 175, — but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may by the imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other States. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provi-

sions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new State, little needs to be said. The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.

* * * * *

So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new States after admission, there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.

* * * * *

The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

* * * * *

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legis-

lation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. . . .

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. If power to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States?

* * * * *

Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper loca-

tion of the local seat of government. She is not equal in power to them if she cannot.

In *Texas v. White*, 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States."

In *Lane County v. Oregon*, 7 Wall. 76, he said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Holmes Dissent.

Discussion Notes

1. Reread section 4, clauses 1 and 4 of the Enabling Act for North Dakota, South Dakota, Montana and Washington, p. 14. Could those states change the mandated state constitutional provisions after being admitted to the Union?

2. Could the required provisions in New Mexico, p. 17, be changed after admission?

3. For discussions of the nonoriginal states and the conditions of their admission to the Union, see Julien C. Monnet, "Violations by a State of the Conditions of Its Enabling Act," *Columbia Law Review* 10 (November 1910): 591; George W. Wickersham, "New States and Constitutions," *Yale Law Journal* 21 (November 1911): 1.

C. State Constitutions as Instruments of Lawmaking

**James Willard Hurst,
The Growth of American Law:
The Law Makers**

**Boston: Little, Brown & Co., 1950;
pp. 237-38, 240-46.**

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James Willard Hurst.

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3. Social Functions: Constitutional Legislation

We have seen that the Federal Constitution as a rule kept its original character as a document which fixed the basic frame of government, allocated power among the major agencies, and stated some general limitations on official power. But after 1830 state constitutions were filled with increasing amounts of specific legislation. Often these were the products of intense party or interest-group conflicts. State constitutional change occasionally, of course, involved revision of governmental structure, but when this was so, it was with little deliberation or debaté.

A great variety of specific matters were written into state constitutions. But the matters of real controversy which gave the formal constitution-making process its distinctive role in legislation fell into two categories: suffrage and apportionment, and economic regulation. State constitutions were used in effect to decide where and how the weight of votes should be felt in party and class conflict. Sometimes this was done by the way in which the right to vote was defined. Sometimes it was done through the apportionment of the districts in which the people's representatives were to be elected. State constitutions

were also used, more or less haphazardly, to decide particular questions about the role that the government should play in the economy; some interests sought to write into constitutions stronger guarantees of property and limitation upon the extent of public regulation; other interests sought to broaden the authority of the state to regulate or perform services, or wanted the constitutions to limit more strictly state favors for special groups.

A. Suffrage and Apportionment Battles

In one of the persistent trends in our constitutional law, all adult citizens gained the right to vote. In theory this concerns the structure of government: Why, then, does it belong in this analysis of the use of constitutions as vehicles of legislation? The answer is in the practice rather than the theory of politics. The vote was not extended to broader classes of citizens as a result of any dispassionate pursuit of a political ideal. Party battles and class feeling went into the trend, with as much of opportunism as of principle. Those who fought for extended suffrage often wanted to write it into the constitution simply to put a political victory of the time and place into the form most difficult for their opponents to upset.

Hot class conflict swirled about the adoption of white male suffrage in the first state constitutions after 1776. The social and political conditions of the succession of frontier states then, however, made it a taken-for-granted point. Next, prejudice against the foreigner was fanned for political advantage; definition of the voting rights of the foreign born became an issue in constitution making in Michigan in 1837, for example, and in Indiana in the 1850's and for a generation thereafter; on the West Coast from the 1870's into the twentieth century men saw no incongruity in writing race prejudice into their constitutions by denying the vote to Asiatics. Some of the militant idealism of the Abolitionists went into the

Fifteenth Amendment, but the more immediate and practical pressure for it came from passionate, partisan determination to keep the Republican party in control of the Union for an indefinite future. Women's suffrage ran its eventually successful course into the first quarter of the century. Back of this battle for the vote, of course, were strong ideas about women's social status. But these were no more important to the outcome than the very specific, if naive, conceptions that many politicians and interest groups, as well as reformers, held about the effect that the women's vote would have on such "moral" issues as control of liquor.

An expanded suffrage was closely related to the tendency to put an increasing amount of legislation into state constitutions. The constitution-making process showed more sensitivity to popular political currents, and hence a greater readiness to write into constitutions more detailed limits on government authority, and more specific authorizations for government services and protections.

* * * * *

B. Contests over Economic Regulation

Property—the getting, distributing, and holding of it—was the object of most of the substantive policy and limits on power that were written into state constitutions. The preponderance of such issues in constitutional legislation testified how far the law in the United States was concerned with the economic balance of power.

At first analysis, surprisingly few of these constitutional enactments of economic policy could be labeled of conservative origin. Most of them were products of the liberal politics of their times, expressing either the liberal's hopes or his disillusioned reading of experience. The explanation of this "liberal" background of constitutional legislation lay in the judge-made law of the constitution. Conservatives had their constitutional protection from judges rather than from the specific terms of constitutions. Operating under a few broadly phrased constitutional declarations, judicial review provided the more ready, and flexible protections for property. Among the specific constitutional limitations, the notably conservative ones were the limits put on taxation and public expenditure. Even here the picture was confused; in their origin most of the limits on spending, in particular, marked revolt against the earlier excesses of the promoter; in the 1930's, however, they provided points for conservative attacks upon spending policies with which states tried to meet the downswing of the business cycle.

Whether regard be had to those constitutional provisions resulting from liberal or from conservative drives, the main note was negative. The fact was not without meaning for appraisal of the strengths and weaknesses of political liberalism in the United States. In their definitions of policy for the general welfare, our constitutions were overwhelmingly negative. They stated limits on power rather than objectives of power. They showed more distrust than confidence in the uses of authority.

This was partly a consequence of the form of our governments. The federal government was wholly one of delegated powers; of necessity thus the Federal Constitution stated positive objects of national policy and spoke of grants of power. The state governments inherited the historic authority of general government. The state constitutions naturally, therefore, dealt largely with the limitation of powers that resided in state governments without the need of affirmative grant.

But government and politics do not move just to vindicate a legal theory. The negative emphasis in state constitutions continued because it fitted strong, if more or less inarticulate, beliefs among the people as well as the social setting which shaped those beliefs. At first, not much positive government seemed to be needed in this wealthy new country. This was no less true, though the people's practical attitude toward government led them to make some affirmative demands on it even at the outset. Too, in this setting, it was right for the individual to stand on his own feet. In every community there were some bad men whose badness must be punished or controlled. But this kind of thing was abnormal, and should be handled by specific prohibitions and regulations as the need appeared.

Until the 1930's the prevailing political notion was in terms of the bad men and restriction. New ideas stirred before this; but they did not control during the years when our formative constitutions were written. The New York constitutional convention of 1938 was concerned to declare that government had positive responsibilities, and powers accordingly, to provide health insurance, highway safety, urban transport, slum clearance, and low-cost housing. But this expressed a new current of thought concerning government's role in society, a current that did not begin to gather force until close to the end of the nineteenth century.

The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of "special" and "local" legislation. The related fear, that special favors would be sought under cover, was expressed in requirements that every bill bear a title clearly stating its subject matter, and that every bill deal with but one subject. The same fear was behind

insistence upon many requirements, hopefully designed to insure full publicity and open deliberation of the merits of legislation, through three readings, reference to committee, recording of the yeas and nays, and the like.

Real, if naive, public protest spoke through such provisions; its stimulus was in revealed fraud and corruption in public-land dealings and in the getting and granting of franchises, subsidies, and rate privileges for turnpikes, canals, river improvements, toll bridges, and, of course, especially railroads and street railways. So also between 1840 and 1880 banking was singled out, either as a wholly prohibited subject of legislation, or at least as one on which there must be no "special" laws. People's attitudes toward banks wavered in the nineteenth century, more or less according to the swings of the business cycle. Banks were vastly unpopular when the "colonial" frontier saw in them the grasping representatives of the settled and wealthier parts of the country; they were popular when, as local institutions, they seemed to offer easy money; but when the collapse came, they were blamed for speculative excesses. On the whole, during this period, the net judgment was unfavorable, as the constitutions testified.

The rapid, vast, and ruthless expansion of the railroads in the thirty years after the Civil War brought the second wave of constitutional limitations. States and local governments responded to early popular enthusiasm and to the pressures of railroad promoters, and liberally and often heedlessly granted land and money subsidies, subscribed to stock, and lent the public credit to build railroads. Railroad building proved very expensive, the more so because in conspicuous instances it was conducted for the greatest profit of the promoters. Lines were laid out in areas that could not for many years, if ever, support them. State and local governments found themselves out-of-pocket and burdened with long-term debts. The people found that the railroads for whose building these sacrifices had been made were often not completed; or, if they were built, were in such precarious financial condition that they could not bring the expected cheap and efficient transportation. The public reaction was the more intense because the railroads used their power arbitrarily, allowing rebates and fixing discriminatory rates, to the favor of some shippers and localities and the injury of others.

State constitutions first reflected these facts in amendments strictly prohibiting the grant of public money or credit by the state or local governments to private enterprises. These provisions first appeared in the '70s, but were enacted mainly in the late '80s, and thence to the end of the century. Other amendments set almost absolute bans upon the borrowing of money by the state or, less often, by local governments; government henceforth was to pay as it went,

out of current revenue. There appeared new recognition that taxes were in their effects an important form of economic regulation, affecting the distribution of wealth and power. Constitutional amendments limited or forbade tax exemptions. They defined taxable subjects more broadly, and occasionally expressed an effort to lift the tax load somewhat from the farmer mortgagor and put it on the mortgagee.

In a score or more of states another kind of constitutional change grew out of the railroad expansion. This was the creation of regulatory commissions, protected by constitutional status against legislative tampering. This it is clear, came from no abstract idea that the symmetry of government structure required constitutional provision for the new administrative bodies. The men who put these enactments into constitutions did so to settle contests between popular parties and the railroads for control of the government machinery, and to settle these in a way that they hoped would stick.

4. Social Functions: The Motives for Constitutional Legislation

Why did people go to the trouble of using the formal processes of constitution making in order to pass what often amounted simply to specific legislation? Mainly, they used this alternative channel for law-making because it offered new opportunities for change and promised permanence. Where constitutional amendments dealt with the structure of government power—which, theoretically, was the only thing that constitutions should deal with—there was also the desire to put basic decisions into permanent form; there was sometimes also a recognition that such changes should be in a form that firmly established the legitimacy of the government. Generally, however, as we have seen, when the people used the constitutional forms to set up state government structure, they did so out of a rather matter-of-fact acceptance of the practical need for adopting certain familiar institutions. The specific legislation written into state constitutions was often prompted by much more particular motives.

The two factors, of permanence and a new avenue to change, were closely related in the use of state constitutions for the enactment of particular policies. Men felt that legislation in constitutional form would be harder to upset, because the procedure for amending a constitution was more involved than passing a statute. Curiously, this stress on permanence often only illustrated a more general motive for putting legislation into the constitutions: that because of its independence from the everyday institutions of government, the constitution-making process might offer opportunities for changes that could not be had through other channels. This independence might not only facilitate certain changes, but also insure that, once made, they would stay.

When certain interests sought permanence for their policies by putting them into constitutional form, they expressed their distrust of what they could accomplish through the ordinary agencies of government; they expressed also their fears of what their opponents might be able to accomplish through the ordinary agencies. Plainly this was behind the constitutional amendments that forbade government to loan public credit, incur long-range debt, or spend public money to subsidize private promotions. A similar concern led many states to grant constitutional status to railroad regulatory commissions. In California, for example, such a commission was first set up by statute, but the railroads caused its repeal. In the California constitutional convention of 1878-1879, farmer and labor groups united to re-establish a railroad commission on a basis secure from legislative restriction; the delegates saw themselves as truer representatives of the people, enacting the people's legislation in a form that would last. A contrasting example appeared in the provision of the New York constitution of 1821 that fixed the taxes to pay debts incurred for building canals. Here the impetus to constitutional enactment was conservative. The more settled part of the state feared that after the canals were built, the relatively new and poor western regions of the state would try to cut taxes needed to pay off the canal debts.

The constitution-making process was used not only to conserve a victory won, but to skirt obstacles in the ordinary agencies to the enactment of new policy. Sometimes the effort was to break a log jam in the legislature. The Massachusetts convention of 1917 furnished an example. A leading issue there was whether the constitution should be amended to prohibit the grant of money to aid sectarian institutions. Those who sought this action from the convention apparently did so because they had tried for more than fifteen years without success to induce the legislature to propose such an amendment. Virginia offered another instance. The railroads for years fought efforts to abolish the fellow servant rule by statute. Proponents of the change, however, finally made it plain that if they could not win via the legislature they were probably going to win through the constitutional convention that met in 1901-1902. At that point the legislature abolished the rule.

It was not always the legislature which was bypassed through constitutional enactment. The process was used also to overrule judicial decisions adverse to some substantial interest or demand in the state. Compared with the influence that judicial review had upon United States law and politics, the number of such instances was not impressive. But their existence reminded that change could not be dammed up indefinitely.

Federal constitutional history supplied two notable examples: The Eleventh Amendment overruled

Chisholm v. Georgia, to make plain that a state could not be sued without its consent by a private party in the federal courts. The Sixteenth Amendment overruled *Pollock v. Farmers' Loan & Trust Company*, to establish that Congress might tax incomes. Examples of this constitutional "reversal" of decisions could also be seen in the work of the California constitutional convention of 1878-1879. In suits brought by banking interests, the California court had ruled that the old constitution did not permit "property" taxes to be laid on intangibles, including the value of a mortgagee's interest in mortgaged land. The farm debtors in the 1878 convention insisted that provision be made for taxing intangible wealth, especially mortgage interests. Another enactment of the 1878 convention set up a state board of tax equalization. This replaced a board created under legislation which the California court had declared unconstitutional; the court held that the statute attempted an invalid delegation of power, and that it also violated a provision of the old constitution which put the assessment and collection of taxes in locally elected officials. Under the old system certain localities, notably those dominated by large landholders, had shifted state taxes to other sections by reducing assessments; local needs were met by raising local tax rates on these assessed values. The 1878 convention seemed for the moment to have corrected the situation. But it did not clearly state the powers of the new state board of equalization. The court thus had to interpret the provision, and in doing so considerably restricted the new board's power to interfere with local assessors' favors to special interests. At best the slow-moving process of constitutional legislation was not equipped to match the more flexible power of the courts.

Constitutional amendment was sometimes used to forestall possible judicial challenge to legislative action. This was probably one reason why the New York constitutional convention in 1938 adopted various provisions declaring the legislature's authority to provide added public services in the state. Because the California constitution could be amended rather easily, this approach seems to have been taken often in that state; the California legislature proposed as constitutional amendments some measures that amounted to statutes, where the legislature feared that the courts might question their validity if they were passed as legislation.

Legislation enacted into state constitutions often involved the deepest political and social feeling of the time. Men often felt that it was critically important to give constitutional status to some declaration of policy which to them embodied a matter of principle or symbolized a great victory. Such efforts helped to exalt the idea of the constitution among our political beliefs. Nevertheless, a realistic appraisal of the bulk of the constitutional legislation did not add up to a very impressive estimate of its importance. In most

cases such specific enactments of policy did not direct, but merely recorded, the currents of social change. Most of this constitutional wisdom was the wisdom of hindsight. So far as much of this constitutional law was obeyed, this was because it was enacted when particular conflicts had reached a peak, and comparatively soon thereafter men's interests had so shifted as to relieve the pressure. Or the constitutional provisions merely registered an already formed public opinion whose weight, rather than the force of the law, changed the operations of government.

Even where constitutional legislation had force, the verdict was still a mixed one. It was undoubtedly worthwhile that it be demonstrated now and then that change too long dammed up through ordinary government channels could be affected by constitu-

tional amendment. It is extremely dangerous to social stability for a substantial opinion to find the regular channels of political action blocked. But experience suggested that the constitution-making process should be used only occasionally, if it were not itself to produce dangerous rigidity in government. Constitutional change was likely to be relatively difficult and slow to achieve. Specific policy, enacted in this resistant form according to the judgment and passion of the time, might prove a dangerous barrier to flexible treatment of later situations. The rigidity of some early prohibitions on banking, and of some later limitations on public financial operations, demonstrated the point. The processes for the enactment of policy into constitutional form served best by the reminder of their existence rather than by frequent use.

Discussion Notes

1. Is it true today, as Professor Hurst said above, that most constitutional legislation did not direct, but merely recorded, the currents of social change and "merely registered an already formed public opinion . . .?"

2. Regarding the matter of "constitutional legislation," see also, Orrin K. McMurray, "Some Tendencies in Constitution Making," *California Law Review* 2 (March 1914): 209-11; Note, "California's Constitutional Amendomania," *Stanford Law Review* 1 (January 1949): 279; Note, "Initiative and Referendum—Do they Encourage or Impair Better State Government?" *Florida State University Law Review* 5 (Fall 1977): 925.

3. Walter Dodd emphasized an important reason for "legislation" in state constitutions:

Similar reasons in some cases account for the placing of legislation in the constitution itself. For example, when the highest state court has declared unconstitutional a statute limiting labor on public works to eight hours a day, the people may put into the constitution an authorization for such legislation, but they may with equal brevity put the legislative action into the constitution itself.

Walter Dodd, "The Function of a State Constitution," *Political Science Quarterly* 30 (June 1915): 213.

4. The use of state constitutional amendments to overrule state civil liberties decisions is treated in Chapter 3, Section F.

5. Law and economics scholars consider statutes and constitutional provisions to be "long-term contracting" between special interests and legislators. For a "law and economics" explanation of state constitutional provisions as "a particu-

larly durable type of long-term legislative contract . . . because constitutional rights are harder to repeal than ordinary legislation," see W. Mark Crain and Robert D. Tollison, "Constitutional Change in an Interest-Group Perspective," *Journal of Legal Studies* 8 (January 1979): 166. See also William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics* 18 (December 1975): 892.

6. For another point of view about state constitutions, see Donald S. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 31-32:

A written constitution is a political technology. In a sense it is the very embodiment of the technology for achieving the good life. In addition, each constitution will contain sets of techniques for achieving the good life that will vary according to the vision that is being pursued, and the vision will be established by those writing the constitution. . . . The constitution is the plan for a way of life both in the sense of containing a description of (1) what that life should be like, and (2) a way of life. The former would be accomplished by enunciating the major principles guiding the good life envisioned, listing the values which are supportive of such a life, and describing the moral content of such a life, and thus providing a definition of justice. The latter would include a description of political offices, the duties of each office, how each is to be filled, how the offices interact to reach collective decisions, and who is eligible to hold each office—in effect, a design for the distribution of power.

**William Swindler,
"State Constitutions for the 20th Century"**

Nebraska Law Review
50 (Summer 1971): 583-86, 588-89.

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The State Constitutional Phase

In the last quarter of the nineteenth century, the center of political gravity was still in the states. In the Great Plains and the Rocky Mountains, indeed, the process of creating states out of territories was still going on, and at least one observer felt that the initial constitutions in these areas were "drawn up and adopted . . . with very little study by frontiersmen strongly under the influence of the tenets of Jacksonian democracy."²⁶ However that might be, the record of the older states to the east showed the developments which were to come; many of these states were, by the eighties and nineties, operating under the second or third constitution adopted since statehood, and the basic changes usually were spaced at intervals of a generation, thus suggesting that new charters emerged from a substantial alteration in the social or economic structure of the area. Certainly the new constitutions grew in size as their writers sought to come to grips with new issues. The first general wave of revision in the Ohio and Mississippi Valleys, for example, in the 1840's and 1850's sought to deal with the problem of underfinanced state banks and the issuance of unsecured banknotes. The generation after the Civil War was concerned with the depredations of the rapidly spreading railroads and, by the eighties, with the problems of the interstate corporation and ultimately the trust.

Two constitutional developments, in Illinois in 1870 and in Missouri in 1875, marked the beginning of modern state constitutionalism. The Illinois constitutional amendment brought grain elevators and warehouses under government supervision and thus substantially developed in American law the concept of the administrative regulatory agency.³⁰ Its constitutionality was upheld in 1877.³¹ The Missouri inno-

vation was the so-called "home rule" article in the state constitution of 1875, which for half a century thereafter would be cited as the touchstone of modern organization for local government.³² There were other changes fermenting during this period generally; a writer in 1892 found that in four contemporary adoptions of new charters, two in states just admitted to the Union (Idaho and Wyoming) and two post-Reconstruction Southern states (Kentucky and Mississippi), there were a number of startling challenges to orthodox common law and public law. The secret ballot, woman suffrage, limitations upon hours of labor, and numerous reforms in tort law were among the novelties.³³

These constitutional innovations, and the legislation drafted in implementation of them precipitated a certain amount of litigation both in state and federal courts. The ultimate question, of course, was whether these state attempts to cope with new economic and social issues unanticipated by the earlier constitutions were derogatory of any fundamental theories held to be ingrained in English common law, natural law or some vaguely conceived "higher law."³⁴ The results of this constitutional testing in the courts were ambivalent; generally, the judicial course in the area of economic regulation was one of retreat from the position taken in *Munn v. Illinois*. The rapid ascendancy of laissez-faire philosophy in federal constitutional law during this period would mean that what was forbidden to national government was likely also to be forbidden to state government, and periodically the Supreme Court would deliver an opinion to that effect.

The injunction against state impairment of contracts was the most common refuge of laissez-faire; thus, in 1878, a North Carolina constitutional amendment increasing the exemption of debtors' property from sale upon execution of a judgment was held invalid as to prior obligations.³⁶ Many communities which had sought relief from their state governments for obligations undertaken in the heyday of railroad promotion, after the railroad developments failed to materialize, were held fully liable on their bonds to holders in due course.³⁷ On the other hand, state efforts to prohibit discriminatory rate practices among railroads were often frustrated by the Court's reliance on the Commerce Clause.³⁸

²⁶Anderson, *The Constitution of Minnesota*, 5 Minn. L. Rev. 407, 433 (1921). See Dealey, *The Trend of Recent Constitutional Changes*, 8 PROCEEDINGS AM. POL. SCI. ASS'N 53 (1912); Eaton, *Recent State Constitutions*, 6 Harv. L. Rev. 8 (May 1892).

³⁰ILL. CONST. art XIII.

³¹*Munn v. Illinois*, 94 U.S. 113 (1887).

³²Mo. CONST. art X, Sec. 16 (1876). See Swindler, *supra* note 28.

³³See Dealey, *supra* note 26, at 53 et seq.

³⁴See Corwin, *The Higher Law Background of American Constitutional Law* 42 HARV. L. REV. 149 (1928).

³⁶*Edwards v. Kearzey*, 96 U.S. 595 (1878).

³⁷*Rees v. Watertown* 86 U.S. (19 Wall.) 107 (1873); *Ralls County v. United States*, 105 U.S. 733 (1881); *Louisiana ex rel. Nelson v. St. Martin's Parish*, 111 U.S. 716 (1884); *Mobile v. Watson*, 116 U.S. 289 (1886).

³⁸*Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

Conservatives were even more aghast at the constitutional experiments of the Progressive Era. The provision for the initiative and referendum in the Arizona constitution caused a strong effort in Congress to block Arizona's admission to statehood, even though the Supreme Court had already declared that once admitted to the Union a state could enact virtually any domestic legislation it desired.³⁹ Taft's Attorney General, George W. Wickersham, inveighed against the Arizona provisions: "The uncertain sands of shifting popular inclination . . . are far remote from the conceptions of the framers of . . . the Constitution of the United States."⁴⁰ A New York eight-hour day for bakers was set aside,⁴¹ although an Oregon law fixing maximum hours for women was upheld,⁴² thanks, in large measure, to the classic "Brandeis brief" which was submitted in support of the state's power.

The attempts of the states to develop modern constitutional power to deal with modern economic and social issues were thus all too often to be thwarted by a conservative Court obsessed with restraining government from interfering with the free enterprise system. The result, for state constitutional

development during the second and third quarters of the twentieth century, has been a critical increase in the movement of political power toward the national government and away from the states. It is difficult to deny the contention that the adamantness of the narrow constructionists on the Court, in the first three decades of the century, created a vacuum in state constitutionalism which, in the depression of the thirties, invited federal occupancy.

* * * * *

Thus the constitutions of the various states, by the midway point in the twentieth century, together with the decisional law deriving from the documents, indeed appeared to be at a crisis, although the nature of the crisis has not been too clearly analyzed up to now. The metamorphosis in federal constitutional law between 1937 and the end of the Warren Court in 1969 contrasts sharply with prevailing doctrine in state constitutional law. While various new State charters had been adopted in the first half of the century it is fair to say that hardly any fresh concepts in state government, with the possible exception of the experiment in unicameralism introduced in Nebraska in 1937,⁶⁷ were developed in any of them. As for the piecemeal amendment process, it not only has failed to keep the existing constitutions up to date, but often "added further complications to existing inadequacies."

⁶⁷NEB. CONST. art XV.

³⁹Coyle v. Smith, 221 U.S. 559 (1911).

⁴⁰Wickersham, *New States and Constitutions*, 21 YALE L. J. 1, 24 (1911).

⁴¹Lochner v. New York, 198 U.S. 45 (1905).

⁴²Muller v. Oregon, 208 U.S. 412 (1908). Accord, *Bunting v. Oregon*, 243 U.S. 426 (1917).

Discussion Notes

1. For specific, in-depth treatment of state constitution making in specific eras or regions, see Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (Chapel Hill: University of North Carolina Press, 1930, DaCapo reprint, 1971); Merrill Peterson, *Democracy, Liberty and Property: The State Constitutional Conventions of the 1820's* (Indianapolis: Bobbs-Merrill, 1966); Gordon M. Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, Conn., Greenwood Press, 1987); Elmer E. Cornwell, Jay S. Goodman, and Wayne R. Swanson, *State Constitutional Conventions: The Politics of the Revision Process in Seven States* (New York: Prager, 1975).

See generally Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 57-98.

2. Judicial interpretation of constitutions is one form of constitutional change. "Inasmuch as judicial interpretation supported by the doctrine of judicial supremacy is controlling, it has without question had the most profound effect upon constitutional meaning and content." Frank E.

Horack, Jr., "Cooperative Action for Improved Statutory Interpretation," *Vanderbilt Law Review* 3 (April 1950): 384. Is the role of judicial interpretation as important a source of constitutional change for the states as it is for the federal government?

See Cornwell, Goodman, and Swanson, *State Constitutional Conventions*, p. 8:

We should not overemphasize the importance of constitutional change by interpretation at the state level, however. Because of the detailed language of most state constitutions, conservative legislatures and judges have been inclined to follow a rather strict construction. There has been far less interpretative constitutional development at the state than at the national level. As a method of constitutional change, it is probably true that interpretation has been less important than the more formal processes of amendment and revision.

Do you agree with this conclusion? Keep it in mind as you consider the rest of the materials.

**Frank P. Grad,
“The State Constitution:
Its Function and Form for Our Time”**

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The last ten or twenty years have seen an unprecedented wave of activities in state constitutional revision and reform. State after state has formed constitutional commissions, has convened state constitutional conventions, or has submitted massive blocks of state constitutional amendments to the electorate. Much of the discussion relating to the improvement of state constitutional documents has worn a somewhat utopian cast. The effort is frequently pictured by some of the more idealistic civic groups, as well as by some of the more visionary newspapers, as one of achieving something that comes close to an “ideal” state charter.¹ It is the underlying thesis of this article that this aim overshoots the mark, and that in state constitution-making we must be content with something less than the Platonic ideal; we must aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future with efficiency and economy and with minimum interference by unnecessary restrictions. That is not to say that a state constitution should be so narrowly concerned with the state’s immediate problems as to turn it effectively into a prescriptive code of laws for their solutions; rather, the state constitution should be an instrument of government that, like any good instrument or tool, is suited to the performance of many tasks and not just the immediate task at hand. Viewed in that light, we are likely to discover that a flexible and adaptable instrument which helps us in the solution of today’s problems is likely to be flexible and adaptable, with only minor modifications, in managing tomorrow’s tasks as well. It is precisely the broad and flexible charters of an earlier day that are still useful in to-

¹This view was shared, at least in the past, by some academicians. See, e.g., Munro, *An Ideal State Constitution* 181 *ANNALS* 1 (1935).

day’s circumstances, and it is the charters of the late nineteenth century which were too closely concerned with the solutions of many narrowly specific and immediate problems that have become obsolete and that interfere with contemporary solutions because of their mass of detail and resulting rigidity in scope.

It is common to refer to a state constitution as an instrument of government, and it has been so characterized here. An instrument is a tool. The suitability and adaptability of a tool can only be gauged in the relationship to its set task.

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**The Content of State Constitutions—
The Need for Criteria of
Inclusion and Exclusion**

There has long been common agreement that a state constitution should be brief and should limit itself to “fundamentals,” avoiding all “legislative” matter. Little progress has been made, however, toward developing more definite guides to help the constitution-maker in drawing the distinction. Unless he is to be content with the notion that “fundamental matter” is matter which he wishes to include, and “legislative matter” is a term of opprobrium to stigmatize everything he wishes to keep out,⁴⁵ he needs more specific criteria to aid him in determining what matter is appropriate and what is inappropriate for inclusion in the state constitution.

There are some, in fact, to whom the words “fundamental” and “legislative” do seem to furnish a sufficient distinction, or who would rely heavily on the Constitution of the United States to make their point for them. Professor Munro, for example, has commented in a much cited article:

A state constitution should confine itself to fundamentals. This of course begs a question as to what one means by “fundamentals.” True enough, it is hard to define, but everybody knows what it means. Or, if any one does not, he need only read the Constitution of the United States to acquaint himself with an organic document which comes measurably near fulfilling the requirement.⁴⁶

It may be questioned, for example, how far the constitution for a government of delegated and limited powers can serve as a satisfactory model for the preparation of a constitution for a state government

⁴⁵V. O’Rourke D. Campbell, *Constitution-Making in a Democracy* 198-201 (1943) suggests that this is precisely the use made of the distinction at the 1938 New York Convention.

⁴⁶Munro, *An Ideal State Constitution*, supra note 2, at 5.

of plenary, inherent powers. The view that the national constitution furnishes an adequate guide, however, continues to receive some support.⁴⁷

In calling for constitutional inclusion of “fundamental” or “basic” matter only, Professor Munro echoes earlier commentators, and is the forerunner of many later ones. In a review of four late nineteenth century state constitutions—two framed by older states, Mississippi and Kentucky, and two by states then recently admitted to the Union, Wyoming and Idaho, a contemporary observer commented:

One of the most marked features of all recent State constitutions is the distrust shown of the Legislature. . . .

Enough of these constitutions has been quoted to show their manifest faults, their verbosity, and their omissions. They all err in incorporating into the organic law matter that should have been left for legislation. . . . A constitution should affirm general principles, leaving details to legislation.⁴⁸

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All the sources reviewed which lay stress on the “fundamental”-“legislative” distinction appear to share a number of underlying assumptions: (1) that, although there may be an intermediate area of doubt, there is, on the one hand, a set of constitutional provisions which are clearly fundamental or basic, and that, on the other, there are provisions which are clearly more appropriate for legislation; (2) that the terms “fundamental” and “legislative” have more or less readily ascertainable and applicable content unaffected by time or place; (3) that a brief constitution, one that is limited to “fundamental” matters, is better than a long constitution that contains “legislative” detail. The position taken here is that these assumptions are only partly true, and that a consideration of the problems and criteria of constitutional inclusion and exclusion must concern itself with a balancing of the purposes of the constitution and the needs of government, rather than with an attempt to supply a fixed meaning for the valuative terms “fundamental” and “legislative.” It is argued here that although there is a more or less agreed upon “core” area of constitutional content, criteria of inclusion and exclusion must take account of the needs of government as

conditioned by time and place. And although constitutional brevity has generally been found to be of advantage to state government, it is only one of several values to be achieved, and not necessarily the most important one. To put the last point differently, the best state constitutions are usually brief—but they are not the best because they are brief, but because they best meet the needs of state government.

Some Essential Considerations in the Development of Criteria

The discussion which follows seeks to aid the framer of a state constitution in the determination of what subjects are appropriate for constitutional treatment, and how they are to be treated, including the degree of detail appropriate. Recognition must, of course, be given in such an endeavor, first, to the need for inclusion of certain “core” subjects which common experience and tradition support as basic for the proper functioning of state government, and second, to the practical necessity—depending on the particular circumstances in a state at a given time—of including other matters so important to the state as to call for constitutional treatment.

This brings us to a consideration of the significance of treating a subject in the state constitution rather than leaving it to be dealt with by ordinary law. The significance is simply this: (1) it places the matter included in the constitution beyond change by normal law-making processes, and (2) it places it at the highest level of the legal authority of the state. Self-evident as they may seem, the two effects of constitutional, rather than, for instance, statutory treatment of a subject bring with them a large array of consequences. The development of criteria for inclusion and exclusion thus becomes mainly an endeavor of weighing these consequences in particular contexts.

Without anticipating the detailed consideration of the matter, it must be recognized at the outset that the twin effects of constitutional treatment have consequences which, depending on the circumstances, may be considered beneficial or harmful. The enduring quality of a provision of the state constitution may protect a desirable policy from frivolous changes by the legislature, or it may delay or prevent the change to a new and better policy from one embedded in a constitution which is no longer responsive to current needs. The fact that a constitutional provision stands at the pinnacle of the state’s legal authority may protect a major interest of the people against encroachment by any branch of government, or it may nullify inconsistent laws or other governmental acts, regardless of their intrinsic merit and regardless of the fact that changed circumstances may have given them a higher importance in a changed scheme of values. It

⁴⁷E.g., R. Dishman, *State Constitutions: The Shape of the Document* 12 (New York: National Municipal League, 1960).

⁴⁸Eaton, *Recent State Constitutions*, 6 Harv. L. Rev. 53, 121, 122 (1892).

ought to be added, too, that the beneficial consequences are usually intended, whereas the harmful ones are, more often than not, unintended and the result of changed circumstances. Inflexibility in the face of changed circumstances results in constitutional obsolescence and diminished power to act responsibly on the part of government organs. These factors in turn breed constitutional instability as a consequence of the need for frequent amendment. In the light of these various possible consequences, the decision as to inclusion or exclusion of particular subjects in the constitution becomes a matter of weighing the advantages against the potential costs of inclusion.

In Conclusion

The basic inquiry in evaluating any proposal to include a particular subject or provision in a state constitution should be whether the value of embodying this proposal in higher law, beyond change by normal lawmaking processes, is greater than the cost of so doing. In the balancing process necessary to reach a final decision, the importance of the provision to the people and to the effective government of the particular state must be weighed against the cost in

terms of inflexibility, obsolescence, decreased responsibility of the government, constitutional instability and the nullification of inconsistent government action. In reaching a decision, consideration should also be given to whether the policy embodied in the proposal is one likely to endure, or whether it is likely to suffer rapid obsolescence by reason of societal or technological changes. Another factor to be considered is whether adequate means other than inclusion in the constitution are available to achieve the particular objective.

It is clear that the criteria proposed will require difficult judgments of degree, and the factors taken into consideration may be evenly balanced. But in view of the fact that all of the provisions in state constitutions operate as limitations on the legislature and on the government as a whole, and in view of the fact that the cost of including a proposal is likely to be high in the terms described, the burden of proof concerning the need for inclusion should be squarely on its proponent, and any doubts on the issue should be resolved against inclusion and in favor of the freedom of government to respond to emerging problems without constitutional limitations, express or implied.

Discussion Notes

1. Is the argument that a proposal is not appropriate for constitutional treatment likely to convince the advocates of the proposal? Is this an argument that we can assume is applied consistently by constitution makers? See Robert F. Williams, "The Anatomy of Law Reform: Dissecting a Decade of Change in Florida In Forma Pauperis Law," *Stetson Law Review* 12 (Winter 1983): 385-386.

2. Would the United States Constitution be an appropriate model to follow in drafting state constitutions? Why or why not?

3. For another view of the proper principles to be included in a state constitution, see A.E. Dick

Howard, " 'For the Common Benefit': Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker," *Virginia Law Review* 54 (June 1968): 860-869.

4. A well-known ex-Governor observed in 1967:

State constitutions, for so long the drag anchors of state progress, and permanent cloaks for the protection of special interests and points of view, should be revised or rewritten into more concise statements of principle.

Terry Sanford, *Storm Over the States* (New York: McGraw-Hill, 1967), p. 189.

Six Constitutional Patterns

There appear to be six constitutional patterns among the American states. These patterns are rooted in the original constitutional conceptions of the founding era plus differences among the types and goals of pioneers who first settled the Northern, Middle, and Southern colonies of the New World. Subsequent migrations carried the constitutional ideas of these sections westward and, in some cases, resulted in significant changes as settlers mixed, confronted new environments and sets of governmental problems, and framed their constitutions at different times, thereby incorporating conceptions of government prevalent at the times of their writing.

Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutions"

Publius: The Journal of Federalism
12 (Winter 1982): 18-22.

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The Commonwealth Pattern

The commonwealth pattern derives largely from the constitutions of the states of greater New England. They are basically philosophic documents designed first and foremost to set a direction for civil society and to express and institutionalize a theory of republican government. Based on seventeenth and eighteenth-century Puritan and Whiggish ideas about constitution making, this pattern is the oldest in America. It emphasizes the constitution as a covenant establishing a civil society and setting forth its frame of government. These constitutions, as brief or briefer than the federal document, concentrate on setting forth the philosophic basis for popular government, guaranteeing the fundamental rights of the individual and delineating the elements of the state's government in a few broad strokes. Frames of government in the classic American sense, they have shown greater longevity and, at least in the case of Massachusetts, greater longevity than the U.S. Constitution.

Except for Vermont, none of the New England states has had more than two constitutions in its history, and Vermont has had only three, the last being adopted in 1793. Their fundamental documents have not been treated lightly. Like the federal Constitution, they have not been altered to reflect every new constitutional fad, but have remained general documents reasonably adaptable to different times and needs.

Eight states outside of New England whose political character was formed by New Englanders have followed the commonwealth pattern. All are still operating under their original constitutions. Although the youngest among them—those admitted as states in the latter half of the nineteenth century—have somewhat longer constitutions than their sisters formed earlier, as a rule they are also relatively short. Their greater length is accounted for in the somewhat more detailed restrictions placed on the institutions of state government and in the granting of constitutional status to state educational and welfare institutions.

Minnesota's constitution is a good example of this variation of the commonwealth pattern. Adopted in 1858 when Minnesota attained statehood, it is about 40 percent longer than that of Massachusetts, but still ranks among the shorter constitutions. The additional material in the Minnesota constitution consists of more explicit delineations of the powers and duties of state officers and clear provisions for schools, taxes, banking, highways, and legislative apportionment.

The Commercial Republic Pattern

A second pattern has prevailed in the Middle states (the northern states just south of New England and the states to the west of them which they have in-

fluenced, including most of the very large ones). These states have built their constitutions upon a series of compromises required by the conflict of ethnic and commercial interests and ideals created by the flow of various streams of migrants into their territories, and the early development of commercial cities.

The pattern in each is much the same. As each stream of migrants has been able to demand a government modeled after the one its people knew "back home" or a fundamental law that would protect its socioeconomic interests, the state's constitution has been replaced or revised accordingly. Most of the states in this category have had three to six constitutions apiece. These constitutions tend to be longer than those written in the commonwealth mold, primarily because the compromises written into them have had to be made explicit and presented in detail to soften potential conflicts between rival elements that have sharply divergent views of what is politically right and proper.

Illinois is an example of this tradition. Illinois was organized as a state by southern settlers in 1818. They endowed the state with a brief document which then reflected the South's approach to constitution making. Then, in the 1830s, large numbers of New Englanders began to arrive in the state. As they consolidated their settlements, they wanted to adapt the Illinois government to their own needs. To do so, they needed to change the state constitution, particularly in regard to local government, public education and public welfare. In the 1840s, they successfully bargained with their fellow citizens from Southern and Middle state backgrounds to reach a compromise embodied in the Constitution of 1848.

The compromise was seriously strained by the Civil War which almost rent Illinois as it did the Union. In order to settle outstanding differences and restore harmony, the state adopted a new constitution in 1870 which maintained the compromise of 1848, but restructured the institutions which embodied that compromise to allow for minority representation in each part of the state. Between 1870 and 1970, none of the several attempts to adopt a new constitution succeeded, precisely because leaders of the state's important interests were afraid to upset the balance of forces established by the compromise. New interests were accommodated by constitutional amendments, initially granting home rule to Chicago in 1904, and a spate of modernizing amendments in the late 1950s. The cleavages of the Civil War era had sufficiently diminished by the late 1960s to enable a new constitutional convention to shape a document that is considered to be one of the most advanced in the country.

The Southern Contractual Pattern

The Southern states developed a third pattern of constitution making, one which began with a general penchant for changing constitutions and was en-

hanced by the need to do so because of the disruption of constitutional continuity caused by the Civil War. Except for North Carolina and Tennessee, none of the eleven states of the former Confederacy has had less than five constitutions, most of which embodied the constitutional changes of secession, reconstruction and the restoration of white supremacy. Alabama, for example, adopted a constitution upon its admission to the Union in 1819, a revised document when it seceded from the Union in 1861, and still another when it sought to be restored to full rights in 1865. Then it adopted two constitutions during Reconstruction (1868 and 1875) and finally a constitution ratifying white supremacy in 1901. Yet the Civil War is not solely responsible for the South's relatively casual attitude toward its fundamental charters. Of the five Southern states that did not secede, only West Virginia has had less than four constitutions.

Constitutions of the Southern contractual pattern are unique in other and related ways. They are the only group to formally acknowledge the supremacy of the U.S. Constitution (a product of Reconstruction). At the same time, most of them contain (and retain) many provisions—particularly regarding elections, civil rights, and legislative apportionment—which have been invalidated by U.S. Supreme Court decisions. In general, the Southern contractual pattern has looked upon state constitutions as instruments designed to perpetuate a particular social system based on slavery or racial segregation. As political instruments, Southern state constitutions are designed to diffuse the formal allocation of authority among many offices in order to accommodate the swings between oligarchy and factionalism characteristic of Southern state politics. Perhaps because of the fluctuating balance of factions in many of the Southern states, their citizens have also been more tempted to write into their constitutions materials normally included in ordinary legislation.

Texas is a prime example of this pattern. The Lone Star State's first constitution, adopted in 1836, established the Republic of Texas. Then, in 1845, Texas adopted a new constitution to join the Union, another to join the Confederacy in 1861, a fourth to rejoin the Union in 1866, a fifth in 1869 to satisfy radical Republican Reconstructionists, and a sixth in 1876 to restore white supremacy and Democratic control and to limit state government, in part, by fragmenting power and establishing many independently elected offices. Indeed, the constitution includes an explicit statement of the principle of limited government. The Texas constitution is long, somewhat unwieldy, not highly venerated, and contains 233 amendments. Efforts to substantially revise the constitution failed at the polls in 1975.

The Civil Code Pattern

Louisiana is the one state that operates within a constitutional pattern of its own. Because of its original French background, its constitutions have been more like the basic civil codes of European countries—long, detailed, and not particularly revered. The Pelican State has had eleven different constitutions since 1812. Its tenth constitution, adopted in 1921, contained some 256,500 words, over six times as many as the average state document. As of 1965, it had been amended 439 times. The Louisiana constitutional tradition provides, in effect, a continuing referendum on all basic governmental decisions in the state and its localities. In 1974, however, 36 percent of the registered voters turned out to adopt (by 58 percent) a more modernized constitution containing only 29,704 words.

The Frame of Government Pattern

The fifth pattern is to be found exclusively among the less populated states of the Far West. In these states, the constitutions are frames of government first and foremost. They explicitly reflect the republican and democratic principles dominant in the nation in the late nineteenth century when their first constitutions were written, and then go on to specify the structure of state government and the distribution of powers within it in the style of the times. Their constitutions tend to be business-like documents of moderate length that reflect the relative homogeneity of the states themselves. Indeed, among those states, only Oklahoma has a population of over two million and it has the longest constitution of the group, reflecting, in part, its Southern antecedents.

Montana is a good example of this frame of government pattern. Admitted as a state in 1889, its original constitution reflected the frame of government approach when it was at its height. In 1972, that state adopted a constitution after what experts in the field consider to be a model process of constitution writing and ratification. While the new constitution incorporates many of the recommendations of constitutional reformers, it also appears to remain faithful to the frame of government pattern, adapting it to late twentieth century ideas.

The constitutional tradition of the Treasure State has tended to emphasize limited government except on certain matters of economic development. After World War II, Montana emerged from almost a century of well-nigh colonial status under the control of the Anaconda Company and later, Montana Power. In part, the new constitution of 1972, which replaced the state's original document of 1889, symbolized the new independence of the state and the assertion of power by the general citizenry.

The Managerial Pattern

Alaska and Hawaii, the two newest states, reflect a sixth constitutional pattern, one developed in the last half of the twentieth century. Their constitutions come closest to fitting the model designed by today's constitutional reformers. This reform model emphasizes conciseness, broad grants of powers to the state executive branch, and relatively few structural restrictions on the legislature. Their constitutions also feature articles dealing with local government, natural resource conservation, and social legislation. In all of this, they reflect the Hamiltonian managerial

model, albeit without being aware of it. While, as a model, it is as old as the republic itself, only in the twentieth century has it entered the mainstream of American constitutional development and only in the newest states could it serve as the basis for their constitutional foundations.

Alaska's constitution of 1956 must serve the nation's last land frontier and to some extent preserve it at a time when it is experiencing great pressures of modern economic development. Since statehood, its constitution has been amended fourteen times, in part to correct some of the excesses of the managerial approach.

Discussion Notes

1. Would it be likely that a state which had a constitution conforming to one of the patterns described by Dr. Elazar could revise its constitution so as to fit a different pattern?

2. Would the type of pattern into which a state's constitution fit be likely to influence the way the courts interpreted the constitution?

Chapter 2
**States and Their Constitutions
in the Federal System**

A. Introduction

James Madison, in the *Federalist*, Number 45 contended:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

Madison had unsuccessfully proposed that the federal Constitution authorize the Congress to veto any state law. See Charles F. Hobson, "The Negative on State Laws: James Madison, the Constitution and the Crisis in Republican Government," *William and Mary Quarterly* 36 (3d.Ser.) (April 1979): 215.

Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), p. 173:

The question of the relation of the states to the federal government is the cardinal question of our constitutional system It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question. The general lines of definition which were to run between the powers granted to Congress and the powers reserved for the states, the makers of the Constitution were able to draw with their characteristic foresight and lucidity; but the subject matter of that definition is constantly changing, for it is the life of the nation itself. . . . The old measures of the Constitution are every day to be filled with new grain as the varying crop of circumstances comes to maturity.

B. The Guarantee Clause

Article IV, Section 4, U.S. Constitution

The United States shall guarantee to every State in this Union a Republican Form

of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

Discussion Notes

1. See generally *The Federalist*, No. 21. What does the guarantee clause mean when it refers to a "Republican Form of Government"? See Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly* 29 (3d Ser.) (January 1972): 72, and Ruth H. Bloch, "The Constitution and Culture,"

William and Mary Quarterly 44 (3d Ser.) (January 1987): 550.

2. With respect to the guarantee clause, see William M. Wiecek, *The Guarantee Clause of the United States Constitution* (Ithaca: Cornell University Press, 1972); Note, "A Niche for the Guarantee Clause," *Harvard Law Review* 94 (January 1981): 681.

3. Who decides whether a state's government is "republican"?

Pacific States Telephone and Telegraph Company v. Oregon 223 U.S. 118 (1912)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the Government from the beginning to be political in character, and therefore not cognizable by the judi-

cial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its constitution (Art. IV, Sec.1). This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and house of representatives added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of vot-

ers were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted when approved by popular vote should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters.

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In 1903 (Feb. 24, 1903, Gen. Laws 1903, p. 244) detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on and promulgated by the Governor in 1906 (June 25, 1906, Gen. Laws 1907, p. 7) as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, two per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts as required by the statute and was accordingly assessed two per centum upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay and the failure to make such payment.

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The assignments of error filed . . . are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of Sec. 4 of Art. IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government. . . . This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. Because of their absolute

unity we consider all the propositions together, and therefore at once copy them.

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IV.

"The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union and which the State is bound to maintain.

V.

"The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: Representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, and executive and a judiciary. One of these, the legislature, is destroyed by the initiative."

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. . . the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

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Do the provisions of Sec. 4, Art. IV, bring about these strange, farreaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case *Luther v. Borden*, 7 How.1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established character government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the State nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of 21 years and upwards and also by a large majority of those who were entitled to vote for general officers cast in favor of a constitution" which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the

inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining such established government. On this subject it was said (p. 38):

"For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time, were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals."

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the voluntary government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) "that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses, etc." It was further remarked:

"This doctrine is clearly and forcibly stated in the opinion of the supreme court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of sec. 4 of Art. IV, of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people, and they in the nature of things, if the government is a free one, must have a right to change their

constitution. Where in the ordinary course no other means exists of doing so, that right of necessity embraces the power to resort to revolution. As, however, no such right it was urged could exist under the Constitution, because of the provision of sec. 4 of Art. IV, protecting each State on application of the legislature or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guarantee of a government republican in form was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular State hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of sec. 4 of Art. IV, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

“Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

“The fourth section of the fourth article of the constitution of the United States provided that the

United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

“Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.”

* * * * *

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time.

* * * * *

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the as-

sault which the contention here advanced makes is not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State

that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Discussion Notes

1. Would the decision in *Pacific States Telephone* preclude a state court from determining that some provision of a state constitution violated the federal guarantee clause?

2. A recent commentator proposed that the guarantee clause be interpreted to require "as a matter of federal constitutional law, that the states either *observe their own constitutions* and laws or change them by legally valid procedures." Note, "The Rule of Law and the States: A New Interpretation of the Guarantee Clause," *Yale Law Journal*

93 (January 1984): 561 (emphasis added). Is this a workable proposal?

3. With respect to the "Dorr Rebellion," giving rise to *Luther v. Borden*, discussed at length in *Pacific States Telephone and Telegraph*, see Geroge M. Dennison, *The Dorr War: Republicanism on Trial 1831-1861* (Lexington: 1975); Marvin Gettleman, *The Dorr Rebellion: A Study in American Radicalism, 1833-1949* (New York: 1973); John M. Schuchman, "The Political Background of the Political-Question Doctrine: The Judges and the Dorr War," *American Journal of Legal History* 16 (April 1972): 111.

C. The Supremacy Clause

Article VI, Clause 2, United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or laws of any State to the Contrary notwithstanding.

1. Conflict between State Constitutions and the Federal Constitution

28 U.S.C. sec. 1257 provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a *statute* of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79 (1980) the Court stated:

We initially conclude that this case is properly before us as an appeal under 28 USC sec. 1257 (2). It has long been established that a state constitutional provision is

a “statute” within the meaning of sec. 1257 (2).

Is there a difference in analysis when a state constitutional provision, rather than a state statute or administrative practice, is challenged as violating the federal constitution? Read the next case with this in mind.

Reitman v. Mulkey 387 U.S. 369 (1967)

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether Art. I, sec. 26, of the California Constitution denies “to any person . . . the equal protection of the laws” within the meaning of the Fourteenth Amendment of the Constitution of the United States. Section 26 of Art. I, an initiated measure submitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part of all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

The real property covered by sec. 26 is limited to residential property and contains an exception for state-owned real estate.

The issue arose in two separate actions in the California courts, *Mulkey v. Reitman* and *Prendergast v. Snyder*. In *Reitman*, the Mulkeys, who are husband and wife and respondents here, sued under sections

51 and 52 of the California Civil Code³ alleging that petitioners had refused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that sections 51 and 52, insofar as they were the basis for the Mulkeys' action, had been rendered null and void by the adoption of Proposition 14 after the filing of the complaint. The trial court granted the motion and respondents took the case to the California Supreme Court.

First, the court considered whether sec. 26 was concerned at all with private discriminations in residential housing. This involved a review of past efforts by the California Legislature to regulate such discriminations. The Unruh Act, Civ. Code sections 51-52, on which respondents based their cases, was passed in 1959. The Hawkins Act, formerly Health & Safety Code Sections 35700-35741, followed and prohibited discriminations in publicly assisted housing. In 1961, the legislature enacted proscriptions against restrictive covenants. Finally, in 1963, came the Rumford Fair Housing Act, Health & Safety Code Sections 35700-35744, superseding the Hawkins Act and prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units. That act was enforceable by the State Fair Employment Practice Commission.

It was against this background that Proposition 14 was enacted. Its immediate design and intent, the California court said, were "to overturn state laws that bore on the right of private sellers and lessors to discriminate," the Unruh and Rumford Acts, and "to forestall future state action that might circumscribe this right." This aim was successfully achieved: the adoption of Proposition 14 "generally nullifies both the Rumford and Unruh Acts as they apply to the housing market," and establishes "a purposed constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

³ Cal. Civ. Code §§ 51 and 52 provide in part as follows: "All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars (\$250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

Second, the court conceded that the State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market. Its conclusion was that it did.

To reach this result, the state court examined certain prior decisions in this Court in which discriminatory state action was identified. Based on these cases . . . it concluded that a prohibited state involvement could be found "even where the state can be charged with only encouraging," rather than commanding discrimination. Also of particular interest to the court was MR. JUSTICE STEWART'S concurrence in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was therefore invalid. To the California court "[t]he instant case presents an undeniably analogous situation" wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decisions"; sec. 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination. . . ." The court could "conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination. . . ." The judgment of the California court was that sec. 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.

There is no sound reason for rejecting this judgment. Petitioners contend that the California court has misconstrued the Fourteenth Amendment since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to "authorize" and "encourage" discrimination because it makes legally permissible that which was formerly proscribed. But, as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an

existing policy of neutrality with respect to private discriminations. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the intent of sec. 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with sec. 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of sec. 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that sec. 26 would and did have wider impact than a mere repeal of existing statutes. Section 26

mentioned neither the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby pro tanto repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Discussion Notes

1. Would the outcome in *Reitman* have been different if the California housing discrimination laws had merely been repealed? Why would the technique of constitutional amendment have been chosen?

2. Compare *James v. Valtierra*, 402 U.S. 137 (1971); George Lefcoe, "The Public Housing Referendum Case, Zoning, and the Supreme Court," *California Law Review* 59 (November 1971): 1384.

3. In *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) the Supreme Court said, "With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions." See also *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 135 (1885); *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 232 (1956).

Hunter v. Underwood 471 U.S. 222 (1985)

JUSTICE REHNQUIST delivered the opinion of the Court.

We are required in this case to decide the constitutionality of Art. VIII, sec. 182, of the Alabama Con-

stitution of 1901, which provides for the disenfranchisement of persons convicted of, among other offenses, "any crime . . . involving moral turpitude."² Appellees Carmen Edwards, a black, and Victor Underwood, a white, have been blocked from the voter rolls pursuant to sec. 182 by the Boards of Registrars for Montgomery and Jefferson Counties, respectively, because they each have been convicted of presenting a worthless check. In determining that the misdemeanor of presenting a worthless check is a

²Section 182 of the Alabama Constitution of 1901 provides:

The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in

adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

crime involving moral turpitude, the Registrars relied on opinions of the Alabama Attorney General.

* * * * *

The predecessor to sec. 182 was Art. VIII, sec. 3, of the Alabama Constitution of 1875, which denied persons “convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary” the right to register, vote or hold public office. These offenses were largely, if not entirely, felonies. The drafters of sec. 182, which was adopted by the 1901 convention, expanded the list of enumerated crimes substantially. . . . The drafters retained the general felony provision—“any crime punishable by imprisonment in the penitentiary”—but also added a new catchall provision covering “any . . . crime involving moral turpitude.” This latter phrase is not defined, but it was subsequently interpreted by the Alabama Supreme Court to mean an act that is “immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute fixes, the moral turpitude.” *Pippin v. State*, 197 Ala. 613, 616, 73 So. 340, 342 (1916) (quoting *Fort v. Brinkley*, 87 Ark. 400, 112 S. W. 1084 (1908)).

* * * * *

Section 182 on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes or a crime falling within one of the catchall provisions. Appellee Edwards nonetheless claims that the provision has had a racially discriminatory impact. The District Court made no finding on this claim, but the Court of Appeals implicitly found the evidence of discriminatory impact indisputable:

The registrars’ expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses. 730 F. 2d, at 620.

So far as we can tell the impact of the provision has not been contested, and we can find no evidence in the record below or in the briefs and oral argument in this Court that would undermine this finding by the Court of Appeals.

Presented with a neutral state law that produces disproportionate effects along racial lines, the Court

of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment:

[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. 429 U.S., at 264-265.

See *Washington v. Davis*, 426 U.S. 229, 239 (1976). Once racial discrimination is shown to have been a “substantial” or “motivating” factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor. See *Mt. Healthy*, 429 U.S., at 287.

Proving the motivation behind official action is often a problematic undertaking. See *Rogers v. Lodge*, 458 U.S. 613 (1982). When we move from an examination of a board of county commissioners such as was involved in *Rogers* to a body the size of the Alabama Constitutional Convention of 1901, the difficulties in determining the actual motivations of the various legislators that produced a given decision increase. With respect to Congress, the Court said in *United States v. O’Brien*, 391 U.S. 367, 383-384 (1968) (footnote omitted):

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decisionmaking in this circumstance is thought sufficient to risk the possibility of misreading Congress’ purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

But the sort of difficulties of which the Court spoke in *O’Brien* do not obtain in this case. Although understandably no “eyewitnesses” to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept

the post-Reconstruction South to disenfranchise blacks. See S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Vann Woodward, *Origins of the New South, 1877-1913*, pp. 321-322 (1971). The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:

And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).

Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.

* * * * *

The evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians. Having reviewed this evidence, we are persuaded that the Court of Appeals was correct in its assessment. The court's opinion presents a thorough analysis of the evidence and demonstrates conclusively that sec. 182 was enacted with the intent of disenfranchising blacks. We see little purpose in repeating that factual analysis here. At oral argument in this Court appellants' counsel essentially conceded this point, stating: "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182; that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that." Tr. of Oral Arg. 6.

In their brief to this Court, appellants maintain on the basis of their expert's testimony that the real purpose behind sec. 182 was to disenfranchise poor whites as well as blacks. The Southern Democrats, in their view, sought in this way to stem the resurgence of Populism which threatened their power:

"Q. The aim of the 1901 Constitution Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites; is that not correct?

"A. Yes, sir.

"Q. The idea was to prevent blacks from becoming a swing vote and thereby powerful and useful to some group of whites such as Republicans?

"A. Yes, sir, that's correct.

"Q. The phrase that is quite often used in the Conventional is to, on the one hand limit the franchise to [the] intelligent and virtuous, and on the other hand to disenfranchise those [referred] to as 'corrupt and ignorant,' or sometimes referred to as the ignorant and vicious?

"A. That's right.

"Q. Was that not interpreted by the people at that Constitutional Convention to mean that they wanted to disenfranchise practically all of the blacks and disenfranchise those people who were lower class whites?

"A. That's correct."

* * * * *

"Q. Near the end of the Convention, John Knox did make a speech to the Convention in which he summarized the work of the Convention, and in that speech is it not correct that he said that the provisions of the Suffrage Article would have a disproportionate impact on blacks, but he disputed that that would be [a] violation of the Fifteenth Amendment?

"A. Yes, sir, that is true. Repeatedly through the debates, the delegates say that they are interested in disfranchising blacks and not interested in disfranchising whites. And in fact, they go out of their way to make that point. . . . But the point that I am trying to make is that this is really speaking to the galleries, that it is attempting to say to the white electorate that must ratify this constitution what it is necessary for that white electorate to be convinced of in order to get them to vote for it, and not merely echoing what a great many delegates say. . . . [I]n general, the delegates aggressively say that they are not interested in disfranchising any whites. I think falsely, but that's what they say.

"Q. So they were simply trying to overplay the extent to which they wanted to disenfranchise blacks, but that they did desire to disenfranchise practically all of the blacks?

"A. Oh, absolutely, certainly." Cross-examination of Dr. J. Mills Thornton, 4 Record 73-74, 80-81.

Even were we to accept this explanation as correct, it hardly saves sec. 182 from invalidity. The explanation

concedes both that discrimination against blacks, as well as against whites, was a motivating factor for the provision and that sec. 182 certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation.

* * * * *

At oral argument in this Court, appellants' counsel suggested that, regardless of the original purpose of sec. 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as as-

sault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes —felonies and moral turpitude misdemeanors—are acceptable bases for denying the franchise. Without deciding whether sec. 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.

The judgment of the Court of Appeals is Affirmed.

<p>Discussion Notes</p> <p>1. For background on the 1901 Alabama Constitution's suffrage provisions, see Malcolm Cook McMillan, <i>Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism</i> (Chapel Hill: University of North Carolina Press, 1955), pp. 263-359.</p> <p>2. The Court refers to state "law" when considering the validity of this state constitutional provision. Should the court approach a state constitutional provision with more deference than a mere state law?</p> <p>3. In an earlier challenge to another provision of Alabama's constitution providing for racial exclusion of voters a lower court struck down the provision and the Supreme Court affirmed. "Mr. justice Reed, in view of the fact that a constitutional provision of a state is involved . . . is of the opinion that probable jurisdiction should be noted and the case set down for argument." <i>Davis v. Schnell</i>, 336 U.S. 933 (1949).</p>
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Trombetta v. State of Florida
353 F. Supp. 575 (M.D. Fla. 1973)

Opinion and Order

HODGES, District Judge.

At the time this suit was filed the plaintiffs were members of the Florida Legislature and the Congress had just submitted for ratification by the state a proposed Twenty-Seventh Amendment to the Federal Constitution. Plaintiffs complained that legislative action on the proposed amendment was impeded by Article X, Section 1 of the Florida Constitution of 1968 (25 F.S.A. p. 729), and they sought a summary decree declaring that provision to be repugnant to Articles V and VI of the Constitution of the United States. The challenged section of the Florida Constitution prescribes:

Sec. 1. Amendments to United States Constitution. "The legislature shall not take action on any proposed amendment to the constitution of the United States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification."

II

Tracing the origin of Article X, Section 1 of the Florida Constitution is not only an interesting venture into national history, it also serves to clearly point the way to the only proper application of the Supreme Court decisions which control the constitutional issue.

During the Reconstruction Era following the Civil War the state governments within the Confederacy were subordinate to the War Department. These states were arranged in five military districts and all, except Tennessee, were placed under military rule.³ In January, 1870, the Tennessee Legislature called a convention to draft a new state constitution. The result was a redraft of the state's existing constitution with certain changes suggested by recent events⁴ which included, of course, the circumstances prevailing in the south at the time of the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. See *Coleman v. Miller*, supra. Thus, one of the additions to the Tennessee Constitution of 1870 was Article 2, Section 32, which provided as follows:

³See R. Henry, *The Story of Reconstruction*, at 219 (1963); E. McPherson, *The United States During Reconstruction*, at iii (1969).

⁴See Henry, at 402.

Sec. 32. Amendments to Constitution of United States. No Convention or General Assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such Convention or General Assembly shall have been elected after such amendment is submitted.”

Shortly following Reconstruction the electorate of Florida adopted this state’s Constitution of 1885. Article XVI, Section 19 of that document was identical to Article 2, Section 32 of the Tennessee Constitution, and there can be no doubt that the latter inspired the former. Article XVI, Section 19 of the Florida Constitution of 1885 thereafter remained in effect until 1968 when it was slightly revised and carried forward as Article X, Section 1 of the Florida Constitution of 1968, i.e., the provision now being considered.

III

A determination of the case turns upon the application of two Supreme Court decisions, *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct.495, 64 L.Ed. 871 (1920); and *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922).

In *Hawke* the plaintiff sought to enjoin the Ohio Secretary of State from preparing a ballot allowing the people to vote on the Eighteenth Amendment. The Ohio Constitution provided for a referendum on any action of the legislature ratifying a proposed amendment to the Federal Constitution. The Court held the Ohio Constitution provision to be invalid, establishing the principle that the action of a state legislature in ratifying an amendment to the Federal Constitution is a purely Federal function under Article V transcending any limitation sought to be imposed by the people of a state through their own constitution.

If *Hawke* was the only expression of the Court on this subject I would have no difficulty whatever in distinguishing the decision on its facts as well as in principle. The Ohio Constitution patently attempted to remove its legislature as the agent of Ohio in the ratification process, and this was correctly observed to be in direct conflict with Article V. The Florida provision, however, leaves full authority in the legislature while safeguarding the rights of a constituency to express itself concerning so vital a matter as a change in the constitution. This, to me, is not only salutary but in complete harmony with Article V. While the legislature, and only the legislature, can perform the Federal function, it necessarily acts in such capacity as

the agent of the people of the state; or, indeed, it might not act at all.⁵

Any effort to distinguish *Hawke* is rendered futile, however, by the Court’s decision two years later in *Leser*. Ratification of the Nineteenth, Women’s Suffrage Amendment had been proclaimed on August 26, 1920. A suit was then brought in Maryland to disqualify two women registrants. The thrust of the action was a wholesale attack upon the validity of the ratification of the Amendment in several states. The opinion of the Court did not particularize these contentions or specifically identify the individual states involved. Rather, it summarily disposed of the issues as follows (258 U.S. at 136-137, 42 S.Ct. at 217):

The second contention is that in the Constitutions of several of the 36 states named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their Legislatures. The argument is that by reason of these specific provisions the Legislatures were without power to ratify. But the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state. [Citing *Hawke*]

Thus, the *Leser* opinion *per se* adds very little to the teaching of *Hawke*. Examination of the precise contentions presented to the Court, however, reveals that the ratification in Tennessee was a principal target in view of Article 2, Section 32 of the Tennessee Constitution of 1870 (See 66 L.Ed. at 507-508). In net effect, therefore, the *Leser* Court specifically extended and applied the principle of *Hawke* to the very provision now embodied in Article X, Section 1 of the Florida Constitution of 1968, and it goes without saying that this Court is bound by that decision.

Article X, Section 1, of the Florida Constitution of 1968 is hereby declared to be unconstitutional and void.

⁵The proposed child labor amendment of 1924, for example, may yet be outstanding since Congress imposed no time limit upon ratification. See, *Coleman v. Miller*, *supra*. The present Congressional practice of specifying a limitations period of seven years upon the ratification process is obviously intended to settle amendment questions, one way or another, by a day certain; but this too is entirely consistent with the deliberative consideration contemplated by the Florida Constitution in view of the length of time allowed.

Discussion Notes

1. For the earlier procedural history of the *Trombetta* case, which might have led to ratification of the Equal Rights Amendment in Florida in 1972, see *Trombetta v. Florida*, 339 F. Supp. 1359 (M. D. Fla. 1972). See also, Note, "The Process of Constitutional Amendment," *Columbia Law Review* 79 (January 1979): 106.

2. For a somewhat similar case in Illinois, see *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975).

3. Under the analysis in *Trombetta*, could a state legislature provide for a non-binding referendum on a proposed federal constitutional amendment? See *Kimble v. Swackhamer*, 584 P. 2d 161 (Nev. 1978), *stay denied* 439 U.S. 1385 (1978).

2. Conflict with Federal Statute

State of North Carolina ex rel.
Morrow v. Califano
445 F. Supp. 532 (E.D.N.C. 1977)

Opinion and Order

RUSSELL, Circuit Judge, LARKINS, Chief District Judge, and DUPREE, District Judge.

This is a suit against the Secretary of Health, Education and Welfare challenging the constitutionality of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. sec. 300k *et seq.* (hereinafter referred to as "the Act"). The original complainant was the State of North Carolina. Later, interventions by the American Medical Association, the North Carolina Medical Society, as well as by the State of Nebraska, were allowed.

The attack by North Carolina on the Act focuses primarily on the requirement thereunder that any State, in order to qualify for financial grants under the federal health programs, should establish a State Health Planning and Development Agency, which, among other things, should "administer a State certificate of need program [satisfactory to the Secretary] which applies to new institutional health services proposed to be offered or developed within the State" and under which "only those services, facilities, and organizations found to be needed shall be offered or developed in the State." And the reason for the State's concern is found in the decision of its own Supreme Court that a certificate of need statute as required under the Act "is in excess of the constitutional power of the Legislature." *In Re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729, 733 (1973). Absent a constitutional amendment, the State argues it would be required by the challenged provision of the Act to forfeit its right to participate in some forty-odd federal financial assistance health programs. It contends that, under these circumstances, the requirement represents an

effort to compel the State to amend its constitution and thus constitutes an unconstitutional interference with the State's legislative and constitutional processes violative of the principles of federalism and state sovereignty, as guaranteed under the due process clause, the Tenth Amendment and the Guaranty Clause of Article IV, Section 4 of the Constitution.

* * * * *

As we have said, the primary attack of the plaintiff North Carolina relates to the certificate of need requirement in the Act. In making such an attack, the plaintiff concedes that, in the exercise of a valid spending power, the federal government may impose terms and conditions upon fiscal grants allotted by it among the states. *King v. Smith* (1968) 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; *Oklahoma v. Civil Service Comm'n* (1947) 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794. Nor does the plaintiff dispute the validity of federal appropriations to promote the public health under the general welfare clause. Its attack on the certificate of need requirement is that, while Congress may attach conditions to federal grants to the states, such conditions may not be arbitrary, may not be unrelated to the legitimate purposes of federal health legislation, and may not invade the sovereign rights of states.

The Act as a whole had as one of its basic purposes the more efficient and economical uses of health services. It grew out of a Congressional concern that the many unneeded hospital beds available in the nation imposed an unnecessarily exorbitant financial burden on the furnishing of required health care, and that there was an uneven distribution of health care facilities, resulting in some areas being over supplied and others being woefully deficient.² It sought through a national health planning policy to provide for the development of a program for dealing with the "maldistribution of health care facilities and manpower" and to "authorize financial assistance for the development of resources to further that pol-

²See U.S. Code Congr. & Admn. News, 93rd Cong., 2d Sess., 1974, pp. 7878-9.

ity.”³ An integral part of such a program was the certificate of need requirement which the plaintiff assails. The State health planning and development agency, authorized under the Act, was to “[s]erve as the designated planning agency of the State [to] * * * (B) administer a State certificate of need program which [should apply] to new institutional health services proposed to be offered or developed within the State and which is satisfactory to the Secretary. Such program shall provide for review and determination of need prior to the time such services, facilities, and organizations are offered or developed * * *, and provide that only those services, facilities, and organizations found to be needed shall be offered or developed in the State.”⁴

We perceive nothing unconstitutional either in the purposes of the Act or in the condition thereby attached to health grants made to the States under federal health programs. Without question Congress in making grants for health care to the States, should be vitally concerned with the efficient use of the funds it appropriates for that purpose. It had a perfect right to see that such funds did not cause unnecessary inflation in health costs to the individual patient. It certainly had the power to attach to its grants conditions designed to accomplish that end.

The plaintiff argues that however valid such power may be generally, this power of the federal government to attach conditions to grants to the States is not an unlimited one and may not be stretched to validate “coercive” conditions. That it urges is the necessary consequence of the requirement of a State certificate of need law. In support of this argument, it relies primarily on *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 57 S.Ct. 883 81 L.Ed. 1279. In *Steward*, the Court recognized that to hold “motive or temptation [on the part of a State to comply with a condition attached to a federal appropriation grant] is [to be construed as] equivalent to coercion is to plunge the law in endless difficulty.”⁵ It accordingly declared as a general rule, that whenever the condition attached by Congress to an appropriation grant available to the States relates to a “legitimately national” purpose, inducement or temptation to conform⁶ does not go beyond the bounds of the federal government’s legitimate spending power and is not coercion in any constitutional sense.⁷

³42 U.S.C. & 300k(a)(3)(B) and (b).

⁴42 U.S.C. & 300m 2(a)(4)(A),(B).

⁵301 U.S. at 589, 590, 57 S.Ct. at 893.

⁶In our recent opinion in *State of Maryland v. Environmental Protection Ag.* (4th Cir. 1975) 530 F.2d 215 at 228, *vacated and remanded* 429 U.S. 1036, 97 S.Ct. 728, 50 L.Ed 766; we spoke of these inducements as “[t]he alternative whip of economic pressure and seductive favor,” which are legitimate under the constitutional spending power.

⁷301 U.S. at 591, 57 S.Ct. 883.

It is not to be assumed that the plaintiff would argue that fiscal support for a national health program is not a legitimate national interest, which will support a federal grant to the States. Were it to do so, it would undercut the very basis of its action, which seeks to secure the benefits of such grants without compliance with the challenged condition. Accepting then the premise that such federal support is constitutionally valid, it would seem manifest that the federal government could validly attach a condition which was intended to assure the efficient use of the funds so granted. Such a condition would certainly relate to the legitimate national interest in health. So viewed, it would satisfy the standard phrased by Justice Cardozo in *Steward* and would be no more onerous on States than countless other federal programs in other fields, such as highways, etc.

The plaintiff, North Carolina, would, however, find the condition coercive under the unique circumstances applicable to it. This situation arises because the Supreme Court of North Carolina, by declaring that the Constitution of North Carolina, as it presently exists, proscribes the creation and operation of a state certificate of need mechanism. As a result of that ruling North Carolina is threatened with a future loss of federal aid under some forty-two federal health assistance programs, a loss which can only be avoided by a constitutional amendment. When a legislative condition operates that drastically upon a State, the plaintiff contends, it becomes “coercive,” and not simply inducement. It is unfortunate that its Constitution, as presently phrased and interpreted, might prevent compliance by North Carolina with the federally established condition. Simply because one State, by some oddity of its Constitution may be prohibited from compliance is not sufficient ground, though, to invalidate a condition which is legitimately related to a national interest sought to be achieved by a federal appropriation and which does not operate adversely to the rights of the other States to comply. Were this not so, any State, dissatisfied by some valid federal condition on a federal grant could thwart the congressional purpose by the expedient of amending its Constitution or by securing a decision of its own Supreme Court. The validity of the power of the federal government under the Constitution to impose a condition of federal grants made under a proper Constitutional power does not exist at the mercy of the State Constitutions or decisions of State Courts. Moreover, the “coercive” effect of a termination of federal assistance on the plaintiff North Carolina seems quite unreal. The actual loss to North Carolina should it lose all federal assistance health grants would be less than fifty million dollars; in 1974, its State revenues totaled some 3.1 billion dollars. The

impact of such loss could hardly be described as “catastrophic” or “coercive.”

It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland v. Environmental Protection Ag.*, *supra*, 530 F.2d 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states *an option* to enact such legislation and, in order to induce that enactment, offers financial assistance.⁹ Such legislation con-forms to the pattern generally of federal grants to the states and is not “coercive” in the constitutional sense.

It is true that the assailed condition contemplates that the state certificate of need program will apply to all health facilities constructed or expanded in the State. It will therefore cover the construction of new, or the expansion of existing health facilities, whether publicly or *privately* owned and financed. It is obvious, though, that, if only public construction were covered by the certificate of need program, the public interest in avoiding unnecessary increases in health care by reason of the addition of unneeded additional facilities could be thwarted by private construction. For this reason, every court which has considered the constitutional validity of state certificate of need laws has found that the inclusion of private construction within the law’s coverage valid and reasonable, save

⁹*Massachusetts v. Mellon* (1923) 262 U.S. 447, 480, 43 S.Ct. 597, 67 L.Ed. 1078.

in the North Carolina case already cited. . . . We find the reasoning of these cases sound, as applied to this Act.

We find equally unpersuasive that this Act, with its certificate of need condition, threatens “the integrity of a recognized state government” and the “Republican form of government” and is therefore violative of the Guaranty Clause of the Constitution, Article IV, Section 4, or the Tenth Amendment. As we have already observed, the statutory condition on which the plaintiff directs its attack is not mandatory but is to be adopted or not at the option of the State and its burden on the State, if it should operate to terminate the plaintiff’s right to participate under the federal health assistance programs, would not be coercive.¹⁰

¹⁰Plaintiff cites *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245. That case is not in point. It involved whether the Commerce Clause authorized a wage-hour amendment covering the employees of states or their subdivisions. We do not have such a direct regulation here; neither is the constitutional basis for the condition the Commerce Clause. The constitutional authorization in this case is the “spending power.” See Note, *Applying the Equal Pay Act to State and Local Government: The Effect of National League of Cities v. Usery*, 125 U.Pa.L.Rev. 665 at 676. In *Usery*, the Court was careful to point out that it was not considering the validity of the federal legislation under that power. The limited application of *Usery* was recognized in *Usery v. Charleston County School District* (4th Cir. 1977) 558 F.2d 1169.

Discussion Notes

1. The *Califano* case was affirmed in a memorandum opinion by the United States Supreme Court, 435 U.S. 962 (1978).

2. Prior to the enactment of the National Health Planning and Resources Development Act of 1974, the North Carolina Supreme Court decided *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E. 2d 729, 736 (1973). It held that state certificate of need legislation was unconstitutional. Among other reasons, it concluded:

Such requirement establishes a monopoly in the existing hospitals contrary to the provisions of Article I, sec. 34 of the Constitution of North Carolina and is a grant to them of exclusive privileges forbidden by Article I, sec. 32.

See Note, “Hospital Regulation After Aston Park: Substantive Due Process in North Carolina,” *North Carolina Law Review* 52 (March 1974): 763. For consideration of similar matters of economic regulation under state constitutions, see Chapter 3, Section E.

hour provisions to *state and local government* employees.

The Court observed:

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to pri-

a. Note on *Garcia v. San Antonio Metropolitan Transit Authority*

National League of Cities v. Usery, 426 U.S. 833 (1976), discussed in footnote 10 of the *Califano* case, invalidated a congressional extension of the Fair Labor Standards Act’s minimum wage and maximum

vate citizens, but to the State as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

426 U.S. at 845.

It held:

Our examination of the effect of the 1974 amendments as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies.

426 U.S. at 851.

. . . States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made.

426 U.S. at 854-55.

Usery caused much speculation as to the extent of its limitation on commerce clause legislation applying to the states. See, Note, "Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power," *University of Pennsylvania Law Review* 128 (December 1979): 402 (arguing that the *Usery* commerce clause analysis should be extended to the congressional spending power). That argument was rejected in the *Califano* case. See also, George D. Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs," *American University Law Review* 28 (Spring 1979): 279; Kenneth W. Dam, "The American Fiscal Constitution," *University of Chicago Law Review* 44 (Winter 1977): 292-94;

See generally, Lawrence H. Tribe, "Unraveling *National League of Cities*: Affirmative Rights to Essential Government Services," *Harvard Law Review* 90 (April 1977): 1065; Frank I. Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in *National League of Cities v. Usery*," *Yale Law Journal* 86 (May 1977): 1165.

In 1985, however, the Supreme Court in a 5-4 decision reversed *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Justice Blackmun reasoned:

We revisit in these cases an issue raised in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." *Id.*, at 852. Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

* * * * *

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

* * * * *

The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," *Anderson v. Dunn*, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing

needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

* * * * *

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.¹¹ The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U.S. Const., Art. I sec. 2, and Art. II, sec. 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I sec. 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 332 (B. Wright ed. 1961). Similarly, James Wilson observed that "it was a favorite object in the Convention" to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end. 2 Elliot, at

438-439. Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 408 (B. Wright ed. 1961). He further noted that "the residuary sovereignty of the States [is] implied and secured by that principle of representation in one branch of the [federal] legislature" (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch v. Maryland*, 4 Wheat. 316, 435 (1819). In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. . . . [A]gainst this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." *EEOC v. Wyoming*, 460 U.S., at 236.

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet. . . .

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

¹¹See, e.g., J. Choper, *Judicial Review and the National Political Process* 175-184 (1980); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954); La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 *Wash. U.L.Q.* 779 (1982).

Discussion Notes

1. With respect to the place of the *Garcia* case in the history of the Supreme Court's approach to federalism concerns, see David M. Skover, "Phoenix Rising' and Federalism Analysis,"

Hastings Constitutional Law Quarterly 13 (Winter 1986): 271.

2. Is Congress or the Supreme Court the better forum for resolution of state/federal disputes?

b. Congressional Accommodation of State Prerogatives

Approximately eight months after *Garcia* was decided Congress enacted the following amendments:

**Public Law 99-150 [S. 1570];
November 13, 1985**

Fair Labor Standards Amendments of 1985

An Act to amend the Fair Labor Standards Act of 1938 to authorize the provision of compensatory time in lieu of overtime compensation for employees of States, political subdivisions of States, and interstate governmental agencies, to clarify the application of the Act to volunteers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title; Reference to Act

SECTION 1. (a) Short Title. This Act may be

Discussion Notes

1. In Justice Blackmun's opinion in *Garcia*, 469 U.S. at 551 n. 11, he cites Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (April 1954): 543, in support of his conclusion that the political process in Congress provides the

cited as the "Fair Labor Standards Amendments of 1985."

* * * * *

Compensatory Time

SEC. 2. (a) Compensatory Time. Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

"(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

* * * * *

(c) Liability and Deferred Payment. (1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986. . . .

**Senate Report
(Labor and Human Resources Committee)
October 17, 1985
[To accompany S.1570]**

* * * * *

III. Background and Need for Legislation

A. Background

intended protection for states. Do the Fair Labor Standards Amendments of 1985 support this argument? What about the earlier congressional decisions to include state employees within the coverage of the Fair Labor Standards Act?

2. Do representatives who come from the states to the national government undergo a change in attitude about the use of federal power?

Congress enacted the Fair Labor Standards Act (FLSA) in 1938, establishing nationwide minimum wage and maximum hours standards for the first time. The FLSA proclaimed Congress' intent to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Over the years, the Act has been amended and expanded to include coverage of previously excluded groups of workers. The history of the FLSA as applied to state and local government employees involves a number of actions by Congress, the U.S. Department of Labor (DOL), and the U.S. Supreme Court since 1966.

* * * * *

Under *National League of Cities*, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation were held to be traditional functions of state and local government and, as such, exempt for the FLSA. On December 21, 1979, DOL issued final regulations defining traditional and nontraditional functions of state and local government for purposes of determining whether the FLSA was applicable. In its regulations, DOL added libraries and museums to the functions originally determined by the Supreme Court to be traditional (29 CFR 775.4). DOL defined local mass transit systems, along with seven other functions, as nontraditional (29 CFR 775.3).

A number of public transit authorities challenged the validity of the DOL determination that provision of local mass transit was a nontraditional governmental function. Ultimately, the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* was presented with the question whether that DOL determination was a proper application of the *National League of Cities* doctrine. In 1984, following oral argument, the Court ordered reargument of the *Garcia* case on the question whether the constitutional principles established by *National League of Cities* should be reconsidered.

On February 19, 1985, the Supreme Court expressly overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), and thereby left the FLSA fully applicable to state and local governments.

* * * * *

As a result of the *Garcia* ruling, states and localities are not subject to all FLSA requirements, including the 171 and 212 maximum hours standard for law enforcement and fire protection employees respectively. On June 14, 1985, DOL announced its enforcement policy, stating that the "Wage and Hour Division will begin conducting FLSA investigations involving activities considered traditional government employment and involving employment in local mass transit systems operated by State and local governments" and "in all such cases will extend" the in-

vestigation period back to April 15, 1985. DOL selected April 15 as the effective date because that was the date on which the Supreme Court's mandate issued in the *Garcia* case. DOL also announced that it would delay its enforcement activities until October 15, 1985; this date later was extended to November 1, 1985.

Need for the Bill

In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed nonsupervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibilities to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States and their political subdivisions have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions.

Discussion Notes

1. The Twenty-First Amendment to the United States Constitution repealed the Eighteenth Amendment, relating to prohibition. Section 2 provided: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Does this provide any independent restriction on Congress' powers? See *South Dakota v. Dole*, 107 S.Ct. 869 (1987). See also *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 228, 429 N.E. 2d 765 (1981).

2. Evaluate the following case in light of Justice Blackmun's opinion in *Garcia*, and his concurring opinion in *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976).

Wheeler v. Barrera
417 U.S. 402 (1974)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. sec. 241a *et seq.*, provides for federal funding of special programs for educationally deprived children in both public and private schools.

This suit was instituted on behalf of parochial school students who were eligible for Title I benefits and who claimed that the public school authorities in their area, in violation of the Act, failed to provide adequate Title I programs for private school children as compared with those programs provided for public school children. The defendants answered that the extensive aid sought by the plaintiffs exceeded the requirements of Title I and contravened the State's Constitution and state law and public policy. First Amendment rights were also raised by the parties. The District Court, concluding that the State had fulfilled its Title I obligations, denied relief. The United States Court of Appeals for the Eighth Circuit, by a divided vote, reversed. 475 F.2d 1338 (1973). We granted certiorari to examine serious questions that appeared to be present as to the scope and constitutionality of Title I. 414 U.S. 908 (1973).

I

Title I is the first federal-aid-to-education program authorizing assistance for private school children as well as for public school children. The Congress, by its statutory declaration of policy, and otherwise, recognized that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.

Since the Act was designed to be administered by local public education officials, a number of problems naturally arise in the delivery of services to eligible private school pupils. Under the administrative structure envisioned by the Act, the primary responsibility for designing and effectuating a Title I program rests with what the Act and the implementing regulations describe as the "local educational agency." This local agency submits to the "State educational agency" a proposed program designed to meet the special educational needs of educationally deprived children in school attendance areas with

high concentrations of children from low-income families. The state agency then must approve the local plan and, in turn, forward the approved proposal to the United States Commissioner of Education, who has the ultimate responsibility for administering the program and dispensing the appropriated and allocated funds. In order to receive state approval, the proposed plan, among other requirements, must be designed to provide the eligible private school students services that are "comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority." United States Office of Education (USOE) Program Guide No. 44, para. 4.5 (1968). . . .

The questions that arise in this case concern the scope of the State's duty to insure that a program submitted by a local agency under Title I provides "comparable" services for eligible private school children.

II

Plaintiff-respondents are parents of minor children attending elementary and secondary nonpublic schools in the inner city area of Kansas City, Missouri. They instituted this class action in the United States District Court for the Western District of Missouri on behalf of themselves and their children, and others similarly situated, alleging that the defendant-petitioners, the then State Commissioner of Education and the members of the Missouri Board of Education, arbitrarily and illegally were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children. The complaint sought an injunction restraining continued violations of the Act and an accounting and restoration of some \$13,000,000 in Title I funds allegedly misapplied from 1966 to 1969.

In what perhaps may be described as something less than full cooperation by both sides, the possibility of providing "comparable" services was apparently frustrated by the fact that many parochial schools would accept only services in the form of assignment of federally funded Title I teachers to teach in those schools during regular school hours. At the same time, the petitioners refused to approve any program providing for on-the-premises instruction on the grounds that it was forbidden under both Missouri law and the First Amendment and, furthermore, that Title I did not require it. Since the larger portion (over 65%) of Title I funds allocated to Missouri has been used to provide personnel for remedial instruction, the effect of this stalemate is that substantially less money per pupil has been expended for eligible students in private schools, and that the services provided in those schools in no sense can be considered "comparable."

In response to petitioners' argument that Missouri law forbids sending public school teachers into private schools, the court held that the state constitutional provision barring use of "public" school funds in private schools had no application to Title I funds. The court reasoned that although the Act was generally to be accommodated to state law, the question whether Title I funds were "public," within the meaning of the Missouri Constitution,⁹ must necessarily be decided by federal law. *Id.*, at 1351-1352. Finally, the court refused to pass on petitioners' claim that the Establishment Clause of the First Amendment would be violated if Title I, in fact, does require or permit service by public school teachers on private school premises. The reason stated for the court's refusal was that since no plan had yet been implemented, the court "must refrain from passing upon important constitutional questions on an abstract or hypothetical basis." *Id.*, at 1354.

⁹The Missouri Constitution, Art. 9, & 5, provides: "The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever." (Emphasis supplied.)

The Constitution, Art. 9, sec. 8, also provides:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever." Finally, the Constitution's Bill of Rights, Art. 1, & 7, provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In *Special District v. Wheeler*, 408 S. W. 2d 60, 63 (1966), the Supreme Court of Missouri held that "the use of public school moneys to send speech teachers . . . into the parochial schools for speech therapy" was not a use "for the purpose of maintaining free public schools," within the meaning of Art. 9, & 5, of the State's Constitution, and therefore was a practice "unlawful and invalid." That case did not involve federal funds. . . .

III

* * * * *

In this Court the parties are at odds over two issues: First, whether on this record Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and, second, whether that requirement, if it exists, contravenes the First Amendment. We conclude that we cannot reach and decide either issue at this stage of the proceedings.

A. **Title I requirements.** As the case was presented to the District Court, petitioners clearly had failed to meet their statutory commitment to provide comparable services to children in nonpublic schools. The services provided to the class of children represented by respondents were plainly inferior, both qualitatively and quantitatively, and the Court of Appeals was correct in ruling that the District Court erred in refusing to order relief. But the opinion of the Court of Appeals is not to be read to the effect that petitioners must submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours.

The legislative history, the language of the Act, and the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act. There was a pronounced aversion in Congress to "federalization" of local educational decisions.

It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district.

H.R. Rep. No. 143, 89th Cong., 1st Sess., 5 (1965); S. Rep. No. 146, 89th Cong., 1st Sess., 9 (1965).

And 20 U.S.C. sec. 1232a provides, *inter alia*:

"No provision of . . . the Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system. . . ."

Although this concern was directed primarily at the possibility of HEW's assuming the role of a national school board, it has equal application to the possibility of a federal court's playing an overly active role in supervising the manner of Title I expenditures.

At the outset, we believe that the Court of Appeals erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri law. Whatever the case might be if there were no expression of specific congressional intent, Title I evinces a clear intention that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds.¹³ The key issue, namely, whether federal aid is money "donated to any state fund for public school purposes," within the meaning of the Missouri Constitution, Art. 9, sec. 5, is purely a question of state and not federal law. By characterizing the problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law. The correct rule is that the "federal law" under Title I is to the effect that state law should not be disturbed. If it is determined, ultimately, that the petitioners' position is a correct exposition of Missouri law, Title I requires, not that that law be preempted, but, rather, that it be accommodated by the use of services not proscribed under state law. The question whether Missouri law prohibits the use of Title I funds for on-the-premises private school instruction is still unresolved. See n. 9, *supra*.

¹³During the debates in the House, it was generally understood that state constitution limitations were to be accommodated. For example, at one point Congressman Goodell raised the possibility that state law would preclude certain forms of services to nonpublic schools. The response from Congressman Perkins, Chairman of the Subcommittee, was:

"The gentleman is an able lawyer and he well knows you cannot do anything in this bill that you cannot do under the State law." 111 Cong. Rec. 5744 (1965).

Responding to a later observation by Mr. Goodell that dual enrollment was prohibited by 28 States, Congressman Carey responded:

"The prohibition applies to a single type of program. That is why we have a multiplicity of programs in this, so that they can choose one in helping the children who are disadvantaged in any one public school." *Id.*, at 5758.

Congressman Thompson subsequently observed:

"Therefore, the provision about providing full assistance under title I is up to the public school district, subject to the laws of the States." *Ibid.*

Furthermore, in the present posture of this case, it was unnecessary for the federal court even to reach the issue whether on-the-premises parochial school instruction is permissible under state law. The state-law question appeared in the case by way of petitioners' defense that it could not provide on-the-premises services because it was prohibited by the State's Constitution. But, as is discussed more fully below, the State is not obligated by Title I to provide on-the-premises instruction. The mandate is to provide "comparable" services. Assuming, *arguendo*, that state law does prohibit on-the-premises instruction, this would not provide a defense to respondents' complaint that comparable services are not being provided. The choice of programs is left to the State with the proviso that comparable (not identical) programs are also made available to eligible private school children. If one form of services to parochial school children is rendered unavailable because of state constitutional proscriptions, the solution is to employ an acceptable alternative form. In short, since the illegality under state law of on-the-premises instruction would not provide a defense to respondents' charge of noncompliance with Title I, there was no reason for the Court of Appeals to reach this issue. By deciding that on-the-premises instruction was not barred by state law, the court in effect issued an advisory opinion. Even apart from traditional policies of abstention and comity, it was unnecessary to decide this question in the current posture of the case.

See also *id.*, at 5979 (remarks of Cong. Thompson); *id.*, at 5757 (remarks of Cong. Goodell); *id.*, at 5747 (remarks of Cong. Perkins).

The Handbook clearly recognizes that state law is to be accommodated:

"Many State departments of education found severe restrictions with respect to the kind of services that their respective State constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

"The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

"*Dual enrollment may not be allowed.

"*Public school personnel may not perform services on private school premises.

"*Equipment may not be loaned for use on private school premises.

"*Books may not be loaned for use on private school premises.

"*Transportation may not be provided to private school students.

"Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

Discussion Notes

1. Does Title I reflect any evidence of the "Political Safeguards of Federalism"?

2. In *SeaPak v. Industrial, Technical and Professional Employees*, 300 F. Supp. 1197 (S.D. Ga. 1969), aff'd 423 F. 2d 1229 (5th Cir, 1970), aff'd, 400 U.S. 985 (1971), the court observed, at page 1201:

After all, state prohibition of compul-

sory unionism is a Congressional dispensation of grace, not the imperious right of a state.

3. For an example of congressional legislation intended to clarify the issue of whether the National Labor Relations Act was intended to preempt state constitutional and statutory "right to work" provisions, see *Retail Clerks International Assoc. v. Schermerhorn*, 375 U.S. 96 (1963).

c. Congressional Displacement of State Constitutions

125 Congressional Record—House, P. 993
(daily ed. Feb. 29, 1979)

Legislation to Bring Temporary Relief to Arkansas vis-a-vis Interest Rates

Mr. ALEXANDER. Mr. Speaker, I rise today to join my colleagues from Arkansas (Mr. HAMMERSCHMIDT, Mr. ANTHONY, and Mr. BETHUNE) in the introduction of legislation that will bring temporary relief to a situation existing in Arkansas.

The legislation we are introducing today will allow national banks, federally chartered financial institutions, or federally insured savings and loan associations and savings banks to charge interest on business or agricultural loans in the amount of \$25,000 or more, notwithstanding any State constitution or statute, at a rate of not more than 5 percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the financial institution is located. Home mortgage, consumer, or other interest rate ceilings established by any State would not be disturbed. The legislation would expire on January 1, 1981.

Mr. Speaker, this legislation will most significantly impact the State of Arkansas. Arkansas' constitution sets the maximum interest rate which may be charged by business borrowers at 10 percent. Most other States exempt business loans from usury ceilings or have ceilings at a level which do not create a problem under current economic conditions.

In response to the credit problems that the Arkansas usury limitations caused in our State (and at that time in Tennessee and Montana as well), Congress enacted legislation in the 93d Congress, Public Law 93-501, the so-called Brock bill, which included a

provision to allow national banks and federally insured institutions to charge on business and agricultural loans of \$25,000 or more interest at a rate of 5 percent in excess of the Federal discount rate, regardless of a State's usury laws. The bill had a duration of 3 years (it expired July 1, 1977) and did not affect consumer or home mortgage loans.

* * * * *

At the time Congress passed the Brock bill, Arkansas' lending institutions were paying up to 13 percent for money bought through the Federal Reserve System. Although many of the State's financial institutions continued to make business loans in anticipation that the rates would go down, it was obvious that this practice could not continue over a long period of time and the financial institution remain solvent.

Arkansas, with the expiration of Public Law 93-501, finds itself in a similar position today. Hardest hit by our usury limitations are construction, agricultural and small business firms who cannot channel funds into the State through corporate subsidiaries. Estimates are now being compiled to determine the actual economic loss to Arkansas because of the lack of relief since the expiration of Public Law 93-501.

Arkansas is presently rewriting its State constitution which will be presented to the voters in the 1980 general election. The usury issue will be one addressed in the document.

Given the credit crunch that our State's financial community finds itself in, it is the hope of the Arkansas delegation that Congress will approve this temporary legislation until such time as the Arkansas electorate has voted on a usury provision in the State constitution that will provide permanent relief.

Mr. ANTHONY. Mr. Speaker, I, too, join my colleagues from the State of Arkansas in urging support of this bill. It is with reservation that I do so, however, and that reservation should be explained.

In 1874, the people of the State of Arkansas created our State constitution. At that period in our history, over 100 years ago, it was deemed by the people that 10 percent interest was the most any person should have to pay for money borrowed. The impor-

tance of that conclusion was such that it was inserted in the constitution, not merely relegated to a rule of law passed by the State legislature or forged by decisions of our State supreme court.

It is also important to emphasize, Mr. Speaker, that the Supreme Court of Arkansas has through the years steadfastly guarded the mandate of our constitutional prohibition against interest in excess of 10 percent. Time and time again the court has found that if a person is charged an amount for borrowing money it is interest, regardless of what it is called: time-price differential, commitment fee, and so forth.

Also, it is the law in Arkansas that if a loan is found to be usurious, not only is the interest and principal of the loan forfeited by the lender, but the agreement itself is void. There have been instances in which the wronged borrower has not only been al-

lowed to not pay back the loan and the interest there on, but has been allowed to keep the house, automobile, or whatever the collateral was that he borrowed the money to buy.

So, Mr. Speaker, the usury law of the State of Arkansas is not something to be casually pushed aside. Arkansans overwhelmingly agree that 10 percent is enough, and I agree with them. Unfortunately, the economy of Arkansas is affected and determined from without as well as from within the State. The inflation ravaging this Nation has reached such proportions that the banking and lending community cannot continue to survive with the 10-percent limitation imposed on them.

We are asking this Congress to give that lending community temporary relief until once again, in a Constitutional Convention, the people of our State can decide what is and what is not usury (sic).

Discussion Notes

1. With respect to this interest rate legislation, see Maxine Master Long, "Trends in Usury Legislation—Current Interest Overdue," *University of Miami Law Review* 34 (January 1980): 325; Note,

"Usury Legislation Its Effects on the Economy and a Proposal for Reform," *Vanderbilt Law Review* 33 (January 1980): 204-05.

2. Is Congressional legislation a generally recognized avenue of state constitutional change?

McInnis v. Cooper Communities, Inc. 611 S.W. 2d 767 (Ark. 1981)

HOLT, Justice.

Appellants brought suit to have a note and mortgage declared usurious and void, in violation of Art. 19, sec. 13 of the Constitution of Arkansas (1874), which restricts the charge of interest to 10% annually. Appellee responded that the loan, bearing 12% interest, was valid, because it came within the preemptive provisions of the Depository Institutions De-regulation & Monetary Control Act of 1980, 94 Stat. 132. . . . Succinctly, the issue on rehearing is the validity of this congressional act which suspends a state's usury laws and, also, reserves to a state the right to veto by overriding the act. Further, if valid, is appellee's loan to appellant usurious? We hold the act valid and appellee's loan to appellants is not usurious.

* * * * *

Under sec. 501(a)(1), the 10% usury limit in our state would not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on residential real property, among other things, that is made after March 31, 1980. . . . As indicated, we are

of the view appellee has sufficiently met the requirements of the act.

We now consider whether this congressional act preempts our usury laws as to those areas covered by the act. Congress has power to do this by virtue of the Supremacy Clause, Art. 6, cl. 2, Constitution of the United States. Congress has broad powers to legislate under the Commerce Clause of our Federal Constitution, Art. 1, sec. 8, cl. 3, this power to legislate falling into, *inter alia*, the category concerning the regulation of activities affecting commerce. . . . Certainly, it cannot be disputed that congressional regulation of the availability and flow of money between the various states comes within the scope of the Commerce Clause.

* * * * *

We now note that the testimony during the congressional hearings was that state usury laws have a significant impact on the economy by diverting credit out-of-state, stagnating the housing industry and resulting in the inability of the farmers and small businessmen to borrow, all of which distorts and adversely affects local and national economy. See 126 Cong. Rec.H. 2273-2275 (daily ed. March 27, 1980); 126 Cong.Rec.S. 3170-3176 (daily ed. March 27, 1980). The legislative history of an act, as reflected by congressional hearings, is most significant.

In *Stephens Security Bank v. Eppivic Corp.*, 411 F.Supp. 61 (W.D.Ark.1976) (affirmed 553 F.2d 102

[8th Cir. 1977]), the court had before it the question of whether the "Brock Bill," Title II of P.L. 93-501, October 29, 1974 (predecessor to the Monetary Control Act here), preempted the Arkansas 10% constitutional usury limitation as to loans of \$25,000 or more made by national banks, FDIC-insured state banks and FSLIC-insured savings and loan associations for business and agricultural purposes. The court found the bill preemptive. The court's observations there are applicable here:

The legislative history reflects findings that the financial community in the affected states has suffered because of the high price it must pay for money as opposed to the limitation on the interest it may earn. . . .

Testimony indicated that the usury ceilings were impacting heavily on the construction, small business and agricultural areas of the economies of the states, with a likelihood of severe shortage or unavailability of credit to these classes in the economy. The report states, . . . the evidence before the Committee indicates that . . . [u]nless remedial action is taken in the very near future, these states could suffer from unemployment and business failures.

* * * * *

S.Rep. No. 368, 96th Cong., 1st Session, U.S. Code Cong. & Admin. News 1980, 834.

The "Brock Bill" also had a provision, as does this legislation, allowing the state legislature to reassert the state's usury provision and, thus, override the federal legislation. The court in *Stephens* quoted the committee report that this provision reflected "a congressional policy of permitting a state the primary opportunity to determine its usury statutes. . . ." This same language appears in the committee report with respect to the act under consideration here.

An override provision has been a part of other acts including the Taft-Hartley Act, see 29 U.S.C. sec. 164(b); the Federal Bankruptcy Code, 11 U.S.C. sec. 522(b); and the Housing and Rent Act of 1947 as amended, 50 U.S.C.App. sec. 1881 *et seq.* This provision in the Taft-Hartley Act was upheld in *Retail Clerks International Association v. Schermerhorn*, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), in which the court noted any resulting conflict between state and federal law would be a "conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements". . . . The act is effective until our legislature deems it necessary to reinstate

our 10% usury ceiling. So far, it has not seen fit to do so. Parenthetically, we note that our legislature adopted a resolution urging a reenactment of the "Brock Bill," a predecessor to the Monetary Control Act here. Senate Concurrent Resolution 44 (March 8, 1979).

* * * * *

We hold the Monetary Control Act a valid exercise of congressional authority pursuant to the Commerce Clause and that the loan in question is not usurious. Therefore, the chancellor correctly awarded summary judgment in favor of appellee. Affirmed.

* * * * *

PURTLE, Justice, dissenting.

It is true, as the majority states, that the Supremacy Clause, Art. 6, cl. 2 of the Constitution of the United States declares that the Constitution and the laws made in pursuance thereof are the supreme law of the land. I agree with this statement. I do not believe the Depository Institutions Deregulation sec. Monetary Control Act of 1980 was enacted pursuant to the United States Constitution. . . .

Art. 19, sec. 13, Arkansas Constitution, states:

All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, . . .

The contract here in question undisputedly charged a rate of interest in excess of our constitutional limit. In fact, it has been determined that the case was a test case. Had this court been aware of this fact I believe we would not have considered it. In my opinion, the Constitution of the State of Arkansas is binding upon this court until such time as it is shown that it conflicts with the United States Constitution or the laws passed by Congress in pursuance thereof. I do not believe the Depository Institutions Deregulation & Monetary Control Act of 1980 is such a law. . . .

Until the people of Arkansas change their constitution, I will continue to uphold it unless I am convinced that there exists a clear conflict between it and the United States Constitution or a law passed by Congress in pursuance thereof. I believe the people of Arkansas have recently indicated an intention to retain their present constitutional provision relating to interest rates. . . .

Discussion Notes

1. What is the status of the Arkansas constitutional usury limit?
2. The congressional statute apparently per-

mitted the Arkansas *legislature* to reinstate the *constitutional* usury limit. Does this make sense? Is this a valid exercise of federal commerce clause power?

D. Interstate Compacts and State Constitutions

Article I, Section 10, Clause 3, United States Constitution

Provides in pertinent part:

No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .

West Virginia ex rel. Dyer v. Sims 341 U.S. 22 (1951)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

After extended negotiations eight States entered into a Compact to control pollution in the Ohio River system. See Ohio River Valley Water Sanitation Compact, 54 Stat. 752. Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia recognized that they were faced with one of the problems of government that are defined by natural rather than political boundaries. Accordingly, they pledged themselves to cooperate in maintaining waters in the Ohio River basin in a sanitary condition through the administrative mechanism of the Ohio River Valley Water Sanitation Commission, consisting of three members from each State and three representing the United States.

The present controversy arose because of conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact.

The Legislature of that State ratified and approved the Compact on March 11, 1939. W. Va. Acts 1939, c. 38. Congress gave its consent on July 11, 1940, 54 Stat. 752, and upon adoption by all the signatory States the Compact was formally executed by the Governor of West Virginia on June 30, 1948. At its 1949 session the West Virginia on June 30, 1948. At its 1949 session the West Virginia Legislature appropriated \$12,250 as the State's contribution to the expenses of the Commission for the fiscal year beginning July 1, 1949. W. Va. Acts 1949, c. 9, Item 93. Respondent Sims, the auditor of the State, refused to issue a warrant upon its treasury for payment of this appropriation. To compel him to issue it, the West Virginia Commissioners to the Compact Commission and the members of the West Virginia State Water Commission instituted this original mandamus proceeding in the Supreme Court of Appeals of West Virginia. The court denied relief on the merits, 134 W. Va. , 58 S.E. 2d 766, and we brought the case here, 340 U.S. 807, because questions of obviously important public interest are raised.

The West Virginia court found that the "sole question" before it was the validity of the Act of 1939 approving West Virginia's adherence to the Compact. It found that Act invalid in that (1) the Compact was deemed to delegate West Virginia's policy power to other States and to the Federal Government, and (2) it was deemed to bind future legislatures to make appropriations for the continued activities of the Sanitation Commission and thus to violate Art. X, sec. 4 of the West Virginia Constitution.

* * * * *

But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. La Plata Co.*, 304 U.S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another.

The Supreme Court of Appeals of the State of West Virginia is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution. Two prior decisions of this Court make clear, however, that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.

The issue in the *Hinderlider* case was whether the Colorado Legislature had authority, under the State Constitution, to enter into a compact which affected the water rights of her citizens. The issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.

That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated. We are not here concerned, and so need not deal, with specific lan-

guage in a State constitution requiring that the State settle its problems with other States without delegating power to an interstate agency. What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. If this Court, in the exercise of its original jurisdiction, were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the State. The West Virginia Legislature would have no part in determining the State's obligation. The State legislature could not alter it; it could not disregard it, as West Virginia on another occasion so creditably recognized. The obligation would be fixed by this Court on the basis of a master's report. Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. The Compact involves a reasonable and carefully limited delegation of power to an interstate agency. Nothing in its Constitution suggests that, in dealing with the problem dealt with by the Compact, West Virginia must wait for the answer to be dictated by this Court after harassing and unsatisfactory litigation.

The State court also held that the Compact is in conflict with Art. X, sec. 4, of the State Constitution and for that reason is not binding on West Virginia. This section provides:

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war; but the payment of any liability, other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

The Compact was evidently drawn with great care to meet the problem of debt limitation in light of this section and similar restrictive provisions in the constitutions of other States. Although, under Art. X of the Compact, the States agree to appropriate funds for administrative expenses, the annual budget must be approved by the Governors of the signatory States. In addition, Article V provides: "The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." In view of these provisions, we conclude that the obligation of the State under

the Compact is not in conflict with Art. X, sec. 4 of the State Constitution.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE REED, concurring. I concur in the judgment of the Court but disagree with the assertion of power by this Court to interpret the meaning of the West Virginia Constitution. This Court must accept the State court's interpretation of its own Constitution unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule.¹

There is no problem concerning the binding effect upon this Court of state court interpretation of state law, under the Compact Clause such as there is under the clause against impairing the Obligation of Contracts.² Under the latter clause, this Court, in order to determine whether the subsequent state law, constitutional or statutory, impairs the federal prohibition against impairment of contracts, has asserted power to construe for itself the disputed agreement, to decide whether it is a contract, and to interpret the subsequent state statute to decide whether it impairs that contract.³ Even then we accept state court conclusions unless "manifestly wrong."⁴ Examination here, under the Contract Clause, is to enforce the federal provision against impairment and is made only to decide whether under the Contract Clause there is a contract and whether it is impaired.⁵ This Court thus adjudges whether state action has violated the Federal Contract Clause. It does not decide the meaning of a state statute as applied to a state appropriation.

Under the Compact Clause, however, the federal questions are the execution, validity and meaning of federally approved state compacts.⁶ The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law.

West Virginia adjudges her execution of the

compact is invalid as a delegation of state police power and as a creation of debt beyond her constitutional powers. Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action.

This, I think, was the basis of our holding in *Hinderlider v. La Plata Co.*, 304 U.S. 92. The Supreme Court of Colorado held that compact invalid because it was an executive abandonment by Colorado of a citizen's previously acquired water rights, pp. 104 and 108. But we concluded:

Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.

P. 106.

For that conclusion reliance was placed upon *Rhode Island v. Massachusetts*, 12 Pet. 657, 725, where this Court, speaking of compacts, said:

By this surrender of the power, which before the adoption of the constitution was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might; they could settle them neither by war, or in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before . . . whereby their compacts became of binding force, and finally settled the boundary between them: operating with the same effect as a treaty between sovereign powers.

I would uphold the validity of the compact and reverse the judgment of West Virginia refusing mandamus, with direction to that court to enter a judgment not inconsistent with an opinion based upon the Supremacy Clause.

¹*Union Pac. R. Co. v. Public Service Comm'n*, 248 U.S. 67.

²U.S. Constitution, Art. I, & 10.

³*Appleby v. City of New York*, 271 U.S. 364, 380; *King Mfg. Co. v. Augusta*, 277 U.S. 100, 114; *Coombes v. Getz*, 285 U.S. 434, 441.

⁴*Hale v. State Board*, 302 U.S. 95, 101.

⁵*Coolidge v. Long*, 282 U.S. 582, 597.

⁶*Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 428, where it is said, "Hence we address ourselves to the language of the Compact." And see the last paragraph of that opinion.

Discussion Notes

1. Two well-known commentators on interstate compacts made the following observations on the theory of Justice Reed's concurring opinion in the principal case:

If this construction were to be accepted, the government of a state, by making a compact with another state, could in effect amend the state constitution without regard to the requirements for amendment, such as ratification by popular referendum; similarly a state government could accomplish by compact what it could not by statute under the constitution of the state.

Frederick L. Zimmermann and Mitchell Wendell, "The Interstate Compact and *Dyer v. Sims*," *Columbia Law Review* 51 (December 1951): 937. See also, *Ibid*, at 943 n. 61. See also Felix Frankfurter and James M. Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," *Yale Law Journal* 34 (May 1925): 685.

For an exhaustive survey of the history of the Compact Clause and its interpretation, especially as to which "compacts" must be approved by Congress, see *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978).

2. Was the compact involved in *Dyer v. Sims* just between states? Can states enter compacts with the federal government? See Frank P. Grad, "Federal-State Compact: A New Experiment in Cooperative Federalism," *Columbia Law Review* 63 (May 1963): 825.

3. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) the Supreme Court held that state constitutional provisions on water rights must give way to "federal common law." Why would a state put rules about water rights in its *constitution*?

4. See generally Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* (Carbondale: Southern Illinois University Press, 1971); Weldon V. Barton, *Interstate Compacts in The Political Process* (Chapel Hill: University of North Carolina Press, 1965).

Chapter 3
**State Constitutional Protection of
Individual Liberties in the Federal System**

A. Introduction: State Constitutional Protections beyond Minimum Federal Constitutional Rights

Monrad Paulsen observed in 1951:

Although state constitutions contain full statements of our civil liberties, on the whole the record of state court guardianship of "First Amendment Freedoms" is disappointing. . . . If our liberties are not protected in Des Moines the only hope is in Washington.¹

All state constitutions contain a series of protections or specified rights for individuals. Most of the original state constitutions contained such provisions, and the federal Bill of Rights was to a certain extent patterned on them.² Interestingly, the state bills of rights appear at the beginning of the constitution, rather than at the end as is true with the federal Constitution. This structural difference in state constitutions can be significant.³

Many state constitutional protections use phrases such as "due process of law," or "unreasonable search and seizure," identical to federal constitutional protections. Others use similar language, and still others have no counterparts at all in the federal constitution. These state constitutional provisions are usually referred to as Declarations of Rights. What is their function in the federal system and how do they relate to the federal Bill of Rights? Must words have the same "meaning" when used in both the federal and state constitutions?

The "rediscovery" of state constitutional protections beginning in the 1970s, where state courts began deciding cases based on state rather than federal constitutional provisions, presents one of the most

interesting and challenging facets of constitutional law.

In 1986 United State Supreme Court Justice William J. Brennan, Jr. noted:

Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times.⁴

Even the federal Bill of Rights' origins in state constitutions and earlier colonial and English legal materials had been more or less forgotten until recently. In 1975 Justice Stanley Mosk of California had to remind the bar and bench:

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

People v. Brisendine, 119 Cal. Rptr. 315, 329, 531 P.2d 1099, 1113, 13 Cal.3d 528, 550 (1975).

ENDNOTES

¹Monrad G. Paulsen, "State Constitutions, State Courts and First Amendment Freedoms," *Vanderbilt Law Review* 4 (April 1951): 642.

²A. E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University of Virginia Press, 1968); Richard L. Perry, ed., *Sources of Our Liberties* (Chicago: American Bar Foundation, 1959); Edward Dumbauld, "State Precedents for the Bill of Rights," *Journal of Public Law* 7 (Fall 1958): 323.

³Daniel Elazar, "The Principles and Traditions Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 15 ("Most immediately, their place at the beginning of the constitution is intended to announce that the protection of rights is the first task of government, indeed,

its *raison d'être*.""); *State v. Tapply*, 124 N.H. 318, 325, 470 A.2d 900, 904-05 (1983).

⁴*National Law Journal*, September 29, 1986, Special Section at S-1.

B. The Incorporation of Federal Constitutional Protections against the States

Barron v. Mayor and City Council of Baltimore 32 U.S. 243 (1833)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The plaintiff in error contends that [this matter] comes within that clause in the fifth amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instru-

ment itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

* * * * *

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason. . . . Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would

have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that State, and the Constitution of the United States.

Malloy v. Hogan
378 U.S. 1 (1964)

* * * * *

The extent to which the Fourteenth Amendment prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases in this Court since the Amendment's adoption in 1868.

Although many Justices have deemed the Amendment to incorporate all eight of the Amend-

ments,² the view which has thus far prevailed dates from the decision in 1897 in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use.³ It was on the authority of that decision that the Court said in 1908 in *Twining v. New Jersey*, supra, that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." 211 U.S., at 99.

The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . .," *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, three years later *Gitlow v. New York*, 268 U.S. 652, initiated a series of decisions which today hold immune from state invasion every First Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

Similarly, *Palko v. Connecticut*, 302 U.S. 319, decided in 1937, suggested that the rights secured by the

²Ten Justices have supported this view. See *Gideon v. Wainwright*, 372 U.S. 335, 346 (opinion of MR. JUSTICE DOUGLAS). The Court expressed itself as unpersuaded to this view in *In re Kemmler*, 136 U.S. 436, 448-449; *McElvaine v. Brush*, 142 U.S. 155, 158-159; *Maxwell v. Dow*, 176 U.S. 581, 597-598; *Twining v. New Jersey*, supra, p. 96. See *Spies v. Illinois*, 123 U.S. 131. Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment are: *United States v. Cruikshank*, 92 U.S. 542, 551; *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (First Amendment); *Presser v. Illinois*, 116 U.S. 252, 265 (Second Amendment); *Weeks v. United States*, 232 U.S. 383, 398 (Fourth Amendment); *Hurtado v. California*, 110 U.S. 516, 538 (Fifth Amendment requirements of grand jury indictments); *Palko v. Connecticut*, 302 U.S. 319, 328 (Fifth Amendment double jeopardy); *Maxwell v. Dow*, supra, at 595 (Sixth Amendment jury trial); *Walker v. Sauvinet*, 92 U.S. 90, 92 (Seventh Amendment jury trial); *In re Kemmler*, supra; *McElvaine v. Brush*, supra; *O'Neil v. Vermont*, 144 U.S. 323, 332 (Eighth Amendment prohibition against cruel and unusual punishment).

³In *Barron v. Baltimore*, 7 Pet. 243, decided before the adoption of the Fourteenth Amendment, Chief Justice Marshall, speaking for the Court, held that this right was not secured against state action by the Fifth Amendment's provision: "Nor shall private property be taken for public use, without just compensation."

Fourth Amendment were not protected against state action, citing, 302 U.S., at 324, the statement of the Court in 1914 in *Weeks v. United States*, 232 U.S. 383, 398, that “the Fourth Amendment is not directed to individual misconduct of [state] officials.” In 1961, however, the Court held that in the light of later decisions,⁵ it was taken as settled that “. . . the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth . . .” *Mapp v. Ohio*, 367 U.S. 643, 655. Again, although the Court held in 1942 that in a state prosecution for a noncapital offense, “appointment of counsel is not a fundamental right,” *Betts v. Brady*, 316 U.S. 455, 471; cf. *Powell v. Alabama*, 287 U.S. 45, only last Term this decision was

⁵See *Wolf v. Colorado*, 338 U.S. 25, 27-28; *Elkins v. United States*, 364 U.S. 206, 213.

Discussion Notes

1. On the incorporation of Bill of Rights provisions into the due process clause of the Fourteenth Amendment, thus making them applicable to the states, see Richard C. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (Madison, Wis. 1981).

2. Would federal constitutional rights, developed in cases involving the federal government, have to be applied identically against the states when such rights are incorporated? Robert F. Williams, “In the Supreme Court’s Shadow: Legiti-

re-examined and it was held that provision of counsel in all criminal cases was “a fundamental right, essential to a fair trial,” and thus was made obligatory on the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343-344.⁶

We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases.

⁶See also *Robinson v. California*, 370 U.S. 660, 666, which, despite *In re Kemmler*, *supra*; *McElvaine v. Brush*, *supra*; *O’Neil v. Vermont*, *supra*, made applicable to the States the Eighth Amendment’s ban on cruel and unusual punishments.

macy of State Rejection of Supreme Court Reasoning and Result,” *South Carolina Law Review* 35 (Spring 1984): 391-96.

3. Concerning the question of whether the incorporation doctrine is a correct interpretation of the Fourteenth Amendment, see Alfred W. Meyer, “The Blaine Amendment and the Bill of Rights,” *Harvard Law Review* 64 (April 1951): 939; and Charles Fairman and Stanley Morrison, “Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding,” *Stanford Law Review* 2 (December 1949): 5, 140. See also *Adamson v. California*, 332 U.S. 46 (1947).

Perry v. Louisiana 461 U.S. 961 (1983)

Opinion of JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE POWELL join, respecting the denial of the petitions for writs of certiorari.

My vote to deny certiorari in these cases does not reflect disagreement with JUSTICE MARSHALL’S appraisal of the importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor’s assumption that they will be biased in favor of other members of the same group. I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will en-

able us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two State Supreme Courts have held that a criminal defendant’s rights under state constitutional provisions are violated in some circumstances by the prosecutor’s use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury. *People v. Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499, cert. denied, 444 U.S. 881 (1979). That premise, understandably, has given rise to litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges, which had traditionally been final and unreviewable. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Gilliard v. Mississippi
464 U.S. 867 (1983)

JUSTICE MARSHALL, with whom JUSTICE
BRENNAN joins, dissenting.

* * * * *

For the third time this year, this Court has refused to review a case in which an all-white jury has sentenced a Negro defendant to death after the prosecution used peremptory challenges to remove all Negroes from the jury. See *Miller v. Illinois* and *Perry v. Louisiana* decided together with *McCray v. New York*, 461 U.S. 961 (1983) (MARSHALL, J., dissenting from denial of certiorari). The facts of each case follow a now-familiar pattern: For cause challenges by both defense counsel and the prosecution leave an integrated jury panel. The prosecution then resorts to peremptory challenges to remove Negro members of the panel. Despite defense counsel efforts to show that the prosecution has excluded jurors on the basis of race, the trial court rules that defendant has failed to establish systematic exclusion in the manner required by this Court in *Swain v. Alabama*, 380 U.S. 202 (1965). The all-white jury proceeds to hear the case and sentence the Negro defendant to death.

* * * * *

I write today to address those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions, but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem. Although I appreciate my colleagues' inclination to delay until a consensus emerges on how best to deal with misuse of peremptory challenges, I believe that for the Court to indulge that inclination on this occasion is inappropriate and ill-advised.

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-311 (1932). As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-

as-laboratories metaphor has propelled Justice Brandeis' concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court's abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.

When a majority of this Court suspects that such rights are being regularly abridged, the Court shrinks from its constitutional duty by awaiting developments in state or other federal courts. Because abuse of peremptory challenges appears to be most prevalent in capital cases, the need for immediate review in this Court is all the more urgent. If we postpone consideration of the issue much longer, petitioners in this and similar cases will be put to death before their constitutional rights can be vindicated. Under the circumstances, I do not understand how in good conscience we can await further developments, regardless of how helpful those developments might be to our own deliberations.

Moreover, I have serious misgivings about my colleagues' assumption that many States will, in the foreseeable future, engage in meaningful reconsideration of the discriminatory use of peremptory challenges. In the area of individual rights, state courts traditionally have looked to the federal judiciary for leadership. When decisions of this Court have expanded personal liberties in an area, state judiciaries have followed and, upon occasion, interpreted state constitutional liberties to exceed those guaranteed by the Federal Constitution. But, conversely, when this Court has announced a clearly defined, but limited, federal constitutional protection for a particular right, the State Supreme Courts have been less willing to develop more generous doctrines under their own State Constitutions.

Constitutional limitations on prosecutorial use of peremptory challenges are a clear example of how a limiting precedent in this Court inhibits doctrinal development in the States. In 1965 in *Swain v. Alabama*, a majority of this Court held that the prosecution is free to use peremptory challenges to remove Negroes from the jury in any given case so long as the prosecution does not remove Negroes from juries "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim." 380 U.S., at 223. Even though *Swain v. Alabama* has been roundly and regularly criticized by commentators, see sources cited in *McCray v. New York*, *supra*, at 964-965, n. 1 (MARSHALL, J., dissenting), in the 18 years since *Swain* was decided only two State Supreme Courts have interpreted their State Constitutions to provide criminal defendants greater protection against discriminatory use of peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.

2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U.S. 881 (1979).

Contrary to my colleagues' assumptions, these two recent decisions by the California and Massachusetts high courts have not inspired other State Supreme Courts to deviate from the rule of *Swain* and experiment with new remedies for peremptory challenge misuse. To my knowledge, in the five years since *Wheeler* and *Soares*, not a single State Supreme Court has imposed state constitutional limits on peremptory challenges. In fact, over the same period, at least 19 jurisdictions have considered the issue and,

following *Swain*, reaffirmed their view that the exclusion of Negroes by peremptory challenges is constitutional in the absence of evidence of systematic exclusion.

* * * * *

While this Court attends the Brandeisian experiments in a handful of state courts, criminal defendants in Mississippi and numerous other States have no legal remedy for what a majority of this Court agrees may well be a constitutional defect in the jury selection process. Under the circumstances, I cannot abide by further delay. I would grant the petition.

Discussion Notes

1. What factors seemed to convince the United States Supreme Court to move slowly in this area? Would those factors have been present in cases against the *federal* government?

2. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States struck down the practice of us-

ing peremptory challenges to exclude jurors on racial grounds.

3. After *Batson*, could state courts still rely on state constitutional grounds in dealing with this problem? See *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986).

C. The Rediscovery of State Constitutional Rights

William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights”

Harvard Law Review

90 (January 1977): 489.

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* * * * *

In recent years, however, another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty—has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures,¹ Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state

¹Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). [But see Chapter 3, Section E.]

action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system—state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law for without it, the full realization of our liberties cannot be guaranteed.

* * * * *

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.⁸³ Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them.

⁸³The Court has made this point clear on a number of occasions. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“... a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards”); *Cooper v. California*, 386 U.S. 58, 62 (1967).

Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

* * * * *

Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. Under the banner of vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties. Such decisions hardly bespeak a true

concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual rights,⁸⁴ the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

⁸⁴ See *Stone v. Powell*, 96 S.Ct. 3037, 3051 n.35 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975)

Discussion Notes

1. Justice Brennan's article, although published only in 1977, is among the "most frequently cited law review articles of modern times." Ann Lousin, "Justice Brennan: A Tribute to a Federal Judge Who Believes in State's Rights," *John Marshall Law Review* 20 (Fall 1986): 2 n.3. Justice Stewart G. Pollock of the New Jersey Supreme Court referred to Justice Brennan's article as the "Magna Carta of state constitutional law." Stewart G. Pollock, "State Constitutions as Separate

Sources of Fundamental Rights," *Rutgers Law Review* 35 (Summer, 1983): 716.

2. Justice Brennan updated his views in "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," *New York University Law Review* 61 (October 1986): 535.

3. Justice Brennan has not confined his views to academic literature, however. This following dissent indicates his views as expressed in judicial opinions.

**Michigan v. Mosley
423 U.S. 96 (1976)**

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

* * * * *

But the process of eroding *Miranda* rights, begun with *Harris v. New York* 401 U.S. 222 (1971), continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of *Miranda's* constitutional princi-

ples can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda's* enforcement of the privilege against self-incrimination.

* * * * *

In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Cooper v. California*, 386 U.S. 58, 62 (1967).

* * * * *

Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now

increasingly depreciated by decisions of this Court. . . . I note that Michigan's Constitution has its own counterpart to the privilege against self-incrimination. Mich. Const., Art. 1, & 17; see *State v. Johnson*, *supra*.

Discussion Notes

1. Why would Justice Brennan write a dissent like this? What role could such a dissent have? Williams, "In the Supreme Court's Shadow," 374-77.

2. Paul Bator, "The State Courts and Federal Constitutional Litigation," *William & Mary Law Review* 22 (Summer 1981): 606 n.1:

I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply "available" to be manipulated to negate Supreme Court decisions which are deemed unsatisfac-

tory. And I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court. See, for an example of a not at all subtle invitation of this sort, *Michigan v. Mosley*, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).

3. Why would Bator refer to state constitutional law decisions as "unreviewable"?

Robert F. Williams, "In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result"

South Carolina Law Review
35 (Spring 1984): 353.

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Although the state constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.

Justice Stewart G. Pollock¹
New Jersey Supreme Court

* * * * *

II. A New Model of American Constitutional Law

Persons not attentive to the distinctions between federal and state constitutional law might view United States Supreme Court decisions as enunciating the final, definitive constitutional law regarding the validity of state policies. Under this view, Su-

preme Court decisions represent the *end* of the constitutional decisionmaking process. Other persons, recognizing the state court trend of resorting to independent interpretations of their constitutions in the face of contrary Supreme court holdings, might view the Court's decisions as the *beginning* of the states' independent constitutional decisionmaking process.

This Article's thesis is that Supreme Court federal constitutional interpretations represent the *middle* of an evolving process of constitutional decisionmaking in our federal system. The ongoing legal and political controversy following Supreme Court decisions holding against asserted federal constitutional rights illustrates an emerging new paradigm of judicial review in cases concerning state activities. The process begins with a series of lower court rulings on federal constitutional challenges to state legislative or executive action. These cases eventually lead to a United States Supreme Court ruling on the federal constitutional question. If the Supreme Court upholds the federal challenge (striking down the state policy), the decision establishes a minimum national standard applicable in every state. But if the Court rejects the asserted federal challenge (upholding the state policy), the decision now triggers a series of "second looks" at the question by state-level decisionmakers, including the courts, based on state legal and policy arguments. During this second stage, the Supreme Court decision, while certainly not controlling, continues to play an integral role in the unfolding state legislative, executive, and judicial decisions. Supreme Court dissenting opinions on the question play an equally important role.

¹Right to Choose v. Byrne, 91 N.J. 287, 300, 450 A2d 925, 931 (1982).

D. State Judicial Reliance on State Constitutions

In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) the Alaska Supreme Court was faced with the question of a defendant's entitlement to a jury trial in an assault prosecution under a municipal ordinance. After discussing the federal constitutional standards outlined in *Duncan v. Louisiana*, 391 U.S. 145 (1968) (no jury trial required for "petty offenses"), the court went on to say (471 P.2d at 401-02):

In interpreting the Alaska Constitution we must consider the consequences of denying jury trial to the person being prosecuted. It is of small moment to the citizen whether the period of incarceration is long or short; one day may be too long. Its results may be serious for one man and less so for another, depending upon a variety of circumstances. Furthermore, the great bulk of the citizenry encounters the judicial process most frequently in the prosecution of what have been called the petty offenses. Punishments inflicted at that level can be as harsh and as devastating to the life of the citizen as those meted out for more serious misdemeanors and for felonious conduct. Why should the remedial process be less just at one level than at another? We should be alert against attempts by government to whittle away fundamental rights on grounds of expediency. It is our constitutional duty to prevent such untoward consequences for the citizen at large. It is well stated in *Duncan v. Louisiana*, *supra*, that,

"Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the

voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge he was to have it." 391 U.S. at 156, 88 S.Ct. at 1451.

Accordingly, we declare that in any criminal prosecution, whether under state law or for violation of a city ordinance, the accused upon demand is entitled to a jury trial. What is ultimately persuasive to us is the strong indication by other courts that fundamental fairness under the Fourteenth Amendment requires an extension of procedural safeguards in the administration of criminal justice to an area of crimes once deemed outside the pale of protection. In deciding today that appellant has a constitutional right to a jury trial, we have decided to so extend this protection. In doing so, we recognize that this result has not been reached in certain other jurisdictions or by the United States Supreme Court. The mere fact, however, that the United States Supreme Court has not extended the right to jury trial to all types of offenses does not preclude us from acting in this field. While we must enforce the minimum constitutional

standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.²⁶ We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

In *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) the California Supreme Court upheld a complaint alleging California's system of funding public schools violated both federal and state equal protection guarantees. It remanded the case for trial.

In 1973, however, the United States Supreme Court ruled a similar public school finance system in Texas did not violate the *federal* equal protection clause of the Fourteenth Amendment. *San Antonio District v. Rodriguez*, 411 U.S. 1 (1973). The Supreme Court noted (411 U.S. at 44):

It must be remembered, also that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state

²⁶*Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969). We again iterate our position, taken in *Roberts*, that "[w]e are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."

We also again voice our disapproval of the language in *Knudsen v. City of Anchorage*, 358 P.2d 375 (Alaska 1960) which would indicate that we are bound by the United States Supreme Court's interpretation of the Sixth Amendment of the United States Constitution.

action,"⁸⁸ it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose.

What are the implications of such a statement by the United States Supreme Court in upholding state actions against federal constitutional challenges? Does it provide an argument that the Supreme Court decision is of lesser precedential value in consideration of similar state constitutional claims? See Robert F. Williams, "In the Supreme Court's Shadow," pp. 389-97.

After a lengthy trial in the lower court, *Serrano v. Priest* again reached the California Supreme Court and was decided in 1976. 557 P.2d 929, 950-52 (1976):

The primary position adopted by plaintiffs on this point is the correct one. As *Serrano I* makes clear through its reference to our second *Kirchner* opinion (and as all parties hereto are agreed), our state equal protection provisions, while "substantially the equivalent of" the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. We have recently stated in a related context: "[I]n the area of fundamental civil liberties—which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental

⁸⁸*Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530, 532 (1959) (BRENNAN, J., concurring); *Katzenbach v. Morgan*, 384 U.S. at 659, 661 (Harlan, J., dissenting).

rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law". . . .

Thus, the fact that a majority of the United States Supreme Court have now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal constitutional purposes⁴⁴ can have no effect upon the existing construction and application afforded our own constitutional provisions. Nor can the additional fact—if it be a fact—that certain of the high court's former decisions (which may have been relied upon by us in *Serrano I*) may not be expected to thrive in the shadow of *Rodriguez* cause us to withdraw from the principles we there announced on state as well as federal grounds.

For these reasons then, we now adhere to our determinations, made in *Serrano I*, that for the reasons there stated and for purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest. Because the school financing system here in question has been shown by substantial and convincing evidence produced at trial to involve a suspect classification (insofar as this system, like the former one, draws distinctions on the basis of district wealth), and because that classification affects the fundamental interest of the students of this state in education, we have no difficulty in concluding today, as we concluded in *Serrano I*, that the school financing system before us must be examined under our state constitutional provisions with that strict and searching scrutiny appropriate to such a case.

⁴⁴We do not think it open to doubt that the *Rodriguez* majority had considerable difficulty accommodating its new approach to certain of its prior decisions, especially in the area of fundamental rights. Indeed, we share the curiosity of Justice Marshall, who in his dissent states that he "would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma [ex rel. Williamson]*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), or the right to vote in state elections, e.g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), or the right to appeal from a criminal conviction, e.g., *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956)." (*Rodriguez*, supra, 411 U.S. at p. 100, 93 S.Ct. at p. 1331.)

We are fortified in reaching this conclusion by language appearing in the *Rodriguez* decision itself. The high court, in passing upon the validity of the Texas system under the federal equal protection clause, repeatedly emphasized its lack of "expertise" and familiarity with local problems of school financing and educational policy, which lack "counsel[ed] against premature interference with informed judgments made at the state and local levels." (*Rodriguez*, supra, at p. 42, 93 S.Ct. at p. 1301.) These considerations, in conjunction with abiding concerns from the standpoint of federalism,⁴⁶ in the high court's view "buttress[ed] [its] conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny." (Id. at p. 44, 93 S.Ct. at p. 1302.) This Court, on the other hand, in addressing the instant case occupies a position quite different from that of the high court in *Rodriguez*. The constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions. Moreover, while we cannot claim that we have achieved the perspective of "expertise" on the subjects of school financing and educational policy, our deliberations in this matter have had the benefit of a thoughtfully developed trial record (comprising almost 4,000 pages of testimonial transcript, replete with the opinions of experts of various accomplishments and persuasions, and a clerk's transcript of almost equal size), comprehensive if not exhaustive findings on the part of an able trial judge, and voluminous briefing by the parties and no less than nine amici curiae,

⁴⁶The high court explained its misgivings on the federalism question as follows: "It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While '[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." (Id. at p. 44, 93 S.Ct. at p. 1302; fn. omitted.)

among which are included the state Superintendent of Public Instruction. We believe that this background amply equips us to undertake the searching judicial scrutiny of our

state's public school financing system which is required of us under our state constitutional provisions guaranteeing equal protection of the laws.

Discussion Notes

1. See also, *Robinson v. Cahill*, 62 N.J. 473, 490, 303 A.2d 273, 282 (1973) as to the lack of federalism concerns at the state level.

2. Justice Brennan referred to the concept of "federalism" in his article on state constitutional rights. What does "federalism" mean? What role should it play in the resolution of the issues in these cases?

3. Justice Brennan also contended many "door closing decisions" had been rendered by the Supreme court in the name of federalism. On this aspect of federalism, see Louise Weinberg, "The New Judicial Federalism," *Stanford Law Review* 29 (July 1977): 1191.

4. On federalism generally, see "Symposium on Federalism," *Yale Law Journal* 86 (May 1977): 1018; "Symposium—Aspects of Federalism," *Suffolk University Law Review* 12 (Fall 1978): 1087; "Symposium, State Courts and Federalism in the 1980's," *William & Mary Law Review* 22 (Summer 1981): 599.

5. Would there be other reasons such as lack of federalism concerns, that United States Supreme Court decisions holding against asserted federal constitutional rights ought not to be accorded much weight? See Lawrence Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms," *Harvard Law Review*, 91 (April 1978): 1218-20. See also *infra*, pp. 114-16.

Hansen v. Owens 619 P.2d 315 (Utah 1980)

CROCKETT, Chief Justice:

In original proceedings, the petitioner requests this Court to enjoin enforcement of an order of the defendant, Circuit Judge of Washington County, which directs petitioner to furnish examples of his handwriting for use in connection with a charge of forgery against him.

This petition focuses attention upon the meaning and effect to be given to the protective provisions of our state and federal constitutions relating to being required to incriminate one's self.¹ It is to be noted that the Fifth Amendment to the United States Constitution provides that "[No person] shall be compelled in any criminal case *to be a witness* against himself, . . ." Whereas, our state provision provides that "The accused shall not be compelled to give evidence against himself."

On defendant's behalf, it is urged that the two constitutional provisions, even though not identical in wording, are essentially the same in meaning. From that premise, support is garnered from holdings of the United States Supreme Court that the privilege against self-incrimination does not protect an accused from being the source of real or physical

evidence against him.² It is urged that such rulings are applicable in the instant case.

We take cognizance of the fact that federal courts have generally held that the privilege applies only to evidence of a "testimonial" nature; and we do not doubt their soundness as applied to their particular facts. However, it seems significant that the framers of our Utah Constitution, in Section 12 of Article I, stated that "The accused shall not be compelled *to give evidence* against himself; a wife shall not be compelled *to testify* against her husband, nor a husband against his wife. . . ." (All emphasis herein is added.)

In legal formulations, it is to be assumed that the words used were chosen advisedly. This is particularly true in such foundational documents as constitutions, which it can be assumed are framed with greater than usual care and deliberation. Consequently, when terms of clearly different meanings are used within the same framework, each should be given its own separate, commonly understood meaning. Judged in that light, it seems reasonable to assume that the phrase "to give evidence against himself," as used in our constitution, was intended to mean something different and broader than the phrase "to be a witness against himself" as used in the federal constitu-

¹U.S. Const., Amend. V; Utah Const., Article I, & 12.

²*Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); and *U.S. v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764; 35 L.Ed.2d 67 (1973).

tion. Such a distinction has heretofore been recognized by this Court.⁴

⁴See *Carter v. Cummings-Neilson Co.*, 34 Utah 315, 97 P. 334 (1908) wherein the court so stated and quoted the language of Chief Justice Barch in the case of *Crooks v. Harmon*, 29 Utah 304, 81 P. 95 (1905) wherein he stated:

The word "testimony" is a restricted, limited term, consisting only of the statements of witnesses, while the word "evidence" is a comprehensive term, embracing not only testimony, or the statements of witnesses, but also documents, written instruments, admissions of parties, and whatever may be submitted to a court or a jury to elucidate an issue or prove a case.

Consistent with this is Rule 1(1), Utah Rules of Evidence which states that:

"Evidence," as used in these rules, includes the means, oral, documentary or physical, used as proof on issues of fact.

The significant aspect of this case is made evident by comparison with our case of *State v. Van Dam*, cited by the defendant. There it was held not to be error to introduce evidence relating to hair samples obtained from the accused. There was not involved any compulsion or affirmative act by him. This situation is quite different. Here, the accused has made timely objection to being compelled to *give evidence*, which he asserts may be incriminating. In reference to the cases relied upon by the defendant, we note that this case goes beyond making observations or comparisons of an accused's appearance, or of his body, or its parts or substances obtained therefrom. We do not mean this decision to be understood as going beyond its particular facts. The order directs the accused to do the affirmative act of writing. Considered under our Utah constitutional provision, we see no controlling distinctions between making him respond to questions for possible use against him relating to an alleged crime, and making him write for that purpose.

Discussion Notes

1. Using a variety of additional techniques of interpreting the state constitution the Utah Supreme Court significantly restricted its *Hansen v. Owens* holding in *American Fork City v. Cosgrove*,

701 P.2d 1069 (Utah 1985). The case is reproduced in Chapter 5, Section D, page 200.

2. How important is the difference in language between the federal and state constitutions, discussed in this case?

Beirkamp v. Rogers 293 N.W. 2d 577 (Iowa 1980)

REES, Justice.

The sole issue presented by this appeal is whether the Iowa guest statute, section 321.494, The Code,¹ is violative of Article I, section 6, of the Iowa Constitution. We conclude that the statute is constitutionally offensive and affirm the ruling of the trial court.

* * * * *

I. Before reaching the merits of this appeal we once again wish to explain why our review is limited to the Iowa constitutional ground. As we noted in *Beitz v. Horak*, 271 N.W. 2d 755, 758-59 (Iowa 1978), in 1929 the United States Supreme Court held that Connecticut's guest statute did not violate the equal

protection clause of the Fourteenth Amendment. *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929).

In *Silver* the court found a rational distinction between gratuitous passengers in automobiles and those in other means of conveyance. *Id.*, 280 U.S. at 123, 50 S. Ct. at 59, 74 L.Ed. at 225. Several courts, in evaluating the federal constitutional claim, have sought to distinguish *Silver* by considering a different classification, that separating paying and nonpaying automobile guests. *E.g.*, *Brown v. Merlo*, 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975); *Ramey v. Ramey*, S.C., 258 S.E.2d 883 (1979).

In a series of recent appeals from court decisions upholding the guest statute the Supreme Court has chosen to dismiss for want of a substantial federal question. . . . As we acknowledged in *Beitz*, 271 N.W.2d at 758, these dismissals constitute adjudications on the merits and are binding on both state and federal courts. See *Hicks v. Miranda*, 422 U.S. 332,343-45, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223, 235-36 (1975). While the *Silver* opinion did not pass on the paying-nonpaying passenger distinction, that classification was raised in the aforementioned appeals which were dismissed for want of a substantial federal question. Thus these cursory dismissals effectively foreclose our evaluation of any of the distinctions or classifications challenged in those cases on federal constitutional grounds. See *Sidle v. Majors*,

¹"The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire unless damage is caused as a result of the driver of said motor vehicle being under the influence of an alcoholic beverage, a narcotic, hypnotic or other drug, or any combination of such substances, or because of the reckless operation by him of such motor vehicle."

536 F.2d 1156 (7th Cir.), cert. denied 429 U.S. 945, 97 S.Ct. 366, 50 L.Ed.2d 316 (1976). Section 321.494 does not violate the equal protection clause of the Fourteenth Amendment. *Beitz v. Horak*, 271 N.W.2d at 759; *Keasling v. Thompson*, 217 N.W.2d 687, 692 (Iowa 1974).

II. The result reached by the United States Supreme Court in construing the federal constitution is persuasive, but not binding upon this court in construing analogous provisions in our state constitution. See *Chicago Title Insurance Co. v. Huff*, 256 N.W.2d 17, 23 (Iowa 1977); *Davenport Water Co. v. Iowa State Commerce Commission*, 190 N.W.2d 583, 593 (Iowa 1971). We acknowledged the possibility of varying interpretations or conclusions in *Beitz v. Horak*, 271 N.W.2d at 759, while discussing the guest statute. The constitutionality of the guest statute under the Iowa constitution was not before us at that time. The issue is properly raised in the case at bar.

As neither a suspect classification nor a fundamental right is involved, a traditional equal protection analysis is appropriate. *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980); *Hawkins v. Preisser*, 264 N.W.2d 726, 729 (Iowa 1978). The plaintiff has the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained. . . . This standard has been articulated by the United States Supreme Court in *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964): "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of a class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . ."

The source of this standard in the Iowa Constitution is Article I, section 6, which provides: "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." We have long found a standard similar to

that of *McLaughlin* to flow from Article I, section 6. . . . In light of this standard we evaluate the classifications made in section 321.494.

Our review of the trial court's ruling is de novo as it involves the resolution of a constitutional issue. *State v. Matlock*, 289 N.W.2d 625, 627 (Iowa 1980). The burden of proof remains on the party challenging the constitutionality of the statute.

Two separate distinctions drawn by the statute are challenged by Beirkamp. She challenges the rational basis of distinguishing between paying and nonpaying guests in automobiles as well as that of establishing a different standard of care for guests in the automobile context as opposed to other guests. In response the defendant relies on the decision of this court in *Keasling v. Thompson*, 217 N.W.2d 687, 692 (1974), in which we placed great reliance on *Silver v. Silver* and the apparently pervasive existence of guest statutes in other states in finding section 321.494 constitutional on both federal and state grounds. We are being asked to reconsider our five-four decision in *Keasling* insofar as that holding rests on Iowa constitutional grounds.

There has been a recent trend among state courts considering the validity of their guest statutes under an equal protection analysis to find the statutes without a rational basis, concluding that whatever rational basis they once possessed no longer exists. . . . At the same time several states have sustained the constitutionality of their guest statutes in the face of equal protection challenges. . . .

V. We hold that the classifications contained in the guest statute do not rationally further the legitimate state purpose of preventing collusive recoveries from insurance companies. We further hold that the classification drawn in section 321.494 bear no rational relationship to any conceivable legitimate state purpose and is therefore violative of Article I, section 6, of the Iowa Constitution. Whatever feature or features which may once have distinguished automobile guests from guests in other conveyances or other contexts no longer exist. Our holding in *Keasling v. Thompson* is therefore overruled and the ruling of the trial court in this case is affirmed.

Discussion Notes

1. Is Article I, section 6 of the Iowa Constitution really similar to the equal protection clause of the Fourteenth Amendment? See generally, Robert F. Williams, "Equality Guarantees in State Constitutional Law," *Texas Law Review*, 63 (March/April 1985): 1195.

2. How does the Iowa Supreme Court's "equal protection" analysis compare with that applied in *Serrano v. Priest*?

3. What should be the role of *stare decisis* in

state constitutional law? On *stare decisis*, see Earl M. Maltz, "Some Thoughts on the Death of Stare Decisis in Constitutional Law," *Wisconsin Law Review*, 1980 (No. 3 1980): 467.

4. The Iowa Supreme Court indicates that whatever justification for the automobile guest statute once existed was no longer valid. Under this type of judicial review, can a rational basis for legislation be eroded by the passage of time? See *Miller v. Boone County Hospital*, 394 N.W.2d 776, 779-80 (Iowa 1986).

Cooper v. Morin
399 N.E.2d 1188 (N.Y. 1979)

The facts so far as necessary to determination of the issues remaining before us are not in dispute. The named plaintiffs are three pretrial detainees and three convicted and sentenced inmates of the Monroe County jail, and they represent as a class all women inmates since February, 1974. The jail occupies 55% of the space in the Monroe County Public Building, which is a modern facility opened in 1971. It was originally intended that female inmates would occupy one half of the fourth floor of the new facility. However, subsequent events required the closing of the nearby county penitentiary, and in the fall of 1971, sentenced male prisoners transferred from that jail to the new facility occupied the fourth floor space.

Lacking room for the female inmates, the county contracted with the City of Rochester to convert and use existing "lockup facilities" on the third floor of the abutting city public safety building. Although the new female detention area did not meet the requirements of the regulations of the State Commission of Correction then in effect, the commission approved the use of the facility on a temporary basis. At the time of trial in 1976 that "temporary" operation had continued for over five years.

Of the women lodged in that facility, more than 90% were pretrial detainees; the rest were serving sentences upon conviction. Currently the women are limited to noncontact visits from family and friends. Visiting hours are between 1: 00 and 4: 30 p.m. on Tuesday, Thursday and Sunday. While it appears from the stipulation of the parties that visits can be limited to 10 minutes, the trial court found that women inmates are permitted 15-minute visits and they frequently ran longer. The facility's three visiting booths separate the inmates from their visitors by a floor-to-ceiling steel barrier, in which there is a window about two feet by seven inches in size, through which the inmate and her visitor can see each other. Conversation can take place only by use of telephones. Thus, there is no physical contact whatsoever between the inmate and her loved ones or friends.

Direct contact visits are permitted at the Monroe County jail between inmates and attorneys, clergymen, parole and probation officers, drug counselors and persons involved in community projects at the jail. The evidence established also that in another correctional facility, run by the State, convicted female felons are permitted longer visits in an informal setting which allows for direct contact between the inmate and her family or friends. Indeed, the Monroe County prison officials agree that contact visits would be desirable, but state that they have not been imple-

mented because they require additional security measures which would increase costs.

* * * * *

The Appellate Division, in a decision written some nine months prior to the decision of the United States Supreme Court in *Bell v. Wolfish* (441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447), held that the due process clause of the Fourteenth Amendment of the Federal Constitution requires that a system of contact visitation be instituted, but that the manner and duration of the visits is a matter wholly within the discretion of the prison officials, and as such, beyond the reach of judicial supervision. . . .

For the reasons hereafter set forth we conclude: (1) that (A) contact visitation is not required by either the due process or the equal protection clause of the Fourteenth Amendment to the Federal Constitution but (B) contact visitation of reasonable duration is required by the due process clause of the State Constitution;

* * * * *

I

A

In *Wolfish v. Levi*, 573 F.2d 118 the Court of Appeals for the Second Circuit held that the due process clause of the Fifth Amendment requires that pretrial detainees in Federal custody be allowed contact visitation, and proscribes certain other practices then in force at the Metropolitan Correctional Center in New York. Though the matter was appealed to the Supreme Court, the ruling as to contact visitation was not appealed, and that court noted (*Bell v. Wolfish*, 441 U.S. 520, 559, n. 40, 99 S.Ct. 1861, 1885, n. 40, 60 L.Ed.2d 447, *supra*), that it expressed no opinion on that phase of the matter. Notwithstanding that it did not pass directly on contact visitation, it would seem from its analysis of the other issues in the case that its ruling will be that contact visitation between a pretrial detainee and his or her family or friends is not constitutionally required. In *Bell* the court considered challenges to: (1) the practice of double-bunking, (2) the "publisher only" rule, (3) body-cavity searches after contact visits, (4) the prohibition against receipt of packages, and (5) the practice of surprise searches of inmates' cells. The Court of Appeals for the Second Circuit had held that since pretrial detainees had not been convicted, and therefore were presumed to be innocent, due process required that they be subjected only to those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration.

Rejecting what it considered an intrusive standard of review, the Supreme Court focused instead on the various constitutional limitations on punishment in the criminal judicial process. The court

agreed that the Eighth Amendment proscription against cruel and unusual punishment had no application to pretrial detainees, for they had yet to be convicted. It recognized that the due process clause of the Fifth Amendment proscribed punishment of pretrial detainees, but held that not all prison practices which go beyond the “compelling necessities of jail administration” constitute “punishment.”

* * * * *

It, thus, appears that neither as a matter of Federal due process nor Federal equal protection are plaintiffs entitled to an order requiring the allowance of contact visits.

B

That conclusion does not end the inquiry, however, for plaintiffs claim constitutional protection under the State as well as the Federal Constitution. While neither the Trial Judge nor the Appellate Division considered State constitutional claims, the complaint clearly presents them and they may, therefore, be reached by us.

We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority. . . .

* * * * *

Section 6 of article I of our Constitution mandates that “No person shall be deprived of life, liberty or property without due process of law.” As we have noted in *Wilkinson v. Skinner*, 34 N.Y.2d 53, 58, 356 N.Y.S.2d 15, 20, 21, 312 N.E.2d 158, 161, “The requirements of due process are not static; they vary with the elements of the ambience in which they arise.” While we are in agreement with the Supreme Court’s holding in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447, *supra*, that due process forbids the punishment of pretrial detainees because punishment can only be imposed after conviction, we cannot agree that the validity of the regimen imposed upon such persons during detention turns on no more than whether a regulation has a legitimate purpose other than punishment and is not excessive in relation to that purpose. So one-sided a concept of due process we regard as unacceptable. In our view what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement.

* * * * *

On the detainee’s side of the balance is the fundamental right to marriage and family life on the one hand and to bear and rear children on the other, recognized in our decisions. . . . The detrimental effect upon spousal and parent-child relationships of the denial of contact, if not obvious, is attested to not only by expert testimony . . . and numerous books and articles . . . but also by the prison officials of Monroe County who candidly admitted that contact visits would be beneficial and a more humane method of detention, which they have not provided simply because of budgetary limitations.

On the State’s side of the equation deterrence, retribution and rehabilitation play no part since we speak, by hypothesis, of persons as yet untried. The only legitimate purpose for pretrial detention then is to assure the presence of the detainee for trial. To this end the State may adopt security measures intended to frustrate possible attempts at escape or the passage of contraband from a visitor to a detainee, and in the adoption of such measures the expertise of professional administrators is entitled to respectful consideration. But when so fundamental a right as the maintenance by pretrial detainees of relationships with family and friends is involved the measure adopted must be both reasonable and necessary to the maintenance of security.

The imposition upon the detainee’s rights of the system of noncontact visitation outlined above when contact visitation is recognized by the authorities as the more desirable is clearly unreasonable unless sustained by a strong showing of necessity. Here we are told only that contact visitation would require additional expenditure for rearrangement of the facility and for added personnel to conduct required search procedures. But as we have previously noted “to exalt economic considerations over the rights of our citizens is nothing more than abdication of this court’s constitutional responsibility” (*Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 167, n. 7, 408 N.Y. S.2d 39, 49, n. 7, 379 N.E.2d 1169, 1178, n. 7, *supra*. . . .

We agree, therefore, as a matter of State constitutional law, with the Appellate Division’s requirement that a program of contact visitation for female detainees of the Monroe County jail must be instituted within a reasonable period of time. We disagree with its disposition only with respect to the length of the visitation period allowed. The stipulation of the parties tells us that visitation may be limited to 10 minutes, but the Trial Judge’s findings indicated that 15 minutes is usual and that visitation often runs longer. Limitations of space and time and the requirements of daily routine must, of course, be met, but so woefully short a period as 10 minutes will hardly be meaningful in most situations. The program as devised should, therefore, provide for visitation during a sufficient number of hours per week to allow for visitation of reasonable duration for each

detainee desiring visitation. What is "reasonable duration" is, of course, a function of the space and hours allocated for visitation and the number of persons having visitors on a given day but the system should strive for visits of substantially longer than 10 minutes duration and should be flexible enough to permit extension of visits beyond the minimum period when circumstances permit.

COOKE, Chief Judge (concurring).

I concur in the result, and do so on State constitutional grounds. . . . In view of the construction afforded our State Constitution, it is unnecessary to resolve any issue of Federal constitutional law.

GABRIELLI, Judge (dissenting).

I am compelled to dissent. The majority has today adopted the position that restrictions on the liberties of pretrial detainees must meet the exacting standard of "compelling governmental necessity" in order to be sustained. Accordingly, the majority has held not only that there is a constitutionally protected right to "contact visits," but also that such visits must be substantially longer than 10 minutes duration in order to pass constitutional muster. Since I can find no source for such "rights" in either the Federal or the State Constitution, I am unable to join in the conclusions reached by my colleagues.

Any analysis of the due process rights of pretrial detainees must begin with the Supreme Court's decision in *Bell v. Wolfish*. . . . [T]he Supreme Court has said, due process demands only that a particular restraint on a detainee's liberty be reasonably related to a legitimate governmental goal, such as the government's understandable objective of maintaining the security of its jail facilities (441 U.S. *supra*, at p. 535-540, 99 S.Ct., at pp. 1872-1874).

Recognizing that the prison regulations at issue here would meet this less exacting standard of review, the majority attempts to find a basis for applying a higher level of judicial scrutiny by invoking the due process clause of the State Constitution (N.Y. Const., art. I, & 6) as well as the "fundamental right to marriage and family life." The majority notes that

the rules of the Monroe county jail which proscribe "contact" visitation impair the detainees' ability to maintain normal family relationships and, on the basis of this fact, concludes that the regulations must fall in the absence of a "compelling" justification.

* * * * *

As we have observed on an earlier occasion, "[t]he role of the courts is not to put a stop to practices that are unwise, only to practices that are unconstitutional or illegal" (*Wilkinson v. Skinner*, 34 N.Y.2d 53, 62, 356 N.Y.S.2d 15, 24, 312 N.E.2d 158, 164). Whatever Judges may think about the desirability of affording prisoners extended "contact" visitation privileges, we are not free to substitute our judgment for that of prison administrators in the absence of some impairment of a substantial constitutional right. Notwithstanding the majority's efforts to locate such a right in the due process clause of our State Constitution (N.Y. Const. art. I, & 6), I remain unconvinced that the privilege of "contact" visitation rises to the level of constitutional significance. On the one hand, the majority states unequivocally that the rule prohibiting contact visits for pretrial detainees does not offend the due process clause of the United States Constitution. On the other hand, the majority has blithely concluded that the equivalent clause in our State Constitution, which employs identical language, somehow compels the opposite conclusion. In view of the identity in language and purpose of the two clauses, I can find no justification for using our State due process clause as a basis for creating a "constitutional" right solely because we are dissatisfied with the result reached in a particular Supreme Court decision under the Federal due process clause.

Since I am unable to find a source for the "rights" claimed here, either in the due process provisions of the State and Federal Constitutions or in the "fundamental right to marriage and family life," I would vote to modify the order of the Appellate Division by reversing so much thereof as requires prison officials to institute a program of "contact" visits.

Discussion Notes

1. Why would Chief Judge Cooke have written his short concurring opinion? What purpose does it serve? See Chapter III, Section B, *infra*.

2. Consider the approaches to judicial review in *Beirkamp v. Rogers* and *Cooper v. Morin*. Are these courts merely substituting their judgment for that of the legislative and executive branches, respectively? What does a court do when it searches for the "rational basis" of a statute or executive policy? See Hans A. Linde, "Without Due Process": Unconstitutional Law in Oregon," *Oregon Law Review* 49 (February 1970):

125; Hans A. Linde, "Due Process of Lawmaking," *Nebraska Law Review* 55 (No. 2 1976): 242.

3. Note in *Cooper v. Morin* the New York Court of Appeals' statement that the federal constitution "defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority."

Thus, it is not only through a state constitutional provision, and its judicial interpretation, that states may provide broader individual or other rights than those mandated by the federal constitution. Such rec-

Discussion Notes (cont.)

ognition has led to the enactment, for example, of "press shield laws" after the United States Supreme Court ruled, in *Branzburg v. Hayes*, 406 U.S. 665 (1972), that there was no First Amendment privilege for reporters to refuse to appear before a grand jury or answer its questions. The Court had indicated that state legislatures, or state courts construing state constitutional provisions, could provide for such a privilege. 406 U.S. at 706. See generally, Note, "A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws," *Georgetown Law Journal* 66 (June 1978): 1273.

4. Justice Hans A. Linde of the Supreme Court of Oregon relates the following story:

Eager legal aid lawyers once came to our court trying to fit a woman's right to operate a day care center within the due process analysis of *Goldberg v. Kelly*. Only after the argument did our own examination show that she was entitled to prevail under the state administrative procedure act, which counsel apparently had not read.

Hans A. Linde, "First Things First: Rediscovering the States' Bills of Rights," *University of Baltimore Law Review* 9 (Spring 1980): 390 (footnotes omitted).

5. *Cooper v. Morin* also referred to the "rule-making authority" as a mechanism for providing rights

beyond those protected by the federal constitution. For examples of this technique, see *People v. Jackson*, 391 Mich. 323, 338-39, 217 N.W.2d 22, 27-28 (1974); *Commonwealth v. Richman* 458 Pa. 167, 187-88, 320 A.2d 351, 357-58 (1974) (Pomeroy, J., concurring).

6. In *Harris v. McRae*, 448 U.S. 297 (1980) the Supreme Court upheld the "Hyde Amendment," which placed severe restrictions on federal Medicaid funding for abortion. The Court recognized, however, that states could provide such funding if they so chose. 448 U.S. at 311 n. 16. Are statements such as this, or that in *Branzburg v. Hayes* in Note 3 above, necessary to authorize states to provide rights not recognized under the federal constitution?

7. A number of state supreme courts have rejected the outcome in *Harris v. McRae* (upholding a federal statute) and its companion case, *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding a state statute). See e.g., *Moe v. Secretary of Admn. & Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982). *Contra, Fischer v. Dept. of Public Welfare*, 509 Pa. 282, 502 A.2d 114 (1985).

In many states, however, the legislatures decided to continue funding for abortions of eligible Medicaid recipients. See Robert F. Williams, "In the Supreme Court's Shadow," pp. 379-80.

Questions as to the constitutional validity of zoning restrictions on unrelated individuals living together in "single family" homes illustrate many of the considerations with which we are here concerned. Compare, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) with *State v. Baker*, 81 N.J. 99, 405 A.2d 368, 373-74 (1979) and *City of Santa Barbara v. Adamson*, 610 P.2d 436, 439-40 (Cal. 1980). See also, "Developments in the Law-Zoning," *Harvard Law Review* 91 (May 1978): 1574-78.

In *State v. Baker* the New Jersey Supreme Court invalidated, under the New Jersey Constitution, a municipal zoning prohibition of more than four unrelated individuals sharing a single housing unit. Justice Mountain dissented:

This brings us to a highly significant point in our discussion. The majority, obviously intent upon achieving a foreordained result, could have reached the sought-for goal by finding that the section of the Plainfield ordinance before us, did not, as a matter of *statutory interpretation*, fulfill the requirements of the Zoning Enabling Act. In other words it could have held that the

power to define "family" in the manner set forth in the ordinance went beyond the powers delegated to municipalities by the legislature. The most pertinent portion of the Enabling Act says,

The governing body [of a municipality] may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. [N.J.S.A. 40: 55D-62]

Given the applicable canons of liberal construction adverted to above, it might be thought difficult to read this comprehensive grant of power as forbidding what Plainfield has done. But it would certainly be no more difficult to discover in this language a prohibition against the Plainfield ordinance, than to extract a proscription against such municipal legislation from the vague phrases of Art. I, par. 1 quoted above.* Of course the

*Article 1, paragraph 1 of the New Jersey Constitution provides: All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

difficulty quite clearly arises from the fact that neither the Constitution nor the Enabling Act can sensibly be read to impose the prohibition. But let us move forward to examine with some care the result which follows from the choice made by the majority to place its decision upon the Constitution rather than the statute.

What the Court has chosen to do is most unusual. Normally, where an issue of this sort arises, a court will rest its decision upon a statutory rather than a constitutional ground. It has been suggested that this rule is absolute and unyielding. Had this course been followed here, the result would be very different than the end now achieved. Had the decision been reached as a matter of statutory interpretation, then the Legislature, had it seen fit to do so, could have amended the statute to provide expressly that municipalities should thenceforth have the power the Court had found not to have been previously granted. Now it is completely foreclosed from doing this because the Court has found there to be a *constitutional* violation. The Legislature cannot amend the Constitution.

A parallel experience in Illinois is instructive. In 1966 the Supreme Court of that state, in the case of *City of Des Plaines v. Trotter*, 34 Ill.2d 432, 216 N.E.2d 116 (1966) was required to rule upon the validity of a municipal ordinance very similar to the one before us here. The ordinance in the Illinois case defined a "family" as consisting of one or more persons each related to the other by blood, adoption or marriage together with their respective spouses. "Family" might also include domestic servants and one gratuitous guest. 216 N.E.2d at 117. The court determined that as a matter of statutory construction the ordinance was invalid because the zoning enabling act in Illinois had not delegated to municipalities the power to make such a classification.

In the following year, 1967, the Illinois Legislature adopted Ill.Rev.Stat.1967, c. 24, & 11-13-1(9), which reads as follows:

[T]he corporate authorities in each municipality have the following powers:

* * * * *

(9) to classify, to regulate and restrict the use of property on the basis of family relationship, which family relationship may be defined as one or more persons each related to the other by blood, marriage or adoption and maintaining a common household.

The difference between the way in which the common problem was handled in Illinois and the way in which it has been handled in New Jersey is striking. In Illinois, since the court decision was made to rest upon an issue of statutory interpretation, the people, acting through their Legislature, were readily able to alter a decision with which they disagreed, simply by enacting corrective legislation. In New Jersey, on the other hand, this Court has deprived the people of this opportunity. In the not unlikely event that there should be dissatisfaction with the majority opinion, correction can only be accomplished by either inducing this Court to reverse itself or by amending the Constitution. Neither course is simple or certain. This is what I have referred to above as "an unfortunate resort to the New Jersey Constitution." It is something I think the Court should not have done.

The same problem was presented to this Court in another very important zoning case decided some few years ago. I refer to *So. Burl. Cty., N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*Mt. Laurel*). There a conscious choice was made to rest the decision upon constitutional rather than upon statutory grounds. 67 N.J. at 174-75, 336 A.2d 713. Although I concurred in the Court's holding in that case, I disagreed with the other members of the Court upon this single point. I would have rested the decision upon statutory rather than upon constitutional grounds and wrote a brief concurring opinion so stating. 67 N.J. at 193, 336 A.2d 713. I still believe that that view is correct.

In a discussion of *Mt. Laurel*, a very able commentator had this to say about my concurring opinion:

On this point [whether to rest the opinion upon constitutional or statutory grounds] one Justice (Mountain) concurred specially, on the ground that the decision should be based upon general welfare un-

der the zoning enabling act . . . and therefore that a constitutional decision was unnecessary. This would have been an open invitation to the dominant suburban forces in the Legislature, to try to figure out a way to amend the enabling act in order to get around this decision; and

so the majority wisely rejected it. [3 *Williams, American Land Planning Law*, sec. 6 6.13f, p. 33-34, 1978 *Cum.Supp.*]

But the whole point is that the legislators and the people whom they represent should have the right to the final word. This is what democracy is all about.

Discussion Notes

1. Contrast Justice Mountain's views with those of Justice Hennessey, concurring in *Commonwealth v. O'Neal*, 339 N.E. 2d 676, 693-94 (Mass. 1975).

2. The dissenting opinions in *State v. Baker* and *Cooper v. Morin* accuse the respective majorities of resorting to the state constitution for illegitimate purposes. Could the majority opinions in both cases be said to be resorting to the state constitution as a "reaction" to contrary federal decisions? See Ronald Collins, "Reliance on State Constitutions: Away from a Reactionary Approach," *Hastings Constitutional Law Quarterly* 9 (Fall 1981): 1.

3. In 1974 the electors in California adopted Article I, section 24 of the California Constitution:

Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

In *People v. Brisendine*, 119 Cal. Rptr. 315, 531 P. 2d 1099, 1114 (1975), the California Supreme Court observed:

The ultimate confirmation of our

conclusion occurred, finally, when the people adopted article I, section 24, of the California Constitution at the November 1974 election, declaring that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Of course this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing law.

See also *People v. Norman*, 538 P.2d 237, 245 n.10 (Cal. 1975) (referring to Article I, section 24 as a "declaration of constitutional independence.")

Should the presence of a provision such as this affect the outcome of state constitutional decisions? What is its function? See Patricia A. Dore, "Of Rights Lost and Gained," *Florida State University Law Review*, 6 (Summer 1978): 612; Talbot D'Alemberte, "Constitution Revision Symposium: Introduction," *Florida State University Law Review*, 5 (Fall 1977): 567; Note, "The New Federalism: Toward a Principled Interpretation of the State Constitution," *Stanford Law Review*, 29 (January 1977): 312.

People ex rel. Arcara v. Cloud Books, Inc.

68 N.Y.2d 553, 503 N.E.2d 492 (1986)

WACHTLER, Chief Judge.

The District Attorney of Erie County seeks a court order closing a bookstore as a public nuisance (Public Health Law, art. 23, tit. II) because some patrons are using the premises to commit illegal sexual acts. The question presented is whether an order closing the bookstore, to curtail the illegal acts of customers, incidentally affects the store's constitutional right to freedom of expression, so as to require the

State to show that it is the only available means to abate the nuisance.

This is the second time this case has come before us. On the first appeal we held that such an order would have an incidental impact on the bookseller's First Amendment rights and that the prosecutor had not demonstrated that closing the defendant's store was the "least restrictive means" to abate the nuisance created by some of its customers (*People ex rel. Arcara v. Cloud Books*, 65 N.Y.2d 324, 491 N.Y.S.2d 307, 480 N.E.2d 1089). The Supreme Court reversed concluding that the bookseller's First Amendment rights would not be implicated or sufficiently affected by an order aimed at curtailing the illegal conduct of some of the store's patrons (see *Arcara v. Cloud Books*, 478 U.S. ___, 106 S.Ct. 3172, 92 L.Ed.2d 568). On remand from the Supreme Court we must now decide whether greater protections are afforded the

bookseller under the State Constitution's guarantee of freedom of expression (N.Y. Const., art. I, sec. 8).*

The facts are fully set forth in our prior decision and the Supreme Court opinion. Briefly the case reaches us in the following posture. Cloud Books operates a store where it sells adult books and shows movies which are sexually explicit but not obscene. Certain patrons have used the premises for indecent and illegal sexual acts. The owner is aware of the activities but has done nothing to prevent them; however, there is no contention that the owner is criminally responsible.

The District Attorney is also aware of the illegal acts of the patrons, which were observed by an investigator from his office, but has not arrested the offenders or had them criminally prosecuted. Neither has the prosecutor applied for an injunction to prevent the illegal acts from occurring on the premises in the future. Instead he has applied for an order closing the bookstore for a year under Public Health Law, article 23, title II, which is aimed at preventing public nuisances. The order, if granted, will not legally terminate or suspend the defendant's business—it is free to move next door and continue its activities if space is available. The order will only close the offending building or premise where the patrons committed the illegal conduct. Thus during the year the order would be in effect, the place where the illegal acts occurred would be unhallowed ground, unusable by any person for any purpose.

The District Attorney urges that this scheme should not unduly interfere with the bookstore's legitimate activities. On the other hand he argues, somewhat inconsistently, that it would effectively disrupt and prevent the illegal activities of the patrons and therefore furthers an important governmental interest. The goal of preventing the illegal acts is concededly a legitimate State concern—only the means chosen is in issue. It would appear, without more, that closing the store would be equally disruptive or ineffective with respect to the activities of both the bookstore and its customers. The primary question is whether it implicates the bookseller's constitutional rights of free expression so as to require a balancing of the competing interests.

*N.Y. Constitution, article I, sec. 8 states: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

A divided Supreme Court held that the bookstore's First Amendment rights were not affected because they were not sought to be affected. The majority in that court held that the object of the order is the customers' illegal sexual activity which, it noted, "manifests absolutely no element of protected expression" (478 U.S. at p. ____, 106 S.Ct. at p. 3177). To the extent that order might have an effect on the defendant's legitimate bookselling activities, it was deemed to be too remote to implicate First Amendment concerns. The "least restrictive means test" was held to be applicable only when the government's action was triggered by, and directly aimed at curtailing "conduct that has an expressive element."

We, of course, are bound by Supreme Court decisions defining and limiting Federal constitutional rights but "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States" (*People v. Barber*, 289 N.Y. 378, 384, 46 N.E.2d 329; see also, *People v. P.J. Video*, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556). The Supreme Court's role in construing the Federal Bill of Rights is to establish minimal standards for individual rights applicable throughout the Nation. The function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State.

Freedom of expression in books, movies and the arts, generally, is one of those areas in which there is great diversity among the States. Thus it is an area in which the Supreme Court has displayed great reluctance to expand Federal constitutional protections, holding instead that this is a matter essentially governed by community standards (*Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419). However, New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community (*People v. P.J. Video, supra*). Thus, the minimal national standard established by the Supreme Court for the First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.

It is established in this State that the government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury. . . .

It is also settled that when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose. . . . Although these holdings were based essentially on First amendment principles, they are equally applicable under the State Constitution, since "at the very least, the guarantee of freedom of expression set forth in our State Constitution is of no lesser vitality than that set forth in the Federal Constitution" (*Bellanca v. State Liq. Auth.*, 54 N.Y.2d 228, 235, 445 N.Y.S.2d 87, 429 N.E.2d 765).

The only remaining question is whether the State constitutional guarantee of freedom of expression is implicated by an order closing the defendant's bookstore to prevent illegal acts by patrons. There can be no doubt that bookselling is a constitutionally protected activity or that closing a bookstore for a year may have a substantial impact on that activity. The prosecutor urges that this impact may be constitutionally ignored when, as here, the State's purpose is not to interfere with the store's legitimate bookselling activities but is aimed at preventing patrons from committing illegal acts having no expressive content. That, however, is just another way of saying that the impact of the State's action is not direct but only incidental. Actions of this type are subject to lesser scrutiny than those directed at restraining free expression, but they cannot be said to have absolutely no constitutional implications. The crucial factor in determining whether State action affects freedom of

expression is the impact of the action on the protected activity and not the nature of the activity which prompted the government to act. The test, in traditional terms, is not who is aimed at but who is hit.

Of course a bookstore cannot claim an exemption from statutes of general operation aimed at preventing nuisances or hazards to the public health and safety. It is, however, entitled to special protection, and no undue burden is placed on the State by requiring it to prove that in seeking to close the store it has chosen a course no broader than necessary to accomplish its purpose. If other sanctions, such as arresting the offenders, or injunctive relief prove unavailing, then its burden would be met.

Finally, we note that not every government regulation of general application, having some impact on free expression, implicates constitutional guarantees. Arresting a newspaper reporter for a traffic violation is one example where the impact would not be constitutionally cognizable, as Justice O'Connor noted in her concurring opinion at the Supreme Court. But closing a bookstore for a year, as is required by this statute, cannot be said to have such a slight and indirect impact on free expression as to have no significance constitutionally.

Accordingly, on reargument following remand from the United States Supreme Court, the order of the Appellate Division should be modified to grant defendant partial summary judgment dismissing those portions of the second cause of action seeking an order directing the closing of the premises in question.

Discussion Notes

1. Are there other areas, such as freedom of expression, where diversity among states has been encouraged by the United States Supreme Court? Is such diversity a sign of a well-functioning federal system?

2. Chief Judge Wachtler refers in this opinion to the court's earlier decision in *P.J. Video*. That opinion contains an impressive listing of New York Court of Appeals decisions both following and diverging from United States Supreme Court interpretations of the federal constitution.

New York has now clearly adopted the approach of interpreting its constitution independently of federal constitutional law. See, for example, *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986).

3. For an example of this independent approach, in the first authoritative state constitutional analysis of the drug testing issue, *Patchogue-Medford Congress of Teachers v. Board of Education*,

70 N.Y.2d 57, 510 N.E.2d 325 (1987), the New York Court of Appeals invalidated mandatory drug testing of probationary public school teachers. Chief Judge Wachtler noted:

It is not clear whether the urine test compelled here would satisfy Federal constitutional requirements. The Supreme Court has not yet decided a case involving compulsory drug testing of government employees, and the courts which have considered application of the Fourth Amendment have reached diverse conclusions. All appear to have held that such testing involves a search and seizure, but differ as to whether it is reasonable for the government to act only on reasonable suspicion with respect to a particular employee . . . or whether some form of random testing of all employees in certain categories is permissible. . . . A majority of courts appear to

Discussion Notes (cont.)

support the conclusions reached by the courts below in the case now before us, that urine testing compelled by the government does involve a search and seizure, and that reasonable suspicion is required. . . .

As noted, the School District disputes both of those conclusions and contends that it has a right to conduct such tests at will. The question is an important one which should be settled throughout the State and one on which resort to the Federal Constitution would not be dispositive since the practice, even if permitted by the Fourth Amendment, may not satisfy the requirements of the comparable provision of the State Constitution (N.Y. Const., art. I, sec. 12). The heart of the controversy under both Constitutions is whether the particular test infringes on an expectation of privacy which society considers reasonable. To the extent that this case deals with the expectation of privacy of public employees in this State, it presents a type of inquiry appropriate for resolution under the State Constitution.

We therefore consider it necessary and appropriate to decide this case under both the State and Federal Constitutions.

* * * * *

With respect to the suggestion that our reliance on both Constitutions is somehow unfair to the litigants it should be noted that one of the briefs submitted on this appeal was completely devoted to this issue. In addition, the relief sought here is in the nature of a declaratory judgment, where the object is not to determine whether the rights of a particular litigant have been violated, but is instead intended to provide guidance to the parties so that they may conform their future conduct to the law. As indicated above, reliance on the Federal Constitution alone could not provide a complete or adequate response to that inquiry. For the reasons that follow, we conclude that the test ordered in this case does not satisfy the requirements of either the State or Federal Constitutions.

Compare Judge Simons' concurring opinion in this same case.

E. The Adequate and Independent State Ground Doctrine

Generally speaking, the United States Supreme Court may not review a lower court decision which is based on "adequate and independent state grounds." These materials reflect the impact of this doctrine, and the court's recent major change in it.

Williams v. State **210 Ga. 665, 82 S.E.2d 217 (1954)**

WYATT, Presiding Justice.

1. The defendant is here attempting by extraordinary motion for new trial to challenge the legality of jury put upon him in the instant case. He relies entirely upon the case of *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244, contending that this case is controlling in the instant case. We do not agree with this conclusion. In *Avery v. State of Georgia*, supra, the defendant, upon being arraigned for trial in Fulton County, filed a written challenge to the array of traverse jurors put upon him for reasons set out, among them that the names of White jurors were put upon white slips of paper and that the names of Colored jurors were put upon yellow paper. See *Avery v. State of Georgia*, supra, and *Avery v. State*, 209 Ga. 116, 70 S.E.2d 716. In the instant case, no challenge to the array of traverse jurors was filed, and no question as to the legality of the jury was raised until after the denial of a motion for new trial had been affirmed by this Court. See *Williams v. State*, 210 Ga. 207, 78 S.E.2d 521.

It is settled law in this State that, when a panel of jurors is put upon the prisoner, he should challenge the array for any cause which would go to show that it was not fairly and properly put upon him, and that if he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new

trial. . . . In the instant case, the defendant made no objection to the jury when the panel was put upon him, and made no objection until he filed this extraordinary motion for new trial after a new trial had been denied and that judgment affirmed by this court. See *Williams v. State*, supra. It follows, therefore, that the judgment of the court below dismissing the extraordinary motion for new trial was not error.

* * * * *

3. Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States. However, any question to be considered by this court must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State. We can not simply overlook the rules made for the purpose of providing a fair and orderly procedure in the conduct of trials and other legal processes in this State and permit the defendant to stand negligently or purposefully by, taking his chances of an acquittal, and then, upon his conviction, and upon the denial of a new trial which is affirmed by this court, be heard to say that the panel of jurors put upon him was not fairly and properly selected and empaneled. When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all.

It follows, there was no error in dismissing the extraordinary motion for new trial.

Judgment affirmed. All the Justices concur.

Williams v. Georgia **349 U.S. 375 (1955)**

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Court has here under review the decision of a state court rejecting a claim of infirmity in a conviction for murder based on a constitutional ground raised for the first time in an extraordinary proceeding after the conviction had been affirmed on appeal. Respect for the State's administration of criminal justice requires a detailed narrative of the procedural course of this litigation and an adequate consideration of the legal factors relevant to our disposition.

* * * * *

In his brief on behalf of the State before the State Supreme Court, the Solicitor General of Fulton County had urged, *inter alia*, that there was no showing of a denial of equal protection in this case. On oral argument here, however, the State, with commendable regard for its responsibility, agreed that the use of yellow and white tickets in this case was, in light of this Court's decision in *Avery*, a denial of equal protection, so that a new trial would be required but for the failure to challenge the array. . . .

A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. But the unique aspects of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

* * * * *

We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.

* * * * *

In the instant case, there is an important factor which has intervened since the affirmance by the

Georgia Supreme Court which impels us to remand for that court's further consideration. This is the acknowledgment by the State before this Court that, as a matter of substantive law, Williams has been deprived of his constitutional rights. . . .

The facts of this case are extraordinary, particularly in view of the use of yellow and white tickets by a judge of the Fulton County Superior Court almost a year after the State's own Supreme Court had condemned the practice in the *Avery* case. That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant. We think that orderly procedure requires a remand to the State Supreme Court for reconsideration of the case. Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled.

Remanded.

MR. JUSTICE CLARK, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting.

To borrow a phrase from Mr. Justice Holmes, the opinion of the Court "just won't wash." While I, too, am not deaf to the pleas of the condemned, I cannot ignore the long-established precedents of this Court. The proper course, as has always been followed here, is to recognize and honor reasonable state procedures as valid exercises of sovereign power. We have done so in hundreds of capital cases since I have been on the Court, and I do not think that even the sympathetic facts of this case should make us lose sight of the limitations on this Court's powers.

* * * * *

It is elementary that this Court has no jurisdiction over a case here from a state court where there is an independent and adequate state ground supporting the conclusion reached below. A purported state ground is not independent and adequate in two instances. *First*, where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. *Second*, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

It is obvious that the Georgia court has not been guilty of "evasion." Although the Georgia court's interpretation of state law may not be free from doubt, it is not possible to say that the Georgia decision is without "fair support" in the previous cases. I regard it also as noteworthy that Presiding Justice Wyatt wrote this opinion for the Georgia Supreme Court. It was he who, in the Georgia court's decision in *Avery*, said in dissent:

I cannot agree with the ruling [as to discrimination] for the reason, in my opinion, that this practice is conclusive evidence of discrimination, and for that reason the case should be reversed. 209 Ga. 116, 131, 70 S. E. 2d 716, 726.

In this ruling he went further in protecting the integrity of the jury system than we ourselves thought necessary. Compare *Avery v. Georgia*, 345 U.S. 559, 562-563 (petitioner established "a prima facie case of discrimination" which the State failed to rebut). One who had so acted would hardly be attempting to evade the very federal right he had previously upheld so strongly.

Similarly, the Georgia procedure is not unduly burdensome. The majority concedes that "[a] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." Even if the majority could somehow strike down the Georgia court's holding that it lacked discretion, it is not enough to show that Georgia has the power and refuses to exercise it. There is no case to support the implication that the exercise of discretion against a federal right is, without more, an evasion. See *Brown v. Allen*, 344 U.S. 443, 484-486. Indeed, it would seem that there would have to be a withholding of discretion for the purpose of depriving *Williams* of a federal right. There is nothing even approaching that here.

A state court's decision cannot be overturned if any one of the grounds supporting it is independent and adequate. There is one ground here which appears so unassailable that the majority does not even attack it. Georgia law makes a showing of due diligence on the part of the movant a prerequisite to granting extraordinary motions for new trial. The state court in this case found that due diligence had not been properly pleaded, and that the facts of which the Georgia court could take notice conclusively demonstrated that diligence was indeed completely lacking.

* * * * *

MR. JUSTICE MINTON, with whom MR. JUSTICE REED and MR. JUSTICE CLARK join, dissenting.

Georgia has a rule of law that the jury panel must be challenged at the threshold, that is, as Georgia expresses it, before the panel is "put upon the defendant." If the panel is not thus challenged, the issue cannot later be raised and is considered as waived "once and for all." *Williams v. State*, 210 Ga. 665, 669, 82 S. E. 2d 217, 220. Ga. Code Ann., § 59-803. See *Jordan v. State*, 22 Ga. 545.

This is a reasonable rule. It gives the State an opportunity to meet the challenge and to justify the array, or, if it is improperly constituted, an opportunity to correct it.

In the instant case, the challenge to the array was not presented at the time the panel was put upon the petitioner-defendant. If the defendant thus fails to challenge the array before it is put upon him, he may not raise the question as to its legality for the first time in a motion for a new trial. *Lumpkin v. State*, 152 Ga. 229, 231, 109 S. E. 664, 665. Such a requirement complies with the Federal Constitution. *Brown v. Allen*, 344 U. S. 443, 480.

* * * * *

Williams v. State
211 Ga. 763, 88 S. E. 2d 376 (1955)
DUCKWORTH, Chief Justice.

* * * * *

The Supreme Court, 349 U.S. 375, 75 S.Ct 814, undertakes to remand the case for further consideration, and in their opinion has pointed to Georgia law vesting in the trial judge discretion in ruling upon an extraordinary motion for new trial and apparently concluded therefrom that this court should reverse the trial court because that discretion was not exercised in the way the Supreme Court would have exercised it. We know and respect the universally recognized rule that the exercise of discretion never authorizes a violation or defiance of law. In this case, as pointed out by us, that law is that the question sought to be raised must be raised before trial and not otherwise.

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay, we state that our opinion in *Williams v. State*, 210 Ga. 665, 82 S.E.2d 217, is supported by sound and unchallenged law, conforms with the State and Federal Constitutions, and stands as the judgment of all seven of the Justices of this Court.

Discussion Notes

1. The United States Supreme Court denied certiorari from the second opinion of the Georgia Supreme Court. 350 U.S. 950 (1956).

2. The defendant, Aubry Williams, was executed. The case is discussed in Stephen L. Wasby, *The Impact of the United States Supreme Court* (1970), p. 198, and Walter Murphy, "Lower Court Checks on Supreme Court Power," *American Political Science Review* 53 (December 1959): 1019-20.

3. How would this doctrine come into play in the area of State constitutional protection of civil liberties in the federal system? See Scott H. Bice, "Anderson and the Adequate State Ground," *Southern California Law Review* 45 (Summer 1972): 750 and Jerome B. Falk, Jr., "Foreword, The State Constitution: A More Than 'Adequate' Non-federal Ground," *California Law Review* 61 (March 1973): 273.

4. In *Robins v. Pruneyard Shopping Center*, 447 U.S. 74 (1980) the United States Supreme Court reviewed a California Supreme Court decision holding that the California Constitution protected persons who solicited signatures on petitions in a shopping center. The United States Supreme Court had earlier ruled the federal constitution

did not provide equivalent protection. *Lloyd v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

The owner of the shopping center, however, contended that the California Constitution, as so construed, constituted a "taking" of his property—a violation of his federal constitutional rights under the Fifth and Fourteenth Amendments. The Court accepted the case on this basis, but ruled against the owner of the shopping center.

Why was the California court's decision not insulated from Supreme Court review by the adequate and independent state ground doctrine? If this case was reviewable, why are not all others?

5. Kenneth L. Karst, "Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law," *California Law Review* 60 (May 1972): 744:

Where the challenged state law is itself a part of the state constitution, it is not possible for the decision to be so insulated from Supreme Court review of the federal constitutional issues, for there is no opportunity to rest a decision on alternate state grounds.

Michigan v. Long 463 U.S. 1032 (1983)

JUSTICE O'CONNOR:

* * * * *

II

Before reaching the merits, we must consider Long's argument that we are without jurisdiction to decide this case because the decision below rests on an adequate and independent state ground. The court below referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law.³ Long argues that the Michigan courts have

provided greater protection from searches and seizures under the state constitution than is afforded under the Fourth Amendment, and the references to the state constitution therefore establish an adequate and independent ground for the decision below.

It is, of course, "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773, 51 S.Ct. 252, 255, 75 L.Ed. 690 (1931). Although we have announced a number of principles in or to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. See, e.g., *Lynch v. New York*, 293 U.S. 52, 55 S. Ct. 16, 79 L.Ed. 191 (1934). In other instances, we have vacated, see, e.g., *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 20 (1940), or continued a case, see e.g., *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), in order to obtain clarification about the nature of a state court decision. See also *California v. Krivda*, 409 U.S.

³On the first occasion, the court merely cited in a footnote both the state and federal constitutions. See 413 Mich., at 471, n. 4, 320 N.W.2d, at 869, n. 4. On the second occasion, at the conclusion of the opinion, the court stated: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, & 11 of the Michigan Constitution." *Id.*, at 472-473, 320 N.W.2d, at 870.

33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972). In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. . . . In *Oregon v. Kennedy*, 456 U.S. 667, 670-671, 102 S.Ct. 2083, 2086-2087, 72 L.Ed.2d 416 (1982), we rejected an invitation to remand to the state court for clarification even when the decision rested in part on a case from the state court, because we determined that the state case itself rested upon federal grounds. We added that “[e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits.” *Id.*, at 671, 102 S.Ct., at 2087.

This *ad hoc* method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. Moreover, none of the various methods of disposition that we have employed thus far recommends itself as the preferred method that we should apply to the exclusion of others, and we therefore determine that it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary.

The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties. Vacation and continuance for clarification have also been unsatisfactory both because of the delay and decrease in efficiency of judicial administration, see *Dixon v. Duffy*, 344 U.S. 143, 73 S.Ct. 193, 97 L.Ed. 153 (1952), and, more important, because these methods of disposition place significant burdens on state courts to demonstrate the presence or absence of our jurisdiction. . . . Finally, outright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate “where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below.” *National Tea Co.*, *supra*, 309 U.S., at 556, 60 S.Ct., at 679 (1940).

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this

respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. “It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.” *National Tea Co.*, *supra*, 309 U.S., at 557, 60 S.Ct., at 679.

* * * * *

Justice STEVENS, dissenting.

The jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer’s search of respondent’s car violated the Fourth Amendment. The case raises profoundly significant questions concerning the relationship between two sovereigns—the State of Michigan and the United States of America.

The Supreme Court of the State of Michigan expressly held “that the deputies’ search of the vehicle

was proscribed by the Fourth Amendment of the United States Constitution and art. 1, & 11 of the *Michigan Constitution*.” Pet. for Cert. 19 (emphasis added). The state law ground is clearly adequate to support the judgment, but the question whether it is independent of the Michigan Supreme Court’s understanding of federal law is more difficult. Four possible ways of resolving that question present themselves: (1) asking the Michigan Supreme Court directly, (2) attempting to infer from all possible source of state law what the Michigan Supreme Court meant, (3) presuming that adequate state grounds are independent unless it clearly appears otherwise, or (4) presuming that adequate state grounds are not independent unless it clearly appears otherwise. This Court has, on different occasions, employed each of the first three approaches; never until today has it even hinted at the fourth. In order to “achieve the consistency that is necessary,” the Court today undertakes a reexamination of all the possibilities. *Ante*, at XX. It rejects the first approach as inefficient and unduly burdensome for state courts, and rejects the second approach as an inappropriate expenditure of our resources. *Ibid*. Although I find both of those decisions defensible in themselves, I cannot accept the Court’s decision to choose the fourth approach over the third—to presume that adequate state grounds are intended to be dependent on federal law unless the record plainly shows otherwise. I must therefore dissent.

If we reject the intermediate approaches, we are left with a choice between two presumptions: one in favor of our taking jurisdiction, and one against it. Historically, the latter presumption has always prevailed. . . . The Court today points out that in several cases we have weakened the traditional presumption by using the other two intermediate approaches identified above. Since those two approaches are now to be rejected, however, I would think that *stare decisis* would call for a return to historical principles. Instead, the Court seems to conclude that because some precedents are to be rejected, we must overrule them all.

Even if I agreed with the Court that we are free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign states, I could not agree that an expansive attitude makes good sense. It appears to be common ground that any rule we adopt should show “respect for state courts, and [a] desire to avoid advisory opinions.” *Ante*, at XX. And I am confident that all members of this Court agree that there is a vital interest in the sound management of scarce federal judicial resources. All of those policies counsel against that exercise of federal jurisdiction. They are fortified by my belief that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this

Court to intervene—enables this Court to make its most effective contribution to our federal system of government.

The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen’s assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and “overprotected” the citizen.

Such cases should not be of inherent concern to this Court. The reason may be illuminated by assuming that the events underlying this case had arisen in another country, perhaps the Republic of Finland. If the Finnish police had arrested a Finnish citizen for possession of marijuana, and the Finnish courts had turned him loose, no American would have standing to object. If instead they had arrested an American citizen and acquitted him, we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish Court had based its decision on its understanding of the United States Constitution. That would be true even if we had a treaty with Finland requiring it to respect the rights of American citizens under the United States Constitution. We would only be motivated to intervene if an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.

In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.

I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard. . . .

Until recently we had virtually no interest in cases of this type. . . . Some time during the past decade . . . our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future Court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today’s expansion of our jurisdiction.

Discussion Notes

1. Which approach, Justice O'Connor's or Justice Stevens', is more likely to encourage state courts to develop an independent state constitutional jurisprudence? See generally Stewart G. Pollock, "Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts," *Texas Law Review* 63 (March/April 1985): 977.

2. Regarding the recent trend in the United States Supreme Court's practices in accepting cases where state courts have ruled in favor of their citizens, see Robert C. Welsh, "Whose Federalism—The Burger Court's Treatment of State

Civil Liberties Judgments," *Hastings Constitutional Law Quarterly*, 10 (Summer 1983): 819.

3. What about a *federal court* decision based on a state constitutional law ground? Would it be insulated from United States Supreme Court review? See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 291-95 (1982); *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985).

4. Should a federal court abstain from deciding federal law claims where there are possible independent state law grounds for decision? See *Fields v. Rockdale County Georgia*, 785 F.2d 1558, 1561 (11th Cir. 1986).

State of Oregon v. Kennedy 295 Or. 260, 666 P.2d 1316 (1983)

LINDE, Justice.

Convicted of theft, defendant obtained a reversal in the Court of Appeals because his trial followed a mistrial brought on by what the court described as "flagrant overreaching" by the prosecutor. 49 Or.App. 415, 418, 619 P.2d 948 (1980). After this court denied review, 290 Or. 551 (1981), the state obtained a writ of certiorari from the Supreme Court of the United States. The Supreme Court reversed the decision insofar as it rested on prior double jeopardy and due process clauses [sic] of the United States Constitution and remanded the case to the Court of Appeals. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). On remand, the Court of Appeals reconsidered the nature of the Prosecutor's misconduct and its consequences under Oregon law and this time affirmed the conviction. 61 Or.App. 469, 657 P.2d 717 (1983). We allowed review to examine the court's assumption that Oregon law concerning retrials after prosecutor-induced mistrials, a question that first reached this court in *State v. Rathbun*, 287 Or. 421, 600 P.2d 392 (1979), is identical to the view of the federal double jeopardy clause expressed by the majority of the Supreme Court in this case. We conclude that Oregon law is not identical but nevertheless leads to an affirmance of this conviction.

Before reaching the merits, we take up the procedural history that brings the issue before this court.

I. Procedure

The history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states. . . . Like most states,

Oregon throughout its history has had a constitutional ban against placing anyone twice in jeopardy for the same offense. Or. Const. art. I, & 12. That guarantee has in the past been given independent interpretation with results that might not correspond to those in other states or in federal law. . . .

In its initial decision reversing this conviction, the Court of Appeals cited no statutory or constitutional source at all for that result. It quoted from two opinions of the United States Supreme Court to summarize what it called a "general rule" about the permissibility of re prosecution after mistrials. The court then cited its own decision in *State v. Rathbun*, 37 Or.App. 259, 586 P.2d 1136 (1978), noting only that it had been reversed "on other grounds" by this court. It might not be apparent to a reader that this court in fact had reversed the Court of Appeals on the very point at issue under Oregon's double jeopardy clause.

We denied the state's petition for review of the decision of the Court of Appeals. That, of course, implied nothing as to its correctness. *1000 Friends of Oregon v. Board of County Commissioners*, 284 Or. 41, 44, 584 P.2d 1371 (1978). In response to the state's petition to the United States Supreme Court for a writ of certiorari, defendant pointed out that, given the appellate court's cryptic silence on the point, its decision might rest on the Oregon Constitution's double jeopardy clause that was applied by this court in *Rathbun*. The Supreme Court nevertheless granted the petition, carrying forward its current campaign not to let state or lower federal courts draw more protective constraints from the federal constitution's guarantees in matters of criminal law than the Court itself is prepared to recognize. The possibility that the result might rest on an independent state ground was pursued by the justices both on oral argument and in the opinions. The majority took note of the studied citation by the Court of Appeals of its own opinion in *Rathbun*, which purported to apply federal law, despite this court's reversal of that decision under Oregon law. Four justices, however,

thought the role of state law in this case more complex, as expressed by Justice Stevens:

Although I am willing to accept the Court's reading of the Oregon Court of Appeals' opinion as having been based on federal law, I find the question somewhat more difficult than does the Court because the Oregon Supreme Court declined to review the case without explaining its reasons. Since the Oregon Supreme Court seems to have interpreted the state constitutional protection against double jeopardy to be broader than the federal provision, see *State v. Rathbun*, 287 Or. 421, 600 P2d 392 (1979), it is entirely possible that that court's refusal to review the Court of Appeals' decision was predicated on its view that the decision was sound as a matter of state law regardless of whether it was compelled by federal precedents.

456 U.S. at 681 n. 1, 102 S.Ct. at 2092 n. 1 (Stevens, J., concurring, joined by Brennan, Marshall, and Blackmun, JJ.).

This quotation makes clear that a practice of deciding federal claims without attention to possibly decisive state issues can create an untenable position for this state's system of discretionary Supreme Court review. It can also waste a good deal of time and effort of several courts and counsel and needlessly spur pronouncements by the United States Supreme Court on constitutional issues of national importance in a case to whose decision these may be irrelevant. In effect, when this court might reach the same result under the Oregon law that a lower court reaches by citing federal precedents, we would have to allow review at the instance of a losing party ob-

jecting only to the federal holding, while the successful party who might prefer a decision on state grounds has no reason to petition us for review. Surely a practice that requires a winning party to seek review solely in order to shift a favorable judgment from federal to state grounds is wholly unreasonable, apart from its logical flaws.

In the present case, we in fact do not reach the same result as the Court of Appeals' did in its initial decision. Had that decision given its attention first to the state law precedent of *Rathbun* and reversed defendant's conviction under article I, section 12, we might have allowed review in order to compare this case with *Rathbun*. If so, we might not only have decided that state claim against the defendant, as we do today, but also his federal claim, thereby relieving the Supreme Court of concern about a reading of the fifth amendment more expansive than its own. As it is, we reach the issue of Oregon law two and one-half years and hundreds of pages of briefs after it might have been decided in the Oregon courts.

... This court like others has high respect for the opinion of the Supreme Court, particularly when they provide insight into the origins of provisions common to the state and federal bills of rights rather than only a contemporary "balance" of pragmatic considerations about which reasonable people may differ over time and among the several states. It is therefore to be expected that counsel and courts often will refer to federal decisions, or to commentary based on such decisions, even in debating an undecided issue under state law. Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.

Discussion Notes

1. Note the concluding sentence in this excerpt from Justice Linde's opinion, and compare it with the "plain statement" requirement of *Michigan v. Long*. Justice Linde's opinion was handed down on the same day as Justice O'Connor's opinion.

2. With respect to Justice Linde's point that state law claims should be decided prior to federal law claims, see the next section of these materials.

3. Could a state "harmless error" rule provide an adequate and independent state ground?

In *Cooper v. California*, 386 U.S. 58, 62 (1967) the Court held that the California Supreme Court had incorrectly applied a Fourth Amendment precedent and that *federal* law did not require suppression of the disputed evidence. Justice Black, however, observed:

Our holding, of course, does not af-

fect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless error rule to such errors of state law. There being no federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless error rule.

For a discussion of California's constitutional harmless error rule in the field left to it after *Cooper*, see Note, "The California Constitution and the California Supreme Court in Conflict Over the Harmless Error Rule," *Hastings Law Journal* 32 (January 1981): 687.

Colorado v. Nunez
465 U.S. 324 (1984)

PER CURIAM.

The writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring.

The Court today concludes that the Colorado Supreme Court relied on independent and adequate state grounds when it affirmed the trial court's decision to suppress a quantity of heroin seized during a search of respondent Nunez' house following the State's refusal to disclose the identity of a confidential informant on which the Denver Police Department had relied to establish probable cause for the search. I write not to challenge the Court's determination that the judgment under review rests on independent and adequate state grounds, but to make clear that neither the Federal Constitution nor any decision of this Court requires the result reached by the Colorado Supreme Court.

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JUSTICE STEVENS, concurring.

In view of the growing public interest in the magnitude of our workload, I have on occasion taken note of some of the ways in which the present Court makes use of its resources. Several years ago, I expressed concern about the purely advisory character of individual opinions dissenting from orders denying petitions for certiorari. See *Singleton v. Commissioner*, 439 U.S. 940, 944-945 (1978) (opinion of STEVENS, J.). More recently I have noted that the Court is prone to grant certiorari in cases that do not merit our attention. See *Watt v. Alaska*, 451 U.S. 259, 273-276 (1981) (STEVENS, J., concurring); see also *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 72-73 (1983) (STEVENS,

J., dissenting).² Last Term, in *South Dakota v. Neville*, 459 U.S. 553 (1983), and *Michigan v. Long*, 463 U.S. 1032 (1983), the Court decided to enlarge its power to review state-court decisions. I dissented from those novel assertions of appellate jurisdiction in part because I was concerned about the undesirability of the rendition of purely advisory opinions by this Court. See *id.*, at 1065 (STEVENS, J., dissenting); 459 U.S., at 566 (STEVENS, J., dissenting); see also 463 U.S., at 1054 (BLACKMUN, J., concurring in part and in judgment in *Michigan v. Long*) (noting "an increased danger of advisory opinions in the Court's new approach").

Today JUSTICE WHITE "agree[s] that the challenged judgment rests solely on state-law grounds and that this Court lacks jurisdiction to review it." *Ante*, at 327. He nevertheless provides us with an advisory opinion, in which THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concerning the merits of the case. We of course have jurisdiction to determine our jurisdiction over this case, but once we agree that we lack jurisdiction, this case no more provides a vehicle for deciding the question upon which three Justices now volunteer an opinion than if the petition for a writ of certiorari had never been filed. I, of course, fully respect their right to their opinions concerning that question, just as I respect other scholars who disagree with the wisdom of the choice made in *Hayburn's Case*, 2 Dall. 409 (1792). I merely note that today's advisory opinion is consistent with the Court's emerging tendency to enlarge its own involvement in litigation conducted by state courts. This tendency feeds on itself, for it can only encourage litigants—particularly institutional litigants—to file even more petitions for certiorari in the hope of obtaining, if not review and reversal, at least an opinion by a number of Supreme Court Justices in support of their position. In light of the increasing flood of certiorari petitions, today's advisory opinion provides further support for concluding that this situation "will very likely progressively worsen."³

²See generally Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 180 (1982).

³White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 *Antitrust L. J.* 275, 280 (1982).

Discussion Notes

1. Justice Stevens expresses concern about the "undesirability of the rendition of purely advisory opinions by this Court." Why does he refer to Justice White's opinion as an advisory opinion?

2. See also *Montana v. Hall*, 107 S.Ct. 1825, 1830 (1987) (Stevens, J., dissenting).

3. Scott H. Bice, "Anderson and the Adequate

State Ground," *Southern California Law Review* 45 (Summer 1972): 757:

But although the state court's decision of independent state and federal questions may seem to serve political and judicial economy, under the current Su-

Discussion Notes (cont.)

preme Court practice such a course, in addition to preventing Supreme Court review, unfortunately will also have the effect of precluding effective political review of the state court ruling. Decisions based on independent state and federal grounds may substantially discourage any effort to use the state political process to change the relevant state law, because amendment to the state constitution or laws cannot correct the federal defect and therefore cannot change the result of the state court's decision. Of course, the citizens or the legislature may proceed with an amendment to the state laws with the notion that another court test involving only the federal question can be instituted once the state law is changed.²³ But it would seem to require a very high degree of organization and commitment to achieve political reform in such circum-

²³A new law suit would be necessary unless the change would be accomplished before the time for taking an appeal or seeking certiorari had expired. See SUP. CT. RULE 22; 28 U.S.C. 2101 (1949). It seems quite unlikely that most changes could be accomplished in such a short period.

stances; rather than changing the effect of the state court decision, all reform of state law will accomplish is a "clear deck" upon which a new law suit may be brought. The presence of the federal ground will therefore produce an insulation from the political process beyond that which a state court would otherwise enjoy when it interprets the provision of state law in a fashion unsatisfactory to a substantial portion of the state's citizens. Thus the present operation of the adequate state ground doctrine allows a state court, which may not be motivated by any considerations of efficiency, to insulate its decision from effective review by either the judicial or political processes for what may be a significant period.²⁴

If a state court bases a decision on independent state and federal grounds to gain this "insulation effect," its action is illegitimate.

²⁴Of course the "chill" on the state political process provided by the federal ground may be decreased significantly if the Court quickly answers the federal question in another case. . . .

F. Advocating and Resisting Greater Protections under State Constitutions

Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice.

Justice Robert E. Jones
Supreme Court of Oregon*

*State v. Lowry, 295 Or. 337, 365, 667 P.2d 996, 1013 (1983) (Jones, J., concurring specially).

1. The Sequence of Constitutional Arguments

So far we have looked at cases where courts have been willing to go beyond federal constitutional guarantees and rest their decisions on state constitutional grounds. How do the courts reach such a conclusion? How can lawyers effectively advocate such an approach?

**Hans A. Linde,
“Without ‘Due Process’:
Unconstitutional Law in Oregon”**

**Oregon Law Review
49 (February 1970): 133.
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Convenient as it may be to reduce the diverse federal and state premises in this manner to a single body of “constitutional law,” there are two things wrong with it. First, it contradicts the hierarchical logic of the federal constitutional premises. Second, the provisions of the federal and Oregon constitutions are not in fact alike.

First, the logical relationship between the state and federal constitutional claims. The federal source of all “due process” and “equal protection” attacks on state regulation is the fourteenth amendment’s command that “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given

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state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.

The point is obvious when a conclusion such as "Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of Oregon constitution article I" is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it. While a defendant may have both a state and a federal constitutional claim to present, legally these are not cumulative but alternative: "If this official action is not forbidden by the state constitution, as I claim it is, then the state denies me a federal right." When the Oregon Supreme Court held in 1961 that the distribution of textbooks to parochial schools was forbidden by Oregon's article I, section 5, it would have been contradictory to go on to hold that Oregon supported religion in violation of the federal establishment clause. Similarly, if Portland's "after-hours" ordinance or the gasoline-storage regulation

in *Burns* is held to violate some provision of the Oregon constitution, then Oregon is not depriving Mr. James or Mr. Leathers of liberty or property and they have no further fourteenth amendment claim to be decided. That claim becomes not merely surplusage, it has in fact been satisfied. Conversely, when an Oregon court holds that Oregon has denied someone due process or equal protection in violation of the federal amendment, it in effect assumes that nothing within Oregon's own law stood in the way of the challenged action.

It should be clear that the point is not merely pedantic. When a decision rests on an independent ground of state law along with the federal constitutional claim, the latter is not reviewable on certiorari in the United States Supreme Court. And in a subsequent litigation of some comparable cases in the federal courts, a federal judge will be bound to follow the state court's holding on the cited state constitutional premise, not on the supposedly "identical" federal premise.

Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*

Discussion Notes

1. Reread the excerpts from Justice Linde's opinion in *Oregon v. Kennedy*, page 99, and compare them with these views of then-Professor Linde thirteen years earlier.

2. For other expressions of this point of view, see Hans A. Linde, "Book Review," *Oregon Law*

Review 52 (Spring 1973): 332-41; "First Things First: Rediscovering the States' Bills of Rights," *University of Baltimore Law Review* 9 (Spring 1980): 379; "E Pluribus—Constitutional Theory and State Courts," *Georgia Law Review* 18 (Winter 1984): 165.

state-court judgments absent a "plain statement" that such judgments rest on state grounds.

* * * * *

III

The Court's decision to monitor state-court decisions that may or may not rest on nonfederal grounds is not only historically disfavored but risks the very confrontations and tensions a more humble jurisdictional stance would avoid. The presumption applied today allocates the risk of error in favor of the Court's power of review; as a result, over the long run the Court will inevitably review judgments that in fact rest on adequate and independent state grounds. Even if the Court is unconcerned by the waste inherent in review of such cases, even if it is unmoved by

Delaware v. Van Arsdall 475 U.S. 673 (1986)

JUSTICE STEVENS, dissenting.

The Court finds the way open to reverse the judgment in this case because "[t]he opinion of the Delaware Supreme Court, which makes use of both federal and state cases in its analysis, lacks the requisite 'plain statement' that it rests on state grounds." Ante, at 678, n. 3. In so holding, the Court continues down the path it marked in *Michigan v. Long*, 463 U.S. 1032, 1037-1044 (1983), when it announced that it would henceforth presume jurisdiction to review

the incongruity between the wholly precatory nature of our pronouncements on such occasions and Art. III's prohibition of advisory opinions, it should be concerned by the inevitable intrusion upon the prerogatives of state courts that can only provide a potential source of friction and thereby threaten to undermine the respect on which we must depend for the faithful conscientious application of this Court's expositions of federal law.

Less obvious is the impact on mutual trust when the state court on remand—perhaps out of misplaced sense of duty—confines its state constitution to the boundaries marked by this Court for the Federal Constitution. In *Montana v. Jackson*, 460 U.S. 1030 (1983), for example, this Court vacated and remanded “for further consideration in light of *South Dakota v. Neville*, 459 U.S. 553 (1983).” In so doing, this Court presumed that the judgment of the Montana Supreme Court did not rest on Montana's Constitution. Justice Sheehy, joined by the author of the state court's original opinion, rather bitterly disagreed:

In our original opinion in this case, we had examined the rights guaranteed our citizens under state constitutional principles, in the light of federal constitutional decisions. Now the United States Supreme Court has interjected itself, commanding us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits prescribed by the federal decisions. Effectively, the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state.

Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.

* * * * *

If a majority of this Court had the will to press the issue, we could put the question to the United States Supreme Court four-square, that this State judiciary has the right to interpret its constitution in the light of federal decisions, and to go beyond the federal decisions in granting and preserving rights to its citizens under its state constitution.”

State v. Jackson, ___ Mont. ___, ___, 672 P. 2d 255, 260-261 (1983) (Sheehy, J., dissenting).

See *id.*, at ___, 672 P. 2d, at 264-265 (Shea, J., dissenting).

The Court's two-sentence analysis notwithstanding, one cannot be confident that we have not trenchanted on state prerogatives in this very case. Here, the Delaware Supreme Court applied a rule reversing convictions when the defendant had been totally denied the right to cross-examine a witness for bias. The rule was expressly found to be “consistent with *Davis v. Alaska*, 415 U.S. 308 (1974) and with our ruling in *Weber v. State*, 457 A. 2d 674 (9183)),] for determining whether a violation of the confrontation clause is harmless.” 486 A. 2d 1, 7 (1984) (emphasis added and citations omitted). *Weber* itself emphasized that “[b]oth the United States and Delaware Constitutions guarantee the right of a defendant to confront the witnesses against him. U.S. Const. amend. VI; Del. Const. art. I, & 7.” *Weber v. State*, 457 A. 2d, at 682 (footnote omitted). At no point did the Delaware Supreme Court imply that it reversed the defendant's conviction only because that result was compelled by its understanding of federal constitutional law; rather, the conclusion that its rule was “consistent with” a case of this Court construing the federal Confrontation Clause suggests that it was interested merely in respecting the bounds of federal law as opposed to carrying out its command. The Court rewards the Delaware Supreme Court's circumspection by unceremoniously reversing its judgment.

IV

I agree with JUSTICE MARSHALL that “the Delaware Supreme Court remains free on remand to decide that . . . its harmless-error analysis was the product of state rather than federal law.” *Ante*, at 689. Because the Court's approach does nothing to minimize, and indeed multiplies, future occasions on which state courts may be called upon to clarify whether their judgments were in fact based on state law, it is appropriate to amplify the opinion I expressed in *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (concurring in judgment), that the proper “sequence of analysis when an arguable violation of the State Constitution is disclosed by the record” is for the state court to consider the state constitutional claim in advance of any federal constitutional claim. In that case, I described the Oregon Supreme Court's practice of considering state constitutional claims before reaching issues of federal constitutional law:

“The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.”

Sterling v. Cupp, 290 Ore. 611, 614, 625 P. 2d 123, 126 (1981). *Massachusetts v. Upton*, 466 U.S., at 736.¹⁰

Since that time, at least four other state courts have expressly endorsed the practice of considering state constitutional claims first.¹¹ In response to *Michigan*

¹⁰“[T]he basis for th[e] claim in the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state’s constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state. . . . [I]nsofar as the federal fourteenth amendment is invoked to apply the federal Bill of Rights against state action, particularly in the fields of freedom of ideas, criminal procedure, and compensation for the taking of property, there is no reason to accept such an assumption that the values enshrined in a state’s constitution, in, say, 1859, must today fall short of those in the federal Bill of Rights of 1789. And to add a reference to the corresponding state provision as an afterthought to a holding under the federal guarantee is worse than merely backwards: A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the federal Constitution would assure.” Linde, Without “Due Process,” 49 Ore. L. Rev. 125, 182 (1970). Accord, Linde, E Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 178 (1984) (“My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state’s law protects the claimed right” (footnote omitted)); Linde, First Things First: Rediscovering the States’ Bills of Rights, 9 U. Balt. L. Rev. 379, 383 (1980) (“Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law”). For thoughtful discussion of other views, see Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 Texas L. Rev. 1025 (1985) (advocating that state courts comment on federal issues even in cases decided on state constitutional grounds); Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1356-1367 (1982) (contending that state constitutions should be used only to supplement individual rights in the event that protection under the Federal Constitution is unavailable).

¹¹See, e.g., *Large v. Superior Court*, 148 Ariz. 229, 235, 714 P. 2d 399, 405 (1986). . . . *City of Portland v. Jacobsky*, 496 A.2d 646, 648 (Me. 1985). . . . *State v. Chaisson*, 125 N. H. 810, 814-815, 486 A. 2d 297, 301 (1984). . . . *State v. Coe*, 101 Wash. 2d 364, 373-374, 679 P. 2d 353, 359 (1984). . . . See also Collins, Reliance on State Constitutions: Some Random Thoughts, 54 Miss. L. J. 371, 389-394, and nn. 56-58, 69-72 (1984) (citing cases). See generally Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Texas L. Rev. 1141, 1157-1158, n. 54 (1985) (discussing practice in state courts generally).

To implement this practice of considering state constitutional issues in advance of federal ones, state high courts have directed parties to file supplemental briefs illuminating possible state constitutional bases of decision when the initial briefings have neglected such issues. See *State v. Kennedy*, 295 Ore. 260, 268, 666 P. 2d 1316, 1321 (1983). Cf. *State v. Jewett*, 146 Vt. 221, 222, 500 A. 2d 233, 234 (1985).

v. Long, 63 U.S. 1032 (1983), for example, the New Hampshire Supreme Court concluded:

When a defendant, as in this case, has invoked the protections of the New Hampshire Constitution, we will first address these claims.

. . . We live under a unique concept of federalism and divided sovereignty between the nation and fifty States. The New Hampshire Constitution is the fundamental charter of our State. The sovereign people gave limited powers to the State government, and the Bill of Rights in part I of the New Hampshire Constitution protects the people from governmental excesses and potential abuses. When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution. If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people. The Supreme Court of the State of Oregon recently recognized this responsibility and stated:

The point is . . . that a state’s constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state’s governmental powers, truly independent of the rising and falling tides of federal case law both in method and specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.

State v. Kennedy, 295 Or. 260, 271, 666 P. 2d 1316, 1323 (1983).” *State v. Ball*, 124 N. H. 226, 231, 471 A. 2d 347, 350 (1983).

Since 1983, in over a dozen cases, the New Hampshire Supreme Court has thereby averted unnecessary disquisitions on the meaning of the Federal Constitution.

The emerging preference for state constitutional bases of decision in lieu of federal ones is, in my view, the analytical approach best suited to facilitating the dependent role of state constitutions and state courts in our federal system. There is much wisdom in THE CHIEF JUSTICE’s admonition that “State courts . . . are responsible first for resolving issues arising under their constitutions and statutes and then for passing on matters concerning federal law.” Year-End Report on the Judiciary 18 (1981).

It must be remembered that every State but Rhode Island had a written constitution by the close of the Revolutionary War in 1783. “[F]or the first century of this Nation’s history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities.” *Massachusetts v. Upton*, 466 U.S., at 738-739 (STEVENS, J., concurring in judgment). The independent significance of state constitutions clearly informed this Court’s conclusion, in *Barron v. The Mayor and City Council of Baltimore*, 7 Pet. 243, 247-248 (1833) . . .

While the holding of the *Barron* case has since been superseded by ratification of the Fourteenth Amendment and selective incorporation of the Bill

of Rights, the concomitant atrophication of state constitutional theory was both unnecessary and unfortunate.¹³ State constitutions preceded the Federal Constitution and were obviously intended to have independent significance.¹⁴ The frequent amendments to state constitutions likewise presuppose their continued importance. Thus, whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation.

State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safe guarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound.¹⁵

¹³To quote the Vermont Supreme Court:

One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted:

People do not claim rights against self-incrimination, they “take the fifth” and expect “*Miranda* warnings.” Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws. *State v. Jewett*, 146 Vt., at 223, 500 A. 2d, at 235 (footnote omitted).

¹⁴The early state Bills of Rights were, in fact, specifically motivated by the interest in protecting the individual against overreaching by the majority:

In the period following independence, the state legislatures became increasingly active, enacting a great variety of laws. To many Americans much of this legislation appeared to served the special interests of some groups at the expense of others. Moreover, much of it was thought to violate the natural rights of individuals. For example, the Pennsylvania Council of Censors issued a report in 1784 that listed many examples of legislative violations of the state constitution and bill of rights. The report showed that ‘fines had been remitted, judicially established claims disallowed, verdicts of juries set aside, the property of one given to another, defective titles secured, marriages dissolved,’ and so forth. Similar abuses were also taking placed in New Hampshire and other states. The injustice of these laws, as James Madison said, brought “into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights.” By the end of the 1780’s, the Americans inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the

Crown and its agents, was transferred to the various state legislatures.

* * * * *

As Americans became more distrustful of democracy, Whig political theory gradually declined and Federalist theory became predominant. Americans began to impose greater restrictions on their legislatures in order to safeguard individual rights. In the 1770’s and 1780’s more and more rights were added to bills of rights. Moreover, the power of the legislatures to limit or alienate rights was steadily reduced. Increasingly, bills of rights became binding on legislatures. Instead of saying merely that the legislature ‘ought’ not abridge certain rights, bills of rights began to provide that it ‘shall’ not do so. The prevailing view among the Federalists was that the authority of the legislature and of government generally should extend only to a relatively narrow range of issues.

In summary, during the revolutionary period a “tidal-wave of democracy . . . swept over the colonies.” Thereafter, during the 1780’s, those waters receded and another wave swept in: a wave of concern about protecting “private rights against uncontrolled legislative power.”

Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 Iowa L. Rev. 401, 472-474 (1986).

¹⁵This would facilitate the work of federal courts, which under this Court’s precedents must address issues of state constitutional law before considering claims under the Federal Constitution. See *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 294-295 (1982) (“[T]here is no need for decision of the federal [constitutional] issue” if the state constitution provides “independent support”); cf. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (abstention under *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941)); *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970) (same). There exists a growing recognition among Federal Courts of Appeals that it is incumbent upon them to resolve issues of state constitutional law before reaching issues arising under the Federal Constitution. See, e.g., *Carreras v. City of Anaheim*, 768 F. 2d 1039, 1042-1043 (CA9 1985); *Seals v. Quarterly County Court of Madison County, Tenn.*, 562 F. 2d 390, 392 (CA6 1977).

Because I would not presume that the Delaware Supreme Court failed to discharge this responsibility,

I would dismiss the writ.

Discussion Notes

1. How do Justice Stevens' views compare with those expressed by Justice Brennan?

2. See generally, Ronald K. L. Collins, "Justice Stevens Becomes Advocate of States' Role in High Court," *National Law Journal*, August 27, 1984, p. 20.

**Robert F. Utter,
"Swimming in the Jaws of the Crocodile:
State Court Comment on
Federal Constitutional Issues When
Disposing of Cases on
State Constitutional Grounds"**

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* * * * *

II. Models of State Constitutional Analysis

State courts have taken a number of different approaches to analysis and use of state constitutions. These generally have been identified as the primacy, interstitial, and dual sovereignty models. The following subparts briefly describe these models.

A. The Primacy Model

The primacy model, most eloquently articulated by Justice Hans Linde, has also been referred to as the self-reliant approach.⁸ This model focuses on the state constitution as an independent source of rights and relies on it as the fundamental law. Under the primacy model, federal law and analysis are not presumptively correct. In fact, they are no more persuasive than the decisions of sister state courts. . . .⁹

⁸See *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1364 (1982) [hereinafter cited as *Developments in the Law*].

⁹See Linde, *supra* note 5, at 179; *Developments in the Law*, *supra* note 8, at 1364. Professor Williams has observed that although state constitutional analysis does not and should not preclude resort to federal doctrine, federal analysis should not be treated like the local court's own constitutional analysis. See Williams, *supra* note 5, at 403. He agrees, however, that federal analysis should be treated with the same respect as law from other states, taking into consideration the structural differences in the federal and state systems that might influence the analysis. *Id.*; see *infra* subpart III(B).

B. The Interstitial Model

Under the interstitial model, state courts recognize the federal doctrine as the floor and focus the inquiry on whether the state constitution offers a means of supplementing or amplifying federal rights. The New Jersey Supreme Court's decision in *State v. Hunt* is an excellent example of this approach. . . .

C. The Dual Sovereignty Method

The dual sovereignty method, in some ways the original method of state constitutional analysis, analyzes both the state and federal constitutional provisions. For many years, state courts across the country have decided cases on both federal and state constitutional grounds. Most of these courts, however, simply applied a federal construction to state constitutional provisions. But in recent cases some courts have developed state constitutional analysis that is independent of federal analysis and then engaged in federal analysis as well. Courts applying the dual sovereignty model always evaluate both federal and state provisions in the course of their decisions, even when the decision rests firmly on state grounds. This type of analysis reflects the policies underlying our federal system by making available the maximum protections both levels of government offer to citizens.

Unfortunately, the dual sovereignty model, even more than the other models, generates opinion that critics can call "advisory." Of necessity, courts applying the dual sovereignty model will construe federal constitutional provisions even when they base their holding explicitly on adequate and independent state grounds. To some, such an exercise may be viewed as dicta, unnecessary and superfluous. The remainder of this Article rebuts this criticism.

* * * * *

IV. Dual Analysis

The temptation not to explore federal constitutional provisions is especially strong when the state court finds that the state constitutional provisions condemn the challenged conduct. In such a case, the state constitution will have resolved the issue in controversy; analysis of the federal provision will not be necessary to decision of the case. Even in this situation, however, analysis of the federal provision

should not be criticized merely because it may be dictum. To the contrary, this dual analysis, parallel to the dual sovereignty of our federal system, benefits both the state and the federal judiciaries.

When a state-grounded constitutional decision construes a parallel federal provision, the federal analysis has been criticized as dictum. Whether such a criticism is meaningful or relevant depends upon one's definition of dictum and further, upon whether all dictum should bear a negative connotation. . . . A dual analysis may encompass one of two approaches. A court may render a decision under the state constitution and then determine whether an analysis under the federal law would yield the same result. Or, it can render judgment based on state constitutional grounds and explain, by engaging in an analysis under federal law, why the holding does not conflict with federal law. This second method serves to further policies underlying the supremacy clause. Justice Rehnquist recently emphasized the need for such an approach when he observed that an appeal from a decision resting on a state constitutional provision is properly before the Supreme Court when challenged as a violation of a federally protected right.¹⁵⁸ Dual analysis usually will serve this function, although not explicitly. Because the state court's federal analysis helps the Supreme Court to evaluate the propriety of an appeal from the state decision, that analysis is useful to disposition of the case; it should not be considered dictum.

For example, the Vermont Supreme Court adopted the dual analysis approach in the case of *State v. Badger*.¹⁵⁹ The Badger court first analyzed the federal constitution's treatment of evidence seized and a confession made after interrogation but prior to a Miranda warning.¹⁶⁰ The court went on to consider the same issues under the Vermont constitution, observing that:

Our first concern is comity between this Court and the United State Supreme Court. We stand on a different footing when we evaluate federal constitutional claims. On federal issues, we are no more than an intermediate court, attempting to apply the "supreme law of the land," as pronounced by the United State Supreme Court. . . . Yet, if our ruling is based upon an adequate and independent state ground, federal review is

limited to a determination of whether Vermont law violates some provision of federal law.¹⁶¹

But state court analysis of federal law serves more purposes than simply insuring that the state rule does not conflict with federal law. In addition to the unique perspective state courts bring to federal law, the state court's analysis aids sister state courts. A federal analysis by a state court may offer sister states an interpretation closer to their own perspective than a federal court's, especially if the state court consciously approaches the issue without the federalism concerns inherent in the analysis of federal courts. Furthermore, sister states benefit whether or not they have similar state constitutional provisions, because construction of the parallel federal provision by federal courts will always provide only the lowest common denominator of rights.

V. Conclusion

As more state courts engage in examination of their own constitutions, they will have to decide which of the several approaches to state constitutional analysis best helps them to achieve the goal of providing their citizens with the protections contemplated by the drafters of those constitutions. The dual approach, which not only relies on the state constitution but also recognizes and integrates the role and function of the state court and state sovereignty in our federal system, may well offer courts the best opportunity to realize that goal.

To engage in such an analysis, state judges must take care to fully explain why they believe it important to construe the federal provision. They must be equally careful to separate that exposition from their analysis of the state provision. And finally, they must be sure to signal with utmost care their intent to rest the holding on the state law, relying as much as possible on their own and sister states' reasoning and decisions. In this way they can ensure that there will be no mistake as to their extent to comply with the criteria so carefully detailed in *Michigan v. Long*.¹⁶²

Although a state supreme court should and often may embark upon the interpretation of its own constitution, relying on it to protect the rights of its citizens, the court should nevertheless continue to comment on federal law. Failure to continue to engage in the federal debate can only weaken the values that underlie our federal system. To engage in the debate can only broaden our understanding of the federal constitution. The result will be a healthy, living document, nourished by the court systems of all fifty states.

¹⁵⁸*Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 79 (1980) . . .

¹⁵⁹141 Vt. 430, 450 A.2d 336 (1982).

¹⁶⁰*Id.* at 438-39, 450 A.2d at 341.

¹⁶¹*Id.* at 447-48, 450 A.2d at 346 (citing *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980)). . . .

¹⁶²103 S.Ct. 3469 (1983).

Discussion Notes

1. For a more detailed typology of state court approaches to federal and state law claims, see Ronald K. L. Collins and Peter J. Galie, "Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions," *Publius: The Journal of Federalism* 16

(Summer 1986): 111, reprinted in *University of Cincinnati Law Review*, 55 (No. 2 1986): 317.

2. For a more recent version of Justice Utter's views, see Robert F. Utter and Sanford E. Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," *Indiana Law Review*, 20 (No. 3 1987): 635.

People v. Class 67 N.Y. 2d 431, 494 N.E. 2d 444 (1986)

PER CURIAM. In our earlier opinion in this case, we held that the police "officer's nonconsensual entry into [defendant's] automobile to determine the vehicle identification number violates the Federal and State Constitutions where it is based solely on a stop for a traffic infraction (US Const, 4th Amdt; NY Const, art. I, sec. 12)" (63 N.Y.2d 491, 493, 483 N.Y.S.2d 181, 472 N.E.2d 1009). The Supreme Court reversed on the Federal Constitution, holding that "the police officer's action does not violate the Fourth Amendment" (___ U.S. ___, ___, 106 S.Ct. 960, 963, 89 L.Ed.2d 81), and the case is now before us again.

In support of its own jurisdiction to hear the case, the Supreme Court stated that our decision did not rest on "an independent and adequate state ground"

because it lacked the requisite "plain statement" (___ U.S., at p. ___, 106 S.Ct., at p. 964; see *Michigan v. Long*, 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3477, 77 L.Ed.2d 1201). At this juncture, in our consideration of the case under State law, we cannot disregard the fact that we held that article I, sec. 12 of our State Constitution was violated by the search. Although on remand we have in the past, as a matter of State law, followed Supreme Court decisions in several cases . . . in none of those cases had we initially and expressly relied on the State Constitution. . . .

Where, as here, we have already held that the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless respondent demonstrates that there are extraordinary or compelling circumstances. That showing has not been made.

Accordingly, upon reargument, on remand from the Supreme Court of the United States, the order of the Appellate Division should be reversed, the motion to suppress granted, the conviction vacated and the indictment dismissed.

Discussion Notes

1. Would it make sense for a state court to change its view of a *state* constitutional requirement after reversal by the United States Supreme Court of its parallel *federal* constitutional analysis? See Ronald K. L. Collins, "Reliance on State

Constitutions—The Montana Disaster," *Texas Law Review* 63 (March/April 1985): 1095.

2. Could the New York Court of Appeals have avoided its earlier decision being reviewed by the United States Supreme Court? Could it still have addressed the federal constitutional claim?

2. The "Criteria" or "Factor" Approach

Over the years, commentators have studied decisions of state courts interpreting their constitutions to provide more protection for individual rights than provided under the federal constitution. Some of these commentators identified specific factors, or circumstances, under which state courts would rely on their state constitutions to provide expanded rights. Examples of such factors included differences in the state and federal texts, relevant state constitutional history, existence of state precedents prior to the rise of the federal law, unique local circumstances, the ex-

tent to which the United States Supreme Court has declined to act in an area, etc. Two particularly good examples of this literature are A.E. Dick Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," *Virginia Law Review*, 62 (June 1976): 934-44 and Note, "The New Federalism: Toward a Principled Interpretation of the State Constitution," *Stanford Law Review*, 29 (January 1977): 316-19.

Read the following opinions in *State v. Hunt* with these ideas in mind.

* * * * *

State v. Hunt
91 N.J. 338, 450 A.2d (1982)

SCHREIBER, J.

Merrell Hunt and Ralph Pirillo, Sr. were indicted for bookmaking, N.J.S.A. 2A: 112-3, maintaining a place for gambling, J.J.S.A. 2A: 112-3, conspiracy to commit bookmaking, N.J.S.A. 2A: 98-1, and aiding and abetting bookmaking, N.J.S.A. 2A: 85-14. After the defendant's motions to suppress evidence because of allegedly unlawful searches and seizures by the police were denied, the defendants pursuant to a plea bargain pled guilty to conspiracy and bookmaking. The remaining counts were dismissed. . . . We granted defendant's joint petition for certification . . . primarily to consider the constitutionality of the warrantless search and seizure of defendant's telephone toll billing records. We have considered the other issues raised by the defendants and find no merit in them. Accordingly, our discussion will be primarily directed to the disclosure of the telephone records.

* * * * *

As indicated at the outset, our concern is with the toll billing records. The key questions are whether an individual has a protectible interest in those records under the Fourth Amendment to the federal Constitution or Article I, par. 7 of the New Jersey Constitution. Both constitutional provisions acknowledge the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The historical roots of the Fourth Amendment centered about protection from unwarranted intrusions into the home. This privacy interest in the home and place of business has continued unabated throughout our judicial history. Indeed, as the telephone has taken its place in the home and at business, the privacy interest has expanded to include telephone conversations.

The United States Supreme Court has protected a telephone conversation from governmental eavesdropping by an electronic recording device. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). That Court has also indicated that it will not protect information or material beyond the conversation itself. We surmise as much because of its decision in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). In that case, without a warrant or court order, the police placed a pen register on the defendant's telephone. On the basis of information obtained from the pen register and other evidence, the police obtained a warrant to search the defendant's home. The defendant sought to suppress the evidence obtained. The Supreme Court rejected the motion.

The expectation of privacy in a pen register, both subjectively and objectively, is substantially similar to that in toll billing records. The difference between toll billing records, which reflect long distance completed calls, and the pen register, which identifies all local and long distance numbers dialed, whether completed or not, does not have any impact upon Justice Blackmun's analysis. His rationale places the toll billing record into the pen register mold. This conclusion is borne out by the federal courts that have passed on this question and have concluded that toll billing records are not entitled to Fourth Amendment protection. . . .

Our inquiry does not end at this point, for we must consider the application of the search and seizure safeguard in the New Jersey Constitution. This Court has seen fit to hold that the search and seizure provisions in the federal and New Jersey Constitutions are not always coterminous, despite the congruity of the language. . . . Though notions of federalism may seem to justify this difference, enforcement of criminal laws in federal and state courts, sometimes involving the identical episodes, encourages application of uniform rules governing search and seizure. Divergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same.

Sound policy reasons, however, may justify a departure. New Jersey has had an established policy of providing the utmost protection for telephonic communications. Long before the Supreme Court's opinion in *Katz v. United States*, *supra*, the New Jersey Legislature had in a 1930 statute made it a misdemeanor to tap a telephone line. L. 1930, c. 215, & 1, at 987. Justice Wachenfeld commented on this statute in *Morss v. Forbes*, 24 N.J. 341, 363, 132 A.2d (1957): "The Legislature, as the foremost exponent of the public policy of this State, has condemned the tapping of wires as a method for achieving the detection and punishment of crime."

This proscription of the 1930 statute was continued until 1968, see R.S. 2: 171-1 (1930) and N.J.S.A. 2A: 146-1, when it was replaced by a substantially similar ban incorporated in the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A: 156-1 et seq. In addition to the legislative restrictions on wiretaps, our case law has adopted a policy of protecting the privacy of telephonic communications. In *In re Wire Communication*, we held that "[s]tatutes that directly impinge on the individual's right to be free from unwarranted governmental intrusion into privacy should be construed narrowly." 76 N.J. at 268, 386 A.2d 1295. See also *State v. Catania*, 85 N.J. 418, 427 A.2d 537 (1981) (interpretation of wiretap minimization provision); *State v. Cerbo*, 78 N.J. 595, 397

A.2d 671 (1979) (State must seal tapes of completed wiretap immediately upon expiration of the tap).

In this case we are persuaded that the equities so strongly favor protection of a person's privacy interest that we should apply our own standard rather than defer to the federal provision. We do so in the spirit announced in a recent comment, "The Interpretation of State Constitutional Rights," 95 *Harv.L.Rev.* 1324, 1367 (1982):

In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties. This role derives its character from the freedom of state courts to move beyond the protections provided by federal doctrine and from the distinctive character of state courts and state constitutions. But the state constitutional role is also shaped by the emergence of the federal Bill of Rights in recent decades as the primary constitutional shield against intrusions by all levels of government. The present function of state constitutions is as a second line of defense for those rights protected by the Federal Constitution and as an independent source of supplemental rights unrecognized by federal law.

* * * * *

PASHMAN, J., concurring.

I concur in all respects with the result reached by the Court in this case. I write for two specific reasons. First, I wish to underscore the importance of the privacy interests implicated here by pointing out the significant dangers to civil liberties that would be posed by unrestrained police access to personal telephone billing records. Second, and at least as important, I feel impelled to address the discussion in both the majority opinion and Justice Handler's concurrence concerning the extent to which this Court should construe the New Jersey Constitution to offer greater protection of the fundamental rights and liberties of New Jersey citizens than that offered under the federal constitution as interpreted by the United States Supreme Court. Because I believe that both opinions define too narrowly the circumstances under which New Jersey courts should independently construe the New Jersey Constitution, I offer my own analysis of the theoretical bases of state constitutional interpretation and its limitations.

* * * * *

II

For quite a few years, this Court, and other state courts across the country, have been construing state constitutions to extend a greater measure of protection for fundamental constitutional rights than the

United States Constitution has been construed to afford. See the cases collected in Justice Handler's concurrence, ante at 962-963. We have done so on the basis of provisions in our constitution not found in the federal constitution . . . or on the basis of provisions virtually identical to federal provisions. . . . We have not hesitated to do this in the face of directly contrary United States Supreme Court decisions.

* * * * *

This Court has not to date set forth any rules, principles or theories explaining when it will go beyond the federal courts in protecting constitutional rights liberties. Our cases have merely stated our undoubted power to construe the New Jersey Constitution in accord with our own analysis of the particular right at issue.

Consequently, I applaud Justice Handler's thoughtful effort to rationalize our cases in this area and to analyze when divergent state and federal constitutional interpretations are appropriate. However, I disagree with his analysis. In his view, this Court should adhere to the federal constitutional interpretation unless one of several factors is present showing that a different interpretation is of special concern to New Jersey. The factors listed include differences in the texts of the two constitutions, pre-existing state law and distinctive state traditions and public attitudes. Although the factors listed are potentially broad, they impose clear limits. At bottom, Justice Handler's approach effectively entails a presumption against divergent interpretations of our constitution unless special reasons are shown for New Jersey to take a path different from that chosen at the federal level.¹ Similarly, the majority here suggests that "[d]ivergent interpretations are unsatisfactory," ante at 955, absent "[s]ound policy reasons." Ante at 955.

I would reverse the presumption. As a general rule, this Court should construe the New Jersey Constitution as it considers appropriate, taking into account the various factors that constitute sound constitutional analysis. United States Supreme Court opinions, both majority and dissenting opinions, can be valuable sources of wisdom for us. But this Court should not uncritically adopt federal constitutional interpretations for the New Jersey Constitution merely for the sake of consistency. Of course, there are certain situations and contexts that, for policy reasons, call for uniform national rules. In those cir-

¹I recognize that Justice Handler does not believe that the effect of his analysis would be to create a presumption against independent state constitutional analysis, ante at 967, but his opinion can be read to provide precisely that. It appears that he would find divergence from the federal constitution improper unless one of the standards he sets forth is met. To the extent this is true, he is creating a presumption that can only be overcome by fitting the case within one of those standards.

cumstances, the need for uniformity should be weighed into the balance, with the possible result that we will conform to the federal rule when we would not otherwise have done so.

Stated succinctly, Justice Handler urges that we follow federal constitutional interpretation unless there are particular reasons to diverge from it. I believe there are several strong reasons why this Court should perform an independent constitutional analysis unless there are particular reasons to conform.

The simplest but perhaps most compelling reason for extending state constitutional rights beyond their federal counterparts is that it strengthens the constitutional safeguards of fundamental liberties. “[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.” Brennan, “State Constitutions,” 90 *Harv. L.Rev.* at 503. When this Court considers that important constitutional rights are inadequately protected by the federal constitution, we have an obligation under the State Constitution to supply that protection. The virtue of independent sources of constitutional protection is that, as Justice Brennan stated, quoting James Madison, “independent tribunals of justice ‘will be naturally led to resist every encroachment upon rights. . . .’” 90 *Harv.L.Rev.* at 504. The New Jersey Constitution is a separate fount of liberty, and we must enforce it.

A second reason for extending state constitutional interpretation beyond the limits imposed at the federal level derives from the resultant diversity of constitutional analysis. The majority and Justice Handler assume without explanation that uniformity in constitutional law is an unqualified advantage. However, as one commentator has stated, “Rather than threaten the federal system, such a process [of state constitution law] is more likely to create a healthy debate over the interpretation of federal law.” “Developments in the Law—The Interpretation of State Constitutional Rights,” 95 *Harv.L.Rev.* 1324, 1396. Similar constitutional concepts can be developed in a variety of ways. The path chosen by the United States Supreme Court is not necessarily the best, the most protective of our constitutional rights, or the most reflective of the intent of the Framers. See Levinson, “‘The Constitution’ in American Civil Religion,” 1979 *The Supreme Court Review* 123, 140-41.³ State supreme courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis’ words, “as a laboratory” testing competing interpretations of constitutional concepts that may better serve the people of those states. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1931) (Brandeis, J.,

³As discussed below, the United States Supreme Court clearly perceives reasons for conservatism in enforcement of constitutional rights that do not apply to state courts.

dissenting). In our federal system, there is strength in diversity and competition of ideas.⁴

A third important reason for extending our interpretation of constitutional rights beyond that offered by the United States Supreme Court is that we do not share the strong limitations perceived by that Court in its ability to enforce constitutional protections aggressively. Those limitations arise from the structure of our federal system, the Court’s role as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation, and the Court’s lack of familiarity with local conditions. These difficulties do not similarly limit state courts.

In our federal system, many important governmental roles and decisions are reserved for the states. It is believed therefore that unduly “activist” enforcement of constitutional rights by the federal courts impinges on important state prerogatives. Justice Brennan, in his now famous article, explains that the Supreme Court has repeatedly allowed concerns of federalism to “limit the protective role of the federal judiciary.” 90 *Harv.L.Rev.* at 503.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them.

[Brennan, 90 *Harv.L.Rev.* at 503]

This Court has repeatedly recognized the significance of these federalism concerns and of the fact that they do not similarly limit this Court. . . . The presumption against state constitutional interpretation offered by my colleagues fails to recognize this important consideration.

The United States Supreme Court has also been hesitant to impose on a national level far-reaching constitutional rules binding on each and every state. This reluctance derives, first, from the nationwide jurisdiction of the Court. Once it settles a rule, experimentation with different approaches is precluded. See *San Antonio School District v. Rodriguez*, 411 U.S. at 43, 93 S.Ct. at 1302, 95 *Harv.L.Rev.* at 1348-51. Further, the supreme Court has adverted to its lack of familiarity with local problems and conditions as a reason for hesitance. *San Antonio School District v. Rodriguez*, 411 U.S. at 41, 93 S.Ct. at 1301. Again, this applies with far less force at the state level.

⁴As noted above, there are realms of constitutional law in which uniformity is an important interest and therefore must be considered. Absent such circumstances, however, we should not pursue uniformity for its own sake.

For these various reasons, we should not be reluctant to engage in independent state constitutional analysis. None of our prior cases in this area has suggested hesitance, and there is no reason for it. Where this Court perceives that the federal constitution has been construed to protect the fundamental rights and liberties of or citizens inadequately, it cannot shrink from its duty to act. The New Jersey Constitution provides the citizens of this state with a fully independent source of protection of fundamental rights and liberties. It is our role alone to say what those rights are, and it is our solemn obligation to enforce them.

HANDLER, J., concurring.

I agree with the result reached by the majority in this case and its decision to utilize the State Constitution to vindicate a right seemingly neglected by the Federal Constitution. I write separately to expose the reasoning that I find implicit in our decision and to explain more fully the judicial principles which I believe underlie the salutary resort to state constitutions as a fountainhead of individual rights.

I

The United States Supreme Court has clearly recognized that each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" . . . With growing frequency, states are now availing themselves of this resource, finding in their own constitutions greater protections for citizens' rights than those found to exist under parallel provisions in the Federal Constitution.

* * * * *

Our own courts have followed this same course, recognizing the New Jersey Constitution as an alternative and independent source of individual rights. We have expressed the firm belief that "state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal constitution." *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980). . . .

This Court has been fully responsive to its judicial role in ultimately resolving questions that concern its citizens. As Justice Brennan has observed: "[I]t is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of the vital issues of life, liberty and property that trouble countless human beings of this National every year." Brennan, "Introduction: Chief Justice Hughes and Justice Mountain," 10 *Seton Hall L.Rev.* xii (1979). There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of

constitutional doctrine may be the eventual result of such an expedient approach.¹ See Collins, "Reliance on State Constitutions—Away From a Reactionary Approach," 9 *Hastings Const.L.Q.* 1, 2 (1981); Bice, "Anderson and the Adequate State Ground," 45 *S.Cal.L.Rev.* 750, 766 (1972). See generally "Developments—The Interpretation of State Constitutional Rights," 95 *Harv.L.Rev.* 1323, 1362-66 (1982).

It would be unfortunate if our decision today were cast in that light. The majority recognizes that, as a matter of federal constitutional law, personal telephone records are not constitutionally protected. *Ante* at 954. It then invokes the State charter to achieve a result unattainable under federal law.

There is surely no impropriety in state courts building an independent body of state constitutional law. . . .

Nevertheless, our national judicial history and traditions closely wed federal and state constitutional doctrine. It is not entirely realistic, sound or historically accurate to regard the separation between the federal and state systems as a schism. The states are not always free to act independently under their own constitutions. State constitutions may be used to supplement or expand federally guaranteed constitutional rights. However, they may never be used to undermine or circumscribe them. *U.S. Const.*, Art. VI, cl. 2. See *State v. Funicello*, 60 N.J. 60, 69, 286 A.2d 55 (1972) (Weintraub, C.J., concurring). Furthermore, a considerable measure of cooperation must exist in a truly effective federalist system. Both federal and state courts share the goal of working for the good of the people to ensure order and freedom under what is publicly perceived as a single system of law. See Hart, "Relations Between State and Federal Law," 54 *Colum.L.Rev.* 489 (1954); Note, *supra*, 13 *Am.Crim.L.Rev.* at 748-49. Moreover, while a natural [sic] monolithic legal system is not contemplated, some consistency and uniformity between the state and federal governments in certain areas of judicial administration is desirable.

For these reasons, state courts should be sensitive to developments in federal law. Federal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive. We have recently recognized the importance of federal sources of constitution doctrine. See *General*

¹This, in a sense, has occurred in California, labeled "the birthplace of th[e] new judicial independence" by one commentator. Note, "State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism," 13 *Am.Crim.L.Rev.* 737, 740 (1976). The voters of that state recently passed a referendum requiring state courts to give the same meaning to provisions of the California Constitution as is given to parallel provisions in the U.S. Constitution. See Proposition 8 (adopted June 8, 1982). The referendum may affect the ability of the California courts to give their own charter independent force.

Assembly v. Byrne, 90 N.J. 376, 381-384, 448 A.2d 438 (1982). The opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address.

It is therefore appropriate, in my estimation, to identify and explain standards or criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights. . . . There are several considerations that are relevant and important in making that determination.

(1) Textual Language—A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law. Textual language can be relevant in either of two contexts. First, distinctive provisions of our State charter may recognize rights not identified in the federal Constitution. For example, the New Jersey Constitution provides for a right to education (*N.J. Const.*, Art. VIII, & 4, par. 1) which has served as the basis for protections not afforded by the federal Constitution. *Robinson*, 62 N.J. 473, 303 A.2d 273.

Second, the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis. . . .

(2) Legislative History—Whether or not the textual language of a given provision is different from that found in the federal Constitution, legislative history may reveal an intention that will support reading the provision independently of federal law. For example, in *Schmid*, we explored the legislative history in determining that our free speech clause was intended to be more expansive than the First Amendment. 84 N.J. at 557, 423 A.2d 615. . . .

(3) Preexisting State Law—Previously established bodies of state law may also suggest distinctive state constitutional rights. See *Schmid*, 84 N.J. at 557, 423 A.2d 615. State law is often responsive to concerns long before they are addressed by constitutional claims. Howard, *supra*, 62 Val.L.Rev. at 1416-18. Such preexisting law can help to define the scope of the constitutional right later established. *Id.*

(4) Structural Differences—Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. The United States Constitution is a grant of enumerated powers to the federal government. *Saunders*, 75 N.J. 200, 225-26, 381 A.2d 333 (1977) (Schreiber, J., concurring); *Gangemi v. Berry*, 25 N.J. 1, 8-9, 134 A.2d 1 (1957). Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their

elected representatives.² *Schmid*, 84 N.J. at 558, 423 A.2d 615; *Smith v. Penta*, 81 N.J. 65, 74, 405 A.2d 350 (1980); *Gangemi*, 25 N.J. at 8-9, 134 A.2d 1. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them. *Schmid*, 84 N.J. at 558, 423 A.2d 615. See also *Alderwood*, 96 Wash.2d at 238-39, 242, 635 P.2d at 113, 115 (state action requirement is dictated by conservative pressures peculiar to federal constitutional role and, thus, is not applicable at the state level).

(5) Matters of Particular State Interest or Local Concern—A state constitution may also be employed to address matters of peculiar state interest or local concern. When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. . . . Moreover, some matters are uniquely appropriate for independent state action. For example, in *Alston*, we adopted a rule of standing to challenge searches and seizures that is broader than the federal standard. 88 N.J. at 227, 440 A.2d 1311. We felt free to do so because that question implicated the management of our own court system, which is of peculiarly local concern. It also reflected a strong state policy in favor of access to our courts and liberalized standing to vindicate legal claims. . . .

(6) State Traditions—A state's history and traditions may also provide a basis for the independent application of its constitution. Thus, in *Schmid*, we emphasized New Jersey's strong tradition of protecting individual expressional and associational rights in holding that the New Jersey Constitution provided greater protections for the right to free speech than those found in the federal Constitution. And in *State v. Bellucci*, 81 N.J. 531, 410 A.2d 666 (1979), we gave the state constitutional right to effective assistance of counsel more expansion protection than that found in the federal Constitution because of our firm policy regarding the proper role of attorneys in criminal trials. . . .

(7) Public Attitudes—Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters. While we have never cited this criterion in our decisions, courts in other jurisdictions have pointed to public attitudes as a relevant factor in their deliberations. See, e.g., *Ravin v. State*, 537 P.2d 494, 503-04 (Alaska 1975) (broad privacy protection mandated by *Alaskans'* desire for individualistic lifestyles); *District Attorney v. Watson*, 381 Mass. 648, XX, 1980 Mass. Adv. Sh.

²For example, the First Amendment simply provides that "Congress shall make no law . . . abridging the freedom of speech," *U.S. Const.* amend. I, while the New Jersey Constitution affirmatively guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects," *N.J. Const.* (1947), Art. 1, par. 6.

2231, 2245, 411 N.E.2d 1274, 1282 (death penalty contrary to prevailing standards of decency in Massachusetts, as evidenced by absence of any use of death penalty in Commonwealth since 1948).

The explication of standards such as these demonstrates that the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned. This process does not require presumptive weight to be accorded the federal experience, just an intelligent awareness and assessment of that experience.³ See, e.g., *General Assembly*, 90 N.J. at 381-384, 448 A.2d 438. The enumerated criteria, which are synthesized from a burgeoning body of authority, are essentially illustrative, rather than exhaustive. They share a common thread—that distinc-

³To the extent that Justice Pashman suggests in his concurring opinion that this approach establishes a presumption in favor of federal constitutional interpretations, supra at 960, no decision of this Court has recognized such a presumption, and nothing in this opinion or in the majority opinion, as I read it, calls for or encourages the establishment of such a presumption.

Discussion Notes

1. The approach taken by Justice Handler in his concurring opinion was adopted by a unanimous New Jersey Supreme Court in *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983). See also *State v. Gunwall*, 106 Wash. 2d 54, 61-63, 720 P. 2d 808, 811-13 (1986), where the Washington Supreme Court adopted “nonexclusive neutral crite-

tive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights.

II

Applying these principles to this case, I am satisfied that adequate grounds exist for invoking the State Constitution. New Jersey’s long history of statutory and legal protection for telephonic communications makes independent resort to the State charter appropriate in the face of conflicting federal law.

* * * * *

The question then becomes whether there exists a right cognizable under our State Constitution to protect the privacy of telephone billing records. As I have already explained, I would invoke the State charter as an independent source for protecting individual rights when there are sound reasons grounded in State law, tradition or policy to do so. I find such reasons present in this case.

ria,” noting that it would “consider these criteria to the end that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of . . . the United States Supreme Court.”

2. Is there a difference between lawyers using the factor approach as an advocacy tactic and judges using it to decide cases?

**Robert F. Williams,
“In the Supreme Court’s Shadow:
Legitimacy of State Rejection of
Supreme Court Reasoning and Result”**

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* * * * *

**III. Legitimacy of State Judicial Disagreement
with the United States Supreme Court**

[U]nmistakably, a high state court judge and a United States Supreme Court Justice must often look at the same case with different eyeglasses.

Justice William J. Brennan, Jr.¹⁵²
United States Supreme Court

**A. Criteria for Disagreement with the
United States Supreme Court**

The development of criteria to justify a state court decision rejecting a Supreme Court interpretation of a similar or identical federal constitutional question can, in the long run, impede independent state constitutional interpretation . . .

Another example of New Jersey’s criteria justification is Justice Handler’s concurring opinion in *State v. Hunt*. . . . Justice Handler’s *Hunt* opinion portrays the state constitution as a “fall-back” source of rights to which state courts may “resort” under certain circumstances. But the Justice cautioned:

There is a danger, however, in state courts turning uncritically to their state con-

¹⁵²Brennan, *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. Fla.L.Rev. 225, 227 (1966). See also Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. Rev. 945, 949 (1964), where Justice Brennan posits that the roles of state supreme court justices and United States Supreme Court Justices, even in the same case, are functionally different.

stitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach.

.... It is therefore appropriate, in my estimation, to identify and explain *standards or criteria* for determining when to invoke our State Constitution as an independent source for protecting individual right.

Justice Handler listed seven criteria or standards that would justify a result different from the Supreme Court's (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."

Justice Handler denied that his analysis created a presumption in favor of the Supreme Court result,¹⁶⁴ but Justice Pashman in a separate concurrence disagreed.¹⁶⁵ Importantly, Justice Pashman observed that such a presumption limits a state court's authority to interpret its constitution.¹⁶⁶

The New Jersey Supreme Court thus appears to require some objectively verifiable difference between state and federal constitutional analysis—whether textual, decisional, or historical—to justify a state court's interpretational divergence. This view

¹⁶⁴*Id.*, n.3, 405 A.2d at 967 n.3 (Handler, J., concurring). In a recent article, Justice Handler stated: "I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy or tradition." Handler, *Expounding the State Constitution*, 35 RUTGERS L.REV. 197, 204 (1983). See also *id.* at 206 n.29; *State v. Williams*, 93 N.J. 39, 57, 459 A.2d 641, 650 (1983) ("We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional history, legal traditions, strong public policy and special state concerns warrant such action.")

¹⁶⁵*Hunt*, 91 N.J. at 346 n.1, 348, 450 A.2d at 960 n.1, 962 (Pashman J., concurring). See also *Right to Choose v. Byrne*, 91 N.J. 287, 332-33, 450 A.2d 925, 949 (1982) (Pashman, J., concurring in part and dissenting in part).

¹⁶⁶"Although the factors listed [by Justice Handler] are potentially broad, they impose clear limits." *Hunt*, 91 N.J. at 354, 450 A.2d at 960 (Pashman, J., concurring). See also *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982) (federal constitutional interpretations do not limit state constitutional rights).

implies that in the absence of one or more of the criteria identified, it is illegitimate for a state court to reject the reasoning or result of a Supreme Court decision.

Thus, the New Jersey approach treats the Supreme Court's reasoning and result as presumptively correct¹⁶⁸ for state constitutional analysis. As a result of this presumption, the state court is compelled to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent.¹⁶⁹ A constitutional interpretation "that will stand the test of detached criticism"¹⁷⁰ is not enough. Justification in this manner raises several critical issues: (1) Is disagreement over substantive constitutional interpretation illegitimate? (2) Does the persuasive power of Supreme Court decisions depend upon the Court's institutional position or the soundness of its reasoning? Since the New Jersey view places a high value on the institutional aspect of constitutional interpretation at the expense of independent state constitutional jurisprudence, it is submitted that this approach attributes too much to Supreme Court decisions.

The type of criteria, factors, and standards listed by the New Jersey Justices and other commentators¹⁷¹ reflect circumstances under which state courts have interpreted their constitutions to provide more extensive rights than their federal counterpart. They properly serve as important guides for courts and advocates.¹⁷² But they should not serve as limitations on state court authority to disagree with Supreme Court constitutional analysis even if none of the factors are present.

¹⁶⁸See *supra* notes 164-166 and accompanying text. Justice Linde refers to the notion of presumptive validity as a "*non sequitur*." *State v. Kennedy*, 295 Or. 260, XX, 666 P.2d 1316, 1322 (1983).

¹⁶⁹See *Note, supra* note 16, at 318: "The court must convince the legal community and the citizenry at large that it was justified in its disagreements with the Supreme Court and the state constitution supports different outcomes." (footnote omitted).

¹⁷⁰Howard, *supra*, note 65, at 934. *But see* Linde, *supra* note 22, at 248 (citing the importance of constitution decisions even when they are vulnerable to academic criticism).

¹⁷¹See, e.g., Galie, *The Other Supreme Courts, supra* note 2; Howard, *supra* note 65, at 934-44; Williams, *supra* note 2, at 185-91, *Developments in the Law, supra* note 2, at 1330 n. 27. Several commentators have presented similar factors as "criteria." See, e.g., Deukmejian and Thompson, *supra* note 19, at 986-96; *Note, supra* note 16, at 318-19.

¹⁷²Justice Linde has stated that "to make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result." Linde, *First Things First, supra* note 55, at 392.

**Robert F. Williams,
“Methodology Problems in
Enforcing State Constitutional Rights”**

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**C. The Power of United States
Supreme Court Decisions:
The Mistaken Premise**

Most of the methodological problems state courts encounter when interpreting state rights which are analogous to those contained in the federal Bill of Rights arise, in Justice Linde's words, from "the non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions."⁹⁷ The often unstated premise that United States Supreme Court interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions is simply wrong. But it still exerts a significant amount of intuitive force upon lawyers and judges grappling with problems of state constitutional interpretation. It is important, therefore, to understand the sources of this mistaken premise.

First, the premise is based on our conception of the power and authority of the United States Supreme Court in our legal system. Most judges and legal practitioners, as well as members of the media, formed their attitudes about the United States Supreme Court when it was recognizing rights. Federal constitutional decisions recognizing new constitutional rights are extremely powerful. Under the Supremacy Clause, these decisions have the power to reach into every single trial court in the country because state judges must follow them. Based on this experience, it is an odd feeling for lawyers and state

⁹⁷State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1322 (1983). Justice Brennan noted in 1977 that United States Supreme Court decisions rejecting claimed rights under the Federal Constitution "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them." Brennan, *supra* note 62, at 502. See also Beasley, *supra* note 15, at 414 ("The virtual piggybacking of the state clause onto the federal clause renders the former a parasite instead of an independent source of authority.").

judges to think about having a "choice" as to whether they must follow decisions of the United States Supreme Court. But, in fact, state courts *do* have a choice as to whether to follow decisions rejecting asserted federal constitutional rights.

It is critical to remember that it is very different for the Supreme Court to hold that people *have* certain rights that must be respected under the federal Constitution than for it to hold that people *do not have* such rights. Because both are decisions of the United States Supreme Court, however, judges and lawyers "feel" both kinds of decisions should have the same force. Upon closer examination, however, it is clear that just because some action is not prohibited by the federal Constitution, it is not therefore automatically "authorized" in the absence of contrary state law, for the Constitution only *limits* the actions of state officials; *authority* to take these actions must be found in state law."¹⁰²

The justices of the United States Supreme Court have been referred to as "teachers in a vital national seminar."¹⁰³ But their lessons, like those of all teachers, differ. When they teach us that the federal Constitution does not provide certain rights, the issues are not foreclosed at the state level under the state constitution. Justice Brennan advised:

[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.¹⁰⁵

For this reason, I have referred to United States Supreme Court decisions holding against asserted federal constitutional rights as "the *middle* of an evolving process of constitutional decisionmaking in our federal system."¹⁰⁶ Despite this clear distinction between Supreme Court cases which recognize rights and those which do not recognize rights, there still remains a certain aura of correctness to all decisions of

¹⁰²State v. Scharf, 288 Or. 451, 454, 605 P.2d 690, 691 (1980) (emphasis added). Justice Linde's point in this opinion is very important and should shift attention away from limits on actions in either the state or federal constitutions, to the underlying authority for such action. This can be a very different kind of argument, often shifting the focus from constitutional law to statutory law.

¹⁰³Rostow, The Democratic Character of Judicial Review, 66 Harv.L.Rev. 193, 208 (1952). See also Note, Of Laboratories and Liberties: State Court Protection of Political and Civil Rights, 10 Ga.L.Rev. 533 (1976) (discussing impact of United States Supreme Court decisions and potential future state activism).

¹⁰⁵Brennan, *supra* note 62, at 502.

¹⁰⁶Williams, *supra* note 21, at 360.

the United States Supreme Court.¹⁰⁷ This can, unfortunately, lead to what Nebraska Justice Thomas M. Shanahan has recently called a “pavlovian conditioned reflex in an uncritical adoption of federal decisions. . . .”¹⁰⁸ The only way to combat this mistaken premise, often so powerful it is like a reflex, is to understand clearly its origins and work to overcome its force upon the legal system.

* * * * *

Secondly, many of the leading decisions in the so-called reemergence of state constitutional law have inadvertently contributed to bolstering the mistaken premise. As a matter of methodology, many of these decisions initially focus on the United States Supreme Court decision holding against the asserted federal constitutional right and then seek to try to explain why the outcome should be different under the state constitution. No one would consider such an approach in an area in which the state constitutional right at issue had no federal analogue. It is understandable, in light of the position and prestige of the United States Supreme Court in our legal system, that this is the way legal arguments unfold in these cases. It is understandable that lawyers arguing cases, or judges writing opinions to justify their decisions, point to differences in text or history justifying different results under the state constitution. The problem with this approach, however, is that it seems to lend validity to the mistaken premise. In other words, it seems to ascribe a presumptive validity to the U.S. Supreme Court decision and to make it appear that only on the basis of some objective factor or criterion is a state court justified in “disagreeing” with the United States Supreme Court. Thus, the focus of the state court opinion becomes the grounds or reasons for not following the Supreme Court rather than a reasoned elaboration of state constitutional doctrine.

This emerging “criteria” approach, while very appealing to lawyers and judges, is one that should be avoided because the underlying premise on which it is based is invalid. Decisions of the United States Supreme Court declining to recognize rights should not be accorded special weight in state constitutional interpretation. They should not carry any presumptive validity. . . . This is because, as mentioned earlier, federalism and other institutional concerns either explicitly or implicitly, pervade Supreme Court decisions declining to recognize rights against states.

¹⁰⁷In the words of Justice Shirley Abrahamson of the Wisconsin Supreme Court, there is “an understandable human tendency on the part of state judges to view a United States Supreme Court decision on a particular topic as the absolute, final truth.” Abrahamson, *supra* note 1, at 964, *quoted in* Linde, *supra* note 29, at 177.

¹⁰⁸*State v. Havlat*, 222 Neb. 554, 573, 385 N.W.2d 436, 447 (1986) (Shanahan, J., dissenting).

Thus, such decisions must always be viewed as partially attributable to “under-enforcement” of the federal Bill of Rights against the states, and therefore, not of precedential value for state constitutional interpretation beyond the persuasiveness of their reasoning.

* * * * *

Professor Sager has recently provided an additional argument against this mistaken premise by pointing out the influence of “strategic” considerations in judicial enforcement of constitutional provisions,¹²⁷ noting that “they may in some instances lead to withholding the recognition of rights.”¹²⁸ Strategic concerns may, however, be more pronounced at the federal level, leading Professor Sager to conclude:

In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.¹²⁹

These factors make it particularly important for state courts to look first to their own constitutional provisions and judicial doctrines which pre-date incorporation of federal Bill of Rights provisions. Secondly, they must look to state constitutional decisions in other jurisdictions for further guidance. United States Supreme Court decisions rejecting asserted federal constitutional rights should persuade state courts confronting similar claims under their state constitutions *only* by their reasoning, discounted for federalism or strategic concerns, or any other type of deference to the states. The decisions should not be followed merely because of the United States Supreme Court’s institutional position as the highest court in the land for the resolution of federal constitutional claims.

¹²⁷ “[T]o what extent, if any, should state judges faced with claims under provisions of their state constitutions feel themselves bound to defer to Supreme Court interpretations of equivalent federal constitutional provisions?” Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 *Tex.L.Rev.* 959, 959 (1985).

¹²⁸*Id.* at 971.

¹²⁹*Id.* at 976. *See also* Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 *Land & Water L. Rev.* 527, 532-35 (1986) (discussing the institutional reasons for the United States Supreme Court’s narrow view of standing and concluding that, “[t]hese institutional differences between the federal and state courts suggest that active judicial review of public law issues at the state level is not as troublesome theoretically as it is at the federal level”).

**Judith S. Kaye,
“Dual Constitutionalism in
Practice and Principle”**

**The Record of the Association of the
Bar of the City of New York
42 (April 1987): 285.**

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In this year of celebration of the federal Constitution's 200th anniversary, we appropriately also focus attention on the New York Constitution, adopted ten years earlier. Given that we have both a state and federal Constitution, a state and federal Bill of Rights, and state and federal courts that are sworn to uphold them, the relation and accommodation between the two is naturally a subject of interest.

Of particular concern are provisions that are parallel if not identical in both constitutions, including, for example, such significant protections of the Bill of Rights as the right of free speech; the right to counsel, due process and equal protection of the law; and the protection against unreasonable searches and seizures. Should state courts decide such common issues on a state or federal basis? Should they read their own constitutions to provide greater protection than found under the equivalent provisions of the federal charter, or should they simply conform to federal precedents? I would like to explore these questions both as a matter of history and as a matter of theory.

I

Much has been written on the recent emergence of state constitutional law. The literature indicates that, more often now, state courts are deciding that standards set by the United States Supreme Court under the federal Constitution do not satisfy the more rigorous requirements of similar provisions of state constitutions, as to which state courts are in general the final arbiters. Some describe this as a new judicial federalism; others, more pejoratively, as an unprincipled reaction to particular criminal law decisions and perceived directions of the Supreme Court.

History tells us that, whether in civil or criminal matters, the independent protection of individual rights under state constitutions is not new; nor is it an illegitimate assumption of authority by state courts. Ironically, in this bicentennial year, the emergence of state constitutional law is in many respects a return to a philosophy of federalism similar—although admittedly not identical—to that of the framers.

* * * * *

In short, as a historical matter, state constitutions exist and function independently of the federal Constitution. As the New York Court of Appeals concluded in 1911, Supreme Court interpretations of the fourteenth amendment are simply not “controlling of our construction of our own Constitution.”¹⁹ Decades after the adoption of the fourteenth amendment, state and federal courts continued to function as a partnership of equals in the protection of constitutional rights.

* * * * *

This same fundamental dualism has more recently sparked the heightened interest in state constitutional law, but now it is the state courts that are expressing dissatisfaction with the Supreme Court's role in the enforcement of constitutional rights. While state courts interpreting parallel provisions of their charters may have been satisfied in particular cases that the federal floor also established their own ceiling, reformulation of the floor cannot help but bring the rest of the structure into question. The point to be drawn from history, however, is that in a system of government that is founded upon dual sovereignties, independent state court adjudications based on state constitutions—*two* layers of constitutional protection—are hardly revolutionary or illegitimate.

II

* * * * *

Against this background, I would like to turn to New York State in particular.

As an expression of inviolable principle and fundamental law, the New York Constitution is a curious document—particularly when compared with the United States Constitution. I mean this in two respects.

First, the State Constitution is long and filled with detail, like a volume of miscellaneous statutes, specifying even—as a matter of constitutional dimension—the width of certain ski trails. The article dealing with local finances (article VIII) is longer than the entire federal Constitution. Since its enactment 210 years ago, it has swelled in size and scope, particularly in the aftermath of the Depression, as part of the amendments of 1938. Provisions relating to barge canals, elimination of railroad grade crossings, social welfare and returning veterans reflect paramount concerns at given moments in the rich history of this State, alongside the abiding concern in our extensive Bill of Rights and throughout the constitution for fundamental rights and individual liberty.

¹⁹*Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 317, 94 N.E. 431, 448 (1911).

Second, while the federal Constitution has been amended only twenty-six times in its entire history, the State Constitution has been amended often, for the most part in isolated fragments initiated by the legislature and thereafter approved by the People at a general election. The Constitution has also been extensively revised as the consequence of constitutional conventions, although the 1938 Convention was the only one in this century to have its major work accepted; the reports of the 1915 and 1967 Conventions were entirely rejected by the voters. Additionally, as the constitution itself directs, every twenty years, and whenever the legislature provides, the people are asked at a general election, "Shall there be a convention to revise the constitution and amend the same?"³⁹

The combination of high detail and accessibility of the amendment process gives our Constitution a distinctive New York character. It is a product and expression of this State.

While current interest centers on the common provisions of our two constitutions, to proceed right to that issue ignores the fact that the people of this State have chosen to "constitutionalize" a great number of other matters in the Bill of Rights and throughout the State Constitution. Fortuitously, the heightened interest in concurrent provisions has drawn attention as well to the many matters uniquely part of the state charter.

I will not linger long on a recitation of the provisions of the State Constitution that have no specific analogue or counterpart in the federal document. No one would question that, though other considerations such as due process or equal protection may also be implicated, these singular provisions must at some point be analyzed as a matter of state law.

Our State Constitution provides, for example, the right to a free education⁴⁰ and declares that the aid, care and support of the needy are public concerns.⁴¹ It directs that provision be made for the protection and promotion of public health, and it recognizes that the legislature in its discretion may provide for low-rent housing and nursing home accommodations for persons of low income.⁴² It specifies that environmental conservation is a policy of this State, and mandates that adequate provision be made for abatement of pollution and noise.⁴³ As a matter of constitutional directive, certain executive rules and regulations cannot be enforced until they have been publicly filed.⁴⁴ The benefits of membership in a state pension or retirement system may not be im-

paired,⁴⁵ and the jurisdiction of the Appellate Divisions to hear appeals may not be diminished.⁴⁶ The Bill of Rights bars the abrogation of a cause of action for wrongful death; it guarantees the right of workers to the prevailing wage, and to organize and bargain collectively; and it provides for workers' compensation.⁴⁷

Given its laborious detail, our Constitution may not in every phrase ring with the majesty of Chief Justice Marshall's declaration: "it is *a constitution* we are expounding."⁴⁸ But it *is* a constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude. To borrow former Chief Judge Breitel's eloquent words, in overturning the moratorium on enforcement of city obligations as violative of the state constitutional requirement of a pledge of faith and credit: "it is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased Constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial."⁴⁹

One cannot help but wonder, reading our constitution, why some seemingly everyday matters were elevated to a place in that document of fundamental law and, even beyond, enshrined in its Bill of Rights. Many of these matters were and are the subject of state statutes, some additionally the subject of federal statutes. They were nonetheless purposefully placed in our State Constitution—within an ambit of special deference and protection—in many instances to declare the existence of a right and correlative commitment by the State, to put them beyond repeal by the legislature, and to insure that derivative legislation involving the expenditure of state money and credit would not be cast out as unconstitutional by the judiciary. The People have declared to the courts and others that, as part of the Constitution, these matters stand above the miscellaneous statutes as their expression of what they consider to be particularly important and not subject to revision except by them.

This being so as to the provisions that have no federal analogue or counterpart, no less can be said of the provisions of our State Constitution that *do* have a parallel in the federal Constitution. These provisions have obviously also been placed, and re-

³⁹N.Y. Const. art. XIX, sec. 2.

⁴⁰Id. art. IX, sec. 1....

⁴¹N.Y. Const. art. XVII, sec. 1....

⁴²N.Y. Const. art. XVII, sec. 3; id. art. XVIII, sec. 1....

⁴³N.Y. Const. art. XIV, sec. 4.

⁴⁴Id. art. IV, sec. 8....

⁴⁵N.Y. Const. art. V, sec. 7....

⁴⁶N.Y. Const. art. VI, sec. 4(k)....

⁴⁷N.Y. Const. art. I, sec. 16 (wrongful death); id. sec. 17 (labor); id. sec. 18 (workers' compensation).

⁴⁸McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁴⁹Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 739, 358 N.E.2d 848, 854, 390 N.Y.S.2d 22, 28 (1976).

tained, in our Constitution as an expression of the significance they have within this State.

* * * * *

Thus, despite perceived or even actual identity of texts, there may in particular instances be principled basis for broader protection within this State because of our history in adopting or applying a clause, or for other reasons. While language differences between the two constitutions may determine that there is a need for independent analysis, where our Constitution is at issue, the fact that there is no language difference does not spell the end of state judicial review. It invites inquiry into matters of history, tradition, policy and other special state concerns.

IV

I would like to shift the focus from the historical and practical to the theoretical by asking, is independent state court adjudication of parallel protections supported by a cohesive theory, or is this merely a passing disagreement with particular decisions of the United States Supreme Court?

Currently, a great debate rages in the law as to how a constitution should be interpreted. Some insist that it must be read by the intent of the framers; others assert that intent of the framers cannot be controlling, and that the document must be interpreted in light of prevailing attitudes and modern values. It occurs to me that this issue, as well as the one at hand, both propel us to an even more fundamental inquiry. We can answer the question of how to interpret a constitution, whether state or federal, only by first understanding what, in a real sense, a constitution is.

The very word “constitution,” in common understanding, means the most basic structure of a thing, how it is constituted. The English regarded themselves as having a constitution long before the Colonials began drawing up constitutions for themselves on paper, yet the English constitution has never been written down in a single document. That the English can speak of their unwritten constitution helps to underscore exactly what a constitution means. A community’s constitution is its basic make-up, the source, delineation and delimitation of rights and powers within that society, the collective assessment of the rules of the game under which the process of decision-making and exercise of power within that community will proceed. As the very basis of a living community, a constitution is necessarily a thing of that community.

The essential difference between English and American constitutionalism is not that American constitutions are written. Rather, it is that the English constitution is founded upon a concept of parliamentary supremacy. Under English theory, constitutional sovereignty resides in Parliament. The laws enacted by Parliament, though restrained by tra-

ditions and principles, are perforce within the constitution. Our nation, by contrast, is rooted in a concept that sovereignty resides in the People. Thus it is possible that our designated lawmakers can at times enact laws that fall outside the basic law established by the People. Where the people are sovereign, their conception of their constitution exists apart from, and above, ordinary legislative enactments.

The day-to-day function of a constitution, however, goes further. It is a fact of human nature, and of the democratic process, that our actions—both as individuals and as a community—sometimes conflict with our most basic, or overarching, values. Therefore, what we set out to embody in a constitution are those values we do not wish to sacrifice to more transient choices. Our constitutional values can of course be explicitly changed, but amendments are accomplished only through extraordinary political processes—the approval of two successive legislatures followed by a popular referendum in the case of the New York Constitution,⁷⁴ and the approval of two-thirds of both House of Congress and three-fourths of the states in the case of the federal charter.⁷⁵ A constitution, in short, is that set of values to which we have bound ourselves, the values that transcend even our currently made choices—or, in the words of James Madison, the values that “counteract the impulses of interest and passion.”⁷⁶

This is no abstraction but rather a reflection of the most abiding reality of both our past and present. We talk a great deal about the constitutional shield provided the People against the government, but in a democracy the threats to our values often have popular support. The Constitution throughout history has been called upon to protect long venerated values that are momentarily abandoned or neglected.

It is a function of constitutional law, then, to preserve a community’s overarching values in the face of its transient choices. And it is a significant function of the courts to ascertain and identify these most basic values, and flag them when they are at risk. As Judge Cardozo aptly wrote in *The Nature of the Judicial Process*:

The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits

⁷⁴N.Y. Const. art. XIX.

⁷⁵U.S. Const. art. V.

⁷⁶Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in *The Writings of James Madison* 273 (G. Hunt ed. 1904).

where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaption to changing social needs.⁷⁷

What many, most notably Justice Hugo Black, have sought in a jurisprudence of original intent—the protection of civil liberties by fixing us to an a priori commitment to them—cannot realistically be achieved in that manner. The right to a fair trial or free speech does not exist today simply because a group of framers two centuries ago intended them to exist. They can and do exist today because we mean them to, even though at times we may do or say otherwise. The overarching values of the past can and surely do inform our inquiry into what values make up our “constitution” today. We are, after all, *interpreting* a text, not *inventing* one. Moreover, we look to the past because our most basic values, when they change, tend to do so very slowly, and then by a process of evolution. But interpreting a constitution cannot stop with values of the past. It necessarily involves as well a community’s present values—identifying the values that a community has declared should limit the ordinary processes of its government.

All of this speaks with particular force, and has special relevance, to the subject of state constitutions.

Where a provision has been adopted into a state constitution from the federal charter, intent-based interpretation would obviously be unusually difficult. When dealing with intentions of several distinct groups of framers and amenders, are we to look to the intent of the federal framers, or the intent that the state framers believed—perhaps erroneously—the federal framers held? Or did the state framers intend something altogether different? A text-based “contemporary values” approach fares no better. If we read the words of all the constitutions of this nation in terms of what those words mean today, it is hard to argue that the same words have any different definition anywhere. Obviously, if there is any variation across this nation it is not in the definition of the words themselves, it is in the concepts they embody.

It should be immediately apparent that the Constitution established by New York under threat of British invasion in 1777, and painstakingly reviewed

⁷⁷B. Cardozo, *The Nature of the Judicial Process* 94 (1921).

and amended throughout the ensuing centuries, reflects its own values, which may or may not be identical to those held elsewhere.

Indeed, the history that has shaped the values of this State is different in many respects from that which has shaped the consensus in other states, not to mention our nation as a whole. Many states today espouse cultural values distinctively their own. Alaska, for instance, is unique in its constitutional guarantee of the right to possess marijuana in one’s home.⁷⁹ If it is the judiciary’s duty to look at what a “constitution” represents in order to determine what it says, and if what a constitution represents is that community’s most basic, overarching values, then it is only right to interpret a state constitution independently of others, even where concepts are expressed in the same words. An independent interpretation of course does not mean that identical clauses will invariably be read differently, or more broadly, than their federal counterparts or those of sister states. The Supreme Court, in reading the federal Constitution, must lay out a minimal rule for a diverse nation, with due concern for principles of federalism. State courts, even when working with the same basic provisions, have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations. Their solutions thus may at times be identical to the federal solutions, but they are not necessarily so.

Practical considerations support this theory. State courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People. Moreover, building a coherent body of law—one that is not merely reacting to particular Supreme Court decisions, or waiting on the Supreme Court to flesh out the contours of a developing right—has the advantage of furthering predictability and stability in our state law.

In short, the development of an independent body of state constitutional doctrine not only has deep historical roots but also is theoretically sound.

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⁷⁹See *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975). The court in part based its holding on article I, section 22 of the Alaska Constitution, which states: “The right of the people to privacy is recognized and shall not be infringed.” See *id.* at 500-04.

3. Uniform State and Federal Constitutional Interpretation

The United States Supreme Court ruled in *United States v. Robinson*, 414 U.S. 218 (1973) that a search of a person under custodial arrest was not un-

reasonable under the Fourth Amendment. In *State v. Florence*, 527 P. 2d 1202 (Or. 1974) the Oregon Supreme Court was urged to invalidate such a search

under its own constitution despite *Robinson*. It declined, noting:

Indeed, the views of this court have in some respects been contrary to those expressed in *Robinson*, as indicated by its past decisions. However, we have previously stated in *State v. Cloman*, *supra*, 254 Or. at 15, 456 P.2d at 74, consistent with the rule of *Robinson*, that: "The searched person's privacy has already been partially invaded by the arrest; therefore, the search does not have the personal impact that it otherwise might have."

There are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States and the rights of citizens under the provisions of that Constitution, as well as under identical or almost identical provisions of state constitutions, as in this case. See *State v. Matthews*, 216 N.W.2d 90, 105 (N.D.1974), Erickstad, C. J., concurring specially. See also *People v. Norman*, 112 Cal.Rptr. 43, 49-50 (Cal.App. 1974), and *People v. Cannon*, 18 Ill.App.3d 781, 310 N.E.2d 673, 676 (1974). Cf. *State v. McDaniel*, *supra*, 115 Or. at 216, 231 P. 965.

The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges, provided, of course, that this may be done in such a manner as not to violate the constitutional rights of the individual. The rationale of the rule excluding illegally obtained evidence in state

court proceedings, as established by the Supreme Court of the United States in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), is that such a rule will act as a deterrent upon illegal searches by law officers.

It is true that this "exclusionary" rule has been criticized, including the underlying assumption that it acts as such a deterrent. . . . While this rule is in effect, however, and in order that it may have such a deterrent effect it is important, for the guidance of law officers, that the rule be as clear and simple as may be reasonably possible, consistent with the constitutional rights of the individual.

The rule stated in *United States v. Robinson*, *supra*, is a simplification. Not adopting the rule of *Robinson* would add further confusion in that there would then be an "Oregon rule" and a "federal rule." Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances two different rules would cause confusion.

For these reasons, we overrule our previous decision in *State v. O'Neal*, *supra*, and other previous decisions to the same effect to the extent that they are contrary to the rule which we now adopt. This is consistent with the views of most of the state courts which have as of this date considered the rule of *Robinson*. Most of such courts quote that rule or cite that decision with apparent approval.

Discussion Notes

1. Regarding the reception of *Robinson* by state courts, see Richard D. Harmon and Terry J. Helbush, "Robinson at Large in the Fifty States: A Continuation of the State Bill of Rights Debate in the Search and Seizure Context," *Golden Gate Law Review* 5 (Winter 1974): 1; Catherine Hancock, "State Court Activism and Searches Incident to Arrest," *Virginia Law Review* 68 (May 1982): 1085.

2. In *People v. Gonzalez*, 62 N.Y.2d 386, 389-90, 465 N.E.2d 823, 825 (1984) Judge Simons of the New York Court of Appeals stated: "We deem it desirable to keep the law of this State consistent with the Supreme Court's rulings on inventory searches. . . ." Judge Wachtler, dissenting, contended that the United States Supreme Court decisions were distinguishable, and noted

"It is often difficult enough to follow the Supreme Court's decisions in the Fourth Amendment area without also trying to anticipate them." 62 N.Y.2d at 392, 465 N.E.2d at 826. See also *People v. P.J. Video*, 68 N.Y. 2d 296, 501 N.E. 2d 556 (1986).

3. Is evidence that is seized in violation of state constitutional protections but not equivalent federal constitutional protections available for use in federal prosecutions? See Jill E. Fisch, "Turf Wars: Federal/State Cooperation and the Reverse Silver Platter Doctrine," *Criminal Law Bulletin* 23 (December 1987): 509.

4. Are there areas other than search and seizure where arguments for uniformity could be made?

5. Where the relevant United States Supreme Court decisions recognize rights, is there any similar argument about "uniformity"?

**Earl M. Maltz,
“The Dark Side of State Court Activism”**

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I. Introduction

Discussions of state constitutional law too often focus on the relationship between the United States Supreme Court and its state counterparts. The arguments center on the question of whether the Court's decisions of federal constitutional questions are in any sense binding on courts deciding analogous state constitutional issues. Proponents of state court activism have argued vigorously that in interpreting their own constitutions, state courts legitimately may diverge from the authoritative interpretations of analogous provisions of the federal constitution. On this point activists are on firm ground; generally accepted legal conventions clearly establish the independence of state court judges on issues of state law.

This conclusion, however, marks only the beginning of the inquiry. For merely establishing the independence of the state judiciary from the Supreme Court does not demonstrate that state court activism is desirable. To address the latter problem one must confront the basic structural issue that pervades any analysis of judicial review—the question of the proper relationship between state courts and the other branches of state government.

Evaluation of this relationship usually is undertaken from one of two perspectives—interpretive or noninterpretive. Interpretivist courts seek primarily to divine and implement the intent of the framers of their state constitutions. Noninterpretivist courts, on the other hand, draw upon other sources to identify values relevant to constitutional review of a given law. This article argues that the existing governmental structure undercuts the arguments supporting noninterpretive state court review.

* * * * *

1. Interpretive Review—When judges practice interpretive review, they seek to implement the intent of the constitution framers. In effect, this replaces one set of institutional constraints with another. Rather than being constrained by the conventions of statutory interpretation in constructing the intent of the drafters of a statute, the judge is constrained by similar principles of interpretive review in

his quest to discover the intent of those who drafted the constitutional language. Thus, for example, in enforcing a constitutional provision that limits interest rates a judge can hardly be seen as imposing his views as to the justice of such limits; he is viewed more realistically as simply effectuating the views of those who drafted the provision.

2. Noninterpretive Review—In contrast, specific policy preferences are much more influential when judges practice noninterpretive review. Admittedly, most proposed structures for noninterpretive review would place important constraints on judicial action; typically, judges are admonished to strike down legislative action that is inconsistent with democratic theory, conventional morality, or some similarly defined set of values. Unlike the conventions underlying interpretive review, however, none of the theories of noninterpretive review reflect a societal consensus on the appropriate role of the judiciary. As a result, judges must rely on their individual perceptions of justice and fundamental fairness to choose among the various competing approaches to noninterpretive review.

* * * * *

**III. The Costs of Noninterpretive
State Review**

The exercise of independent noninterpretive review by state courts generates a variety of institutional costs. Among the foremost are those associated with loss of governmental flexibility, uncertainty regarding the state of the law, and the duplication of functions performed by other branches of government.

A. Loss of Flexibility

Ironically, noninterpretivists often cite the need for flexibility as a reason for advocating a more activist judicial posture. They argue that the problems and mores of society change over time and that the rights and responsibilities of government toward the citizenry ought to change accordingly. By binding the judiciary to the intent of the drafters of the constitution, interpretive review would prevent courts from making necessary adjustments in constitutional rights in reaction to changing conditions.

The flaw in this analysis is its focus on the judiciary in isolation from the remainder of the government structure. Society as a whole does not care whether adjustments in the role of government are made by the courts or by legislatures. Indeed, ultimate authority for making these adjustments historically has lain not with the courts but with the other branches of government. Admittedly, the state courts have been important participants in the process

through common-law and statutory adjudication. But because decisions in these contexts have always been subject to legislative scrutiny, the process has remained fluid. By contrast, constitutional adjudication is essentially negative; courts generally define courses of action that other branches of government may not pursue in response to changing conditions. Thus, as judicial activism increases, governmental flexibility decreases.

Constraints produced by noninterpretive review of state constitutions further limit the adaptability of legislatures whose authority already is circumscribed by federal constitutional decisions. Admittedly, because many state constitutions can be amended relatively easily, in this regard the effect of state constitutional activism is sometimes less severe than its federal counterpart. Nonetheless, noninterpretive state constitutional review remains an important constraint on governmental flexibility.

* * * * *

B. Uncertainty

A second cost of noninterpretive state review is the uncertainty such review causes. When judges

regularly practice noninterpretive review, no statute can be relied upon until it has run the gauntlet of judicial review. Under the federal constitution, certainty can be obtained by taking the arduous path to the Supreme Court. State constitutional review increases uncertainty by adding a second layer of judicial review a statute must survive in order to be safe from attack.

C. Duplication

The most important problem with noninterpretive state court review is that it generally duplicates functions exercised by other actors in the lawmaking process. Presumably, the fundamental fairness of a particular statute will be examined by both a legislature in determining whether to pass the statute and the governor in determining whether to veto the statute. A federal judicial evaluation of the constitutionality of a statute under federal law clearly will focus on the statute's fairness. Noninterpretive state court review considers the same arguments once again. Such a duplication of effort necessarily increases the costs generated by the legal system.

* * * * *

Discussion Notes

1. Professor Maltz continues his article by enumerating the justifications for independent state judicial "activism" and providing refutation for each. His ideas are further developed in "Lock-step Analysis and the Concept of Federalism," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 98, and "False Prophet—Justice Brennan and the Theory of State Constitutional Law," *Hastings Constitu-*

tional Law Quarterly 15 (Spring 1988): 429.

2. See also Paul S. Hudnut, "State Constitutions and Individual Rights: The Case for Judicial Restraint," *Denver University Law Review* 63 (No. 1 1985): 85.

3. Is it really useful to discuss concepts like "judicial activism" and "judicial restraint" outside the context of actual facts applied to a constitutional text?

G. State Action as a Requirement under State Constitutions

Under the due process and equal protection clauses of the Fourteenth Amendment, of course, there is a requirement of "state action" to trigger the protections. See generally, Robert J. Glennon and John E. Nowak, "A Functional Analysis of the Fourteenth Amendment 'State Action' Requirement," *Supreme Court Review*, 1976 (1977): 221; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); Paul Brest, "State Action and Liberal Theory: A Case Note on *Flagg Brothers v. Brooks*," *University of Pennsylvania Law Review* 130 (June 1982): 1296.

Would the requirement of state action, however, necessarily be present in *state* constitutional due process and equal protection cases, or under any other state constitutional provisions?

Sharrock v. Dell Buick-Cadillac, Inc. **45 N.Y.2d 152, 379 N.E. 2d 1169 (1978)**

Opinion of the Court
COOKE, Judge.

Challenged here as violative of the due process clauses of the State Constitution (N.Y.Const. art. I, sec. 6) and the Fourteenth Amendment of the Federal Constitution is the statutory authorization afforded a garageman to foreclose his possessory statutory lien for repair and storage charges (Lien Law, sec. 184), by means of a public sale of the vehicle in his possession. We hold the sections 200, 201, 201 and 204 of the Lien Law, insofar as they empower a garageman to conduct an *ex parte* sale of a bailed automobile, fail to comport with traditional notions of procedural due process embodied in the State Constitution, as they deprive the owner of the vehicle of a significant property interest without providing any opportunity to be heard.

On October 12, 1975, plaintiff's husband took her 1970 Cadillac to Dell Buick-Cadillac, Inc. (Dell), for installation of a replacement engine he had purchased elsewhere. The husband signed a work authorization wherein it was agreed that Dell was to remove the defective engine and install its replacement for the sum of \$225. The affidavits of plaintiff and her husband recite that the work authorization form contained no provisions with respect to storage charges which were subsequently unilaterally imposed by Dell. Approximately one week later, plaintiff's husband offered to pay the \$225 to Dell, but was advised by its service manager to withhold payment until the engine was installed.

Unfortunately, the replacement engine proved to be defective and had to be removed. Delivery of a replacement engine was then arranged. When the new replacement engine arrived, Dell informed plaintiff's husband that it would not be installed until Dell was paid the \$225 due for the installation of the original defective engine. Although he agreed to pay this sum, plaintiff's husband did not have that amount of money with him at the time and soon thereafter was hospitalized, rendering him incapable of continuing his business dealings with Dell.

On January 14, 1976 plaintiff received a "Notice of Lien and Sale" by certified mail, informing her that pursuant to section 184 of the Lien Law Dell had imposed a possessory lien against the Cadillac in the amount of \$304.95. That notice further advised that if plaintiff did not tender this sum within 30 days, the automobile would be sold at public auction on March 15, 1976 (see Lien law, sec. 200). Plaintiff was subsequently informed by one of the auctioneers listed on the notice of sale that, her belief to the contrary notwithstanding, included in the lien was the sum of \$79.95, representing storage charges. However, the auctioneer did agree to contact Dell in order to ascer-

tain whether they would “take off” the storage charge from the amount due.

Several days later, the auctioneer informed plaintiff that Dell refused to waive its storage charge and that the amount now due had been increased to \$545. He also advised her that since the book value of the care appreciably greater than \$545, it would be to plaintiff’s advantage to pay the charges since Dell “had her over a barrel” because her husband had taken the car there for repair. On the day of the auction, March 15, 1976, Dell again modified its claim and informed plaintiff that the amount due had been reduced to \$502. Later that day, plaintiff’s 1970 Cadillac, having an established resale value of between \$1,200 and \$1,400, was sold to Dell for the sum of \$502.

Plaintiff then commenced the instant action for declaratory and injunctive relief, as well as damages, claiming that the sale provisions of the Lien Law are violative of her due process rights as they authorize public sale of her automobile without affording the opportunity for a hearing.

The threshold question in any judicial inquiry into conduct claimed to be violative of the due process clause of the Fourteenth Amendment is whether the State has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity (see U.S.Code, tit, 42, sec. 1983; *Jones v. Mayer Co.*, 392 U.S. 409, 422-424, 88 S.Ct. 2186, 20 L.Ed.2d 1189). That much is made plain by the express terms of the amendment which specifies that “nor shall *any State deprive* any person of life, liberty, or property without due process of law” (emphasis added). Purely private conduct, however egregious or unreasonable, does not rise to the level of constitutional significance absent a significant nexus between the State and the actors or the conduct (see Civil Rights Cases 109 U.S. 3, 11, 3 S.Ct. 18, 27 L.Ed. 835). This nexus has been denominated “State action” and is an essential requisite to any action grounded on violation of equal protection of the laws or a deprivation of due process of law. Further, it is settled that where the impetus for the allegedly unconstitutional conduct is private, the State must have “significantly involved itself” in order for that action to fall within the ambit of the Fourteenth Amendment (*Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 18 L.Ed.2d 830).

Despite its outward simplicity as a concept, State action is in fact an elusive principle, one which cannot be easily discerned by resort to ritualistic incantations or precise formalisms (see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45). Instead, a number of factors must be considered in determining whether a State is significantly involved in statutorily authorized private conduct.

These factors include: the source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person (*Melara v. Kennedy*, 9 Cir., 541 F.2d 802, 805). As the test is not simply State involvement, but rather significant State involvement, satisfaction of one of these criteria may not necessarily be determinative to a finding of State action.

We need not address plaintiff’s contention that the actions taken by Dell are attributable to the State of New York for purposes of the due process clause of the Fourteenth Amendment. Recently, in *Flagg Bros. v. Brooks* (436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185), the Supreme Court rejected the argument that a private sale of property subject to a warehouseman’s possessory lien pursuant to section 7-210 of the Uniform Commercial Code constitutes State action. The similarities between section 7-210 and the statutes at issue here might preclude any contrary finding by this court.

* * * * *

In contrast to the due process clause of the Fourteenth Amendment, which is phrased in terms of State deprivation of life, liberty or property, section 6 of article I of the New York Constitution guarantees that “[n]o person shall be deprived of life, liberty or property without due process of law.” Conspicuously absent from the State Constitution is any language requiring State action before an individual may find refuge in its protections. That is not to say, of course, that the due process clause of the State Constitution eliminates the necessity of any State involvement in the objected to activity (see *Stuart v. Palmer*, 74 N.Y. 183, 188). Rather, the absence of any express State action language simply provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision.

The historical differences between the Federal and State due process clauses make clear that they were adopted to combat entirely different evils (see Schwartz, *The Bill of Rights: A Documentary History*, pp. 161, 165, 387, 855-856). Prior to the Civil War, the Federal Constitution had as its major concern governmental structures and relationships. Indeed, prior to the enactment of the Fourteenth Amendment, the Bill of Rights delimited only the power of the National Government, imposing few restrictions on State authority and offering virtually no protections of individual liberties (see *Barron v. Mayor & City Council of Baltimore*, 7 Pet. [32 U.S.]

243, 8 L.Ed. 672). The Fourteenth Amendment was a water-shed—an attempt to extend the catalogue a series of national privileges and immunities, thereby furnishing minimum standards designed to guarantee the individual protection against the potential abuses of a monolithic government, whether that government be national, State or local (see Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 Wash.U.L.Q. 405; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 501). In contrast, State Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose. Thus, as early as 1843, Justice Bronson, in speaking of the due process clause of our State Constitution, noted: "The meaning of the sec-

tion then seems to be, that no member of the state shall be disfranchised, or deprive of any of his rights and privileges, unless the matter be adjudged against him upon trial and according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him" (*Taylor v. Porter*, 4 Hill 140, 146; see, also, *Wynehamer v. People*, 13 N.Y. 378, 394 [1856]).

Examination of the indices of State participation in nonjudicial foreclosure pursuant to the provisions of the Lien Law at issue here compels the conclusion that New York has so entwined itself into the debtor-creditor relationship as to constitute sufficient and meaningful State participation which triggers the protections afforded by our Constitution.

Discussion Notes

1. See also *Svensden v. Smith's Moving and Trucking Co.*, 54 N.Y. 2d 865, 429 N.E. 2d 411 (1981), cert. denied 102 S.Ct. 1292 (1982) (declaring the nonjudicial sale provisions of Section 7-210

of the Uniform Commercial Code unconstitutional under *Sharrock*).

2. See also *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 191-98, 330 A.2d 1, 17-21 (1974) (Pashman, J., dissenting).

**Alderwood Associates v.
Washington Environmental Council
96 Wash. 2d 230, 635 P.2d 108 (1981)**

UTTER, Justice.

Alderwood Associates obtained a temporary restraining order from the Superior Court for Snohomish County, enjoining the Washington Environmental Council and others (defendants) from soliciting signatures or demonstrating in the Alderwood Mall Shopping Center. The Court of Appeals, upon defendants' request, granted a stay of the order and certified the issue to us. We reverse and hold that defendants' activities were protected by the Washington Constitution.

Petitioners (defendants) are the "Don't Waste Washington Committee" which sponsored Initiative 383, entitled "The Radioactive Waste Storage and Transportation Act of 1980." To qualify the initiative for the November ballot, petitioners were required to obtain 123,700 signatures of registered voters no later than July 4, 1980. When this action was filed on July 1, 1980, the committee had obtained approximately 120,000.

Respondent, Alderwood Associates, owns and operates Alderwood Mall in Lynnwood, Washington. That mall is a regional shopping center with more than 1,000,000 square feet of store area on 110 acres of land. It contains parking for more than 6,000 auto-

mobiles and impact statements on file project 22,000 automobiles entering the mall on an average day in 1978, increasing to 39,600 by 1985.

Permission was sought on June 27, 1980, for petitioners to solicit signatures in the mall. Permission had already been granted by other mall proprietors in the Puget Sound area. But, unlike those proprietors, respondents denied the request.

Believing the denial to be unconstitutional, petitioners proceeded to solicit signatures in the Alderwood Mall in the same manner as permitted by other mall owners. A card table was set up, until respondents requested its removal. They then asked passersby, in a nonobstructive manner, if they wished to sign the initiative petition. More than 100 signatures were obtained each hour and no one alleges that petitioners annoyed or harassed the patrons of the mall or in any way interfered with business activities.

* * * * *

Speech and Initiative Rights

Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), held that the First Amendment to the United States Constitution does not confer the untrammelled right to speak, picket, or petition in a privately owned shopping center. *Accord, Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). As consistently recognized, the First Amendment only protects speech from state imposed restraints. *Hudgens*, supra; *Lloyd*, supra. In *Hudgens*, the United States Supreme Court concluded that re-

straints imposed by privately operated shopping malls are not actions by the government, and consequently the shopping center in that case was not required to permit labor picketing.

* * * * *

The only dispute is whether Washington law permits signature solicitation at privately owned shopping centers. As already noted, the first amendment to the United States Constitution does not require shopping malls to tolerate the signature practice. See *Hudgens*, supra; *Lloyd*, supra. In provides:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances.

It specifically limits only governmental interference. *Hudgens*, supra; *Lloyd*, supra.

In contrast, Const. art. 1, sec. 5 is not by its express terms limited to governmental actions. In this regard, it is like amendment 7 of the Washington Constitution. Section 5 provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

We have never had to determine whether section 5 and amendment 7 require the same "state action" as the Fourteenth Amendment. In *Sutherland*, a case substantially similar to this one, the Court of Appeals did perform a "state action" analysis, but without determining whether the state constitution required it. Such a determination was then unnecessary in light of those facts and existing federal law.

The California constitutional speech guaranty, article 1, section 2, is substantially similar to section 5. In fact, section 5 was modeled after it. Beardsley, *Notes on the Sources of the Washington Constitution, 1889-1939*, reprinted in *Constitution of the State of Washington*, Appendix, pp. IV, VI (1939). The California Supreme Court has determined that the California provision does not require "state action," as defined by the United States Supreme Court. *Robins v. Pruneyard*, supra. *Laguna Pub. Co. v. Golden West Pub. Corp.*, 110 Cal.App.3d 43, 167 Cal.Rptr. 687 (1980).

New Jersey also has a constitutional provision like ours. See N.J.Const. art. 1, para. 6.⁵ The New Jersey Supreme Court has held, like the court in California, that its provision does not require "state action." *Schmid*, 423 A.2d at 628, 639. It applies to all private entities which have put their property to a public use. *Schmid*, 423 A.2d at 628. In *Schmid*, the court held that a private university could not evict a

person for distributing political literature upon its campus.

Both *Schmid* and *Robins*, in applying their state constitutions, rejected the "state action" requirement of the Fourteenth Amendment. They could do that because of the linguistic differences between the state and federal provisions and because the "state action" requirement of the Fourteenth Amendment is the product of several factors not relevant to the state provisions. See Project Report, supra at 290. The "state action" analysis under the Fourteenth Amendment is essentially a judicial balancing of competing interests. Glennon & Newak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup.Ct.Rev. 221, 222, 232-36; *Schmid*, 423 A.2d at 634 (Parshman, J., concurring and dissenting in part). Compare *Logan Valley*, supra, with *Lloyd* supra. As acknowledged by Justice Marshall's dissent in *Lloyd*, 407 U.S. at 580, 92 S.Ct. at 2234:

We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

But not noted by Justice Marshall, and hidden within the balancing, are two factors not restraining state courts when applying state law. Project Report, supra at 290.

The first is that when the United States Supreme Court interprets the Fourteenth Amendment, it establishes a rule for the entire country. Project Report, supra at 290. The court must thus establish a rule which accounts for all the variations from state to state and region to region. The rule must operate acceptably in all areas of the nation and hence it invariably represents the lowest common denominator. Project Report, supra at 290.

The second factor, which is related to the first and actually results from it, is that the Supreme Court must take a conservative theoretical approach to applying the Fourteenth Amendment. Project Report, supra at 290. Federalism prevents the court from adopting a rule which prevents states from experimenting.

Like those in New Jersey and California, our speech and initiative provisions do not expressly mention "state action." And we too are not limited by the factors confronting the United States Supreme Court when it applies the Fourteenth Amendment. This permits us to evaluate in each case the actual harm to the speech and property interests. Therefore, given these differences, we choose to follow the approach of *Schmid* and *Robins* which recognizes that

⁵"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. 1, para. 6.

the “state action” analysis of the Fourteenth Amendment is required by the language of the federal, but not the state, constitution. We have held in other contexts that where our constitutional provision is linguistically different from its parallel in the federal constitutions, we are not bound to treat the state and federal constitutions as coextensive.

* * * * *

DOLLIVER, Justice (concurring).

In concur with the result of the majority but not its reasoning. While I agree that defendants should have been allowed to gather signatures at Alderwood Mall, I believe it is both unnecessary and imprudent to arrive at this result by the constitutional analysis adopted by the majority.

In holding Const. art. 1, sec. 5 may be used by one individual to enforce action against another, the majority has made an unprecedented change in the application of this state’s constitution. It interprets the constitution in a way which has never been done since that document was adopted in 1889. It does so without the slightest historical warrant: No case is cited, there is reference to no authority. The majority simply says, “We choose to follow [this] approach.” That two other jurisdictions have chosen to adopt the approach and that some commentators have written on the subject, while interesting, is less than persuasive as to the Washington Constitution. . . .

While this court has in the past declared the substance of the Washington Constitution may differ from that of similar provisions of the United States Constitution (see cases cited by majority opinion), this is the first time the court has held the Declara-

tion of Rights in our constitution is designed not just to protect the individual from government but that it may also be used by one individual against the other. It is constitution-making by the judiciary of the most egregious sort.

* * * * *

Const. art. 1 is designated as a Declaration of Rights (see Meany & Condon, *Washington’s First Constitution*, 9 Wash.Hist.Q. 145 (1918), reprinted in E. Meany & J. Condon, *Washington’s First Constitution*, 1878, and Proceedings of the Convention 19 (1924)), not the rights of one person against another, but of the people against their government. This subject has been considered in two articles in the Washington Law Review. In Countryman, *Why a State Bill of Rights?*, 45 Wash.L.Rev. 454, 473 (1970), the query is raised as to whether we might not need a new state bill of rights directed toward those “ ‘private governments’ against whose excesses we are also in need of [protection].” It is not contended that these additional guaranties of the rights of private individuals against other private entities presently exist in article 1 of our present state constitution, only that a new bill of rights might be appropriate. See Morris, *New Horizons For a State Bill of Rights*, 45 Wash.L.Rev. 474 (1970).

It is true, as the majority states, that Const. art. 1, sec. 5 does not expressly mention “state action.” It is equally true that until today this court had not even hinted article 1, section 5 was concerned with other than the protection of individual rights against state action.

Discussion Notes

1. What is the relationship between free speech and assembly rights, and the right of initiative, in *Alderwood Associates*?

2. Consider the court’s description of the United States Supreme Court’s state action doctrine in light of the other federalism concerns we have studied.

**David M. Skover,
“The Washington Constitutional
‘State Action’ Doctrine:
A Fundamental Right to State Action”**

University of Puget Sound Law Review
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* * * * *

Recently, however, rumblings of judicial discomfort with federal “state action” parallelism in the

Washington Bill of Rights have attained a seismographically significant level. In major deviation from synonymy with the federal “state action” doctrine, a plurality of four Washington Supreme Court justices endorsing the opinion of the Court in *Alderwood Associates v. Washington Environmental Council* read the free speech and initiative guarantees in article I, section 5 and amendment 7 of the Washington Constitution “as not requiring the same ‘state action’ as the Fourteenth Amendment.” Observing that neither article I, section 5 nor amendment 7 is by express terms limited to governmental actions, the plurality argued that the provisions should not be so interpreted. The inference of a federal “state action” prerequisite to justiciability of an article I, section 5 or amendment 7 claim may deny constitutional safe-

guards against private conduct interfering with important free speech interests and initiative processes, without fulfilling equally compelling countervailing purposes. The “state action” doctrine of the fourteenth amendment of the United States Constitution responds to institutional concerns of the federal judiciary that are irrelevant to state constitutional law declaration.

* * * * *

Alderwood Associates presents striking evidence of a gain in judicial sensitivity to the relevant factors for state constitutional adjudication. The plurality’s movement to the methodology of balancing competing private claims of constitutional right was propelled by a commendable insight that the traditional “state action” inquiry could not be justified as a threshold barrier to the justiciability of a cause of action against a nominally private party under article I, section 5 and amendment 7 of the Washington Constitution. Given the immateriality of the federal constitutional objectives purportedly advanced by the fourteenth amendment’s “state action” doctrine in the context of state constitutional law declaration, the plurality aimed to unseat the “state action” doctrine as the determinant of justiciable claims of rights of free speech exercise raised under article I.

Unfortunately, a close reading of the opinion of the court in *Alderwood Associates* may leave the reader wondering whether the plurality’s aim squarely hit the mark. Noting that “[s]ection 5 and amendment 7 could be interpreted as not requiring any ‘state action,’” the *Alderwood Associates* court refused to take this stance:

Although we read section 5 and amendment 7 as not requiring the same “state action” as the Fourteenth Amendment, that does not mean those provisions are applicable to all speech and initiative activities. If there were no limitations to their application, every private conflict involving speech and property rights would become a constitutional dispute. . . . Such an approach would deny private autonomy and property rights in the same way as the “state action” requirement of the Fourteenth Amendment denies free speech. . . . Instead, being sensitive to the competing speech and property rights, we conclude that section 5 and amendment 7 are applicable when, after balancing all the interests, the balance favors the speech and initiative activity.⁴⁹

* * * * *

⁴⁹Id. at 243 n.8, 635 P.2d at 116 n.8.

The article I provisions that have spawned the Washington “state action” doctrine do not refer expressly to state governmental machinery as the subject of their prohibitions. The guarantees of due process rights,⁵² the right of petition and assemblage,⁵³ the right of free speech and press,⁵⁴ the right of personal privacy and sanctity of the home,⁵⁵ and the right of religious conscience⁵⁶ focus clearly only upon the beneficiaries of civil liberty protections, leaving totally ambiguous the identity of the agents constitutionally charged with liability for infringement.⁵⁷ Therefore, it is as reasonable to construe the language of these prohibitions on their face as directed generally to both public and private actors as it is to presume that these provisions apply exclusively to governmental behavior.

The total absence in these provisions of any language that facially restricts their application to public actors stands in austere contradistinction to the text of other article I provisions that manifestly address state officials and entities.⁵⁸ Article I, section 12 is the first provision within the Washington Bill of Rights that is patently directed to state governmental machinery. Entitled “Special Privileges and Immunities Prohibited,” section 12 states: “No law shall be

⁵²WASH.CONST.art. I, sec. 3 provides: “*Personal Rights*. No person shall be deprived of life, liberty, or property, without due process of law.”

⁵³WASH.CONST.art. I, sec. 4 provides: “*Rights of Petition and Assemblage*. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.”

⁵⁴WASH.CONST. art. I, sec. 5 provides: “*Freedom of Speech*. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”

⁵⁵WASH.CONST.art. I, sec. 7 provides: “*Invasion of Private Affairs or Home Prohibited*. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

⁵⁶WASH. CONST. art. I, sec. 11 provides in pertinent part: “*Religious Freedom*. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion. . . .”

⁵⁷This ambiguity is largely a function of the grammatical structure of the art. I guarantees. The consistent use of passive verb tenses in the command of the provisions obviates any explicit identification of the subjects of their dictates. For example, prototypical phrases include: “No person shall be deprived,” WASH.CONST.art. I, sec. 3, and “shall be guaranteed to every individual,” *id.* sec. 11.

⁵⁸While there are occasional references in WASH.CONST. art. I to “authority of law,” *see, e.g., id.* sec. 3 (no deprivation of life, liberty, or property “without due process of law”); *id.* sec. 7 (no invasion of private affairs or home “without authority of law”), whatever emphasis is placed upon such qualifiers for support of a “state action” restriction in the prohibitions is totally misdirected. When the nature of the constitutional constraint is the extension of protection under the “law of the land,” there is no necessary determination made as to the targets of the command.

passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations." Similarly, article I, section 23 undeniably refers to the Washington Legislature in providing: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Finally, article I, section 31 speaks expressly to the general state government in mandating: "No standing army shall be kept up by this state in time of peace." A reasonable expla-

nation for this variance in form is that the article I provisions that do not address state government in such specific fashions were intentionally drawn in general terms in order to apply to both public and private actors. Without presuming want of skill or negligence in the drafting of the Bill of Rights, the proponent of the Washington "state action" doctrine must otherwise account for these textual distinctions and, in light of them, defend the adoption of a comprehensive "state action" requirement for the entirety of article I as an inevitable judicial enterprise.

Discussion Notes

1. Is the evaluation of the language of the text as provided by Mr. Skover, a useful approach to the state action issue?

2. See Note, "Private Abridgement of Speech and the State Constitutions," *Yale Law Journal* 90 (November 1980): 165.

Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Company 512 Pa. 23, 515 A.2d 1331 (1986)

HUTCHINSON, Justice.

Appellants are a political committee, its chairman, gubernatorial candidate and a campaign worker. They appeal by allowance a Superior Court order, 335 Pa.Super. 493, 485 A.2d 1, affirming Allegheny County Common Pleas. Common Pleas had dismissed their suit for a mandatory injunction directing appellee, owner of a shopping mall, to cease interfering with appellants' political activities on appellee's premises. Appellants claim that they have the right, under the Pennsylvania Constitution's guarantees of free speech and petition, to collect signatures on the gubernatorial candidate's nominating petition in privately-owned shopping malls and that

appellee cannot deny them access to its mall for that purpose.¹

We believe that the Pennsylvania Constitution does not guarantee access to private property for the exercise of such rights where, as here, the owner uniformly and effectively prohibits all political activities and similarly precludes the use of its property as a forum for discussion of matters of public controversy. See *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981). We would therefore affirm Superior Court.

In the spring of 1982, appellants began a drive to collect signatures on nominating papers in an effort to place a candidate on that November's gubernatorial ballot. They sought permission to solicit signatures and educate the public about their cause in a shopping mall known as South Hills Village. South Hills Village is a large enclosed shopping mall in suburban Pittsburgh. The mall contains approximately one million square feet of enclosed space, hosts some 126 stores and is circumscribed by a 5000-vehicle parking lot. It was opened in 1964; appellee has owned it since 1982. The mall has a uniform policy of

¹Appellant claims rights under Article I, Sections 2, 7 and 20 of the Pennsylvania Constitution. Art. I, sec. 2 states:

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

In relevant part, art. I, sec. 7 provides:

... The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . .

Art. I, sec. 20 states:

The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Appellants' claim no rights under the United States Constitution. They concede that the First Amendment to the United States Constitution only protects the right of free speech against governmental restraint, not against the actions of private property owners whose property is being used for a private purpose. This concession is required by the authoritative holdings of the United States Supreme Court interpreting the First Amendment. *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).

forbidding all political solicitation and appellants' request was denied. Rather than risk criminal prosecution by soliciting signatures in the face of this policy, appellants filed a complaint in equity in the Court of Common Pleas of Allegheny County. They sought to enjoin appellee from enforcing its no political solicitation policy on the ground that it violated their speech and petition rights under the Pennsylvania Constitution. Pa. Const., art. I, sections 2, 7, 20.

* * * * *

The primary purposes of a constitution are to establish a government, define or limit its powers and divide those powers among its parts. U.S. Const. amend. X; J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, 121 (2d Ed. 1983). See generally 16 Am.Jur.2d, *Constitutional Law*, sec. 6 (1979). The United States Constitution established a government of limited and enumerated powers. Consequently, the national government possesses only those powers delegated to it. J. Nowak, *supra*, at 121. See generally 16 Am.Jur.2d at sec. 278. State constitutions, on the other hand, typically establish governments of general powers, which possess all powers not denied by the state constitution. J. Nowak, *supra*, at 121. See generally 16 Am.Jur.2d at sec. 16. Our state constitution functions this way and restrains these general powers by a Declaration of Rights. R. Woodside, *supra*, at 3, 113; *Commonwealth v. Wormser*, 260 Pa. 44, 46, 103 A. 500, 501 (1918) (the legislature may enact all laws not forbidden by the state constitution).

The Pennsylvania Constitution of 1776, our first post-colonial constitution, illustrates Pennsylvania's basic constitutional scheme. It contains two parts: one which establishes a government and one which limits its powers. The first part, titled Declaration of Rights of Inhabitants of the Commonwealth or State of Pennsylvania, contains most the language found in our present Article I. The second, titled Plan or Frame of Government for the Commonwealth or State of Pennsylvania, establishes a governmental system. This simple two-part format in itself evinces the draftsmen's intent to establish a government and to limit its powers, R. Woodside, *supra*, at 114, in consonance with their known adherences to the theories of Locke, Montesquieu and other natural law philosophers. J. Selsam, *The Pennsylvania Constitution of 1776*, 176 (1936). Additionally, sec. 46 of the Frame of Government acknowledges the limitations on governmental power by stating:

The Declaration of Rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretense whatever.

Pa. Const. of 1776, Frame of Government, sec. 46. See T. White, *Commentaries on the Constitution of Pennsylvania*, 171 (1901).

By 1790, the government established by the Constitution of 1776 proved unworkable and the legislature authorized a new constitutional convention. T. White, *supra*, at xxiv-xxv. The resolution authorizing this convention included in the five topics to be addressed a call for alterations and amendments to the Declaration of Rights. The fifth topic read:

V. That that part of the constitution of this commonwealth called "A declaration of the rights of the inhabitants of the Commonwealth or State of Pennsylvania," requires alterations and amendments, in such manner as that the *rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and secured [.] . . .*"

T. White, *supra*, at xxv (emphasis supplied).

Nevertheless, the Declaration of Rights was not substantively changed by the convention, although Section 46 of the 1776 Constitution's Frame of Government was rephrased and moved into the Declaration of Rights without material change as Article IX, Section 26. It now reads as it did then:

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is *excepted out of the general powers of government and shall forever remain inviolate.*

Pa. Const. of 1790, art. IX, sec. 26 (emphasis supplied) (renumbered without change at art. I, sec. 25).

Subsequent conventions and amendments have left this frame of government, T. White, *supra*, at xxv, and the Declaration of Rights materially unchanged today. R. Woodside, *supra*, at 114.

Considering the foregoing history, we conclude that the Declaration of Rights is a limitation on the power of state government. *Accord* R. Woodside, *supra*, at 113. The Pennsylvania Constitution did not create these rights. The Declaration of Rights assumes their existence as inherent in man's nature. It prohibits the government from interfering with them and leaves adjustment of the inevitable conflicts among them to private interactions, so long as that interaction is peaceable and nonviolent. This Court has consistently held this view, that the Pennsylvania Constitution's Declaration of Rights is a limit on our state government's general power. *O'Neill v. White*, 343 Pa. 96, 22 A.2d 25 (1941). *Commonwealth ex rel. Smillie v. McElwee*, 327 Pa. 148, 193 A. 628 (1937); *Commonwealth ex rel. McCormick v. Reeder*, 171 Pa.

505, 33 A. 67 (1895). It has also followed this premise in holding that particular sections of the Declaration of Rights represent specific limits on governmental power. Thus, in *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A.2d 59, cert. denied, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961), the Court held that Article I, Section 7 prevents Commonwealth agencies from imposing prior restraints on the communication of thoughts and opinions of individuals. Therein we stated:

Although the provision in Article I, sec. 7, of the Pennsylvania Constitution, as above quoted, has never heretofore been interpreted by this court in present context, it is clear enough that what it was designed to do was to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege. History supports this view.

Id. at 88, 173 A.2d at 62.

We are not suggesting that the rights enumerated in the Declaration of Rights exist only against the state. These rights are specifically reserved to the people; each inhabitant of the Commonwealth, including appellants, appellee and other users of the mall, shares in them and enjoys them. The framers of our constitution considered them basic rights of human beings; we have called them "the Hallmarks of Western Civilization." *Andress v. Zoning Board of Adjustment*, 410 Pa. 77, 86, 188 A.2d 709, 713 (1963). They are not created by the constitution, but preserved by it. *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 A. 70 (1921).

We believe, however, the adjustment of these rights among private parties is not necessarily a matter of constitutional dimensions. If it were, significant governmental intrusion into private individuals' affairs and relations would be likely to routinely occur. This intrusion itself would deprive individuals of important rights of freedom. Free people regulate their private affairs through individual adjustment. We should be wary of insulating that development against legislative, judicial or private change by enshrining a particular position in the text of the constitution. Social and economic developments require a flexible legal framework which can adapt to them. Our common law provides such a framework.

The drafters of the constitution assumed the existence of a body of civil law, common and statutory, which governs violations of rights and breaches of duties between individuals. Constitutions, long-lasting and difficult to change, primarily govern relationships between an individual and the state. The civil

law, which must permit flexible and continuing development as society changes, primarily governs relationships between individuals.

The social and economic development with which we are concerned here is the ongoing substitution of enclosed shopping malls for individual retail stores clustered in downtown shopping areas. These stores were themselves substitutes for the open sheds of the colonial market which was generally located on public ground. Despite these developments in the past two hundred years, common law has not yet given an individual the general right to enter upon the private property of another. *Kopka v. Bell Telephone Co. of Pa.*, 371 Pa. 444, 91 A.2d 232 (1952); *Hobbs v. Geiss*, 13 S & R 417 (1826). Moreover, even if invited for one purpose, the invitee has no recognized right to engage in another activity against the landowner's wishes. *Commonwealth v. Johnston*, 438 Pa. 485, 263 A.2d 376 (1970). Here, the public at large, including appellants, were invited to South Hills Village for commercial purposes: shopping, dining and entertainment. Political solicitation was uniformly forbidden.

Appellants' argument that shopping malls have usurped the function of "Main Street, U.S.A." and town business districts is not lost on us. Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed. These malls have begun to serve as social as well as commercial outlets for the communities they serve. Young people often come to a mall to socialize with their peers. Older people come to enjoy the park-like atmosphere offered in many malls or to view displays erected in the corridors. Members of the community have an opportunity by chance or design to mix, meet and converse. However, these social benefits are ancillary to the commercial purpose of shopping malls and do not involve organized campaigns on particular issues by political or special interest groups. Law and sociology are not coextensive. Though shopping malls may fulfill some of the societal functions of the traditional main street or town market place, we do not believe that this makes them their legal equivalent. Nor does it yet require them to provide a political forum for persons or groups with views on public issues, so long as the owner does not grant unfair advantage to particular interests or groups by making his premises arbitrarily available to those he favors while excluding all others. See *Commonwealth v. Tate*, supra.

Appellants argue that our decision in *Commonwealth v. Tate*, supra, controls this case. We agree that it controls. However, it does not help these appellants. In our view, it demonstrates a limiting rationale

for applying our constitution's rights of speech and assembly to property private in name but used in fact as a forum for public debate. In *Tate*, a private institution of higher learning sponsored a community anti-crime symposium which included a speech by then FBI Director Clarence Kelley. The symposium was open to the public; in fact, the public was encouraged to attend. Appellants, the Lehigh-Pocono Committee of Concern (LEPOCO), sought to peacefully protest against Director Kelley because of his refusal to supply them with information they had requested under the Freedom of Information Act . . . and to protest generally against FBI policies. The College summarily denied LEPOCO's request for a permit; apparently no criteria for granting or denying permits existed. On the day of Director Kelley's speech, members of LEPOCO entered the campus and peacefully distributed leaflets near the auditorium. Twice college officials and the police asked them to leave; they refused. The protesters were arrested for defiant trespass, 18 Pa.C.S. sec. 3503(b). We held that LEPOCO members had a right to speak freely without fear of criminal conviction under art. I, sec. 7 of the Pennsylvania Constitution, because the college had made itself into a public forum and 18 Pa.C.S. sec. 3503(c)(2) provided a defense to a charge to defiant trespass in those circumstances.

* * * * *

South Hills Village, on the other hand, has not made itself a public forum in this manner. Appellee has invited the public at large into the mall only for commercial purposes. By adhering to a strict no political solicitation policy, appellee has uniformly and generally prevented the mall from becoming a public forum. South Hills Village is operated as a market place for the exchange of goods and services but not as a market place for the exchange of ideas. Therefore, the *Tate* analysis does not support appellant's claim.

* * * * *

A shopping mall is not equivalent to a town. Though it duplicates the commercial function traditionally associated with a town's business district or marketplace, the similarity ends there. People do not live in shopping malls. Malls do not provide essential public services such as water, sewers, roads, sanitation or vital records, nor are they responsible for education, recreation or transportation. Thus, the *Marsh* analysis is not applicable to the instant case.

We are aware that the Supreme Court of California has held that the petition and free speech provisions of its constitution confer a positive right to solicit signatures for political purposes in a privately

owned shopping mall. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979), *aff'd*. 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Those provisions are substantially the same as our own. Although the facts of *Pruneyard* are almost identical to this case, the *Pruneyard* rationale is grounded in California law. The California Court, after generally observing that free speech and petition rights are very important in California, 153 Cal.Rptr. at 858-59, 592 P.2d at 345-46, pointed to provisions of the California Constitution similar to ours and held them more expansive than the First Amendment to the United States Constitution. *Id.* 153 Cal.Rptr. at 859, 592 P.2d at 346. We agree with the California Court that these rights are basic and important. We also believe the text of our constitution, like theirs, indicates a more expansive protection than the First Amendment. Indeed, we implicitly recognized that in *Tate*. However, we cannot agree with *Pruneyard's* holding that the state, as a matter of positive law, may constitutionally interfere with a private person who uniformly precludes political activities on his property.

The highest courts of other jurisdictions are divided on this issue. In a plurality decision, the Washington Supreme Court stated that the speech and petition provisions of the Washington Constitution were modeled on the California Constitution and entered an order consistent with *Pruneyard*. *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230, 635 P.2d 108 (1981).

The Supreme Judicial Court of Massachusetts has also held that its state constitution confers a right to solicit signatures in a shopping mall. *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983). It based its decision on the right to petition and seek office. The language of this section of the Massachusetts Constitution is substantially different from the language in Article I, Section 20 of the Pennsylvania Constitution. The court did not reach the free speech provision.

Unlike California, Massachusetts and Washington, other sister jurisdictions in addressing these situations have reached the result we do today. We believe that their position is more nearly correct. The Connecticut Supreme Court in *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984), held that the Connecticut Constitution did not confer a right to solicit signatures in a privately owned shopping mall. The court rejected the *Pruneyard* analysis and held that the history of the Connecticut Constitution shows that their Declaration of Rights is a restraint on the government and does not confer

positive rights. The court also refused to exercise the state's police power, in deference to the legislature.

In *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985), the Michigan Supreme Court also found no right to solicit signatures in a shopping mall under its constitution. The court held that the Michigan Constitution is a restraint on governmental interference with rights. It discussed and rejected both *Pruneyard*, supra, and *Alderwood*, supra, and refused to invade the legislature's domain by exercising the state's police powers.

The California Supreme Court in *Pruneyard* utilized that state's police power to regulate property in the public interest and held that appellants had a right to solicit signatures in a privately owned shopping center. 153 Cal.Rptr. at 860, 592 P.2d at 347. It analogized this exercise of police power in the name of free speech to regulation of private property to further other public interests such as zoning, public health and safety and environmental protection. Id., 153 Cal.Rptr. at 857-59, 592 P.2d at 344-46.

* * * * *

NIX, Chief Justice, concurring and dissenting.

The Opinion Announcing the Judgment of the Court persuasively argues that, unlike its federal counterpart, the Declaration of Rights contained in Article I of our Constitution "assumes their existence as inherent in a man's nature." At 1335. I join in the conclusion that "[t]hese rights are specifically reserved to the people; *each inhabitant of the Commonwealth, . . .*" (emphasis added). At 1335. Thus, the limitation in federal constitutional decisions to matters involving "state action" is not applicable in an analysis where it is alleged that one of these rights conferred under our constitution has been violated. See *Hartford Accident and Indemnity Co. v. Insurance Commissioner of Commonwealth*, 505 Pa. 571, 585, 482 A.2d 542, 549 (1984). (Language of Pennsylvania Constitution, not "state action" test, controls its applicability.) To this extent, I am in complete agreement with the view expressed in the Opinion Announcing the Judgment of the Court.

My departure begins with the statement, "[t]he adjustment of these rights among private parties, however, is not necessarily a matter of constitutional

dimensions." At 1335. When it is applied in this situation, where the issue requires a definition of the right in a given context, it is obviously a question of constitutional dimension. Once a constitutional right is recognized, any claim that its protection has been denied requires a determination of the breadth of that protection. The most frivolous claim of an illegal search, denial of free speech, deprivation of due process, etc., still requires decisions with constitutional implications.

This initial disagreement occasions my further departure from the suggested analysis employed by the plurality in adjusting these constitutional disputes between individuals. As recognized in *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981), a balancing process is required which should attempt to maximize each side's enjoyment of the respective rights claimed. Such an accommodation requires careful analysis. An implied premise that private ownership must prevail is antithetical to the objective that should be achieved.

Private ownership is a generic term for many different relationships. For instance, it embraces residences, non-profit ventures, and purely commercial ventures; it also encompasses different levels of public involvement. In this instance we are faced with the type of private ownership which is comparable to the main commercial area in a given community, a place that has traditionally been an accepted forum for the appropriate expression and exchange of ideas, political and otherwise. The mere fact that it is privately owned should not be the controlling factor in the judgment to be made in this decision. Political expression, even though it may be unpopular at any given time, is certainly one of the rights that fall within the penumbra of rights articulated under our Declaration of Rights. When it is established that it is done in an unobtrusive and orderly fashion, without harassment to those who do not wish to engage in such an exchange, I do not find the basis for concluding that the mere fact that the area is privately owned would necessarily preclude the activity.

Accordingly, I believe that we should direct our trial courts to employ the balancing test in future cases such as these to attempt to accommodate the competing interests.

Discussion Notes

1. This decision refers to the earlier Pennsylvania case, *Commonwealth v. Tate*. Can the two decisions be reconciled?

2. Once a state court recognizes rights to free speech on "private" property, what should be the nature and limits of these rights which go beyond federal constitutional doctrine? Read the next excerpt with this question in mind.

Sanford Levinson,
“Freedom of Speech and the
Right of Access to Private Property under
State Constitutional Law,”
Developments in State Constitutional Law
ed. Bradley D. McGraw

St. Paul: West Publishing Co. 1985, pp. 59-63

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This point underscores the extent to which the access cases necessarily force one to confront some of the most fundamental problems (and dilemmas) in the entire area of civil liberties. Today, I think it is safe to say, no generally accepted comprehensive theory of freedom of speech exists. There are three primary candidates: One emphasizes the general public interest in a free marketplace of ideas, regardless of the topic. That is, information about drug prices is of equal weight to political information. A second focuses on so-called “freedom of expression,” which can include behavior ranging from nude dancing to burning one’s draft card. Finally, there is an approach based on the federal Constitution’s own emphasis on safeguarding a “republican form of government,” which offers special protection to political speech while being less concerned with intervening against legislative attempts to regulate speech unrelated to politics.

This is not the occasion for a full treatment of free-speech theory, but I should confess that my own commitment is more to the “republican form of government” approach than to its two competitors. In any case, though, it is extremely important that all of the litigated cases have involved claims involving political speech, and courts rightly should feel hesitant to extend the protections accorded political speakers to those whose speech is not connected in fairly direct ways with the process of self-governance. The easiest way of making this point is to suggest that the requirement of access by political speakers to Barton Springs Mall, in my own home city of Austin, Texas, does not in the least entail a right of persons to enter the Mall and pass out leaflets advertising the wares available at the Highland Mall. Whatever protection the federal and state constitutions extend to commercial speech surely does not extend this far.

It is also worth mentioning that not only shopping centers and private universities are implicated in

any doctrines of access to private property. Other candidates for access include privately owned “residential” or “retirement” communities, trailer parks, migrant labor camps, and nursing homes, all of which may make deliberate attempts to discourage any outsiders from entering their grounds. At least one New Jersey case⁵⁰ involved a trespass conviction deriving from an attempt by a “planned retirement village” to bar unauthorized visitors from the community grounds.

The defendant was attempting to circulate a petition involving political issues in the local township where the retirement village was located, and the court invalidated the conviction. Although the court stated that it did “not wish to open wide the gates of Rossmoor and [thus] allow anyone to come in at any time, for any purpose[,] [n]evertheless, this court feels compelled to hold ajar the gates of Rossmoor under the present circumstances. To hold otherwise would, in effect, create a political isolation booth.” Here again it is certainly understandable that courts hesitate to grant a general right of access to the property even as they protect one especially important type of speech—that concerning politics and elections.

Let me extend this analysis in the area that I know best, both as a litigator and an academic—the right of access to private university campuses. I suspect, though, that what is true about private universities is by-and-large applicable to the other kinds of private property mentioned, especially residential villages. One characteristic common to both, for example, is that significant numbers of registered voters live on the premises. It is worth noting that this is not true of shopping centers; any rationale, though, for extending rights of access to shopping centers will almost certainly apply even more strongly to private universities or residential communities precisely because of the presence of these genuine inhabitants in the latter. Indeed, the numbers often are high enough that such voters can play a decisive role in municipal elections.

However important it may be, republican-form-of-government rationale for access to otherwise private property has a limited scope. One might well prefer universities that open themselves, and their students, to the broadest range and experiences imaginable. Arguably such openness is required of state and other publicly-funded universities. There is no good argument, however, that any constitution, whether federal or state, requires private universities to incarnate this ideal. What Schmid won in the Princeton case is best defended not in the name of gen-

⁵⁰State v. Kolcz, 114 N.J. Super. 408, 276 A.2d 595 (1971).

eral liberal ideals of free inquiry but in behalf of the much more limited, albeit absolutely vital, ideal of political self-governance. Let us see, therefore, what is not protected under such an ideal.

We have all witnessed over the past two decades the extension at the national level of First Amendment protection to such activities as commercial speech, at least soft-core sexual explicitness, and the use of “vulgar” or “offensive” language in speech directed at adults. It is not clear to me that these protections need be extended to Schmid’s activities on Princeton’s campus, since none speaks to the central value of republican governance.

Commercial speech, as already suggested, is the easiest example. That the state cannot prohibit a lawyer or druggist from advertising does not entail that she has a right to come onto private property and pass out leaflets indicating the current price of goods and services. Student-consumers may have an interest in learning such information, but the role of consumer does not rise to the same level as that of citizen. A university administration can decide that an academic atmosphere is best maintained by limiting the incursion of commerce.

Cultural expression, including alleged pornography, is a much harder issue. The republican-form-of-government rationale implies the right of a pamphleteer, for example, to enter Notre Dame’s campus and communicate with the registered voters who live there in order to seek signatures for or otherwise endorse a referendum that would, say, decriminalize homosexuality or other behaviors condemned by the Catholic Church. Once an issue enters the political process, I believe, a university cannot prevent communication about it to its students, so long as the methods of communications do not otherwise disrupt university operations. Mere opposition to the ideas cannot count as disruption, since the inhabitants of the campus have a joint identity both as students and as voters. Universities can completely regulate what is communicated to students in classrooms, but they ought not be able to isolate the voters from contact with other citizens of the American community who wish to discuss candidates or issues of direct political import.

Does this mean, however, that a person has a right to enter the campus and pass out leaflets endorsing homosexuality itself or containing vivid narrative descriptions of the pleasures attached to uninhibited sexual expression? Even though such leaflets clearly would be protected by the First Amendment if handed out in traditional “public forums” like streets and parks, I am inclined to think that they need not be protected on private property. Although sexual identity and expression are surely important, they are analytically separable from the

overall process of democratic self-governance. The religious and associational rights of Notre Dame, Brigham Young, or similar institutions are entitled to prevail against the free speech claims of the entrant. Thus I think that a private university could ban the sale on its campus of *Playboy* (let alone *Hustler*), though it is a much closer question if it could prevent the distribution of *Human Events* or the *Monthly Review* (let alone *The Public Interest* or *The Nation*).

Indeed, I also am willing to grant that a Catholic school need show no hospitality to someone like Grace Marsh, a Jehovah’s Witness determined to demonstrate the evil of the Church’s doctrines. A private university organized around a religious creed need feel under no state-imposed duty to engage in self-criticism by welcoming onto its campus those who would attack its central premises. Justice Black never really explained how Marsh’s specific aims were related to the general social good of creating an informed electorate. In terms of modern doctrine, her rights on public property are best explained as flowing from the general duty of content neutrality whereby the state cannot open its own forums to speech in general and then select out religious speech for worse treatment.

There is no good reason to interpret state constitutional guarantees of freedom of speech to require access to private property for those who wish to propagate religious views; it is hard to imagine why a State has any interest at all in maximizing the confrontation by its citizens with the full range of ideas about religion. States do, however, have a very strong, indeed a “compelling” interest, in protecting against the use of private power in ways foreseeably detrimental to effective self-governance, and it is enough for states to protect *that* interest.

Somewhat more difficult are issues presented by the regulation of “vulgar” speech. Must Princeton or Notre Dame allow Schmid to come on campus while wearing a jacket or buttons containing “four-letter words”? There is at least one strain of republican-governance theory, especially that associated with the philosopher Alexander Meiklejohn, that emphasizes the rationalism and decorum of political debate. Under this model, political discussions ought to be conducted with emphasis on the reasoned elaboration of one’s viewpoint, with “emotion” and epithet kept to a minimum. This strain sees little worth in protecting the public use of vulgarity.

I have little hesitation in rejecting legally imposed decorum so far as the “public forum” is concerned; I think that *Cohen* was rightly decided. Universities present more complex problems, however. To the extent that universities stand for the general value of structured discourse, they necessarily oppose the reduction of complex issues to single-

phrase labels. Insofar as one generally permits even the state to engage in time, place, and manner regulation of public speech, perhaps one wants to acknowledge as well a university's entitlement to insist that political argument be conducted in a manner befitting the general commitment of the university to reason.

The very difficulty of these, and other issues, may speak in favor of state-by-state solutions to these conundrums, as opposed to national decision-making by the United States Supreme Court. Obviously I am delighted that the New Jersey Supreme Court ruled

in favor of Schmid in the Princeton case, just as I am pleased by the trend of the decisions discussed in this essay. Nonetheless, there may be some merit in Connecticut's having gone the other way. The premise that States can be laboratories for social experimentation is not merely a cliché. My own hope is that all states will ultimately find it desirable to accept the rights articulated by California, New Jersey, Pennsylvania, and Massachusetts, but the decision-making process can only be aided by the evidence provided by the diversity of experience in the various states.

Discussion Notes

1. Professor Levinson, author of the foregoing excerpt, successfully represented the individual claiming state constitutional free speech rights in *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), appeal dismissed *sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

2. Are you comfortable with Professor Levin-

son's proposed view of protected speech under state constitutions? See Todd F. Simon, "Independent but Inadequate: State Constitutions and Protection of Freedom of Expression," *University of Kansas Law Review* 33 (Winter 1985): 305; John A. Ragosta, "Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection," *Syracuse Law Review* 37 (No. 1 1986): 1.

People v. Zelinski 155 Cal.Rptr. 575, 594 P.2d 1000 (1979)

MANUEL, Justice.

Virginia Zelinski was charged with unlawful possession of a controlled substance, heroin (Health & Saf. Code, sec. 11350). A motion to suppress evidence pursuant to Penal Code section 1538.5 was denied. She entered a plea of guilty and appeals. (Pen. Code, sec. 1538.5, subd. (m).) We reverse.

On March 21, 1976, Bruce Moore, a store detective employed by Zody's Department Store, observed defendant place a blouse into her purse. Moore alerted Ann O'Connor, another Zody detective, and the two thereafter observed defendant select a pair of sandals, which she put on her feet, and a hat, which she put on her head. Defendant also took a straw bag into which she placed her purse. Defendant then selected and paid for a pair of blue shoes and left the store.

Detectives Moore and O'Connor stopped defendant outside the store. Moore placed defendant under arrest for violation of Penal Code section 484 (theft) and asked her to accompany him and detective O'Connor into the store. Defendant was taken by O'Connor to the security office where Pat Forrest, another female store detective, conducted a routine "cursory search in case of weapons" on the person of defendant.

Moore testified that he reentered the security office when the search of defendant's person was completed, opened defendant's purse to retrieve the

blouse taken from Zody's, and removed the blouse and a pill vial that lay on top of the blouse. Moore examined the vial, removed a balloon from the bottle, examined the fine powdery substance contained in the balloon, and set the vial and balloon on the security office desk to await the police who had been called.

Detective O'Connor, who testified to the search of defendant's person by Forrest, was initially confused as to whether the pill vial containing the balloon had been taken from the defendant's purse or from her brassiere. On cross-examination, O'Connor was certain that she saw Forrest taking it from defendant's brassiere. According to O'Connor, the pill bottle was placed on the security office desk where detective Moore shortly thereafter opened it and examined the powdery substance in the balloon. Later the police took custody of the vial and defendant was thereafter charged with unlawful possession of heroin.

Defendant's appeal involves two questions—(1) whether the store detectives Moore, O'Connor and Forrest exceeded the permissible scope of search incident to the arrest, and (2) if they did, whether the evidence thus obtained should be excluded as violative of defendant's rights under federal or state Constitutions. We have concluded that the narcotics evidence was obtained by unlawful search and that the constitutional prohibition against unreasonable search and seizure affords protection against the unlawful intrusive conduct of these private security personnel.

Store detectives and security guards are retained primarily to protect their employer's interest in property. They have no more powers to enforce the law

than other private persons. (See *Private Police in California: A Legislative Proposal* (1975) 5 Golden Gate L.Rev. 115, 129-134; cf. *Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 100-101, fn. 3, 73 Cal. Rptr. 575, 447 P.2d 967.) Like all private persons, security employees can arrest or detain an offender (Pen.Code, sec. 837) and search for weapons (Pen.Code, sec. 846) before taking the offender to a magistrate or delivering him to a peace officer (Pen.Code, secs 847, 849).

* * * * *

The permissible scope of search incident to a citizen's arrest is set out in *People v. Sandoval* (1966) 65 Cal.2d 303, 311, fn. 5, 54 Cal.Rptr. 123, 128, 419 P.2d 187, 192.5: "A citizen effecting such an arrest is authorized only to 'take from the person arrested all offensive weapons which he may have about his person' (Pen.Code, sec. 846), not to conduct a search for contraband 'incidental' to the arrest, or to seize such contraband upon recovering it. [Citation.] We reject the suggestion of *People v. Alvarado* (1962) 208 Cal.App.2d 629, 631, 25 Cal.Rptr. 437, that the search of one private individual or his premises by another is lawful simply because 'incidental' to a lawful citizen's arrest. . . ." The rationale behind the rule is that, absent statutory authorization, private citizens are not and should not be permitted to take property from other private citizens.

The limits of the merchant's authority to search is now expressly stated in Penal Code section 490.5. Paragraph (3) of subdivision (e) provides that "During the period of detention any items which a merchant has reasonable cause to believe are unlawfully taken from his premises *and* which are in plain view may be examined by the merchant for the purposes of ascertaining the ownership thereof." (*Italics added.*) Neither the statute nor the privilege which it codified purport to give to the merchant or his employees the authority to search.

In the present case, instead of holding defendant and her handbag until the arrival of a peace officer who may have been authorized to search, the employees instituted a search to recover goods that were not in plain view. Such intrusion into defendant's person and effects was not authorized as incident to a citizen's arrest pursuant to section 837 of the Penal Code (*Sandoval, supra*, 65 Cal. fn. 5, at p. 311, 54 Cal.Rptr. 123, 419 P.2d 187), or pursuant to the merchant's privilege subsequently codified in subdivision (e) of section 490.5. It was unnecessary to achieve the employees' reasonable concerns of assuring that defendant carried no weapons and of preventing loss of store property. As a matter of law, therefore, the fruits of that search were illegally obtained.

The People contend that the evidence is nevertheless admissible because the search and seizure were made by private persons. They urge the *Burdeau*

v. McDowell (1921) 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 holding that Fourth Amendment proscriptions against unreasonable searches and seizures do not apply to private conduct, is still good law and controlling. . . .

Defendant contends, on the other hand, that only by applying the exclusionary rule to all searches conducted by store detectives and other private security personnel can freedoms embodied in the Fourth Amendment of the federal Constitution and article I, section 13 of the state Constitution be protected from the abuses and dangers inherent in the growth of private security activities.

More than a decade ago we expressed concern that searches by private security forces can involve a "particularly serious threat to privacy" (*Stapleton, supra*, 70 Cal.2d at pp. 100-101, fn. 3, 73 Cal.Rptr. at pp. 577 n. 3, 447 P.2d at pp. 969 n. 3); in *Stapleton* and later in *Dyas v. Superior Court* (1974) 11 Cal.3d 628, 633, 114 Cal.Rptr. 114, 522 P.2d 674, we left open the question whether searches by such private individuals should be held subject to the constitutional proscriptions. We now address the problem.

Article I, section 13 of the California Constitution provides in part that: "That right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated. . . ." Although the constitutional provision contains no language indicating that the "security" protected by the provision is limited to security from governmental searches or seizures, California cases have generally interpreted this provision as primarily intended as a protection of the people against such governmentally initiated or governmentally directed intrusions. The exclusionary rule, fashioned to implement the rights secured by the constitutional provision, has therefore been applied to exclude evidence illegally obtained by private citizens only where it served the purpose of the exclusionary rule in restraining abuses by the police of their statutory powers. . . .

We have recognized that private security personnel, like police, have the authority to detain suspects, conduct investigations, and make arrests. They are not police, however, and we have refused to accord them the special privileges and protections enjoyed by official police officers. (See *People v. Corey* (1978) 21 Cal.3d 738, 147 Cal. Rptr. 639, 581 P.2d 644.) We have excluded the fruits of their illegal investigations only when they were acting in concert with the police or when the police were standing silently by. (*Stapleton, supra*, 70 Cal.2d at p. 103, 73 Cal.Rptr. 575, 447 P.2d 967.) We are mindful, however, of the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby. Since *Stapleton* was decided, the private se-

curity industry has grown tremendously, and, from all indications, the number of private security personnel continues to increase today. A recent report prepared by the Private Security Advisory Council to the United States Department of Justice describes this phenomenon in the following terms: "A vast army of workers are employed in local, state and federal government to prevent crime and to deal with criminal activity. Generally thought of as the country's major crime prevention force are the more than 40,000 public law enforcement agencies with their 475,000 employees. While they constitute the . . . most visible component of the criminal justice system, another group has been fast rising in both numbers and responsibility in the area of crime prevention. With a rate of increase exceeding even that of the public police, the private security sector has become the largest single group in the country engaged in the prevention of crime." (Private Security Adv. Coun. to U.S. Dept. of Justice, LEAA, Report on the Regulation of Private Security Services (1976) p. 1.)

Realistically, therefore, we recognize that in our state today illegal conduct of privately employed security personnel poses a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers. (See generally, *Private Police in California—A Legislative*

Proposal, supra, 5 Golden Gate L.Rev. 115; Bas-siouni, *Citizen's Arrest: The Law of Arrest, Search and Seizure for Private Citizens and Private Police* (1977), p. 72.) Moreover, the application of the exclusionary rule can be expected to have a deterrent effect on such unlawful search and seizure practices since private security personnel, unlike ordinary private citizens, may regularly perform such quasi-law enforcement activities in the course of their employment. (See *Seizures by Private Parties: Exclusion in Criminal Cases* (1967) 19 Stan.L.Rev. 608, 614-615.)

In the instant case, however, we need not, and do not, decide whether the constitutional constraints of article I, section 13, apply to all of the varied activities of private security personnel, for here the store security forces did not act in a purely private capacity but rather were fulfilling a public function in bringing violators of the law to public justice. For reasons hereinafter expressed, we conclude, that under such circumstances, i.e., when private security personnel conduct an illegal search or seizure while engaged in a statutorily-authorized citizen's arrest and detention of a person in aid of law enforcement authorities, the constitutional proscriptions of article 1, section 13 are applicable.

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Discussion Notes

1. See John M. Burkoff, "Not So Private Searches and the Constitution," *Cornell Law Review* 66 (April 1981): 627; *State v. Nelson*, 354 So.2d 540 (La. 1978); *State v. Helfrich*, 600 P.2d 816 (Mont. 1979).

2. In what other contexts could the state action requirement be reduced or eliminated?

3. Article I, paragraph 19 of the New Jersey Constitution provides "Persons in private employment shall have the right to organize and bargain collectively . . ."

4. See generally Note "Free Speech, The Private Employee, and State Constitutions," *Yale Law Journal* 91 (January 1982): 522. For cases treating the problem of state action in the private employment context, see *Schreiner v. McKenzie Tank Lines, Inc.*, 432 So.2d 367 (Fla. 1983); *Gay Law Students Assoc. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 468-70, 595 P.2d 592, 598-602 (1979); *Peper v. Princeton University*, 77 N.J. 55, 389 A.2d 465 (1978).

H. Substantive Due Process and State Constitutions

A.E. Dick Howard, “State Courts and Constitutional Rights in the Day of the Burger Court”

Virginia Law Review 62 (June 1976): 879-83.

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I. Economic Regulation

Attempts to resort to the federal courts for the protection of economic enterprise from government regulation began shortly after the adoption of the Fourteenth Amendment. They came at a time when many states, such as those that passed the Granger Laws,²³ were beginning to be more active regulators of business. At first it appeared that the Fourteenth Amendment's due process clause would be confined to questions of procedure, but pressures to make substantive decisions soon arose. In 1877 Justice Miller complained that the Supreme Court's docket was “crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law.” He thought this “abundant evidence” of a “strange misconception” about the Fourteenth Amendment.²⁴ And a few years later the Court commented that the Court was “not a harbor

where refuge can be found from every act of ill-advised and oppressive State legislation.”²⁵

Yesterday's strange misconceptions have a way of becoming tomorrow's law. It was not many years before the Court was to become just the sort of refuge it said it would not be. In 1897 the Court for the first time struck down a state law on substantive due process grounds, speaking through Justice Peckham of Fourteenth Amendment “liberty” as including the right to live and work where one chooses, earn a livelihood “by any lawful calling,” pursue “any livelihood or avocation,” and enter into contracts for those purposes.²⁶ In 1905 the Court used the due process clause to strike down a New York statute limiting employment in bakeries to ten hours a day, stating that statutes limiting the hours in which “grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual. . . .”²⁷ For the next thirty years the Court used the due process clause to invalidate minimum wage laws, statutory standardization of bread loaf weight, and other state social and economic legislation.²⁸

The so-called “Constitutional Revolution” of the 1930's, occasioned in part because of the pressing need to use state police power to deal with the crisis of a severe depression, brought a new order supportive of economic regulation. Since then, the Supreme Court has overruled many of the old substantive due process decisions, taking the view that as far as eco-

²⁵Missouri Pac. Ry. v. Humes, 115 U.S. 512, 521 (1885).

²⁶Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

²⁷Lochner v. New York, 198 U.S. 45, 61 (1905).

²⁸See, e.g., Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (prohibiting use of shoddy [sic] in manufacture of bedding); Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (weight of loaves of bread); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (minimum wages for women); Coppage v. Kansas, 236 U.S. 1 (1915) (outlawing “yellow dog” contracts in labor relations).

²³These were laws passed by certain midwestern states in the early 1870's attempting through rate reform to regain control over the railroads operating in those states. They provoked a major constitutional crisis over state interference with private enterprise. See G. MILLER, RAILROADS AND THE GRANGER LAWS (1971).

²⁴Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

conomic questions are concerned, it will “not sit as a super-legislature” to weigh the wisdom of state legislation.³⁰ The point is made most directly in *Ferguson v. Skrupa*,³¹ where Justice Black—long one of the most bitter foes of the old uses of substantive due process—declared: “Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.”³²

In this area the Burger Court has adhered to the “hands-off” doctrine that its predecessors have followed since 1937. . . .

Long before the adoption of the Fourteenth Amendment, state courts had begun to develop a body of substantive due process law, drawing on state constitutional due process or “law of the land” provisions.⁴¹ And notwithstanding the Supreme court’s post-1937 “hands-off” posture in the economic sphere, studies of state court decisions have made it clear that substantive due process has lived on in the states. Two such studies were written in the 1950’s. One concluded that “it is not surprising that just as the doctrine of substantive due process was finding expression in the states *before* 1890, so also the principle should continue to enjoy a vigorous life in some states *after* it has fallen into disuse on the national level.”⁴² The other study expressly approved of this activity by state courts. Noting that pressure groups are often able to secure legislation distinctly not in the public interest, the commentator thought the problem of abuse of the police power “real and important” and argued for state courts using state constitutions “to strike a balance between the economic freedom of the individual and the power of government.”⁴³

Old habits die hard, and it is not surprising that state court judges in the 1950’s were still thinking in substantive due process terms. That generation of judges had completed their legal education well before even the Supreme Court had begun to reject the premises of the cases decided early in the twentieth century. One might expect, however, that by the 1970’s, with the Supreme Court’s renunciation of

substantive due process in economic cases so clear and so widely known, state court would have fallen in line, and limited their own review of legislative judgments touching social and economic questions.

A look at state court decisions of the 1960’s and 1970’s shows that this has not happened. Substantive due process continues to live in at least some state courts. The picture, one hastens to say, is quite mixed. Many courts defer to legislative judgments in terms similar to those used by the United States Supreme Court. For example, the Supreme Court of Ohio has stated that it is “not concerned with the wisdom” of legislation,⁴⁴ and the Supreme Judicial Court of Massachusetts has determined that all it requires is that there be “any rational basis of facts that reasonably can be conceived” to sustain the legislation.⁴⁵

A number of state courts, however, prefer a more searching inquiry into the justification for state regulation of economic activity. Cases reviewing challenges to fair trade laws, regulation of prices, and business and professional licensing schemes and other barriers to entry into a business or profession are illustrative.

Fair trade law cases are especially interesting because they reveal an instance in which, precisely at the same time the federal trend has been towards the “hands-off” view, state courts have been increasingly willing to strike down such laws.⁴⁶ As of 1956, seventeen states had upheld these statutes as valid under their state constitutions; only four states had declared them unconstitutional.⁴⁷ Today, the tide has turned markedly in the other direction; far more states have struck down fair trade laws than have upheld them.⁴⁸ The state courts overturning these laws have used various grounds, including invalid delegation of legislative power, violation of due process of law, limits of the police power, and state constitutional provisions against price fixing or monopolies.

³⁰*Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

³¹372 U.S. 726 (1963).

³²*Id.* at 732.

⁴¹See generally A. Howard, *The Road From Runnymede* (1968); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv.L. Rev. 366, 460 (1911).

⁴²Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L.REV. 91, 93 (1950) (emphasis in original).

⁴³Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L.Rev. 226, 248-51 (1958). See also Note, *Counterrevolution is State Constitutional Law*, 15 Stan.L.Rev. 309 (1963).

⁴⁴*Olin Mathieson Chem. Corp. v. Ontario Store of Price Hill, Inc.*, 9 Ohio St. 2d 67 70, 223 N.E.2d 592, 594 (1967).

⁴⁵*Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass. 409, 416, 294 N.E.2d 354, 358 (1973).

⁴⁶Congress has recently repealed its statutory authorization for fair trade laws. Act. of Dec. 12, 1975. Publ. L. No. 94-145, 89 Stat. 801, amending 15 U.S.C. sec. 1, 45 (1970), as amended (Supp. IV, 1974). Fair trade statutes authorize resale price maintenance by contracts enforceable against nonsigners having knowledge of such contracts.

⁴⁷See *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass. 409; 413-14, 294 N.E.2d 354, 357 (1973).

⁴⁸See 2 CCH Trade Reg. Rep. para. 6.041 (Mar. 15, 1976).

Discussion Notes

1. For an excellent review of the demise of federal substantive due process, see Robert G. McCloskey, "Economic Due Process and The Supreme Court: An Exhumation and Reburial," *Supreme Court Review* 1962: 34 (1962).

2. See James C Kirby, Jr., "Expansive Judicial

Review of Economic Regulation Under State Constitutions," in *Developments in State Constitutional Law*, ed. Bradley D. McGraw (St. Paul: West Publishing Co., 1985), pp. 94-145; Peter J. Galie, "State Courts and Economic Rights," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 76.

**Bulova Watch Co. v.
Brand Distributors of North Wilkesboro,
Inc. 206 S.E.2d 141 (N.C. 1974)**

The plaintiff is a well known manufacturer of watches and other products which it sells throughout the nation to retail jewelry stores for resale. Within this State, it sells its watches to retailers with whom it enters into a "Fair Trade Agreement." By such agreement the retailer agrees not to sell or offer for sale any watch or other article, bearing the plaintiff's brand or trade name, at a price different from that shown on a retail price list compiled and furnished by the plaintiff, who reserves the right to change the listed prices from time to time. The agreement further provides that the plaintiff agrees to employ all reasonable and lawful means, including legal action, to obtain and enforce general observance of such prices by retailers.

The corporate defendants operate retail establishments selling watches, jewelry and like products in North Wilkesboro, the individual defendant being the president and principal stockholder of each such corporation. None of the defendants has made any contract with the plaintiff, or with any other person, restricting such defendant's right to sell any watch or other product manufactured by or bearing the brand, name or trade mark of the plaintiff, or restricting such defendant's right to fix, as it may see fit, the price for which it will sell such article:

* * * * *

Watches and other products manufactured by the plaintiff are sold in North Carolina in fair and open competition with like products of other manufacturers. The plaintiff has repeatedly taken legal action and, by other lawful means, has consistently endeavored to prevent sales of its products at retail in North Carolina for prices less than those established by its price lists issued pursuant to its "Fair Trade Agreements."

* * * * *

In each of the lower courts they [defendants] contended that the Act is a violation of the Law of the Land Clause, Article 1, sec. 19, of the Constitution of North Carolina in that: (1) It arbitrarily limits the property rights of a retailer in a product which he has purchased and his liberty to dispose of the article as he sees fit; (2) it has no relation to the health, safety or welfare of the citizens of North Carolina, but is an unwarranted and unconstitutional use of the police power of the State to enforce an artificial price fixed by the plaintiff; and (3) it is an unconstitutional delegation to private persons, firms and corporations of the power to fix prices without any standard of administration or control by any governmental agency.

* * * * *

LAKE, Justice.

The pertinent portions of the North Carolina Fair Trade Act, enacted in 1937, are as follows:

* * * * *

"GS 66-56. *Violation of contract declared unfair competition.*—Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby."
(Emphasis added.)

In *Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528, 125 A.L.R. 1308 (1939), this Court held the Fair Trade Act constitutional, Justice Barnhill, later Chief Justice dissenting. The judgments of the Court of Appeals and of the Superior Court in the present case are in accord with that decision. The defendants ask us to reconsider that decision and to determine anew the constitutionality of the Fair Trade Act, specifically the nonsigner provision contained in G.S. sec. 66-56, substantially for the reasons set forth in

the dissenting opinion of Justice Barnhill. We allowed certiorari for that purpose.

The articles, bearing the plaintiff's trade name, sold and proposed to be sold by the defendants were and are lawfully acquired and owned by such defendant, having been purchased by such defendant "at bankruptcy sales and from various parties other than the plaintiff." Nothing in the record suggests that any defendant acquired any such article through the breach by its supplier of any contract between such supplier and the plaintiff. The prices charged for such products by each such defendant have been satisfactory to it and to its respective customers. Nothing in the record indicates that such selling defendant has failed to make a profit, deemed reasonable by it, upon any such sale, or proposes to do so.

The defendants assert that the provision of G.S. sec. 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, is invalid because it is an unlawful delegation of legislative power to a private corporation and also because it deprives the defendants of their liberty and property otherwise than by the law of the land, in violation of Article I, sec. 19, of the Constitution of North Carolina.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, the Supreme Court of the United States had before it the Illinois Fair Trade Act, which, in all respects material hereto, is identical with the North Carolina Act. The Court, in an opinion by Mr. Justice Sutherland, held that the provision of the Act, extending the force of the "fair trade" contract to a non-signer thereof, was not "so arbitrary, unfair or wanting in reason as to result in a denial of due process," and that there was "nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others."

The decisions of the Supreme Court of the United States as to the construction and effect of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States are, of course, binding upon this Court. It is also true that the expression "The Law of the Land," used in Article I, sec. 19, of the Constitution of North Carolina, is synonymous with "Due Process of Law." *Rice v. Rigsby and Davis v. Rigsby*, 259 N.C. 506, 518, 131 S.E.2d 469. However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court. *State v. Barnes*, 264 N.C. 517, 520, 142 S.E.2d 344. See also, *Corning Glass Works v. Ann & Hope, Inc.*, of Danvers, Mass., 294 N.E.2d 354.

Consequently, neither *Lilly & Co. v. Saunders*, supra, nor *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, supra, prevents us from a redetermination of the validity of the provision of G.S. sec. 66-56, insofar as it purports to extend to one not a party thereto the effect of a fair trade contract made by the plaintiff with another retailer.

* * * * *

G.S. sec. 66-56, in its application to non-signers of fair trade contracts is also invalid for the reason that it violates Article I, sec. 19, of the Constitution of North Carolina. The term "liberty," as used in this provision of the Constitution, is an extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States.

In *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, the Supreme Court of the United States, speaking through Mr. Justice Peckham, said:

The "liberty" mentioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Obviously, this liberty of contract is not absolute. Like the other aspects of liberty, it may be reasonably restricted by legislation, otherwise valid, for the protection of the public health, safety, morals or welfare, including economic welfare. As was observed in *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, there is nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells," and when the economic welfare of the public so requires, it is within the power of the state to fix a minimum as well as a maximum price for the sale of a commodity, even though the seller is not a public utility. It is also true that, within constitutional limits, it is the function of the Legislature, not of the courts, to determine the economic policy of the State and this Court may not properly declare a statute invalid merely because the Court deems it economically unwise. *Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E.2d 745. It is, however, the duty of this Court to declare invalid a statute which forbids one who has lawfully acquired an article of commerce to sell it at a

price satisfactory to himself, unless there is some reasonable basis for the belief that the benefit to the

public therefrom outweighs the infringement upon the owner's liberty of contract.

Discussion Notes

1. See also *Pennsylvania State Bd. of Pharmacy v. Pastor*, 441 Pa. 186, 272 A. 2d 487 (1971).

2. See Note, "Counterrevolution in State Constitutional Law," *Stanford Law Review* 15 (March 1963): 314:

This judicial revolution has created a real dilemma for the state courts. These courts cannot refuse to enforce state trade regulation which has been enacted for the benefit of particular pressure groups without violating the tenets of a philosophy which bears the endorsement of Holmes, Thayer, Corwin, Hand, and Frankfurter, which has been accepted by the United States Supreme Court, and which is probably regarded as sacred by most of the academic commentators. Yet if the courts enforce such legislation, they will produce results which are pernicious not only for the businessmen whose rights

are restricted but also for the public as a whole.

3. "Developments in the Law—The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (April 1982): 1498-99:

Both courts and commentators have largely ignored the possibility that judicial review might play a radically different role—that of safeguarding the interests of *majorities*. State constitutional law could be dramatically divorced from its federal counterpart if state courts were to reconceive their purpose in terms of elaborating and employing a theory of majoritarian, rather than anti-majoritarian, review. In fact, there is reason to believe that state courts already have undertaken something very much like this change of direction in one area: the review of economic regulation.

Read the next case with this in mind.

Department of Insurance v. Dade County Consumer Advocate's Office
492 So. 2d 1032 (Fla. 1986)

OVERTON, Justice.

This appeal . . . concerns the validity of sections 626.611(11) and 626.9541(1)(h)1, Florida Statutes (1983), which prohibit insurance agents from accepting from their customers a commission lower than the commission set by the insurer. The First District Court of Appeal declared these "anti-rebate statutes" unconstitutional, finding that they are an invalid exercise of the state's police power. We have jurisdiction. Art. V, sec. 3(b)(1), Fla. Const. We find these statutes unnecessarily limit the bargaining power of the consuming public and, in accordance with prior consumer decisions of this Court, we affirm the decision of the district court and hold that these statutes are unconstitutional to the extent they prohibit rebates of insurance agents' commissions.

* * * * *

We are concerned with the narrow issue of whether a statute that prohibits an insurance agent from reducing the amount of the commission he or

she will earn from selling the insurance is valid. Historically, this Court has carefully reviewed laws that curtail the economic bargaining power of the public. In fact, this Court was one of the first to hold unconstitutional a "fair trade act" that allowed a manufacturer to establish a minimum retail price for which the retailer could sell a product to the consumer. See *Liquor Store v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949). We found that such legislation is not within the scope of the state's police power and noted that "[c]onstitutional law never sanctions the granting of sovereign power to one group of citizens to be exercised against another unless the *general welfare* is served." *Id.* at 374 (emphasis in original). We concluded that the act was arbitrary, unreasonable, and violated the right to own and enjoy property. In *Larson v. Lesser*, 106 So.2d 188 (Fla. 1958), we struck down as unconstitutional a statute that prohibited a public adjuster who represents insureds from soliciting business on the ground that the restraint imposed was not rationally related to the public's welfare. In *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962), this Court held invalid a pharmacy board rule that prohibited the advertisement of the name or price of prescription drugs on the basis that it was an attempt to prohibit price competition which had no reasonable relation to public safety, health, morals or general welfare. In *Florida Board of Pharmacy v. Webb's City, Inc.*, 219 So.2d 681 (Fla. 1969), we held invalid a

statute which prohibited retail drug establishments from using the media to promote the use or sale of prescription drugs.

* * * * *

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. . . . We find the district court properly found no relationship between the enactments and any legitimate state interest and, therefore, it was not called upon to determine the degree to which the anti-rebate statutes advance a state interest.

From our review of the record, we find no identifiable relationship between the anti-rebate statutes and a legitimate state purpose in safeguarding the public health, safety or general welfare. Insurance agents' commissions do not affect the net insurance premium and are unrelated to the actuarial soundness of insurance policies. The other arguments presented by the Department of Insurance in support of the statutes' constitutionality have been properly responded to by the district court in its opinion. Many of these arguments have been previously unsuccessfully made to uphold statutes or regulations limiting consumers' bargaining power for other services.

* * * * *

BOYD, Chief Justice, dissenting.

Although not explicitly stated, implicit 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 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.

* * * * *

There is no allegation that the legislation under attack violates any constitutional rights or penalizes or infringes upon any constitutionally protected liberty. Nor does it establish any suspect classification. It is a regulation of economic activities and relationships. The challenge is purely of the so-called "substantive due process" variety. When faced with such a

challenge, the power of a court to inquire into the validity of a law is severely limited, and rightly so. In order to declare the law invalid, a court must find that the law is simply and absolutely arbitrary, resting on no conceivable rational relation to the public welfare as determined by the legislature. In evaluating legislation under this "reasonable relation" test,

we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even whether the means chosen will in fact accomplish the intended goals; our only concern is with the constitutionality of the means chosen.

. . . .

. . . [Courts should presume] the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary.

Lasky v. State Farm Insurance Co., 296 So.2d 9, 15-16, 17 (Fla.1974).

* * * * *

Nothing in the majority opinion or the respondents' brief provides any authority for the proposition that the constitutional standard for validity of legislation under the due process clause of article I, section 9, Florida Constitution, is any different from that embodied in the due process clause of the United States Constitution and made binding on the states by the fourteenth amendment. If the Florida Constitution gives the Florida courts the power to invalidate legislation on the ground of lack of political, economic, or social wisdom, this Court should explicitly so hold.

* * * * *

The plenary power to adopt regulatory policy in the interest of the public welfare lies with the legislature. The legislature, in other words, makes law. Courts, in performing their function of adjudicating cases and controversies within their jurisdictions, interpret and apply the law when there is a dispute or conflict regarding how it applies. In the course of performing this function and exercising the authority to apply law and decide cases, courts may ignore or decline to apply laws that violate constitutional rights when challenged by a person suffering an injury from such violation. But courts cannot make law on matters upon which the legislature has spoken when no constitutional violation appears.

The legislature is composed of elected representatives of the people. When standing for election to the legislature, candidates may and should express their views on policy questions. Thus after being

elected, such representatives express the desires of their constituents when they propose and vote upon legislation. Judges, on the other hand, are chosen for office, whether by election or appointment, and retained in office, primarily on the strength of their legal skill, their personal integrity, their promise and undertaking to apply the law fairly and impartially, or some combination of these and similar factors as perceived by the electors or the appointing authority. Judges normally do not campaign for election or apply for appointment on the basis of their personal views on policy questions and such personal views should have no bearing on their performance of their judicial duties. If a regulation adopted by the legislature does not serve the public interest, or achieves a purpose not desired [sic] by the public, the forum in which persons desiring to change the law should seek relief is the legislature. Policy questions are essentially political questions and must be left, under our constitutional form of government, to the elected

lawmakers. The notion that acts of the legislature are not full-fledged laws until they receive an official judicial imprimatur is completely erroneous.

In the district court of appeal below, the Department of Insurance correctly cited to the many court decisions from all around the country holding that courts must defer to the legislative judgment in matters of regulation of the insurance industry. The district court in its opinion responded: "The precedential value and persuasiveness of these cases are severely limited by the impact of the revolution in consumer's rights which has occurred since the turn of the century." 457 So.2d at 498 (footnote omitted). The great glory of our constitutional system of democratic government is that "revolutions" in social, political, economic, and legal thought can be translated into public policy quite readily through the ballot box. They should not be imposed from above by appointed judges in contravention of the public will.

Discussion Notes

1. Is Chief Justice Boyd correct when he says there is no reason for state due process analysis to be different from federal due process analysis?

2. Could the federalism arguments we saw earlier, pp. 79–80, have any relevance here?

3. Is the fact that the United States Supreme Court takes a "hands-off" attitude to these questions relevant when they come before state courts?

4. See also *Waller v. State Construction Licensing Bd.*, 250 Ga. 529, 299 S.E.2d 554 (1983).

I. "Overruling" State Constitutional Decisions by State Constitutional Amendment

In 1979 the voters in California approved an initiative to amend the California constitutional provision on due process and equal protection to read as follows:

**California Constitution, Art. I, sec. 7.
Due process and equal protection;
pupil school assignment or
transportation privileges and immunities**

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provision regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the education process, preserving harmony and tranquillity in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

Discussion Notes

1. What is the purpose of an amendment such as this? See Comment, "Proposition 1 and Federal Protection of State Constitutional Rights," *Northwestern University Law Review*, 75 (November 1980): 685.

2. What is the effect of an amendment such as this?

3. The amendment was upheld against a federal constitutional challenge in *Crawford v. Bd. of Ed. of Los Angeles*, 458 U.S. 527 (1982).

4. Compare *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975) with Pa.Const. Art. I, section 9, as amended.

**Florida v. Casal
462 U.S. 636 (1983)**

PER CURIAM.

The writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds.

Chief Justice BURGER, concurring:

The Court today concludes that the Florida Supreme Court relied on independent and adequate state grounds when it affirmed the suppression over 100 pounds of marijuana discovered aboard a fishing vessel—the evidence upon which respondents' convictions for possession and importation of marijuana were based. The Florida Supreme Court did not expressly declare that its holding rested on state grounds, and the principal state case cited for the probable cause standard, *Florida v. Smith*, 233 So.2d. 396 (Fla.1970), is based entirely upon this Court's interpretation of the Fourth Amendment of the Federal Constitution. I write not to challenge today's determination that the State Court relied on independent and adequate state grounds, however, but rather to emphasize that this Court has decided that Florida law, and not federal law or any decision of this Court, is responsible for the untoward result in this case.

The two bases of state law upon which the Florida Supreme Court appears to have relied are Art. 1, sec. 12 of the State Constitution and Florida Statute sec. 371.58 (1977), *currently codified* at Florida Statute sec. 327.56 (1983 Supp.). Article 1, sec. 12 of the Florida Constitution is similar to the Fourth Amendment of the Federal Constitution. I question that anything in the language of either the Fourth Amendment of the United States Constitution or Art. 1, sec. 12 of the Florida Constitution required

suppression of the drugs as evidence. However, the Florida Supreme Court apparently concluded that state law required suppression of the evidence, independent of the Fourth Amendment of the United States Constitution.

The people of Florida have since shown acute awareness of the means to prevent such inconsistent interpretations of the two constitutional provisions. In the general election of November 2, 1982, the people of Florida amended Art. 1, sec. 12 of the State Constitution. That section now provides:

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.

As amended, that section ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States.

* * * * *

With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement. The people of Florida have now done so with respect to Art. 1, sec. 12 of the State Constitution. . . .

Discussion Notes

1. Reread Paul Bator's criticism of Justices of the United States Supreme Court using their dissents to "campaign to enact into unreviewable state constitutional law" their views, on page 77. Would Bator criticize Chief Justice Burger's opinion?

2. With respect to the Florida amendment, at what point in time are "decisions of the United States Supreme court construing the 4th Amendment" considered binding on the state courts? Are decisions after adoption of the amendment binding? See *Bernie v. State*, 524 So.2d 988 (Fla.1988).

3. For literature on this phenomenon, see Ronald K.L. Collins, "Foreword: Reliance on State Constitutions—Beyond the 'New Federalism'," *University of Puget Sound Law Review* 8 (Winter 1985): x-xi; James M. Fischer, "Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence," *Hastings Constitutional Law Quarterly* 11 (Fall 1983): 43; Donald E. Wilkes, Jr., "First Things Last: Amendomania and State Bills of Rights," *Mississippi Law Journal* 54 (June 1984): 223; Janice C. May, "Constitutional Amendment and Revision Revisited" *Publius: The Journal of Federalism* 17 (Winter 1987): 169-79.

**Commonwealth v. Colon-Cruz
393 Mass. 150, 470 N.E.2d 116 (1984)**

LIACOS, Justice.

In *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (1980), this court declared unconstitutional the capital punishment statute, c. 488 of the Acts of 1979. The court held that the penalty of death was impermissibly cruel under art. 26 of the Declaration of Rights of the Massachusetts Constitution. That article then provided, in its entirety: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

On November 2, 1982, the voters approved a constitutional amendment which added a second and third sentence to art. 26: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death." Art. 116 of the Amendments to the Massachusetts Constitution. This amendment had been adopted by joint sessions of the General Court in the years 1980 and 1982.

On December 15, 1982, both houses of the General Court enacted c. 554 of the Acts of 1982, providing for capital punishment in certain cases of murder in the first degree. The act was approved by the Governor on December 22, 1982, and took effect on January 1, 1983, to apply to offenses committed on or after the effective date. St.1982, c. 554, sec. 8. . . . We conclude that art. 26 now prevents this court from construing any provision of the Massachusetts Con-

stitution, including art. 26 itself, as forbidding the imposition of the punishment of death. We do not, however, see anything in the new language of art. 26 which prevents us from invalidating a particular death penalty statute under the Massachusetts Constitution on a ground other than that the imposition of the punishment of death is forbidden.

* * * * *

We do not consider that our invalidation of this statute is equivalent to prohibiting the imposition of the punishment of death. When, in *Commonwealth v. Gagnon* . . . we held that G.L. c. 94C, sec. 32 (a), was unconstitutionally vague and therefore was void, the Commonwealth lost the authority to execute the ten-year prison sentences which had been imposed on the defendants under that section. That result did not mean that we were construing either the United States Constitution or our own as prohibiting the imposition of ten-year sentences of imprisonment. Ten-year prison sentences are in themselves constitutional; the particular statutes which provide for them may be unconstitutional for a variety of reasons.¹¹

* * * * *

¹¹One of those reasons might be that, in particular circumstances, a ten-year prison term is a cruel or unusual punishment. Likewise, we consider that the art. 26 ban against cruel or unusual punishment still may apply to a statute authorizing the death penalty. Instead of operating to prohibit the imposition of the death penalty, however, art. 26 now operates to regulate it. For instance, hypothetical statutes such as those described in note 14 *infra* still may be ruled unconstitutional under art. 26. Furthermore, a statute may be ruled unconstitutional under art. 26 although it might not be construed as unconstitutional under the Eighth Amendment to the United States Constitution. If the proponents of art. 116 had wished to tie the standard of review under art. 26 to that under the Eighth Amendment, they could have done so. See Fla. Const. art. 1, sec. 12 (as amended Nov. 2, 1982).

The first joint session of the General Court to adopt art. 116 did so on September 19, 1980, while Watson was pending before this court. The amendment was adopted in joint session by the next General Court on June 21, 1982. The sparse history of this amendment in the General Court sheds little light on the purpose for which it was adopted by either joint session. Nothing in that legislative history, however, indicates any notion that the amendment would shield all death penalty legislation from review under the Massachusetts Constitution. Nothing in the legislative history contradicts the natural inference that art. 116 was principally designed to overrule this court's interpretation of art. 26 as forbidding the death penalty and to forestall the possibility that any other provision of the Constitution would be interpreted thus. . . .

That inference is sustained by the summary of the proposed amendment which was circulated to the voters and was printed on the ballot in the manner required by the Massachusetts Constitution, art. 48, General Provisions III and IV of the Amendments, as amended by art. 74, sec. 4, and art. 108. That summary read: "The proposed constitutional amendment would allow the legislature to enact laws authorizing the state courts to impose the death penalty on the conviction of crimes to be specified by law. The proposed amendment would provide that no provision of

the state constitution may in the future be construed as prohibiting the imposition of the punishment of death. A YES vote would change the state constitution to allow the State Legislature to authorize the death penalty for crimes. A NO vote would not change the present prohibition against the death penalty." Nothing in the arguments for and against the amendment circulated to the voters concerned the total insulation of death penalty legislation from constitutional review.¹³

The words of an amendment "are to be construed in such way as to carry into effect what seems to be the reasonable purpose of the people in adopting them." *Raymer v. Tax Comm'r*, 239 Mass. 410, 412, 132 N.E. 190 (1921). The construction of art. 116 which the Commonwealth urges us to adopt would mean that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution. In the absence of any indication to the contrary in the language and history of the amendment, we cannot accept the Commonwealth's radical construction of art. 116 as carrying into effect the reasonable purpose of the people.¹⁴ See *People v. Superior Court of Santa Clara County*, 31 Cal.3d 797, 806-809, 183 Cal.Rptr. 800, 647 P.2d 76 (1982).¹⁵

¹³These arguments were circulated to the voters in accordance with art. 48, General Provisions, IV. So also was the minority report of the joint Committee on Criminal Justice, which began, "Today the Joint Committee on Criminal Justice recommends that, after 35 years, we reinstate the death penalty and that in order to do so we repeal the prohibition of it embodied in Article 26 of the Declaration of Rights."

¹⁴The Commonwealth's construction of art. 116 also would mean that a statute authorizing the imposition of the death penalty for shoplifting or prescribing the use of torture to carry out a death sentence would be valid under the Massachusetts Constitution. Nothing in the language or history of art. 116 persuades us that the people intended it to have this consequence either. See note 11 *supra*.

¹⁵In *People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, cert. denied, 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed.2d 344 (1972), the California Supreme Court held that death was an impermissibly cruel punishment under former art. 1, sec. 6, of the California Constitution, proscribing cruel or unusual punishment. In November, 1972, art. 1, sec. 27, of the California Constitution was enacted by initiative. It provides: "All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

In *People v. Superior Court of Santa Clara County*, *supra*, a majority of the California Supreme Court ruled unconstitutionally vague subdivision (a)(14) of Penal Code sec. 190.2. That subdivision set forth as a "special circumstance[]" that "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." The penalty mandated under that section for a defendant found guilty of murder in the first degree in any case where that or any other special circumstance was charged and specially found to be true was death or confinement in State prison for a term of life, without possibility of parole.

The court rested its decision on art. 1 secs 7(a) and 15, of the Constitution of the State of California, as well as on the due process clause of the Fourteenth Amendment to the United States Constitution. It rejected the State's argument that art. 1, sec. 27, of the California Constitution insulated from State constitutional review all statutes, substantive and procedural, relating to the death penalty and thus precluded the court from reviewing the subdivision at issue under the California Constitution. See *People v. Superior Court of Santa Clara County*, *supra*, 31 Cal.3d at 807-809, 183 Cal.Rptr. 800, 647 P.2d 76. The court stated that "[n]owhere in the section or the legislative history is there any indication that the drafters or proponents intended to affect the continuing applicability of the state Constitution in death penalty trials insofar as the defect in the statute in question does not relate to the death penalty per se." *Id.* at 808, 193 Cal.Rptr. 800, 647 P.2d 76. It also based its conclusion as to the intention behind sec. 27 on the absurd results which would be produced by the logical extension of the State's interpretation of the section. For example, the vagrancy law's

The unconstitutionality of the questioned provisions. The death penalty provisions enacted in St.1982, c. 554, violate art. 12 of the Declaration of Rights of the Massachusetts Constitution. They impermissibly burden both the right against self-incrimination and the right to a jury trial guaranteed by that article. We base this conclusion on the fact that according to the terms of St.1982, c. 554, the death penalty may be imposed, if at all, only after a trial by jury. Those who plead guilty in cases in which death would be a possible sentence after trial thereby avoid the risk of being put to death. The inevitable consequence is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury. . . .

HENNESSEY, Chief Justice (concurring).

I concur in the opinion of the court. Under the recent amendment to art. 26, the death penalty itself is not *forbidden* by any provision of the State Constitution. However, the amendment does not preclude consideration of the constitutionality of the statutory *implementation* of the death penalty. Under c. 554, a defendant who pleads guilty to murder in the first degree cannot be sentenced to death. Consequently, it is clear that any defendant who does not plead guilty, is found guilty after a trial, and is subsequently sen-

tenced to death, has been, under art. 12 of the Declaration of Rights, unconstitutionally penalized for exercising his right to try his case rather than to plead guilty. This conclusion is unavoidable unless one distorts and “rewrites” in an impermissible manner the clear language of the legislation.

I add that I should prefer that the court rests its conclusion of unconstitutionality upon the United States Constitution. If the court had done so, it would be unnecessary at this time to reach the issue of the scope and meaning of art. 116 of the amendments to the State Constitution. In *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968), the Supreme Court stated: “Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.” In a number of cases the Supreme Court has relied on the *Jackson* principle in vacating death sentences. . . . Chapter 554 suffers from the same defect found in *Jackson* and is clearly unconstitutional under the Fifth and Sixth Amendments to the Constitution of the United States.

¹⁵(cont.)

“common drunk” provision, which the court had determined to be void for vagueness, precluding imposition of a county jail term, could not have been invalidated under the State Constitution if the penalty for being a “common drunk” had been death. *Id.* at 809, 183 Cal.Rptr. 800, 647 P.2d 76.

At oral argument before us, the Commonwealth sought to distinguish the California case in that the statutory subdivision there ruled unconstitutional had to do with the process of determining guilt or innocence. See *id.* at 803, 183 Cal.Rptr. 800, 647 P.2d 76. The Commonwealth conceded at oral argument that art. 116 does not insulate statutory provi-

sions dealing with the process of determining guilt or innocence from State constitutional review. It stated that art. 116 was wholly concerned with disposition.

Although the subdivision invalidated by the California court was concerned with the determination of guilt, the language of the court quoted above indicates that it considered more than just statutory provisions so concerned to be subject to State constitutional review. Furthermore, we see no more justification for interpreting art. 116 as insulating provisions dealing with sentencing from review under the Massachusetts Constitution than for interpreting it as so insulating provisions dealing with the determination of guilt. See notes 11 and 14 *supra*.

Discussion Notes

1. Why would Chief Justice Hennessey want to rest the court’s decision on the *federal* constitution?

2. Does it make sense that state constitutional civil liberties decisions, many of which protect

minorities, can be overturned by a simple majority of those voting on a state constitutional amendment? Is there any alternative? What pitfalls are associated with alternatives? See May, “Constitutional Amendment and Revision Revisited,” p. 178.

Chapter 4

State Constitutional Protections without Equivalent Federal Protection

A. Introduction – Examples of Rights Protections not Contained in the Federal Constitution

As we have seen, many of the classic federal constitutional rights have analogues in the state constitutions. These state provisions may be interpreted by the states to provide a greater measure of rights than similar or identical federal provisions.

In addition, however, state constitutions contain many rights not even contemplated by the federal constitution. Examination of any state constitution will reveal numerous constitutional rights of an entirely different nature from those with which we are familiar.

Would decisions based on such provisions always provide an “adequate and independent state ground” for the decision, thus precluding United States Supreme Court review?

Kluger v. White **281 So. 2d 1(Fla. 1973)**

ADKINS, Justice.

This is an appeal from an order of dismissal entered for defendants and against plaintiff in this property damage action by the Dade County Circuit Court, specifically passing upon the constitutionality of Fla. Stat. sec. 627.738, F.S.A. We have jurisdiction pursuant to Fla.Const., art. V, sec. 3(b)(1), F.S.A.

The cause of action arose from an automobile collision between a car owned by appellant, and driven by her son, and one owned by appellee, and driven by another person. The amended complaint filed by appellant alleged that the driver of appellee’s car was negligent and had been formally charged with failure to yield the right of way; that there were damages to appellant’s car to the extent of \$774.95; and that the fair market value of the car was \$250.00.

Appellant was insured with appellee, Manchester Insurance and Indemnity Company, but the policy did not provide for “basic or full” property damage coverage. . . .

Fla.Stat. sec. 627.738, F.S.A., provides, in effect, that the traditional right of action in tort for property damage arising from an automobile accident is abolished, and one must look to property damage with one’s own insurer, unless the plaintiff is one who

(1) has chosen not to purchase property damage insurance, and

(2) has suffered property damage in excess of \$550.00.

* * * * *

The appellant in the case *sub judice* falls into that class of accident victims with no recourse against any person or insurer for loss caused by the fault of another, taking her allegations as true. She did not choose to purchase either “full or basic coverage for accidental property damage” to her automobile, and her damages were the fair market value of her automobile since repair costs cannot be recovered where they exceed the fair market value of the automobile before the collision. . . .

Appellant has raised numerous constitutional challenges to Fla.Stat sec. 627.738, F.S.A. As appellant points out in her brief, the issues are limited to the single statute dealing with property damage, and the remainder of the Florida Automobile Reparations Act is not under consideration in the case *sub judice*.

It is likewise unnecessary for this Court to consider but one of the constitutional issues raised by appellant, for we find, as explained below, that Fla.Stat. sec. 627.738, F.S.A., fails to comply with a reasonable interpretation of Fla.Const., art. I, sec. 21, F.S.A., which reads as follows:

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This Court has never before specifically spoken to the issue of whether or not the constitutional guarantee of a "redress of any injury" (Fla.Const., art. I, sec. 21, F.S.A.) bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party.

Corpus Juris Secundum provides:

A constitutional provision insuring a certain remedy for all injuries or wrongs does not command continuation of a specific statutory remedy. However, in a jurisdiction wherein the constitutional guaranty applies to the legislature as well as to the judiciary, . . . it has been held that the guaranty precludes the repeal of a statute allowing a remedy where the statute was in force at the time of the adoption of the Constitution. Furthermore, . . . the guaranty also prevents, in some jurisdictions, the total abolition of a common-law remedy.

16A C.J.S. Constitutional Law sec. 710, pp. 1218-1219.

This Court has held that the Declaration of Rights of the Constitution of the State of Florida does apply to State government and to the Legislature. *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926). The right to a cause of action in tort for negligent causation of damage to an automobile in a collision was recognized by statute prior to the adoption of the 1968 Constitution of the State of Florida, as evidenced by the fact that Fla.Stat. sec. 627.738, F.S.A., the statute under attack, specifically exempts owners and drivers of automobiles from tort liability for such damages. In addition, the cause of action for damage to property by force or violence—trespass *vi et armis*—was one of the earliest causes of action recognized at English Common Law.

It is essential, therefore, that this Court consider whether or not the Legislature is, in fact, empowered to abolish a common law and statutory right of action without providing an adequate alternative.

Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change. Nor can we adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when an alternative approach is available.

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. sec. 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 abolishment of such right, and no alternative method of meeting such public necessity can be shown.

It is urged that this Court has previously approved action by the Legislature which violated the rule which we have laid down. We disagree.

In *McMillan v. Nelson*, 149 Fla. 334, 5 So.2d 867 (1942), this Court approved the so-called "Guest Statute" which merely changed the degree of negligence necessary for a passenger in an automobile to maintain a tort action against the driver. It did not abolish the right to sue, and does not come under the rule which we have promulgated.

Workmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury.

The Legislature in 1945 enacted Fla.Stat. Ch. 771, F.S.A., which abolishes the rights of action to sue for damages for alienation of affections, criminal conversation, seduction or breach of promise. This Court upheld the validity of the chapter in *Rotwein v. Gersten*, 160 Fla. 736, 36 So.2d 419 (1948). The Court opined:

The causes of action proscribed by the act under review were a part of the common law and have long been a part of the law of the country. They have no doubt served a good purpose, but *when they become an instrument of extortion and blackmail, the legislature has the power to, and may, limit or abolish them.*

(Emphasis supplied) (p. 421)

Thus, in abolishing the right of action for alienation of affections, etc., the Legislature showed the public necessity required for the total abolition of a right to sue.

The Legislature has not presented such a case in relation to the abolition of the right to sue an automotive tortfeasor for property damage. Nor has alternative protection for the victim of the accident been provided, as evidenced by the facts here before the Court.

Had the Legislature chosen to require that appellant be insured against property damage loss—as is, in effect, required by Fla.Stat. sec. 627.733, F.S.A., with respect to other possible damages—the issues would be different. A reasonable alternative to an action in tort would have been provided and the issue would have been whether or not the requirement of insurance for all motorists was reasonable. That issue is not before us.

Retaining the right of action for damages over \$550.00 (Fla.Stat. sec. 627.738(5), F.S.A.) does not correct the constitutional infirmity, but merely gives rise to another argument, that appellant has been deprived of the equal protection of the law solely on the basis of the value of her automobile in violation of Fla.Const., art. I, sec. 2, F.S.A., and U.S.Const., amend. XIV, sec. 1. It is unnecessary to reach the merits of this contention because the statute under consideration has already failed constitutional muster on other grounds.

BOYD, Justice (dissenting):

I dissent.

The judgment of the trial court should be affirmed for the following reasons:

* * * * *

The second reason we should affirm the judgment of the trial court reaches the Constitutional question involved. The question as to the constitutionality of the section of the statute denying plaintiff the opportunity to sue defendant White, on the ground that plaintiff had declined to purchase her own collision insurance, and was, therefore, her own insurer to the extent of \$550.00, is one of great importance.

Plaintiff claims that the statute, by denying her the opportunity to litigate against defendant White, violates sec. 21 of Article I of the Constitution of the State of Florida, by denying “redress for an injury.” This Court must determine whether the statute does indeed deny access to the courts in such a manner as to conflict with the foregoing constitutional provision. Obviously, a literal and dogmatic construction of said provision would deny both the legislature and the Court the power to impose reasonable and logical limitations on the constitutional right to use the courts of Florida. It, of course, is assumed that the citizens who adopted the 1968 Constitution intended that the language therein be given the same construction as similar language in the prior Constitution of 1885.

This Court has held that the right to maintain litigation is not absolute but, rather, is subject to reasonable restraints. We have repeatedly upheld statutes of limitation, which prevented aggrieved persons

from litigating for redress of injury, unless the suits were filed within a time specified by Statute.

In some instances, we have followed the principles of the Common Law to bar certain actions where, admittedly, wrongs have occurred. In *Orefice v. Albert*, we noted that:

It is an established policy, evidenced by many decisions, that suits will not be allowed in this state among members of a family for tort. Spouses may not sue each other, nor children their parents. The purpose of this policy is to protect family harmony and resources. . . .

In other instances, the law of Florida contains many decisions which have upheld the constitutional validity of legislation modifying Common Law causes of action. In most of those decisions, the party presenting a constitutional challenge presented arguments similar to those of plaintiff in the present case. For example, in *Rotwein v. Gersten*, legislation which completely abolished the causes of action for alienation of affections, criminal conversation, seduction, and breach of contract to marry was held to be proper and not prohibited by constitutional limitation. In *Rotwein*, this Court clearly stated that an individual does not have a vested interest or property right in a Common Law cause of action, and further noted that when a Common Law cause of action becomes an instrument of abuse, the legislature can enact the necessary modifications.

The Florida “Guest Statute” was also upheld in the face of constitutional attacks prior to its recent repeal by the Legislature. Prior to the enactment of the “Guest Statute,” an individual could maintain a Common Law cause of action for the negligence of a driver of the vehicle in which he was riding. The “Guest Statute” modified such cause of action by relieving the driver from tort liability for ordinary negligence. In *McMillan v. Nelson*, constitutional challenges were presented, urging, among other things, that the legislation deprived individuals of remedy under law, and violated equal protection and due process requirements. This Court rejected such arguments, and upheld the validity of the statute.

Finally, another instance of the latter type is the Workmen’s Compensation Act. Under that Act, an injured workman is provided a schedule of benefits from his employer without reference to the cause of injuries arising out of the course of his employment. The concept of “fault” has been eliminated. Despite the fact that they modify Common Law causes of action, such laws have universally been held to be a legitimate and constitutional exercise of legislative power.

Recently, in the landmark decision of *Pinnick v. Cleary*¹² the Supreme Judicial Court of Massachusetts upheld that state's newly-enacted no-fault insurance law. As Florida's law provides that those *who decline to purchase property insurance coverage* may sue

to recover for collision damage only when such damage exceeds \$550.00, the Massachusetts law, in an analogous manner, provided that those *who elected a deductible in their otherwise compulsory medical payments coverage*, could sue to recover for "pain and suffering" only when total medical expenses exceeded \$550.00.

¹²271 N.E.2d 592 (Mass.1971).

Discussion Notes

1. What other types of issues can "access to court" provisions such as Florida's apply to?

2. See Thomas E. Willging, "Financial Barriers and the Access of Indigents to the Courts," *Georgetown Law Journal* 57 (November 1968): 255-56; Note, "Article I, Section 21: Access to Court in Florida," *Florida State University Law Review* 5 (Fall 1977): 871.

3. For a complete survey of the origins of access to court provisions and their judicial application see Note, "The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or A Receptacle of Important Substantive and Procedural Rights?" *Rutgers Law Journal* 13 (Winter 1982): 399.

Saylor v. Hall 497 S.W.2d 218 (Ky. 1973)

REED, Justice.

* * * * *

The operative facts are: In May 1955, the defendant, E.H. Hall, a builder, completed construction of a house on a lot he owned. Shortly thereafter, he sold the house and lot to the defendants, Thomas and Kathlyn Johnson, who thereafter owned and controlled the property. The house was originally occupied in June 1955, when the improvements had been substantially completed. In July 1969, James Saylor and his wife rented the property from the Johnsons and moved in. The Saylor children had two children, Jimmy, then age 6, and Marvin, then age 4. Four months later, while the Saylor children were sitting on the floor watching television, a stone fireplace and mantel located in the room collapsed; Jimmy was crushed to death, and Marvin was severely injured.

In July 1970, within one year of the date of the accident, James Saylor as personal representative of his dead son, Jimmy, and Marvin, through his father, James, as next friend, instituted this lawsuit against the Johnsons and Hall. The suit alleged that Jimmy's death and Marvin's personal injuries were caused by the negligence of Hall, the builder, and by the negligence of the Johnsons who had leased the property to the Saylor children. The defendants filed motions for summary judgment. The evidentiary material produced demonstrated that the plaintiffs had evidence that Hall installed the braces on the mantel in a negligent

and unworkmanlike manner, and that the Johnsons knew or should have known of the dangerous but hidden condition created, and yet did not correct it or warn the Saylor children of its existence. The trial judge did not reach the merits concerning the triability of the lawsuit. He decided that action against Hall, the builder, was barred by limitations because of the provisions of KRS 413.120(14) and KRS 413.135. From this order of dismissal of the builder, the plaintiffs appealed, after meeting the procedural requisites for such action.

In 1964, the General Assembly carved out for different treatment from other actions for personal injuries, those where the claim was against "the builder of a home or other improvements." KRS 413.120(14). This statute provides that such an action must be commenced within five years after the cause of action accrues, and [the] "cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected." *Ibid.*

The builder's potential liability was again the subject of legislative concern in 1966 when a more expansive statute, KRS 413.135, was enacted. It provided in part that no tort action for *personal injuries or for wrongful death arising out of "deficiency"* in construction of any improvement to real property could be brought against the builder after the expiration of five years following the "substantial completion of such improvement." Both of these statutes were expressed as parts of the general chapter on limitations of actions.

The plaintiffs argue that the application of these two statutes to bar their claims violates the Constitution of the United States and particularly the Due Process and Equal Protection Clauses of the Four-

teenth Amendment. They also assert application of the questioned statutes to their causes of action is prohibited by numerous sections of the Constitution of Kentucky. We find it necessary, however, to consider only the effect of sections 14, 54, and 241 of the Kentucky Constitution as they have been judicially construed.

The defendant points out that substantially similar statutes have been adopted in 31 other states, and have been held valid by each state court of last resort that has considered them except in one instance. The defendant's arguments are: that the legislature may abolish old common law rights of action or create new ones; that it may enact statutes of "ultimate repose"; and that it may reasonably and rationally classify legal areas to be protected in order to achieve a permissible legislative objective in the manner provided by the concerned statutes. Nevertheless, the defendant concedes, tacitly if not explicitly, the Kentucky legislature has no constitutional power to extinguish common-law rights of action for negligence, but counters with the assertion that no such right of action for negligence against a builder existed at the time the questioned statutes were enacted, and, therefore, the legislature was free to act. Here, in our judgment, lies the heart of the issue to be decided. If the defendant is wrong in his assertion of the nonexistence of a right of action for negligence against the builder under the circumstances present when the statutes were passed, then the application of these statutes to the plaintiff's claim is constitutionally impermissible in this state.

* * * * *

Section 14 of the Constitution of Kentucky states:

All courts shall be open and every person, for an *injury* done him in his lands, goods, *person* or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.
(italics supplied).

This section was held to apply to the legislative branch of government as well as to the judicial in *Commonwealth v. Werner*, Ky., 280 S.W.2d 214 (1955). Section 54 of the same Constitution states:

The General Assembly shall have no power to limit the amount to be recovered for *injuries resulting in death*, or for *injuries to person* or property. (italics supplied).

The Kentucky Constitution in Section 241 states:

Whenever the death of a person shall result *from an injury inflicted by negligence* or wrongful act, then, *in every such case*, damages may be recovered for such death from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom it belongs; and until such provision is made the same shall form part of the personal estate of the deceased person.
(italics supplied).

This court construed section 241 in 1911 to mean that ". . . it is not within the power of the legislature to deny this right of action. The section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person. . . ." *Britton's Adm'r v. Samuels*, 143 Ky. 129, 136 S.W. 143.

Kentucky has no guest-passenger automobile statute, not because of legislative inaction, but because such a statute was voided as violative of our state Constitution. In the decision, section 54 played a prominent part. In *Ludwig v. Johnson et al.* 243 Ky. 533, 49 S.W.2d 347 (1932), this court struck down a statute that prohibited recovery by a guest passenger in an automobile against the owner or host driver for personal injuries or death resulting from the driver's negligence. Recovery was permitted by the statute only in the instance of intentional conduct. The court's holding was: "The [automobile guest-passenger] statute under consideration violates the spirit of our Constitution as well as its letter as found in sections 14, 54 and 241. It was the manifest purpose of the framers of that instrument to preserve and perpetuate the common law right of a citizen injured by the negligent act of another to sue to recover damages for his injury."

The defendant builder concedes that our legislature cannot abolish a common-law right of action for negligence. It is his contention, however, that at the time the questioned statutes were enacted, there was no existing right of action for negligence in this state where the plaintiff was a third party and the defendant was a builder whose work had been completed and accepted by the owner with whom he had contracted.

* * * * *

Returning now to the principle that we discussed in the opening of this opinion, we conclude that it is unnecessary in this case to delineate or define the

outer limits of a builder's liability in 1964 in Kentucky to a third party injured by the negligence of the builder whose work had been completed and accepted by the owner. We are satisfied that, under the precise facts of this case, the builder at that time was at the least subject to liability to third parties for negligent construction, though completed and accepted, that created a latent defect in a stone mantel and fireplace in a home where innocent third parties on the property could foreseeably be injured by such dangerous and concealed condition. Therefore, we hold that there was an existing right of action in this state for the type of negligence claimed in this lawsuit when the questioned statutes were enacted.

The legislature's power to enact statutes of limitation governing the time in which a cause of action must be asserted by suit is, of course, unquestioned. In this state, however, it is equally well settled that the legislature may not abolish an existing common-law right of action for personal injuries or wrongful death caused by negligence. KRS 413.120 (14) provides that an action for personal injuries caused by the negligence of the builder of a home must be brought within five years, and the "cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected." KRS 413.135(1) provides, in part, that no action "sounding in tort" resulting from "deficiency" in the construction of any improvement to real property or "for injury to the person or for wrongful death arising out of any such deficiency," shall be brought against the builder after the expiration of five years following "the substantial completion of such improvement." In our view the application of these statutory expressions to the claims here asserted destroys, pro tanto, a common-

law right of action for negligence that proximately causes personal injury or death, which existed at the times the statutes were enacted. The statutory expressions as they related to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.

The right of action for negligence proximately causing injury or death, which is constitutionally protected in this state, requires more than mere conduct before recovery can be attempted. Recovery is not possible until a cause of action exists. A cause of action does not exist until the conduct causes injury that produces loss or damage. The action for negligence evolved chiefly out of the old common-law form of action on the case, and it has always retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. See Prosser, *Handbook of the Law of Torts*, section 30, page 143 (4th Edition 1971). Indeed, the Supreme Court of New Jersey realized the relevance of this consideration in the recent case cited by the defendant builder in support of his argument on another phase of the case. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662, 666 (1972).

"It is not within the power of the legislature, under the guise of a limitation provision, to cut off an existing remedy entirely, since this would amount to a denial of justice, and, manifestly, an existing right of action cannot be taken away by legislation which shortens the period of limitation to a time that has already run." 51 Am.Jur.2d, *Limitations of Actions*, section 28, page 613. Surely then, the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.

Discussion Notes

1. The court quotes section 54 of the Kentucky Constitution. Why would such provisions be in state constitutions?

2. These access to court issues illustrate only one of numerous state constitutional rights which have no federal analogue. Another example would be state "Equal Rights Amendments." See gen-

erally, Comment, "Equal Rights Provisions: The Experience Under State Constitutions," *California Law Review*, 65 (September 1977): 1086; Robert F. Williams, "Equality Guarantees in State Constitutional Law," *Texas Law Review*, 63 (March/April 1985): 1212-14; Note, "Rediscovering the New Jersey E.R.A.: The Key to Successful Sex Discrimination Litigation," *Rutgers Law Journal* 17 (Winter 1986): 253.

Sterling v. Cupp **290 Or. 611, 625 P.2d 123 (1981)**

LINDE, Justice.

Plaintiffs, who are male inmates of the Oregon State Penitentiary, sued to enjoin Superintendent Cupp and other prison officials from assigning fe-

male guards to duties which involve frisking male prisoners or observation of prisoners in showers or toilets, or for such other relief as the court deemed proper. After allowing a number of female corrections officers to intervene as parties defendant, the court enjoined defendants Cupp and Watson from "assigning female correctional officers to any position in which the job description or actual duties include frisks or patdowns of male prisoners, except in emergency situations. . . ."

The Oregon Constitution long has included in its Bill of Rights, besides the prohibition of cruel and unusual punishments, no less than five such provisions that have no federal parallel. It undertakes to guarantee that punishment shall be designed for reformation and not “vindictive justice”⁶ and shall not reach beyond the guilty individual,⁷ to forbid excessive fines and disproportionately heavy penalties,⁸ and, most relevant here, to confine “rigorous” treatment of prisoners within constitutional bounds of necessity. Or.Const. Art. I, sec. 13.⁹

“No person arrested, or confined in jail, shall be treated with unnecessary rigor.”

“Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. . . .”

Provisions like these have antecedents as early as New Hampshire’s 1783 constitution, coming to Oregon by way of Ohio and Indiana. They reflect a widespread interest in penal reform in the states during the post-Revolutionary decades. The clauses are not as universal as more familiar parts of the bills of rights, and ideas of humanitarian “reform” have changed with time and among the states. The Pennsylvania Constitution, among the first, provided that the penal laws were to be reformed and punishments made less “sanguinary” (i.e. bloody) by substituting imprisonment at hard labor, open for observation by the public. Penn. Frame of Government secs. 38, 39 (1776). Practice often did not follow aspirations. Even in theory, a “Golden Age of Penology” could not be discerned before the 1870’s. In 1870 the Tennessee Constitution provided for “the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners.” Tenn.Const. Art. I, sec. 32. But while constitutional texts differ the present point is that many states thought a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude independently of any concern of the Congress or of Madison’s Bill of Rights. The same commitment took the form of two interstate compacts adopted by Oregon and enacted as statutes, which provide that inmates of correc-

tional institutions “shall be treated in a reasonable and humane manner.” ORS 421.245, Art. IV(5); ORS 421.284, Art. IV(e). Oregon’s article I, section 13 is in this tradition.¹⁵

It may well be that the interest asserted by the prisoners in this case can be brought within one of the kinds of “privacy” said to be protected by unexpressed penumbras of the United States Constitution. . . . But in three respects the guarantee not to be “treated with unnecessary rigor” in Oregon’s article I, section 13, is a more cogent premise than such a federal “right of privacy.”

First, it has an unquestioned source in a provision expressly included in the political act of adopting the constitution.

Second, that provision is addressed specifically to the treatment of persons “arrested, or confined in jail.” Unlike rights of privacy, there can be no argument that rights under this guarantee are forfeited by conviction of crime or under lawful police custody, as those are the circumstances to which its protection is directed.

Third, “privacy” poses the paradox that its elasticity in the face of important public policies contradicts its theoretical premise as a right so fundamental as to be implied in the national Constitution; by contrast, article I, section 13, itself makes necessity the test of the practice it controls.

For these reasons, although in this case the considerations under “privacy” or under article I, section 13, are much the same, we proceed under the section of our own constitution directly addressed to prison practices.

II. Opposite-Sex Search as Indignity

The guarantee against “unnecessary rigor” is not directed specifically at methods or conditions of “punishment,” which are the focus of article I, sections 15 and 16, as section 13 extends to anyone who is arrested or jailed; nor is it a standard confined only to such historically “rigorous” practices as shackles, the ball and chain, or to physically brutal treatment or conditions, though these are the most obvious examples. Thus the Indiana Supreme Court wrote, in sustaining a conviction of police officers for assault and battery on a prisoner:

The law protects persons charged with crime from ill or unjust treatment at all

⁶Or.Const. Art. I, sec. 15:

“Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.”

⁷Or.Const. Art. I, sec. 25:

“No conviction shall work corruption of blood, or forfeiture of estate.”

⁸Or.Const. Art. I, sec. 16:

⁹Or.Const. Art. I, sec. 13:

¹⁵Equivalent clauses are found also in Georgia Const. sec. 2-114 (1976) (“ . . . nor shall any person be abused in being arrested, while under arrest, or in prison”); Tenn.Const. Art. I, sec. 13 (1980); Utah Const. Art. I, sec. 9 (1971); Wyo.Const. Art. I, sec. 16 (1977) (“No person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for.”).

times. Only reasonable and necessary force may be used in making an arrest, . . . ‘no person arrested, or confined in jail, shall be treated with unnecessary rigor,’ section 15, art. I, Const. . . . ‘While the law protects the police officer in the proper discharge of his duties, it must at the same time just as effectively protect the individual from the abuse of the police.’

U.S. v. Pabalan (1917) 37 Philippine 352, 354.”

Bonahoon v. State, 203 Ind. 51, 178 N.E. 570, 571, 79 A.L.R. 453, 456 (1931). “Unnecessary rigor” is not to be equated only with beatings or other forms of brutality. Thus Georgia’s phrasing of the constitutional clause, *supra* note 15, is simply that prisoners shall not “be abused.” Since it is “unnecessary” rigor that is proscribed, the first question under this clause is whether a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity.

* * * * *

TONGUE, Justice, specially concurring.

I concur in the result reached by the majority insofar as it holds that male prisoners cannot be subjected to searches by female guards involving touching of genital or anal areas except in emergencies. I do not, however, agree with the grounds on which the majority opinion is based, not only because I believe them to be wrong, but also because they are based upon a theory wholly different from the theory on which the case was both tried and appealed to the Court of Appeals.

* * * * *

<p>Discussion Notes</p> <p>1. Reread the five provisions of the Oregon Constitution set forth in the court’s footnotes on page 162. What influence might they have in issues such as those raised in <i>Cooper v. Morin</i>, p. 84, or in death penalty cases? <i>See generally</i>, Stephen Kanter, “Dealing With Death: The Constitution-</p>	<p>ality of Capital Punishment in Oregon,” <i>Willamette Law Review</i> 16 (Winter 1979): 30-52.</p> <p>2. Georgia’s constitutional provision, referred to by Justice Linde, is discussed by Dorothy T. Beasley, “The Georgia Bill of Rights: Dead or Alive?” <i>Emory Law Journal</i> 34 (Spring 1985): 380-415.</p>
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Ravin v. State
537 P.2d 494 (Alaska 1975)

* * * * *

In Alaska we have also recognized the distinctive nature of the home as a place where the individual’s

2. *The constitutional right of prisoners to be protected from “treatment with unnecessary rigor” as a ground to prohibit “patdown” searches by guards of the opposite sex.*

The opinion by the majority is indeed a scholarly opinion. I do not, however, agree with the majority in its holding that prisoners have a constitutional right under Article I, sec. 13 of the Oregon Constitution to protection against such searches. It may be, for reasons stated by the majority, that to hold that prisoners have a constitutional “right of privacy” is to adopt a concept subject to the criticism that “[a] concept in danger of embracing everything is a concept in danger of conveying nothing,” and that the law should not “pay [such] a price in clarity and cogency,” as stated by the majority. (P. 127).

To me, however, the concept that a prisoner’s constitutional right to be protected against treatment with “unnecessary rigor” is subject to much the same criticism particularly when extended to what prisoners may consider to be “unnecessary” searches. I am also concerned that to confer upon prisoners a constitutional right to object to such searches may open a Pandora’s Box from which prisoners may, by habeas corpus or otherwise, deluge the courts with litigation based upon claims that many of the rules and practices customary in the operation of penal institutions are “unnecessarily rigorous.”

If required to choose between a constitutional “right of privacy” and a constitutional right to object to “treatment” which is “unnecessarily rigorous,” I would choose the former for the reasons stated by the majority opinion of the Court of Appeals, despite its conceptual problems.

privacy receives special protection. This court has consistently recognized that the home is constitutionally protected from unreasonable searches and seizures, reasoning that the home itself retains a protected status under the Fourth Amendment and Alaska’s constitution distinct from that of the occupant’s person. The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and

now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

The home, then, carries with it associations and meanings which make it particularly important as the situs of privacy. Privacy in the home is a fundamental right, under both the federal and Alaska constitutions. We do not mean by this that a person may do anything at anytime as long as the activity takes place within a person's home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the *Stanley* guarantee to possession for purely private, noncommercial use in the home. And secondly, we think this right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or

with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.

Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.

Discussion Notes

1. A number of states, like Alaska, have specific privacy provisions in the texts of their state constitutions. See Note, "Toward a Right of Privacy as a Matter of State Constitutional Law," *Florida State University Law Review* 5(Fall 1977): 631; Gerald B. Cope, Jr., "To Be Let Alone: Florida's Proposed Right of Privacy," *Florida State University Law Review*, 6 (Summer 1978): 671.

2. The New Jersey Constitution, along with several others, guarantees the right to organize and bargain collectively for public and private employees. See Richard A. Goldberg and Robert F. Williams, "Farmworkers' Organizational and Col

lective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights," *Rutgers Law Journal* 18 (Summer 1987): 729; Comment, "State Constitutional Right to Damages for Private Discrimination in Employment," *DePaul Law Review* 28 (Fall 1978): 229.

3. See also Michael L. Perlin, "State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?" *Loyola of Los Angeles Law Review* 20 (June 1987): 1249; *Rivers v. Katz*, 67 N.Y. 2d 485, 495 N.E. 2d 337 (1986) (state constitutional right of involuntarily committed mental patients to refuse antipsychotic drugs).

Tucker v. Toia 43 N.Y. 2d 1, 371 N.E. 2d 449 (1977)

GABRIELLI, J.

The Commissioner of the State Department of Social Services appeals directly to this court . . . from a judgment of the Supreme Court . . . declaring section 15 of chapter 76 of the Laws of 1976 (now a part of Social Services Law, sec. 158), to be unconstitutional, and enjoining its implementation and enforcement. We affirm the judgment appealed from, on the ground that the challenged section constitutes a substantive violation of section 1 of article XVII of the New York State Constitution.

New York residents under the age of 21 who are in need of public assistance normally receive aid

through either the Federally subsidized Aid to Families with Dependent Children Program (AFDC) (Social Services Law, sections 343-362), or the State's broad Home Relief Program (Social Services Law, secs 157-166). The determination of which program is applicable in a particular instance is based on whether the needy individual under 21 is residing with either a parent or a legally responsible relative. If he is residing with such a person, he is eligible for AFDC, but not home relief, whereas if he is not residing with such a person, entitlement to benefits stems from the home relief program and not AFDC.

Section 15 of chapter 76 of the Laws of 1976 amended subdivision (a) of section 158 of the Social Services Law, the section which determines eligibility for home relief. As amended, the statute provides that home relief is not to be provided to a person under the age of 21 who does not live with a parent or legally responsible relative, unless and until the

applicant commences a support proceeding against any such parent or relative and an order of disposition is obtained in that support proceeding. Prior to the enactment of section 15, no such limitation was imposed upon a needy young person's right to public assistance. Rather, the public welfare authorities were subrogated to whatever right the recipient might have to support from a parent or responsible relative (see Social Services Law, sec. 101 *et seq.*; Family Ct Act, sec. 415). Under that system, a person under the age of 21, whether or not residing with a parent or responsible relative, was entitled to public assistance upon proof of need, regardless of existence of a parent or responsible relative, and it was left to the State to seek to recoup its welfare expenditures via a support proceeding against any such parent or relative. This is the method which was used in both AFDC and home relief cases prior to adoption of the section under attack and it is of interest to note that it is the method still used in AFDC cases.

Plaintiffs in this action are three individuals under the age of 21 who are not living with a parent or responsible relative, and are thus eligible only for home relief, not for AFDC. They are concededly needy and, prior to the effective date of section 15, they would have been and were entitled to home relief, having met all requisite criteria.

One of the plaintiffs was 18 years old at the time this action was commenced. His father had abandoned his mother before plaintiff's birth, and his whereabouts are unknown. Until 1976, the son had lived with his mother, and was receiving an AFDC grant. His mother was then committed to a State hospital due to mental illness and, as a result, the son became ineligible for AFDC. Although he ultimately obtained a final disposition in a support proceeding against his mother in an attempt to satisfy section 15, he was denied home relief on the ground that he had not obtained a final disposition in a support proceeding against his missing father.

* * * * *

Standing uncontroverted is the accepted fact and reality that in each of these cases in order to obtain the required "disposition," it would take from several weeks to several months, during which time no public assistance would be available to these needy young people. . . . In certain areas of the State even greater delays are normal, and, in fact, it has been estimated that in New York City it will often take from 10 to 12 months to obtain a "disposition" in such a support proceeding. Under the challenged statute, the plaintiffs and others in similar situations are, of course, denied any public assistance during this period, although they meet all criteria for measuring need,

solely on the basis of their failure to obtain a disposition. Since they do meet the need criteria, and are thus a fortiori unable to support themselves without public aid, one must wonder how they are to survive this period of waiting for an overcrowded Family Court system to process their often quite futile support petitions.

In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution. Section 1 of article XVII of the New York State Constitution declares: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." This provision was adopted in 1938, in the aftermath of the great depression, and was intended to serve two functions: First, it was felt to be necessary to sustain from constitutional attack the social welfare programs first created by the State during that period (*cf. People v. Westchester County Nat. Bank*, 231 NY 465); and, second, it was intended as an expression of the existence of a positive duty upon the State to aid the needy.

The legislative history of the Constitutional Convention of 1938 is indicative of a clear intent that State aid to the needy was deemed to be a fundamental part of the social contract. For example, the report of the Committee on Public Welfare, the group which drafted what became section 1 of article XVII of our Constitution, specifically states that one purpose of the amendment was to "recognize the responsibility of the State for the aid, care and support of persons in need" (Revised Record of the Constitutional Convention of the State of New York, vol II, p 1084 [1938]). Even more explicit are the comments by Edward F. Corsi, Chairman of the Committee on Social Welfare, in moving the adoption of the provision by the convention:

"We have made provision for the relief of the needy. Convinced that the care of the unemployed and their dependents is in our modern industrial society a permanent problem of major importance affecting the whole of society, we have recommended that:

"The aid, care and support of the needy are public concerns and shall be provided by the State and by such of its subdivisions and in such manner and by such means as the Legislature may from time to time determine."

"Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down

explicitly in our basic law a much needed definition of the relationship of the people to their government.

“While the obligation expressed in this recommendation is mandatory, in that the Legislature shall provide for the aid, care and support of persons in need, the manner and the means by which it shall do so are discretionary.

“The Legislature may continue the system of relief now in operation. It may preserve the present plan of reimbursement to the localities. It may devise new ways of dealing with the problem. Its hands are untied. What it may not do is to shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government” (Revised Record of the Constitutional Convention, vol III, p 2126 [1938]).

In view of this legislative history, as well as the mandatory language of the provision itself, it is clear that section 1 of article XVII imposes upon the State an affirmative duty to aid the needy. . . . Although our Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term “needy,” it unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy. Such a definite constitutional mandate cannot be ignored or easily evaded in either its letter or its spirit (see *Flushing Nat. Bank v. Municipal Assistance Corp. for City of N.Y.*, 40 NY 2d 731, 737, 739; *Sgaglione v. Levitt*, 37 NY2d 507; *Matter of Sloat v. Board of Examiners*, 274 NY 367, 370).

We find that section 15 of chapter 76 of the Laws of 1976 is unconstitutional in that it contravenes the letter and spirit of section 1 of article XVII of the Constitution. The effect of the questioned statute is plain: it would effectively deny public assistance to

persons under the age of 21 who are concededly needy, often through no fault of their own, who meet all the criteria developed by the Legislature for determining need, solely on the ground that they have not obtained a final disposition in a support proceeding. Certainly, the statute is in furtherance of a valid State objective, for it is intended to prevent unnecessary welfare expenditures by placing the burden of supporting persons under 21 upon their legally responsible relatives. This valid purpose, however, cannot be achieved by methods which ignore the realities of the needy’s plight and the State’s affirmative obligation to aid all its needy.

In *Matter of Barie v. Lavine* (40 NY2d 565), we were presented with a somewhat similar challenge to a social services regulation providing for the temporary suspension of recipients who unjustifiably refuse to accept employment. We summarily dismissed the constitutional arguments proffered in *Barie*, stating: “The Legislature may in its discretion deny aid to employable persons who may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment” (*id.*, at p. 570). In that case we were concerned with a reasonable legislative determination that such individuals were not needy. The present case, in contradistinction, presents a very different question: May the Legislature deny all aid to certain individuals who are admittedly needy, solely on the basis of criteria having nothing to do with need? Today, we hold that it may not. As the chairman of the Constitutional Convention’s Committee on Social Welfare indicated, although the Legislature is given great discretion in this area, it cannot simply “shirk its responsibility which . . . is as fundamental as any responsibility of government” (Revised Record of the Constitutional Convention, vol III, p 2126 [1938]).

Discussion Notes

1. One month after *Tucker* was decided, the New York Court of Appeals emphasized that “the Legislature is vested with discretion to determine the amount of aid; what we there [in *Tucker*] held prohibited was the Legislature’s ‘simply refusing to aid those whom it has classified as needy.’” *Bernstein v. Toia*, 43 N.Y. 2d 437, 449, 373 N.E. 2d 238, 244 (1977).

2. To what other situations might a provision like New York’s art. XVII, section 1 apply? See Note, “The Right to Shelter for the Homeless in New York State,” *New York University Law Review* 61 (May 1986): 272. See also John C. Connell, “A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution,” *Rutgers Law Journal* 18 (Summer 1987): 765.

B. "Unenumerated Rights" Provisions of State Constitutions

Most state constitutions contain provisions such as Art. I, section 20 of the Ohio Constitution:

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

See generally Note, "Unenumerated Rights Clauses in State Constitutions," *Texas Law Review* 63 (March/April 1985): 1321.

McCracken v. State 518 P.2d 85 (Alaska 1974)

BOOCHEVER, Justice.

In this case we consider whether a prisoner has a right to represent himself in post-conviction relief proceedings.

* * * * *

However, the aforementioned Supreme Court dicta and the circuit court decisions cited above either construed the sixth amendment's guarantee of the assistance of counsel to incorporate a corollary constitutional right to proceed *in propria persona*, tended to embrace such a construction, or relied for authority upon cases which did one or the other. Consequently, these cases are of questionable relevance to the case at hand, for the sixth amendment to the United States Constitution and art. I, sec. 11 of the Alaska Constitution by their terms apply only to *criminal prosecutions*, and protect only those *accused* of crime with respect to the preparation of a *defense*. An evidentiary hearing on an application for post-conviction relief is not a criminal prosecution, petitioner will not be presenting a defense to a criminal prosecution, and McCracken is not an accused, having al-

ready been convicted. Therefore, if we are to derive a right to represent oneself from either the Federal or the Alaska constitutions, we must look elsewhere. We are persuaded that there is such a right under art. I, sec. 21 of the Alaska Constitution, which specifies that "[t]he enumeration of rights in this constitution shall not impair or deny others retained by the people." At the time that the Alaska constitution was enacted¹⁵ and became effective,¹⁶ the right of self-representation was so well established that it must be regarded as a right "retained by the people." The Treaty of Cession,¹⁷ under which Russia ceded its possessions in North America to the United States, provided that the inhabitants "shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." By virtue of section 35 of the Judiciary Act of 1789,¹⁸ parties then possessed the right in all the courts of the United States to "plead and conduct their own cases personally." Thus, throughout Alaska's history prior to statehood parties were without exception entitled to exercise the right of self-representation. Although we do not imply that all statutory rights in existence at the time that Alaska was admitted to the Union constitute rights "retained by the people" under art. I, sec. 21 of the Alaska Constitution, we are of the opinion that a right so long established and of such fundamental importance must be held to have been so retained.¹⁹

¹⁵The constitution was adopted by the convention of February 5, 1956.

¹⁶The Constitution became effective upon Alaska's admission into the Union on January 3, 1959.

¹⁷15 Stat. 539 (effective June 20, 1867).

¹⁸28 U.S.C. sec. 1654.

¹⁹In view of this holding, we need not decide whether petitioner's claim under the ninth amendment of the United States Constitution is meritorious.

In considering the fundamental importance of self-representation, we are mindful that ours is a society valuing the autonomy of the individual and his freedom of choice. When accused of a crime, or, as here, when seeking relief from a conviction resulting in imprisonment, the opportunity to determine whether to present one's own case or to be represented by appointed counsel is of paramount importance to the individual. Under some circumstances, he may indeed be the only person who will forcefully advance arguments in an unpopular cause. Alaska has been and is endowed with courageous attorneys who have zealously represented those accused of crime, but such dauntless representation may not always be available to one who is the object of opprobrium. The opportunity to present one's own position where liberty itself is at stake should not lightly be disregarded, and the right to counsel should not be used to bar self-representation. "[T]he procedural safeguards of the bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters."²⁰

Having concluded then that there is a right to self-representation under our own constitution, we must illuminate the contours of that right. The right

²⁰Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L. Ed. 268, 275 (1942).

is not absolute. In order to prevent a perversion of the judicial process, the trial judge should first ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner before allowing him to proceed *pro se*. Second, the trial judge should satisfy himself that the prisoner understands precisely what he is giving up by declining the assistance of counsel. Rule 39(b)(3) provides that, at the trial stage, counsel should be appointed unless the defendant "demonstrates that he understands the benefits of counsel and knowingly waives the same." A comparable procedure should be followed in post-conviction proceedings. The advantages of legal representation should be explained to the prisoner in some detail, and in the event of an evidentiary hearing at which the prisoner is present he should be given the option of having legal counsel available for consultation. Indeed, where the court is not completely satisfied that the prisoner is capable of *pro se* representation, it is within its sound discretion to insist that the prisoner accept consultative assistance by appointed counsel. Finally, the trial judge should determine that the prisoner is willing to conduct himself with at least a modicum of courtroom decorum.²²

²²However, the hearing judge must bear in mind that prisoners are not experienced trial lawyers, and are not practiced in the formalities of courtroom etiquette.

* * * * *

Discussion Notes

1. See also *State v. Labato*, 7 N.J. 137, 143, 80 A.2d 617, 619 (1951).
2. Are there other interpretative approaches

state courts could apply to unenumerated rights provisions in state constitutions? See Note, "Unenumerated Rights Clauses," 1325-29.

C. Remedies for State Constitutional Violations

Without question, the rebirth of reliance on state bills of rights is one of the most fascinating developments in civil rights law of the last two decades. . . .

Amid the rejoicing, however, only a few have noticed that a key member of the parade is missing: the conscientious public interest or civil rights attorney who wants to take the law reviews seriously. These plaintiffs' lawyers are enthusiastic about using new state theories to vindicate their clients' constitutional rights to free speech, humane confinement conditions, or equality of the sexes. But the awful secret is that, in contrast to the well-developed federal law of civil rights litigation, few states have implemented adequate compensatory remedies for violations of state guarantees. As a result, relatively few civil actions are brought alleging that invasion of important personal and civil rights transgresses the state, rather than the federal, bill of rights.

It is no accident that the best-publicized uses of state constitutions have been as defenses to criminal or civil liability or as grounds for injunctive relief, rather than as grounds for recovering damages. Appellate criminal cases applying state constitutions are plentiful, in large part because attorneys are paid to file and brief them. When an attorney raises the state constitution as a defense in a civil case—for example, to defend a claim for punitive damages in a defamation action—the incremental cost is not likely to be a significant impediment to its use, as the defendant is in any case obliged to defend. Injunctive relief under state constitutions is most often sought by plaintiffs bringing class action or public interest litigation, for which

privately or publicly funded counsel may be available.

Jenifer Friesen, "Recovering Damages for State Bills of Rights Claims," *Texas Law Review* 63 (March/April 1985): 1269-70.

The following cases indicate some of the potential, and pitfalls, of litigating state constitutional claims for damages.

1. Cause of Action

Gay Law Students Association v. Pacific Telephone and Telegraph Company 156 Cal.Rptr. 14, 595 P. 2d 592 (1979)

TOBRINER, Justice.

In June 1975 plaintiffs, four individuals and two associations organized to promote equal rights for homosexual persons, filed the present class action against Pacific Telephone and Telegraph Company (PT&T) and the California Fair Employment Practice Commission (FEPC). The complaint alleged that PT&T practices discrimination against homosexuals in the hiring, firing and promotion of employees, asserted the illegality of such employment discrimination and sought declaratory and injunctive relief to prevent PT&T from the continuation of such practices. The complaint also prayed for monetary damages to compensate for losses sustained as a result of PT&T's alleged past discrimination. As to the FEPC, the complaint asserted that, contrary to its alleged statutory mandate, the commission had improperly refused to take any action to remedy employment discrimination against homosexuals by PT&T and other employers.

* * * * *

2. *Plaintiffs' allegations of arbitrary employment discrimination against homosexuals state a cause of action against PT&T.*

We begin with a consideration of plaintiffs' claims against PT&T. PT&T asserts, in essence, that its employment practices are subject to no greater legal restrictions than the employment practices of any other employer in this state. Accordingly, PT&T argues that the provisions of the FEPC, which we discuss below, constitute the sole limitations on the company's authority to engage in discriminatory employment practices. As we shall explain, however, we have concluded that, contrary to PT&T's assertions, the equal protection clause of the California Constitution (art. I, sec. 7, subd. (a)) places special obligations on a state-protected public utility, such as PT&T, to refrain from all forms of arbitrary employment discrimination. . . .

(a). *Article I, section 7 subdivision (a) of the California Constitution bars a public utility from engaging in arbitrary employment discrimination.*

Plaintiffs contend that PT&T's alleged discriminatory employment practices violate the equal protection guarantee of the California Constitution by arbitrarily denying qualified homosexuals employment opportunities afforded other individuals. In analyzing this constitutional contention, we begin from the premise that both the state and federal equal protection clauses clearly prohibit *the state or any governmental entity* from arbitrarily discriminating against any class of individuals in employment decisions. . . . Moreover, past decisions of this court establish that this general constitutional principle applies to homosexuals as well as to all other members of our polity; under California law, the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job from which he has been excluded. . . .

In the instant case, of course, the practice of excluding homosexuals from employment has allegedly been adopted not by the state itself but by PT&T, a public utility to whom the state has granted a monopoly over a significant segment of the telephonic communications industry in California. The constitutional question presented in this regard is whether the protection afforded individuals by the state equal protection clause encompasses protection against the discriminatory treatment alleged in the present complaint.

Article I, section 7, subdivision (a) of the California Constitution provides simply that: "*A person may not be deprived of life, liberty or property without due*

process of law or denied equal protection of the laws." (Emphasis added.) Unlike the due process and equal protection clauses of the Fourteenth Amendment, which by their explicit language operate as restrictions on the actions of states, the California constitutional provision contains no such explicit "state action" requirement. . . .

In the instant case, the question with which we are presented is a narrow but important one: Is the California constitutional equal protection guarantee violated when a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly, utilizes its authority arbitrarily to exclude a class of individuals from employment opportunities? As we explain, we conclude that arbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility does, indeed, violate the state constitutional rights of the victims of such discrimination.

* * * * *

Accordingly, we conclude that under the equal protection guarantee of the California Constitution a state-protected public utility not arbitrarily or invidiously discriminate in its employment decisions. (Cf., e.g., *Weise v. Syracuse University, supra*, 522 F.2d 397, 403-408 (employment discrimination by private university found to constitute state action under federal Constitution); *Peper v. Princeton U. Bd. of Trustees* (1978) 77 N.J. 55, 389 A.2d 465, 476-478 (employment discrimination by private university held violative of state constitutional equal protection guarantee). See generally Tribe, *American Constitutional Law, supra*, at p. 1172)

We emphasize that our holding in this regard in no way abridges a public utility's right to prefer the best qualified persons in reaching its hiring or promotion decisions. The equal protection clause prohibits only arbitrary discrimination on grounds unrelated to a worker's qualifications. Thus, while we hold that the California Constitution precludes a public utility's management from automatically excluding all homosexuals from consideration for employment positions—or, by the same token, from excluding any classification of persons because of personal whims or prejudices or any other arbitrary reason—we stress that the constitutional provision does not deny a public utility's management the authority to exercise legitimate judgment in employment decisions.

In the instant case, of course, plaintiffs have alleged that PT&T has adopted an arbitrarily discriminatory employment policy against homosexuals. In light of the foregoing analysis, we conclude that plaintiffs' complaint states a cause of action against PT&T under article I section 7, subdivision (a) of the California Constitution. (Cf. *Bivens v. Six Unknown*

Fed. Narcotics Agents (1971) 403 U.S. 388, 390-397, 91 S.Ct. 1999, 29 L.Ed.2d 619.)¹⁰

¹⁰PT&T maintains that by authorizing a direct court action in this case, we will inevitably undermine the elaborate administrative procedure established by the FEPA with respect to cases of public utility discrimination covered by the act. This contention has no merit. In view of our holding, *post*, that the FEPA does not encompass discrimination against homosexuals, we have no occasion directly to pass on the question of the procedure which properly governs a claim against a public utility that does fall within the aegis of the FEPA. We emphasize in this regard, however, that nothing in this opinion is intended to imply that an employee

may pursue a claim from which a remedy is provided by the FEPA without exhausting the administrative remedies provided by that act.

As the dissenting opinion suggests, as a policy matter it may well be preferable for all employees who are the victims of illegal discrimination to be afforded an administrative remedy before the FEPC. As of yet, however, the Legislature has not granted the FEPC jurisdiction in cases arising out of non-FEPA, constitutionally proscribed discrimination. The absence of such an administrative remedy, however, provides no justification for the judiciary to fail to enforce individual rights under the state Constitution.

* * * * *

Discussion Notes

1. What function could state constitutional provisions play in the legal system if they did not, in themselves, provide a cause of action for their enforcement?

2. The United States Supreme Court recognized a cause of action against federal officials in the *Bivens* case, discussed in this and the next case. Are the issues the same at the state and federal levels?

2. Sovereign Immunity

Figueroa v. State

61 Hawaii 369, 604 P.2d 1198 (1979)

OGATA, Justice.

Plaintiffs-appellees, cross-appellants, Michael Figueroa, Louis Figueroa and Shirley Pimental (hereinafter appellees) instituted an action against the defendant-appellant, cross-appellee, State of Hawaii (hereinafter appellant) to recover damages for an attempted suicide by appellee Michael Figueroa while he was at the Hawaii Youth Correctional Facility, also known as the Koolau Boys' Home (hereinafter HYCF or Boy's Home). After a bench trial, the court below found that the State was negligent in its supervision of Michael, had violated certain of his guarantees under the State and Federal Constitutions and was liable for injuries prior to and subsequently caused by his attempted hanging. Both appellant and appellees appeal from the judgment of \$1,385,250.00 entered in favor of appellees. We vacate the judgment and dismiss the cross-appeal; we further remand the first cause of action of the second amended complaint for a new trial.

* * * * *

III

Appellees also alleged in the second cause of action of the second amended complaint that while Michael was a resident at the Boys' Home, he suf-

fered deprivations of certain constitutional rights guaranteed by the State and Federal Constitutions. The trial court found that the following acts or omissions violated Michael's rights to due process, freedom from cruel and unusual punishment, and rehabilitative treatment:

1. Failure to provide for a hearing before subjecting him to the behavior modification program.
2. Placement in an isolation cell in the absence of "very exceptional circumstances."
3. Failure to provide adequate treatment and care reasonably calculated to bring about the reformation of a minor.

The trial court awarded Michael \$15,000 for "pre-hanging physical pain and suffering and the mental anguish and emotional distress." The court explained that this award could be based on common law negligence or on constitutional violations so that the award could be upheld on negligence alone. However, in this case we are squarely faced with the question as to whether the State can be held liable in money damages for alleged constitutional violations.

The State argues that the court below erred in adjudicating the constitutional claims because the doctrine of sovereign immunity withheld from the court jurisdiction over the State on claims for money damages for alleged constitutional deprivations. We turn to the respective constitutional, statutory and decisional law arguments that are advanced as support for the action taken by the lower court.

It is well-established that the State as sovereign is immune from suit except as it consents to be sued. *A.C. Chock, Ltd. v. Kaneshiro*, 51 Hawaii 87, 451 P.2d

809 (1969); *W.H. Greenwell, Ltd. v. Department of Land and Natural Resources*, 50 Hawaii 207, 436 P.2d 527 (1968). The question of jurisdiction may be raised at any time. *O'Daniel v. InterIsland Resorts, Ltd.*, 46 Hawaii 197, 377 P.2d 609 (1962); *Meyer v. Territory*, 36 Hawaii 75 (1942).

Appellees urge this court to find a private right of action in damages directly from the State Constitution for alleged violations of certain of Michael's constitutional rights. Appellees would have us extend the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in which the United States Supreme Court held that a damage remedy could lie against *federal officials* who violate a plaintiff's constitutional rights so as to provide for liability for damages as against the State. This we cannot do. Just as the federal courts have refused to extend *Bivens* to provide for liability against a sovereign, we are not free to abolish the State's sovereign immunity and the State remains immune from a *Bivens*-type claim.

Further, Article XIV, Section 15 of the State

Constitution which provides that all its provisions are "self-executing to the fullest extent that their respective natures permit" does not constitute a waiver of sovereign immunity for money damages for constitutional deprivations. Appellees argue that with respect to claims involving constitutional provisions, in this case, the rights under both Constitutions to due process and freedom from cruel and unusual punishment, the self-executing clause make available any and all accepted forms of redress including money damages. The argument does not persuade us. The self-executing clause only means that the rights therein established or recognized do not depend upon further legislative action in order to become operative. . . . No case has construed the term "self-executing" as allowing money damages for constitutional violations. More importantly, in a suit against the state, there cannot be a right to money damages without a waiver of sovereign immunity and we regard as unsound the argument that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available.

* * * * *

Discussion Notes

1. Should state *constitutional* sovereign immunity yield to claims for violation of state *constitutional* rights?
2. This case and the one that follows concern

state constitutional provisions that are "self-executing." For further consideration of this issue, see Chapter 5, Section E.

3. Would the outcome in the Hawaii case be different if the sovereign immunity were *statutory*?

**Fenton v.
Groveland Community Services District
135 Cal.App.3d 797, 185 Cal.Rptr. 758
(Cal.App. 1982)**

BIANCHI, Associate Justice.

Statement of the Case

This is an appeal from a judgment dismissing the action for failure to make a timely amendment to the complaint after the sustaining of a demurrer.

On November 8, 1977, appellants were not permitted to vote in Groveland Community Services District in the County of Tuolumne. By letter of November 7, 1977, County Clerk Carlo DeFerrari had informed the precinct election board that probable cause existed to believe that appellant Anne Fenton resided outside the election district. This letter was based on three affidavits filed pursuant to Elections Code section 14216. The affidavits of Elizabeth

Scofield, Fay Hyde, and George Dickens each alleged that Anne Fenton did not reside within the Groveland Community Services District.

Appellants filed a complaint for damages against defendants Groveland Community Services District, the County of Tuolumne, Carlo DeFerrari, Elizabeth Scofield, George Dickens, and Faye Hyde. Appellants alleged they had been denied the right to vote on November 8, 1977 and alleged violations of their constitutional rights to due process and equal protection under the California Constitution. Appellants prayed for \$300,000 in general damages, \$300,000 in punitive damages, and attorney's fees.

* * * * *

Appellants' complaint alleged that the right to vote under state law was abridged by respondents. Respondent County of Tuolumne demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. In their supporting points and authorities, the County specifically relied on the governmental immunities provided in Government Code sections 815, 818, and 820.2. In

sustaining the general demurrer, the trial court did not indicate which of these statutes was dispositive. Thus, each must be considered, since appellants' failure to amend their complaint after leave granted by the court requires appellants to prove that their complaint was not susceptible of a general demurrer on any ground raised below. (49 Cal.Jur.3d, Pleading, sec. 170, p. 591.)

Government Code section 815 provides that a public entity is not liable for the injuries it causes. However, as the Senate Committee Comment on section 815 makes clear, the public entity will be held liable in those instances where the Legislature has passed a statute assessing liability, or where the state or federal constitution requires liability. (See legis. committee com., West's Ann. Gov. Code (1980 ed.) sec. 815, p. 168.)

Initially, it should be noted that section 815, enacted as part of the California Torts Claims Act in 1963, typically serves as a bar to causes of action for damages for personal injuries. Here, appellants seek damages for a violation of their constitutional rights.

However, this is not to say that section 815 is inapplicable. Appellants are, by definition, seeking to state a cause of action in tort.

A tort requires that a plaintiff have a legally protected right which, when invaded by the defendant, is compensable by money damages. The civil remedy for constitutional torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his constitutional rights.

(See Comment, *Executive Immunity for Constitutional Torts After Butz v. Economu* (1980) 20 Santa Clara L. Rev. 453, 455, fn. omitted.)

Thus, respondents were entitled to rely on section 815 in demurring to the complaint. However, the question remains as to whether appellants' cause of action falls within one of the exceptions to the governmental immunity granted by section 815.

As noted above, the Legislature has recognized that the state constitution may provide a cause of action independent from any statute providing for liability. (Legis. committee com., West's Ann. Gov. Code, supra, sec. 815, p. 168.) Appellants contend the right to vote guaranteed by article II, section 2 of the California Constitution provides a cause of action for damages against the County of Tuolumne. Appellant's position is well taken.

* * * * *

[T]he recently decided case of *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 182 Cal.Rptr. 813, provides strong support for

appellants' position. There, plaintiffs alleged violations of their state constitutional rights to free speech and free press. The trial court denied plaintiffs the right to seek damages, and the appellate court deemed this order to have the same legal effect as a general demurrer. (*Id.*, at p. 822, 182 Cal.Rptr. 813.) The court went on to hold that because of the self-executing and important nature of the free speech and free press provision of the California Constitution, plaintiffs were entitled to maintain a cause of action for damages even though no statute granted such a cause of action. (*Id.*, at pp. 851-853, 182 Cal.Rptr. 813.)

Laguna Publishing Co., while not addressing the question of governmental immunity, is persuasive authority for the proposition that section 815 does not bar appellants' state constitutional cause of action. First, the procedural posture in *Laguna Publishing Co.* is identical to that here. An order having the effect of a general demurrer was imposed as to a constitutional cause of action in both cases. Second, the right to vote would appear to be contained in a self-executing provision of the constitution as is the right to free speech and free press.⁴ A constitutional provision is presumed to be self-executing. (*Flood v. Riggs* (1978) 80 Cal.App.3d 138, 154, 145 Cal.Rptr. 573; *Taylor v. Madigan* (1975) 53 Cal.App.3d 943, 950, 126 Cal.Rptr. 376.) This presumption will be given effect unless it appears that legislation is required to implement the right granted. (*Chesney v. Byram* (1940) 15 Cal.2d 460, 462-463, 101 P.2d 1106.) The right to vote contained in article II, section 2, clearly does not require enabling legislation, and must therefore be deemed to be self-executing. (*Ibid.*)

Since the right to vote provision is self-executing, section 815 does not stand as a bar to appellants' cause of action. As was held in *Laguna Publishing Co. v. Golden Rain Foundation*, supra, 131 Cal.App.3d 816, 853, 182 Cal.Rptr. 813, "... the special dignity accorded the rights of free speech and free press ..." afforded plaintiffs the right to seek damages without enabling legislation. The right to vote is no less worthy of protection. (See *Otsuka v. Hite* (1966) 64 Cal.2d 596, 601, 51 Cal.Rptr. 284, 414 P.2d 412, and cases cited therein establishing the fundamental importance of the right to vote.)

Regardless of the foregoing authorities, the law antedating the enactment of section 815 (passed in 1963) is consistent with the position that government-

⁴Article II, section 2, simply provides: "A United States citizen 18 years of age and resident in this state may vote." The old and differently worded right to vote provision (art. (II, sec. 1) was held to be self-executing in *Arapajolu v. McMamin* (1952) 113 Cal.App.2d 824, 830, 249 P.2d 318.)

tal immunity does not lie in this case. In *Rose v. State of California* (1942) 19 Cal.2d 713, 123 P.2d 505, plaintiff brought a cause of action for inverse condemnation. The State demurred alleging they had not consented to the cause of action, nor was there any statutory authorization for such a suit. It was held that the Constitution provided for the cause of action. (*Id.*, at p. 720, 123 P.2d 505.) Significantly, the

legislative committee comment to section 815 provides the example that section 815 is inapplicable to inverse condemnation cases. (Legis. committee com., West's Ann. Gov. Code, supra, sec. 815, p. 168.) If damages are available for the significant deprivation of the right to hold property, they should be equally available for the deprivation of the fundamental right to vote.

Discussion Notes

1. What are the implications of bringing a cause of action for a constitutional "tort," as opposed to a cause of action for an intentional or negligent tort?

2. Is it just the fact that it is a state official who is negligent that changes an ordinary negligence case into a constitutional issue?

**Kerns v. Bucklew
357 S.E.2d 750 (W.Va. 1987)**

McHUGH, Justice:

In this original proceeding the petitioners, Laura Kerns and the West Virginia Human Rights Commission, seek a writ of mandamus compelling the respondents, the President of West Virginia University and the West Virginia Board of Regents, to pay Ms. Kerns the damages that were awarded to her by the West Virginia Human Rights Commission as the result of the Commission's finding of employment discrimination by the respondents' agents against Ms. Kerns on the basis of her sex. The respondents assert that they are immune from liability for the employment discrimination damages by virtue of state constitutional governmental immunity. They argue that Ms. Kerns should seek to enforce the Commission's monetary award by seeking a recommendation of a moral obligation in the West Virginia Court of Claims and funding of the same by the legislature. We hold that state constitutional governmental immunity is superseded in this case by federal constitutional protection against employment discrimination. Accordingly, we grant the writ of mandamus.

* * * * *

II

A.

W.Va. Const. art. VI, sec. 35 provides: "The State of West Virginia shall never be made defendant in any court of law or equity, . . ." In syllabus point 2 of *Ables v. Mooney*, 164 W.Va. 19, 264 S.E.2d 424 (1979), this Court recognized that this state constitutional provision protects the fiscal integrity of the State:

In certain instances a suit may be maintained against a State official in his individual capacity, notwithstanding the constitutional immunity provision found in Article VI, Section 35 of the West Virginia Constitution, where the relief sought involves a prospective declaration of the parties' rights. However, where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief.

That the primary purpose of this state constitutional provision is to prevent the diversion of state money from legislatively appropriated purposes to the payment of court awards is apparent also in syllabus point 2 of *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, ___ W.Va. ___, 310 S.E.2d 675 (1983): "Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State."⁶

The immunity from suits provided to the State by the *Constitution of West Virginia* is to be distinguished from the common law doctrine of governmental immunity, which may be abrogated by the legislature or by this Court through its evolution of common law principles. *Ables v. Mooney*, 164 W.Va. 19, 25 n. 5, 264 S.E.2d 424, 428 n. 5 (1979). In Justice Miller's concurring opinion in *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, ___ W.Va ___, 310 S.E. 2d 675,

⁶This court recently held that a sophisticated commercial entity's breach of contract action against the State was barred by *W.Va. Const.* art. VI, sec. 35. See syl. pts. 2-3, *G.M. McCrossin, Inc. v. West Virginia Board of Regents*, ___ W.Va. ___, 355 S.E.2d 32 (1987).

691 (1983), it was observed that no court has judicially abolished sovereign immunity set by the state constitution.

B.

Nonetheless, the provisions of the *Constitution of the United States* also govern the people of this State, and such provisions, under the supremacy clause, override any contrary state constitutional or statutory law providing less protection or relief than provided by the Federal *Constitution* or federal statutes: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." *U.S. Const.*, art. VI, cl. 2 ("the supremacy clause").

In addition to the overriding effect of the supremacy clause of the *Constitution of the United States* (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the *Constitution of the United States* and which implements such amendment will by its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, sec. 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972. . . .

C.

It is readily apparent that *Fitzpatrick v. Bitzer* and *New York Gaslight Club, Inc. v. Carey* permit affirmative relief, such as an award of back pay and reasonable attorney's fees, in civil actions in *federal* courts under the Equal Employment Opportunity Act of 1972, as amended, where such relief, under state law

(such as governmental immunity), is not obtainable in state administrative or judicial proceedings. We hold that affirmative relief, such as an award of back pay and reasonable attorney's fees, is recoverable against the State of West Virginia as an employer in employment discrimination cases adjudicated before the West Virginia Human Rights Commission or in the court system of this State, as well as being recoverable in actions or proceedings in federal forums, state constitution governmental immunity notwithstanding. In employment discrimination cases the federal law, which is paramount, is intended by the fourteenth amendment and Congress to "be vindicated at the state or local level." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66, 100 S.Ct. 2024, 2032, 64 L.Ed.2d 723, 735 (1980). Under the supremacy clause of the *Constitution of the United States*, the defense of state constitutional governmental immunity is not available in actions or proceedings under the West Virginia Human Rights Act because that statute is part of a joint state/federal scheme to enforce the fourteenth amendment to the *Constitution of the United States*, and the State would ultimately be liable in a federal forum under federal law. Cf. *State v. Kopa*, ___ W.Va. ___, ___, 311 S.E.2d 412, 418 (1983) (this Court deferred to the opinion of the United States Court of Appeals for the Fourth Circuit regarding the unconstitutionality of an alibi instruction because our "sustaining convictions in the state court [would lead to] predictable release through habeas corpus in the federal court."); *see generally* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif.L.Rev. 189 (1981) (state courts have the obligation under the supremacy clause to cast aside their state constitutional, common law or statutory governmental immunity in certain types of cases involving federal constitutional entitlements).

Discussion Notes

1. Would the outcome in this case have been the same if the cause of action had been that

which was recognized in *Gay Law Students Assoc. v. Pacific Tel. & Tel. Co.*, p. 161.

2. Does the doctrine of sovereign immunity belong in state constitutions?

3. Attorneys Fees

Deras v. Myers
272 Or. 47, 535 P.2d 541 (1975)

O'CONNELL, Chief Justice.

Plaintiff seeks a declaratory judgment holding unconstitutional ORS 260.027 and ORS 260.154

which limit the amounts which may be expended in support of or in opposition to candidates for public office in Oregon. Plaintiff, a candidate for State Representative, who wished to expend funds on his behalf and to support and oppose the candidacies of others without regard to the limits imposed by the statutes and regulations, sought to have them declared invalid infringements upon his rights to free expression and equal protection of law guaranteed by the Oregon and federal constitutions. Defendant, as Secretary of State, is charged with the administration of the statutory scheme under attack.

* * * * *

Stated in condensed form, ORS 260.027 imposes a monetary limit upon the total expenditures that can be made in support of or in opposition to a candidate for public office. ORS 260.154 prohibits any expenditure in support of or in opposition to a candidate unless the person making the expenditure is a candidate or is acting with the prior consent of the candidate. . . .

We are faced, then, with the initial question of whether the legislature may exercise its authority to regulate the conduct of elections³ by limiting the rights of individual citizens to spend money in an effort to persuade their fellow citizens of the merits or demerits of electoral candidates without violating the prohibitions contained in Article I, sections 8 and 26 of the Oregon Constitution.

Article I, sec. 8, provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject what ever; but every person shall be responsible for abuse of this right.

Article I, sec. 26, provides:

No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances (sic).

If we hold that either of these provisions of the Oregon Constitution are violated by the Statutes in question, it would not, then, be necessary to discuss the effect of the federal constitution (First Amendment) because in such case it would not come into play.

* * * * *

Overarching all of the foregoing considerations is the inescapable fact that the limiting legislation closes or impedes important channels of communication on public issues and thus denies citizens freedom of expression where the protection of that constitutional right is the most necessary to preserve our system of government.

Defendant asks us to cast this constitutional pro-

³Unlike the Congress which is dependent for legislative authority upon a constitutional grant, the state legislative power is plenary. Thus state legislation is valid unless contrary to constitutional limitation. *Jory v. Martin*, 153 Or. 278, 285, 56 P.2d 1093 (1936).

tection aside to meet alleged evils which are described in broad generalities and unsupported by reliable evidence. The interests described in Article I were not intended to be swept away by this kind of speculation.

* * * * *

Plaintiff further cross-appeals from the trial court's refusal to award him attorney's fees. Although plaintiff concedes that as a general rule American courts will not award attorney's fees to the prevailing party absent authorization of statute or contract, he correctly points out that courts of equity have the inherent power to award attorney's fees. This power frequently has been exercised in cases where the plaintiff brings suit in a representative capacity and succeeds in protecting the rights of others as much as his own.¹⁹ We recognized this equitable exception to the general rule in *Gilbert v. Hoisting & Port*.

Engrs., 237 Or. 130, 384 P.2d 136, 390 P.2d 320, cert. denied 376 U.S. 963, 84 S.Ct. 1125, 11 L.Ed.2d 981 (1964),²⁰ a substantially similar case to the one at hand. In *Gilbert*, the plaintiffs sued the union of which they were members to require fair and democratic elections. We allowed the plaintiffs attorney's fees at both trial and appellate levels because

. . . The preservation of the democratic process in the functioning of unions is a matter of primary concern, not only to union members but to the public as well. . . . Those members of the union who in good faith seek to preserve the internal democracy of their union should not have to bear the expense of a successful suit.

237 Or. at 138, 384 P.2d at 140.

It is beyond dispute that the interest of the public in preservation of the individual liberties guaranteed against governmental infringement of the constitution is even stronger than that present in *Gilbert*. Correspondingly, plaintiff in this case, at least as much as the plaintiffs in *Gilbert*, should not be required to bear the entire cost of this litigation the benefits of which flow equally to all members of the public. Therefore, the case must be remanded for the determination and award of reasonable attorney's fees.

¹⁹*See, Falcon, Award of Attorney's Fees in Civil Rights and Constitutional Litigation*, 33 Md.L.Rev. 379 (1973); *Nussbaum, Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 301 (1973); *Note*, 24 Hastings L.J. 733 (1973).
²⁰*See also, Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

Discussion Notes

1. In what other contexts might state courts recognize a claim for attorneys fees?

2. All of the issues discussed in this section are thoroughly covered in Friesen, "Recovering Damages."

3. It is becoming more common for *federal* constitutional claims to be brought in state courts,

often joined with state constitutional law claims. See Steven H. Steinglass, *Section 1983 Litigation in State Courts* (New York: Clark Boardman, Co., 1987); Steven H. Steinglass, "The Emerging State Court Section 1983 Action: A Procedural Review," *University of Miami Law Review* 38 (May 1984): 381.

Chapter 5
Interpretation of State Constitutions

A. Introduction

[W]e must never forget, that it is a *constitution* we are expounding.

Chief Justice John Marshall
McCulloch v. Maryland 17 U.S. 316, 407 (1819)

Marshall's famous statement, of course, referred to the federal constitution. Should the same attitude he sought to engender with reference to the federal constitution apply when courts interpret or construe state constitutions? Do the courts exhibit a similar attitude, or do they tend to treat state constitutions more as they treat statutes? What techniques of state constitutional interpretation may be identified, and do these techniques differ from federal constitutional interpretation?

Some state constitutions contain provisions relating to interpretation. For example, Article I, section 23 of the South Carolina Constitution:

The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms.

Article 4, Section 7, paragraph 11 of the New Jersey Constitution provides:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

The classic work on state constitutional interpretation was Thomas M. Cooley's *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, first published in 1868 and updated in numerous subsequent editions. Many courts rely on this work as authority, referring to it simply as "Cooley's Constitutional Limitations." But see, Thomas Reed Powell, "Book Review," *Harvard Law Review* 41 (December 1927): 272; William F. Swindler, "State Constitutional Law: Some Representative Decisions," *William and Mary Law Review* 9 (Fall 1967): 166 (describing Cooley's treatise as "now obsolete").

A major factor in state constitutional interpretation is the constitution's general *limiting* function.*

*Therefore, many of the difficult questions of judicial interpretation of state constitutions involve implied limitations on power. Walter Dodd, "Implied Powers and Implied Limitations in Constitutional Law," *Yale Law Journal* 29 (1919): 160:

The preceding discussion has suggested a real antithesis between constitutional construction as it relates to the national government on the one side and constitutional construction as it relates to the state government on the other. With respect to the United States, emphasis has been upon powers, and perhaps the most important single manifestation of judicial action has been the doctrine of implied powers. With respect to the states, emphasis has been upon limitations, and the most important single manifestation of judicial action has been the doctrine of implied limitations. Theoretically state powers are original powers, subject only to such limitations as appear in constitutional texts, and are to be construed liberally; national powers are granted or delegated, and should in theory receive a more restricted application. Actually the reverse is true, and limitations upon states in state and national constitutions are construed more strictly against the state than are textually equivalent limitations as against the national government.

This is, of course, not always the case. For example, it is difficult to characterize a constitutional provision adopted to overcome a judicial decision denying the authority for certain governmental action as a “limitation” on governmental power. The point is, however, that the function of the constitutional provision under scrutiny is an important factor in its interpretation.

The texts of state constitutions are much more volatile than their federal counterpart. They are subject to change, and such changes come from a number of different sources—legislatively recommended

amendment or revision, initiative amendment, or proposals submitted to the voters by constitutional conventions. Thus state constitutional questions often require interpretation of provisions of relatively recent, and sometimes differing, origin. Often the current state constitutional provision is the product of many amendments over the years. Furthermore, many state constitutional provisions have been “copied” from other states. All these factors, distinguishing the federal from state constitutions, can and should affect interpretation.

B. Application of General Concepts of Interpretation

A recurring question in interpreting state constitutional provisions concerns the extent to which concepts of interpretation developed for statutes or other legal documents should be applied to state constitutional interpretation. The Supreme Court of North Dakota has stated: "Generally, principles of construction applicable to statutes are also applicable to constitutional provisions." *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898, 908 (N.D. 1977). Read the following case with this idea in mind.

Eberle v. Nielson **78 Idaho 572, 306 P.2d 1083 (1957)**

TAYLOR, Justice.

The petitioners . . . members of the current Thirty-fourth Session of the State Legislature, on behalf of themselves and others similarly situated, file petition in this Court seeking a writ of mandate to compel issuance of warrants by the defendant, State Auditor, for payment of expenses incurred by them while serving as members of various committees of the legislature. They allege that funds were regularly appropriated from the payment of such expenses; that vouchers were regularly prepared and approved by the presiding officer of the respective houses, and were presented to and approved by the State Board of Examiners; and that the defendant had refused to draw warrants for the payment thereof on the ground that payment of such claims was not authorized by law.

Defendant, answering the petition, admits all of the allegations therein, and affirmatively alleges that

sec. 67-412, I.C., purporting to authorize payment of such expenses, is in violation of Article 3, sec. 23, of the State Constitution. Section 67-412, I.C., enacted in 1951, is as follows:

Each member of the legislature of the State of Idaho shall receive the sum of \$5.00 per day as committee expenses while serving as a member of any committee during any session of the legislature, including the present thirty-first session of said legislature; and provided that no member shall receive such expense for service on more than one committee at the same time.

The pertinent part of sec. 23, Article 3, of the Constitution provides:

Each member of the legislature shall receive for his services a sum of ten dollars per day from the commencement of the session; but such pay shall not exceed for each member, except the presiding officers, in the aggregate, \$600 for per diem allowances for any one session; and shall receive each the sum of ten cents per mile each way by the usual traveled route."

In determining the constitutionality of a legislative enactment, fundamental principles must ever be kept in mind and rigidly observed. Statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of validity. . . .

Where a statute is susceptible of two constructions, one of which would render it invalid and the other would render it valid, the construction which sustains the statute must be adopted by the courts. . . .

The burden of showing unconstitutionality of a statute is upon the party who asserts it, and invalidity must be clearly shown. . . .

It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction. . . .

In construing our State Constitution there are also certain fundamental principles which must be recognized and given effect. Unlike the Federal Constitution, the State Constitution is a limitation, not a grant, of power. We look to the State Constitution, not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden by the state or federal constitutions, it must be held valid.

This fundamental concept of the State Constitution is generally accepted throughout the United States, and is not questioned in these proceedings. It has always been the guiding principle of constitutional construction in this state. . . .

There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of *expressio unius est exclusio alterius* has no application to the provisions of our State Constitution.

Express enumeration of legislative powers is not exclusive of others not named unless accompanied by negative terms.

MacMillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, at page 1033, 17 A.L.R. 288.

It is, of course, elementary law that, unlike the federal constitution, the state constitution is not a grant of power to the legislature but rather a limitation upon the powers of that body. An express enumeration of legislative powers is not exclusive of others not named, unless accompanied by negative terms.

Slavich v. Walsh, 82 Cal.App.2d 228, 186 P.2d 35, at page 39.

. . . the respondent contends that under the doctrine of *expressio unius est exclusio alterius*, since the Constitution specifies two items which may be allowed, any other allowances are invalid. This argument overlooks the fact that our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature. (Citations.)

Collins v. Riley, 24 Cal.2d 912, 152 P.2d 169, at page 171.

This rule was again approved and quoted by the Supreme Court of California in *Dean v. Kuchel*, 37 Cal.2d 97, 230 P.2d 811.

This Court has also heretofore refused to apply the rule of *expressio unius est exclusio alterius* to the revenue provisions of the Constitution, as follows:

Certainly our Constitution does not expressly prohibit the people of Idaho from raising revenue in the manner provided in chapter 179 of the Session Laws of 1913, and, while it is true there are three methods of raising revenue expressed in section 2 of article 7 of the Constitution, we cannot infer from this that an implication arises prohibiting the state from also raising revenue pursuant to its inherent power to do so in any other manner its Legislature may see fit to adopt.

In re Kessler, 26 Idaho 764, 771, 146 P. 113, 114, L.R.A.1915D, 322.

The tax in question is by a method other than those mentioned in section 2, art. 7, of the Constitution, but is not on that account unconstitutional, because it is not necessary that the Constitution expressly authorize the Legislature to enact each and every kind of tax adopted by it. An act is legal when the Constitution contains no prohibition against it.

Independent School Dist. v. Pfof, 51 Idaho 240, 252, 4 P.2d 893, 897.

* * * * *

Applying the foregoing rules and principles to the case before us, we find no limitation in sec. 23, Article 3, of the Constitution, forbidding the legislature to provide for the payment of expenses of its members. It expressly allows to each member \$10 per day "for his services," and provides that such per diem shall not exceed \$600 for any one session. It also allows "ten cents per mile each way by the usual traveled route." This is a lump sum allowance for travel. The section is silent as to any other expenses. It follows that the enumeration of an allowance for services and an allowance for travel, and the absence of any restrictive terms limiting the legislators to such allowances, leaves the legislature free to provide for the payment of other expenses necessarily incurred by its members in the discharge of their duties.

Discussion Notes

1. See also *Imbrie v. Marsh*, 3 N.J. 578, 612-13, 71 A.2d 352, 371 (1950) (Oliphant, J., dissenting) (cautioning about applying *expressio unius* maxim to state constitutions); and *Reilly v. Ozzard*, 33 N.J. 529, 538-39, 166 A.2d 360, 365 (1960) ("Where, as here, the constitutional provision is prohibitory in nature, it surely can not mechanically be inferred that what was not prohibited was thereby affirmatively guaranteed").

2. In *Eberle*, the Idaho Supreme Court avoided the problem of "negative implication" in state constitutional interpretation. As noted earlier, many state constitutions include provisions that could be relegated to statutory law. Particularly when these provisions mandate legislative action or grant authority to a legislature already vested with plenary power, courts can transform these provisions into limitations on legislative power. Professor Frank P. Grad described this problem:

It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation. . . .

In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions. . . . In order to give effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of another).

Frank P. Grad, "The State Constitution: Its Function and Form for Our Time," *Virginia Law Review* 54 (June 1968): 964-66.

For these reasons, many apparent grants of authority become, through judicial interpretation, limits on legislative power. Courts and lawyers should be aware of this hidden dimension of state constitutional language.

3. With respect to the problem of negative implication, see also *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951); *Hoffman v. Clark*, 69 Ill. 2d 402, 422, 372 N.E. 2d 74, 83 (1977); *Ex Parte the Alabama Senate*, 466 So. 2d 914 (Ala. 1985).

4. See also *City of Sacramento v. Hickman*, 59 Cal. Rptr. 609, 428 P.2d 593 (1967), which sets forth a number of principles of state constitutional interpretation.

William F. Swindler, "State Constitutions for the 20th Century"

Nebraska Law Review
50 (Summer 1971): 593-96.

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* * * * *

Judicial Doctrine and the Future

Because state constitutions are all too detailed and explicit, there is a built-in orientation toward strict construction in the majority of states. Despite the assurance that the legislative power is plenary in the absence of specific constitutional limitations, and that the police power of the sovereign resides in the lawmaking branch, courts tend to offset the legislative effort in many cases by a narrow reading of the statutory language and the constitutional formulae

which may apply. Moreover, new constitutions or constitutional amendments are ambivalently treated. Although the standard protestation is that "a constitutional provision can speak only to the future," the influence of past construction is readily preserved when a new provision preserves in haec verba the language of the provision it supplants. As one state court has observed: "When a portion of the constitution has been construed, considered and acted on for decades in one way by all branches of government," only an explicit amendment altering the language or the literal effect of the provision will warrant a change in construction. "[The constitution] should not be changed, expanded or extended beyond its settled intent and meaning by any court to meet daily changes in mores, manners, habits or thinking of the people," except by amendment, the same opinion declared.⁸⁹

* * * * *

Under the prodding example of federal constitutional doctrine, the courts in the states having tended to develop a somewhat broader application of the concept of delegability of legislative power, and to

⁸⁹State v. Hall, 187 So. 2d 861, 863 (Miss. 1966).

define more broadly the police power in general, although, with reference to the exercise of the power, the nexus between public need and the action taken may be narrowly defined. With reference to the recurrent question of use of public school buses by private school pupils, the courts are still inclined to be all but inflexible.

An encouraging trend appears to have developed in quite recent years, as state legislatures have been urged to act more boldly under existing constitutional power, and courts in a number of states have sustained their actions. Where the constitutional language is not in itself restrictive, the general policy endorsed by the constitutional language need not be subjected to rules of strict construction. And where historically a word or phrase has taken on a new meaning or understanding now in general acceptance, which differs from the meaning of the time of enactment of the constitutional passage in which the word or phrase appears, the recent usage will apply. The self-executing nature of many constitutional provisions has been reaffirmed, and in matters of constitutional questions the issue of standing has been disposed of in a manner more conformable with recent federal decisions. The matter of the wisdom of legislation is once again being left to the legislature, and any changing view of public policy relating to legislative enactments is apt to be accepted by the courts. Police power, if reasonably invoked, is upheld, and where this involves anti-discrimination standards it is unequivocally validated.

If this trend of recent state constitutional decision continues, it may conceivably counteract the inhibiting effect of the older narrow construction in so many areas of state jurisprudence. It is too early to determine whether, in the late sixties, state courts have begun to make a massive intellectual reversal of poles analogous to the reversal in federal constitutional law after 1937. There is still the unconscionable tangle of restrictive detail in the constitutions themselves, awaiting deletion through comprehensive amendments. But to the degree that a new state constitutionalism can be effected through a shift from narrow to broad judicial definition of legislative authority, there may be some ground for hope. The decade of the seventies holds the answer.

State v. Jewett
500 A.2d 233 (Vt. 1985)

HAYES, Justice.

In this case, we are asked to decide, among other issues, whether the defendant was illegally stopped and arrested in violation of his rights guaranteed by

Chapter 1, Article 11 of the Vermont Constitution. The state constitutional issue has been squarely raised, but neither party has presented any substantive analysis or argument on this issue. This constitutes inadequate briefing, and we decline to address the state constitutional question on the basis of the record now before this Court. *State v. Taylor*, 145 Vt. 437, 439, 491 A.2d 1034, 1035 (1985). Because the briefs fall short of the mark on the state constitutional claim, we are directing the parties to file supplemental briefs addressing that issue.

The standard we have set is clear: what is adamantly asserted must be plausibly maintained. Yet our duty is not met by simply drawing the line. On the subject of briefing, we have said many times what we are *against!* Now the hour has come to say what we are *for*. To put it in another way, we who have the mind to criticize must have the heart to help.

This occasion makes clear the need to raise the plane of consciousness of bench and bar about the resurgence of federalism that is sweeping across the country. Since 1970 there have been over 250 cases in which state appellate courts have viewed the scope of rights under state constitutions as broader than those secured by the federal constitution as interpreted by the United States Supreme Court.¹

Oregon Justice Hans Linde has stated: "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."²

Recently a young lawyer wrote of attorney neglect regarding the possibilities of state constitutional law:

It is the highest law of our state, yet it is sometimes esteemed the lowest. It is routinely cited, then routinely forgotten. It is our birthright, which we have sold for a bowl of federal porridge. It is our state Constitution, the poor relation of the United States Constitution. But it may soon be coming into new wealth.³

One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards. As Justice Linde has noted:

¹Collins, *Reliance on State Constitutions: Some Random Thoughts*, in *Developments in State Constitutional Law* 2 (B. McGraw ed. 1985).

²Welsh & Collins, *Taking State Constitutions Seriously*, 14 *The Center Mag.* 6, 12 (Sept./Oct. 1981).

³Tinkle, *The Resurgence of State Constitutional Law*, 18 [Me.] *Bar Bull.* 257 (1984).

People do not claim rights against self-incrimination, they “take the fifth” and expect “Miranda warnings.” Unlawful searches are equated with fourth amendment violations. Journalists do not invoke freedom of the press, they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.⁴

Why has all of this happened? Former Justice Charles G. Douglas of the New Hampshire Supreme Court gives this explanation:

The fact that law clerks working for state judges have only been taught or are familiar with federal cases brings a federal bias to the various states as they fan out after graduation from “federally” oriented law schools. The lack of treatises [or] textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to “nationalize” the law and denigrate the state bench.⁵

Despite the burgeoning developments in state constitutional law, only about a dozen law schools have courses in state constitutional jurisprudence. Some commentators have noted that this oversight stems from the fact that many law school deans are former clerks to Justices of the United States Supreme Court or other members of the federal judiciary.

To paraphrase Jefferson, we might as well require a man to wear still the coat which fitted him as a boy as to educate a law student in this time of the post-Warren counter-revolution as if there had been no resurrection of federalism and state judicial independence. It is small wonder that lawyers are confused or baffled when they decide to engage in independent interpretation of the Vermont Constitution.

This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow. In his correspondence with George Wythe, John Adams summed up this kind of historic time: “You and I, dear friend, have been sent into life

at a time when the greatest lawgivers of antiquity would have wished to live.”⁶

* * * * *

Thus, it is important that the attorney consider the various approaches that can be taken to state constitutional argument. We will outline some of them in the paragraphs that follow. The advocate in appellate argument may wish to combine several of these approaches, having in mind that any collegial tribunal contains members with varying legal backgrounds and philosophies. What is appealing to one justice may be unpersuasive to another. Therefore, wise counsel will use every tool available in his or her efforts to convince.

One approach to constitutional argument involves the use of fundamentally historical materials. Mr. Justice Holmes has said that “historic continuity with the past is not a duty it is only a necessity. . . .”¹⁰

In *Gompers v. United States*, 233 U.S. 604, 34 S.Ct. 693, 58 L.Ed. 1115 (1914), Holmes was speaking of the United States Constitution, but his remarks would be equally applicable to the Vermont Constitution. He said:

. . . the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

Id. at 610, 34 S.Ct. at 695.

Historical argument may also touch upon the legislative history of a particular provision, “or on the social and political setting in which it originated, or on the fate of the [provision] in subsequent constitutions.”¹¹

The textual approach to state constitutional argument needs little explanation. A state constitutional clause may confer rights not bestowed by the United States Constitution or contain language that differs from parallel provisions in the National Charter so that the former invites interpretation on independent grounds. Justice Joseph Story draws this distinction between historical and textual arguments:

Mr. Jefferson has laid down [what he deems a perfect canon] for the interpretation of the Constitution. . . . On every ques-

⁴Linde, *E Pluribus—Constitutional Theory and State Courts, in Developments in State Constitutional Law* 279 (B. McGraw ed. 1985).

⁵Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 Suffolk U.L. Rev. 1123, 1147 (1978).

⁶J. Adams, *Thoughts on Government* IV, 200 (1850).

¹⁰Holmes, *Learning and Science in Collected Legal Papers* 139 (1920).

¹¹Linde, *supra*, note 4, at 285.

tion of construction [we should] carry ourselves back to the time, when the Constitution was adopted, recollect the spirit manifested in the debates and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed. . . .

Now who does not see the utter . . . incoherence of this cannon. . . . Is the sense of the Constitution to be ascertained . . . by conjecture from scattered documents, from private papers, from the table talk of some statesmen. . . ? It is obvious, that there can be no security to the people in any constitution of government if they are not to judge of it by the fair meaning of the words of the text.¹²

Both the self-incrimination and search and seizure provisions of the Vermont Constitution contain wording substantially different from the parallel clauses in the Federal Charter. Thus, it is possible that these clauses could be construed differently from somewhat similar provisions in the Federal Constitution or they may be given the same interpretation even though the language differs.

The advocate may also use a sibling state approach in state constitutional argument. This involves seeing what other states with identical or similar constitutional clauses have done. Mr. Justice Charles Douglas points out that in *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 526, 464 A.2d 288, 296 (1983), the legal remedy clause of the New Hampshire Constitution was examined in terms of the analysis by several other state courts of identically worded provisions.¹³ He went on to note that the Rhode Island Supreme Court adopted *Heath* when considering the same language in the Rhode Island Constitution. See *Kennedy v. Cumberland Engineering Co.*, XX R.I. XX, XX, 471 A.2d 195, 200-01 (1984).

Another approach involves the use of economic and sociological materials in constitutional litigation. The classic example of this was in *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), which upheld a state law limiting the hours of labor for women. Then attorney Louis D. Brandeis filed a brief in which he assembled a list of similar state and foreign statutes, "extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor

are dangerous for women," and "extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question," all supporting the contention that the statute at issue bore a reasonable relationship to the public health and safety, concededly legitimate exercises of the police power. *Id.* at 419-20 n. 1, 28 S.Ct. at 325-26 n. 1.

Philip Bobbitt discusses six types of constitutional argument in his very excellent volume.¹⁴ These types are the historical, the textual, the doctrinal, the prudential, the structural, and the ethical. A study of this volume would be of great help to the advocate who approaches for the first time the task of briefing a state constitutional question.

We have not meant to suggest here that all of the types of constitutional argument have been mentioned in this opinion or in Mr. Bobbitt's work. The imaginative lawyer is still the fountainhead of our finest jurisprudence.

No attorney briefing or arguing a state constitutional question before the Vermont Supreme Court should undertake his or her task without first reviewing *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

In that case the United States Supreme Court said:

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, *we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.* (emphasis supplied)

Id. at 1040-41, 103 S.Ct. at 3475-76.

When briefing state constitutional questions, counsel should heed this warning of Mr. Justice Carson of the Oregon Supreme Court:

[B]eware of using federal cases and saying they "compel" a given conclusion. They may, but the point here is that if they are good cases for their logic and their reasoning, then cite them, use them, but do not say they "compel" the state court to reach its decision. The United States Supreme Court will reverse whenever it finds that the state court erred in interpreting federal law. Now this is true even though the state may also have relied on its own constitution. My point here is that if you say that this result is "compelled"

¹²P. Bobbitt, *Constitutional Fate—Theory of the Constitution* 25 (1982) (quoting J. Story, 1 *Commentaries on the Constitution of the United States* sec. 407, at 390 n. 1 (1st ed. 1833)).

¹³Douglas, *State v. Ball: The Need To Put Last Things Last*, IV [N.H.] Trial Bar News 13-15 (March/April, 1984).

¹⁴Bobbitt, *supra*, note 12.

by the federal Constitution, and if we follow your advice, you may be setting yourself up for reversal if the Supreme Court says: "Wrong, the federal Constitution does not compel this decision and we cannot tell from the opinion whether the state court would have reached this result on independent state grounds." Again, first things first, try to get the state court to decide a question based on its law and constitution and not on the federal law; persuaded yes, compelled no.¹⁵

To protect his or her client, it is the duty of the advocate to raise state constitutional issues, where appropriate, at the trial level and to diligently develop and plausibly maintain them on appeal. It is the corresponding obligation of the Vermont Supreme Court, when state constitutional questions of possible merit have been raised, to address them or order that they be rebriefed when the briefs do not pass muster. If we breach this duty, "we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people." *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983).

¹⁵Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, (Appendix prepared by Ronald K.L. Collins), 19 Willamette L.Rev. 641, 651 (1983).

During the American Constitutional Convention when the last members were signing the fundamental Charter, Benjamin Franklin looked toward the chair of General Washington at the back of which a sun had been painted. He observed

... to a few members near him, that painters had found it difficult to distinguish in their art a rising from a setting sun. "I have," said he, "often and often in the course of the session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun."¹⁶

We have an opportunity to develop a sound jurisprudence of state constitutional law that will serve not only this generation of Vermonters but those who will come after us in the decades yet to be. If we meet this challenge we too will see the dawn of a great new day such as Franklin spoke of so many years ago.

¹⁶C. Bowen, *Miracle at Philadelphia* 263 (1966) (quoting James Madison in a letter to Thomas Jefferson).

Discussion Notes

1. What is the Vermont Supreme Court seeking to accomplish with this opinion?

2. Would an opinion like this be likely in an area of state constitutional interpretation which did not have to do with *rights*?

C. The “Plain Meaning” of State Constitutional Provisions

The “plain meaning rule” of *statutory* interpretation has been on the decline since the 1940s. See Harry Wilmer Jones, “The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,” *Washington University Law Quarterly* 25 (December 1939): 2; Arthur Murphy, “Old Maxims Never Die: The Plain Meaning Rule,” *Columbia Law Review* 75 (November 1975): 1299.

Should this trend be applied to constitutional interpretation, particularly state constitutional interpretation?

In *Vreeland v. Byrne*, 72 N.J. 92, 370 A.2d 825 (1977), the Supreme Court of New Jersey made the following observations about state constitutional construction:

The pertinent constitutional provision with which we are here concerned, Art. 4, sec. 5, para. 1, which is quoted above, is not in our view in any sense ambiguous. To us it is devoid of any trace of uncertainty. It limits the eligibility of a member of the Legislature as candidate for “any State civil office or position, of profit,” “during the term for which he shall have been elected.”

The limitation is of a dual nature. The legislator, during the proscribed period, shall neither be “nominated, elected or appointed” to any “civil office or position” which shall either (1) “have been created by law,” or (2) “the emoluments whereof shall have been increased by law” during the term for which he shall have been elected. He remains eligible, during his legislative term, as a candidate for any office or position that does not fall within either of the two forbidden categories. He regains his eligibility with respect to the two proscribed categories of office upon the expiration of the legislative term for which he shall have been elected.

It is a familiar rule of construction that were phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to ex-

trinsic materials. The language speaks for itself, and where found in our State Constitution the language is the voice of the people. As this Court said some twenty years ago,

[T]he Constitution derives its force, not from the Convention which framed it, but from the people who ratified it: and the intent to be arrived at is that of the people.

* * * * *

The Constitution was written “to be understood by the voters: its words and phrases were used in their normal and ordinary as distinguished from technical meaning”; and “where the intention is clear there is no room for construction and no excuse for interpolation or addition.”

United States v. Sprague, 282 U.S. 716, 51 S.Ct. 220, 75 L. Ed. 640 (1931) [*Gangemi v. Berry*, 25 N. J. 1, 16 (1957)].

In considering the meaning of this Article, an important principle of constitutional interpretation should not be overlooked. Not all constitutional provisions are of equal majesty. Justice Holmes once referred to the “great ordinances of the Constitution.”⁴ Within this category would be included the due process clause, the equal protection clause, the free speech clause, all or most of the other sections of the Bill of Rights, as well as certain other provisions. The task of interpreting most if not all of these “great ordinances” is an evolving and on-going process. The history of the Federal Constitution clearly teaches that what may, for instance, be due process in one decade or in one generation will fail to meet this test

⁴*Springer v. Philippine Islands*, 277 U.S. 189, 209, 48 S. Ct. 480, 72 L. Ed. 845, 852 (1928).

in the next. And this is as it should be. The "great ordinances" are flexible pronouncements constantly evolving responsively to the felt needs of the times.

But there are other articles in the Constitution of a different and less exalted quality. Such provisions generally set forth rather simply those details of governmental administration as are deemed worthy of a place in the organic document. Examples from our own Constitution might be the clause in Art. 4, sec. 4 para. 6 that requires bills and joint resolutions to be read three times in each house before final passage; or the provision in Art. 4, sec. 5, para. 3 declaring that upon a member of the Legislature becoming a member of Congress, his seat in the Legislature shall thereupon become vacant; or the requirement set forth in Art. 5, sec. 1, para. 2 that the Governor shall be not less than thirty years of age.

Such constitutional provisions as these, and others like them, important as they doubtless may be, are

entirely set apart from the "great ordinances" mentioned above, and as matter of constitutional interpretation should receive entirely different treatment. Where in the one case the underlying spirit, intent and purpose of the Article must be sought and applied as it may have relevance to the problems of the day, in the other a literal adherence to the words of the clause is the only way that the expressed will of the people can be assured fulfillment.

We submit that the ineligibility clause quite definitely and clearly falls into this latter category. It announces no principle of government: rather it touches upon the mechanics and administration of government, much as in the examples set forth above. Provisions such as this should be read literally. No process of "interpretation" is necessary or appropriate. Only in this way can the plainly-expressed will of the people be carried out.

Discussion Notes

1. Can the "meaning" of words realistically be viewed in this way? See generally, Zechariah Chafee Jr., "The Disorderly Conduct of Words," *Columbia Law Review* 41 (March 1941): 381; Reed Dickerson, "The Diseases of Legislative Language," *Harvard Journal on Legislation* 1 (January 1964): 5.

2. The court in *Vreeland* says that state con-

stitutional language "is the voice of the people." What does this mean?

3. With respect to the different types of state constitutional provisions, and the extent to which judicial interpretation can reduce their uncertainty, see Walter F. Dodd, "The Problem of State Constitutional Construction," *Columbia Law Review* 20 (June 1920): 635.

Lipscomb v. State of Oregon 305 Or. 472, 753 P.2d 939 (1988)

LINDE, J.

In 1921, the Governor's veto power under the Oregon Constitution was amended to include, besides single items in appropriation bills, "any provision in new bills declaring an emergency, without thereby affecting any other provision of such bill." The present dispute concerns whether the quoted words empower the Governor to veto only an emergency clause or any provision of a bill if the bill contains such a clause.

In 1983, the Legislative Assembly passed Senate Bill 137, which made certain changes in the Public Employees' Retirement System (PERS). One section amended an existing provision (ORS 237.003(8)) so as to exclude some types of earnings of college teachers from the definitions of "salary" or "other advantages" for purposes of determining employment retirement credits and employer contributions. 1983 SB 137, sec. 1, codified as ORS 237.003(1) through (12). The bill contained a provision declaring an

"emergency." The Governor signed Senate Bill 137, including the emergency clause, but his message to the Legislative Assembly stated that he disapproved of and therefore vetoed three provisions of the amending bill.

On advice of Legislative Counsel, the legislative leadership at a subsequent special session treated the vetoes as legally ineffective and did not take them up for reconsideration and enactment over the veto. Legislative Counsel published the provisions in the session laws, Oregon Laws 1983, chapter 830, section 1, and in the Oregon Revised Statutes, ORS 237.003(8) (c) (E), (F) and (H) (1983 Replacement Part), but the executive branch treated the provisions as vetoed and continued to make contributions to PERS on the employee earnings that the bill sought to exclude.

* * * * *

Origins of Article V, section 15a. When a constitutional amendment sets out to change the allocation of power between the political departments of government, it is necessary to understand the political background that motivated the amendment. Some amendments may be designed to correct or clarify a text that has proved difficult to administer or in the

view of legislators and voters has been misinterpreted, or to replace obsolete provisions. The 1921 amendment of Article V, section 15a, was not of that kind. It gave the Governor a measure of power over legislation that he did not previously have. Identifying the reasons for the amendment bears on interpreting what this new power was meant to be.

The legal effect of adding a clause declaring an “emergency” to a bill is to allow legislation to take effect sooner than the 90 days after the end of the session provided in Article IV, section 28.⁶ The political consequence is to prevent a referendum of the act upon petition of the voters, because that power is reserved only for “any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.” Or. Const. Art. IV 1(3) (a).

Contemporaneous sources show this background of the 1921 amendment. In 1921, the constitutional innovation of the popular initiative and referendum was still recent, and the use of declarations of emergencies that prevented referendum petitions was controversial. The proposal, Senate Joint Resolution 13, that became the 1921 amendment to Article V, section 15a, was introduced by Senator B. L. Eddy on February 17, 1921, about a week before the end of the legislative session. In the absence of recorded debates, we must rely on press reports. On that day, the Senate had a heated debate about a pair of bills to use a fund collected from all state taxpayers for construction of a highway by a special district of coastal counties. The Oregon Statesman reported that several Senators criticized the declaration of an emergency attached to the bill, Senator Eddy objecting that the emergency clause “prohibits the people having anything to say as to whether [the highway bills] shall become effective.” *Two Highway Bills Passed By Senators*, The Oregon Statesman, Feb. 18, 1921, at 1, col. 3. The emergency clause preventing a statewide referendum on the coastal highway bill was not the only source of controversy about emergency clauses. Also on February 17, 1921, the Senate passed two other bills involving the highway commission that had first been passed at a special session in 1920 with declarations of an “emergency,” but which Governor Olcott had disapproved “not because he was opposed to them but because he did not consider them emergency measures,” as The Oregon Statesman explained in reporting the previous day’s house repassage of the bills. *Id.*, Feb. 17, 1921, at 1, col. 6-7.

⁶Article IV, section 28, of the Oregon Constitution provides:

No act shall take effect, until ninety days from the end of the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law.

Considered descriptions of SJR 13 appeared during the spring. A committee of legislators prepared an official explanation in support of SJR 13 for the official Voters’ Pamphlet, describing SJR 13 as “a constitutional amendment to permit the governor to veto the emergency clause attached to a bill, without affecting the rest of the bill.” The argument stated:

The amendment now proposed would give him the power to veto the emergency clause of any bill, leaving the rest of the bill to stand. At present, if the emergency clause is objectionable, the governor can only veto the whole bill or allow it to become a law. Voters’ Pamphlet for June 7, 1921 Election, at 11.

After explaining the existing provisions on emergency clauses and on the referendum, the committee continued:

When the legislature passes a bill and attaches to it a valid emergency clause, providing that the bill shall take effect upon its passage, there can be no referendum on the bill, that is to say, it cannot be referred to the people for their approval or rejection. It becomes a law at once. It is often necessary, in order to protect the public interests, that this should be the case. There is, however, a tendency to misuse the emergency clause, and to attach it when not necessary or proper.

* * * * *

. . . If the amendment now proposed shall be adopted the governor will have no reason to veto a good bill because an emergency clause has been unwisely added to it. He can veto that clause and allow the bill to stand on its merits, and subject to a referendum if the people so desire. In the absence of the referendum it would take effect at the expiration of ninety days from the adjournment of the legislative session.

The proposed amendment would enable the governor to bring his judgment to bear as to the necessity of the emergency clause, and it would prevent him from making the emergency clause an excuse or pretext for vetoing the whole bill. As matters stand now, there is opportunity for the governor to make the emergency clause the ostensible reason for a veto, which is really based on other grounds.⁹

Id.

Editorial support quoted in the Oregon Voter, a weekly magazine devoted to state government and elections, before the June 7 special election was based on this understanding.

“Adoption of the amendment gives the governor the power to remove the appendix without affecting the body of the measure,” analyzes Pendleton *East Oregonian*. “The emergency clause veto is a needed supplement to the single item veto,” says Astoria *Budget*.

From the McMinnville *Telephone Register*:

“There will be on the June ballot a constitutional amendment, which will grant to the governor the power to veto the emergency clause of any bill passed by the legislature. This is a splendid measure and should have the support of the voters. This measure will correct an abuse which has been done to the purposes of the emergency clause.”

* * * * *

“[T]his clause was intended for use only for cases involving peace, health or safety to the people; but sometimes it has been seized upon and used to keep a measure from being referred to the people, even when no emergency exists.

“This emergency veto will give the governor power to veto the emergency clause and not affect the body of the measure. As it is now, he must veto the entire bill or permit it to become a law. This emergency veto is a needed supplement to the single item veto and when it is passed another of law evils will be relegated to the scrap heap.”

Oregon Voter, June 4, 1921, at 27.

⁹The defensive tone of further passages in the committee’s argument may explain why a legislative majority was ready to increase the Governor’s veto power:

The chief reason for the amendment is to prevent undue encroachment upon the referendum power of the people. Complaint has been made that the legislature seeks at times to prevent measures from being submitted to the people, and accomplishes this object by the use of the emergency clause. We do not think this often happens, and yet there is at times a disposition in the legislature to use the emergency clause where it is unnecessary. The fact that the governor could veto an emergency clause and allow the remainder of a bill to stand would not only protect the referendum power in fact, but would also tend to allay the suspicion that sometimes arises as to the motives of the legislature in using the emergency clause. The amendment is in the interest of good government and of public confidence and repose.

Voters’ Pamphlet, *supra*, at 11-12. The committee’s statement also was published in the Oregon Voter on April 2, 1921 at 17-19.

The Oregon Voter itself favored the measure because it would permit the governor to veto the emergency clause only, thereby preventing its excessive use, particularly its use “solely for the purpose of making it impossible to use the referendum.” *Id.* at 10. Reviewing the measures on the special election ballot, the Portland Oregonian wrote on June 5:

The emergency clause veto constitutional amendment, while not having received any great amount of publicity, apparently is favored by the majority of voters throughout the state. This measure, if approved, will vest in the governor power to veto the emergency clause without affecting any other provisions of such bills.

Portland Oregonian, June 5, 1921, at 1, col. 6 and cont. at 11, col. 1.

“Plain Meaning” of Article V, section 15a. The contemporaneous materials leave little doubt what the sponsors and the public understood SJR 13 to mean at the time of its enactment. While plaintiffs rely on this history of Article V, section 15a, defendants urge us to disregard the historical evidence of its purpose and scope. They argue that resort to legislative history is improper when the meaning of the text is “plain” or “unambiguous.”

This and similar formulations are often recited,¹²

¹²Defendants quote from *Northwest Natural Gas Co. v. Frank*, 293 Or. 374, 381, 648 P.2d 1284 (1982):

As a court, our role is to interpret the statutes and constitutional provisions. We do not redraft these provisions; we interpret them as the legislature has drafted them. It is axiomatic that in a case of statutory and constitutional construction, this court must give preeminent attention to the language which the legislature and the people have adopted. The statutes are the law, and while the legislative history may provide invaluable insights into the legislative process, it remains supplemental to the statutes as adopted.

Plaintiffs counter with *State ex rel Cox v. Wilson*, 277 Or. 747, 750, 562 P.2d 172 (1977):

Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one only “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.”

* * * * *

The court was quoting from *United States v. Amer. Trucking Ass’n*, 310 US 534, 543-44, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940), omitting footnotes. Neither brief refers to the other’s quotation.

but in practice they do not and should not confine the court to historically blind exegesis. A case dealing with the allocation of legislative and executive power by the state's charter of government cannot be treated as if it involved the use of parol evidence to vary the words of a private contract. When one side to a dispute over the meaning of a public law urges a court not to look at or consider materials presented by the other side for its reading of the law, this only invites doubt whether the materials might show that the "plain meaning" is not so plain after all. That is the case here.¹³

In practice, also, courts rarely see disputes over interpretation when the opposing party cannot show a possible alternative reading of the words, which it claims to be correct in context. That, too, is true in this case. Article V, section 15a, is not as unambiguous as defendants claim. It provides (with the 1921 amendment italicized):

The Governor shall have power to veto single items in appropriation bills, *and any provision in new bills declaring an emergency, without thereby affecting any other provision of such bill.*

Fixing upon the word "any" before "provision," defendants insist that it must mean that in bills declaring an emergency, the governor shall have power to veto any provision. Plaintiffs, on the other hand, maintain that the words "declaring an emergency" were meant to modify "provision," not "bills." Defendants, in turn, respond that the amendment's drafters could easily write "any provision declaring an emergency," if this was meant, and that plaintiffs' reading makes surplusage of the words "in new bills."

The arguments show, not that one reading of the text is more correct or even more plausible than the other, but that the constitutional issue cannot be de-

¹³Even a numerical reference, by nature unambiguous when viewed in isolation, may prove erroneous and require interpretation in its legislative context. See, e.g. *Bush v. Greyhound Lines, Inc.*, 295 Or. 619, 669 P2d 324 (1983); *Warren v. Marion County, et al.*, 222 Or. 307, 353 P2d 257 (1960).

cidied simply by parsing the words of the amendment. That approach puts a greater burden on draftsmanship than the legislative institutions, then or now, can bear, let alone the initiative process that produces some of our laws. See *OEA v. Phillips*, 302 Or 87, 106-07, 727 P2d 602 (1986) (Linde, J., concurring). Nor are we dealing with the work of the kind of committee on style that produced the text of the United States Constitution. The 1921 legislative Assembly had no regular legislative counsel or committee staffs, and SJR 13 was sent to committee and reported back to each chamber so quickly as to suggest little if any hearing or scrutiny for potential ambiguity. No doubt there were other and clearer ways to phrase what Senator Eddy and his colleagues had in mind. We have no published explanation why they included the words "in new bills," since any "bill" is "new" when it is introduced, but perhaps they meant to exclude bills already passed earlier in the same session, which was almost at an end. As long as the sponsors and supporters of SJR 13 knew what they intended to accomplish and why, they had little time and probably little patience for meticulous editorial refinements.

Conclusion. Contemporaneous materials widely available to the voters in 1921, particularly the explanation by a committee of legislators in the official Voters' Pamphlet, leave no doubt that the amendment to Article V, section 15a, was intended to authorize the Governor to veto a declaration of emergency in a bill so as to protect the opportunity of voters to petition for a referendum. Although the wording of the amendment also could suggest a much broader power to veto individual provisions of nonappropriation bills, it is not believable that such a broad power would have gone unmentioned and undebated if anyone had understood the amendment as defendants now contend. The Governor's veto power is not the kind of provision that must find new application in changing technological, economic, or social conditions. We agree with the legislative Assembly and the courts below that the purported veto of the disputed provisions of SB 137 were without legal effect.

Discussion Notes

1. Is the language of Oregon's Article V, Section 15a ambiguous? If so, in what sense is it ambiguous?

2. Does Justice Linde's opinion conflict with the statements he quotes in footnote 12?

D. Constitutional History

**L. Harold Levinson,
“Interpreting State Constitutions by
Resort to the Record”**

**Florida State University Law Review
6 (Summer 1978): 567.**

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* * * * *

Scholarly interest has focused, understandably, on the courts as the most authoritative sources of constitutional interpretation. Mention, however, should also be made of nonjudicial interpreters of constitutional language, including executive and administrative officials, legislators, lobbyists, lawyers, and numerous private citizens. These nonjudicial interpreters make decisions, virtually on a daily basis, about the meaning of their constitutions, subject to relatively infrequent scrutiny by the courts. The techniques and sources of constitutional interpretation are therefore of concern to the nonjudicial as well as the judicial interpreters.

This article deals with the interpretation of state constitutions, not the United States Constitution. Significant differences should be noted. First, the Federal Constitution was adopted through ratification by state legislatures, and the intentions of those legislatures are to a considerable extent preserved by the journals of legislative proceedings—intentions that often conflict from one state to another. State constitutions, on the other hand, are adopted by a direct vote of the people, and the people’s intent may be virtually impossible to ascertain, except from circumstantial evidence.

Second, the Federal Constitution is relatively difficult to amend, and this may justify considerable flexibility in the interpretation of the constitutional text. State constitutions are easier to amend and may therefore provide less justification for flexible interpretation. A third and related distinction is that the Federal Constitution was, for the most part, written two centuries ago. Needs have changed, the meaning of certain words in our language has changed, and relatively flexible interpretation may be required. In contrast, many state constitutions are the products of our own times, speaking in our language about our current problems. Less flexibility seems required in interpreting such documents.

Commentators on the interpretation of the Federal Constitution are sharply divided regarding the extent to which the original intent should be taken into account. However, the cases and literature on state constitutional interpretation seem to reflect a strong consensus that original intent must be ascertained and respected. The ultimate success in this endeavor would be achieved if the original intent of the people who adopted the constitutional provision could be ascertained. If the language of the constitutional text is clear on its face, this plain language is deemed to have been understood by the people, and their intent is deemed to coincide with that plain meaning. If, however, the constitutional text does not yield a plain meaning, resort may be had to other sources in order to find the original intent of the people.

On occasion, the people’s intent is sought in such materials as newspaper commentaries or summaries appearing on the ballot. More frequently, the intent of the people is sought by examining the intent of the framers. A number of theories could be suggested in favor of this technique. Perhaps the people conveyed their concerns and instructions to the framers, who acted as agents of the people in formulating the pro-

posals for submission back to the people. Or perhaps the framers, having completed their drafting process, reported back to the people, explaining the meaning of the provisions by informal methods of communication, leaving no historical record but nevertheless imparting some level of understanding, so that the people may have understood what the framers were proposing.

Another possible explanation is that the framers shared with the people a general understanding of how language was used, and what types of problems caused concern, so that the intent of the framers would be likely to coincide with the intent of the people, even without any direct communication flowing about specific provisions contained in the proposals. Still another possible explanation for using the intent of the framers to reflect the intent of the people is that the people, in adopting the constitutional language, realized that some of it could be fully understood only by the individuals who had participated in the drafting process. It could be that the people did not demand an explanation at the time of ratification but rather committed an act of faith, placing their trust in the undisclosed intent of the framers.

A variation of this theory may be applied where the people are called upon to cast a single vote for or against a document that contains a large number of proposed constitutional provisions. Various individual electors may have sufficient interest to probe the framers' intent underlying some of the provisions that are of special concern, but few electors are likely to take the trouble to acquaint themselves with the framers' intent regarding all provisions, even if this intent could be found if requested. The result is that many electors, in ratifying a package proposal, must have placed considerable trust in the intent of the framers.

A final explanation is that, if the intent of the people cannot be found, the only feasible source of interpretation is the intent of the framers, which is used in place of the intent of the people as the most persuasive substitute available. The framers' intent provides a demonstrable and fixed source of interpretation. It may serve as a protection against some of the instability that could result from a constitutional provision that is unclear on its face and is unaccompanied by any expression of original intent.

If the intent of the framers is to be examined as an aid to interpreting a constitutional provision that is not clear on its face, the next task is to find the most acceptable indicator of the framers' intent. In some states the framers prepare official explanations for distribution to the people in advance of the ratification vote. In most situations, however, the framers are unwilling or unable to prepare an official expla-

nation, and the best available source of their intent is the record of their deliberative proceedings.

The intent of the framers is a useful aid in the interpretation of constitutional provisions that are not clear on their face, but only if the *collective intent* can be established. A vote by the deliberative body during the drafting process may well be sufficient evidence of collective intent. A speech by a individual member is not, by itself, sufficient evidence, but it could be combined with other evidence to help with the demonstration.

The search for collective intent therefore requires an examination of the *record as a whole* and a compilation of all parts of the record dealing with the specific point being examined. The record may not contain enough evidence to lead to any conclusion at all; or the record may contain such conflicting evidence that no collective intent emerges; or the record may contain sufficient evidence tending toward a single meaning so that it can be regarded as an acceptable indicator of the collective intent of the framers.

A litigant who urges a certain interpretation of constitutional language, based on his perception of the intent of the framers, should bear the burden of searching the entire record of the framers' proceedings and of demonstrating that the interpretation being urged is supported by the entire record. The court, with the aid of opposing counsel, should then conduct an independent search of the entire record, in order to verify that the proponent's interpretation is indeed supported by the record.

The process of searching the entire record is greatly facilitated if the record has been suitably compiled, indexed, and made available for public inspection. Preparation of an index by a reliable indexer can permit the parties and the court to focus their attention on those portions of the record that are identified, by the index, as relating to the question at bar. If the compiled record and the index are available to the public before the people's vote, the credibility of the record is enhanced, and a closer identity is established between the intent of the framers, as evidenced by the record, and the intent of the people.

This identity does not depend on any assumption that the average citizen availed himself of the opportunity to peruse the record before casting a vote in the referendum. Rather, the point is that the media, political action groups, and others with special interests may have probed portions of the record, making public comments on selected issues. Moreover, it may be assumed that the compiled and indexed record was offered as a completed product, subject to whatever test might be imposed in the public forum, before the referendum.

Discussion Notes

1. Professor Levinson notes that sometimes the intent of the people is sought by examining materials, such as "newspapers commentaries or summaries appearing on the ballot," that were available to them when they voted. The California courts show a particular willingness to examine such materials. See, e.g., *City of Santa Barbara v. Adamson*, 610 P.2d 436, 439-40 (Cal. 1980); *White v. Davis*, 533 P.2d 222, 233-34 n.11 (Cal. 1975); *People v. Brisendine*, 531 P.2d 1099, 1114 (Cal. 1975).

2. In the words of the Pennsylvania Supreme Court:

Where, as here, we must decide be-

tween two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.

Commonwealth ex rel. Paulinski v. Isaac, 483 Pa. 467, 397 A.2d 760, 766 (1979), cert. denied 442 U.S. 918 (1979). See also *Matter of Kuhn v. Curran*, 294 N.Y. 207, 217, 61 N.E. 2d 513, 517-18 (1945) ("in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter").

Kalodimos v. Village of Morton Grove 103 Ill.2d 483, 470 N.E.2d 266 (1984)

SIMON, Justice.

An ordinance of the village of Morton Grove banning the possession of all operable handguns, apparently the first of its kind in the nation, withstood a challenge under the second and ninth amendments to the United States Constitution. (*Quilici v. Village of Morton Grove* (7th Cir.1982), 695 F.2d 261, cert. denied (1983) ___ U.S. ___, 104 S.Ct. 194, 78 L.Ed.2d 170. In that decision the Federal court also concluded that the ordinance was permissible under the Illinois Constitution. (695 F.2d 261, 265-69.) This appeal calls upon this court to determine the meaning of our State constitution by defining the scope of the relevant State constitutional provision, deciding whether the ordinance passes muster under it, and, if so, deciding whether it is permissible under the constitutional home rule power and the police power.

The ordinance (Morton Grove, Ill Ordinance 81-11 (June 8, 1981)) provides that "[n]o person shall possess, in the Village . . . [a]ny handgun, unless the same has been rendered permanently inoperative." It exempts from its operation peace officers, prison officials, members of the armed forces, reserve units and the Illinois National Guard, security guards duly employed by a commercial or industrial enterprise or a public utility, and members of licensed gun clubs who entrust their handguns to the club who for safekeeping when not using them for target shooting or other recreational purposes. Antique firearms are also specifically exempted from the ordinance.

Morton Grove residents filed this action seeking an injunction and a declaratory judgment that the ordinance violates article I, section 22, of the Illinois

Constitution and is an unreasonable exercise of the police power. . . .

I. The Constitutional Right to Arms

Article I, section 22, added to the Illinois Constitution in 1970, provides:

Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

(Ill.Const. 1970, art. I, sec. 22.)

The section does not mirror the second amendment to the Federal Constitution (U.S. Const., amend. II); rather it adds the words "[s]ubject only to the police power," omits prefatory language concerning the importance of a militia, and substitutes "the individual citizen" for "the people." The majority report of the Bill of Rights Committee of the constitutional convention, which framed the provision, makes clear that the latter two changes were intended to broaden the scope of the right to arms from a collective one applicable only to weapons traditionally used by a regulated militia (see *United States v. Miller* (1939), 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206, to an individual right covering a wider variety of arms. Report of the Bill of Rights Committee on the Preamble and Bill of Rights (hereinafter cited as Committee Report), 6 Record of Proceedings, Sixth Illinois Constitutional Convention (hereinafter cited as Proceedings) 87 (1970).

Equally distinctive, however, is the explicit recognition of "the police power" as a limitation on the liberty the provision affords. The Bill of Rights Committee explained in its report that "[b]ecause arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control under the police power." (Committee Report, 6 Proceedings 88.) The committee report described, with spe-

cific citations, five types of regulatory measures that had been approved in other States as not infringing an individual right to arms, including a complete ban on “certain deadly weapons not commonly and peacefully used by individuals, such as machine guns, firearms equipped with silencing devices, gas-ejecting devices, blackjacks, artillery weapons, bombs, etc.” (Committee Report, 6 Proceedings 89) and a total prohibition of “the sale of some weapons in some circumstances” (Committee Report, 6 Proceedings 90, citing *Biffer v. City of Chicago* (1917), 278 Ill. 562, 116 N.E. 182, and a Texas case, *Caswell & Smith v. State* (Tex.Civ.App. 1912), 148 S.W. 1159, which approved a confiscatory tax on all sales of pistols).

Plaintiffs contend that section 22 is ambiguous and that the ambiguity can only be resolved to mean that while the State and its subdivisions have the power to regulate the possession and use of weapons which are commonly used for recreation or protection of person and property, such as by requiring that all purchasers of handguns be licensed (see *Biffer v. City of Chicago* (1917), 278 Ill. 562, 116 N.E. 182), they may not enact a flat ban on such weapons or any discrete category of them. Plaintiffs also argue that the proper focus in interpreting a constitutional provision such as section 22 must be on the common understanding of the citizens of the State who voted to adopt the Constitution.

The meaning of a constitutional provision depends, of course, on the common understanding of the citizens who, by ratifying the Constitution, gave it life. (*People ex rel. Cosentino v. County of Adams* (1980), 82 Ill.2d 565, 569, 46 Ill.Dec. 116, 413 N.E.2d 870; *Client Follow-Up Co. v. Hynes* (1979), 75 Ill.2d 208, 222, 28 Ill. Dec. 488, 390 N.E.2d 847.) This understanding, however, is best determined by referring to the common meaning of the words used. (*Coalition for Political Honesty v. State Board of Elections* (1976), 65 Ill.2d 453, 464, 3 Ill.Dec. 728, 359 N.E.2d 138.) The plain language of the provision clearly leaves the right to bear any type of arms subject to the police power. This belies any assertion that a majority of the voters must have interpreted the plain words of the provision as ruling out any specific regulatory measure. The official explanation which all voters received also left considerable leeway for regulation of guns by stating that under section 22 “the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to safeguard the welfare of the community.” 7 Proceedings 2689.

The insight offered by these materials is consistent with the interpretation of the provision advanced by the delegates who voted to adopt it. The meaning which the delegates to the convention at-

tached to a provision in the Constitution before sending it to the voters for ratification is relevant in resolving ambiguities which may remain after consulting the language of the provision. (*Client Follow-Up Co. v. Hynes* (1979). . . . The reason is that it is only with the consent of the convention that such provisions are submitted to the voters in the first place.

When presented with the report of the Bill of Rights Committee, the delegates to the convention were faced with a choice of adopting the so-called “majority report,” which set forth section 22 in substantially the form in which it was enacted; adopting the “minority report,” which recommended that the constitution remain silent concerning a right to arms; or adopting the “Lawlor amendment,” which read: “The right of the individual to firearms or other means necessary for defense of his person or safeguarding of his property shall not be denied or infringed. The use of deadly weapons for hunting or other sports shall be subject to regulations established by law.” (3 Proceedings 1704.) The Lawlor proposal and the minority report were both rejected. The majority report, which was accepted by the convention, was introduced by Delegate Leonard Foster who stated:

[I]t was urged on us that the right to keep and bear *some form of firearm* should be put into the constitution. . . . [W]e added a qualifier that the right to bear arms would be subject only to the police power of the state. . . .

In general, the committee feels that the state has the right . . . to regulate firearms; that is to say, to determine who can have them and under what circumstances. . . . [W]e feel that *under this provision, the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category.*” (Emphasis added.) 3 Proceedings 1687 (statement of Delegate Foster).

In the debate following the opening statements, Mr. Foster was questioned as follows by Delegate Elmer Gertz:

MR. GERTZ: . . . [U]nder [the] provision, would it be possible for the city or the state to ban all hand guns, except those in the hands of police officers?

MR. FOSTER: It would be possible to ban all hand guns, *including* those in the hands of police officers. (Emphasis in original.) (3 Proceedings 1689).

This response was amplified the following day when, in his introduction of the minority report, Mr. Gertz asserted that “[i]t was admitted yesterday, that the [majority report] would prevent a complete ban of hand guns, for example,” and Mr. Foster interjected, “[T]hat is inaccurate. The statement of the majority was that it would prevent a complete ban on all guns, but there could be a ban on certain categories.” (3 Proceedings 1693.) In addition, Delegate Matthew Hutmacher, who, along with Delegate Foster, presented the majority report stated that the scope of the police power under the right-to-arms provision was coextensive with “due process” (3 Proceedings 1689 (statement of Delegate Hutmacher)). Shortly before the vote which rejected the minority report, Mr. Foster stated:

It is the position of the majority that *under the police power of the state, the legislature would have the authority, for example, to forbid all hand guns.*

. . . [I]t is still the position of the majority that, short of an absolute and complete ban on the possession of *all firearms*, this provision would leave the legislature free to regulate the use of firearms in Illinois. (Emphasis added.)

3 Proceedings 1718 (statement of Delegate Foster).

During the course of the debates, several delegates who later voted in favor of the majority report voiced an understanding of the report that was similar to Mr. Foster’s. For example, one delegate observed that “as everyone has said—* * * hand guns are by far and away the problem in this country and in this state. * * * This [section] does not in any way attempt or intend * * * [to] restrict the state or the county or the city or any other government within our confines of a reasonable * * * control over hand guns. And I submit to you that *that would include the prohibition* * * * .” (Emphasis added.) (3 Proceedings 1717-18 (statement of Delegate Durr).) Another suggested that, far from obstructing State or local legislation aimed at controlling firearms, the majority report gave constitutional sanction to such legislation for the first time. (3 Proceedings 1709-10 (statement of Delegate Elward).) Others stated that, as they understood it, the majority report was a safeguard against the confiscation of all firearms and nothing more. (3 Proceedings 1711 (statement of Delegate Kelleghan), 1712 (statement of Delegate Downen).) Other delegates simply accepted Mr. Foster’s understanding of the extent to which the majority report would permit regulation of guns. 3 Proceedings 1711

(statement of Delegate Kelleghan), 1719 (statement of Delegates Daley and Kamin).

Conspicuously absent from the debates is any expression by any delegate who favored the majority report that handguns could not be banned under the majority proposal. The only suggestions of this kind were made by delegates who opposed the majority report, and were offered only to demonstrate the possibility that voters or the court might interpret the right bestowed by section 22 too expansively in favor of the right to arms. (See 3 Proceedings 1694 (statement of Delegate Weisberg), 1710 (statement of Delegate Fay), 1714 (statement of Delegate Ladd).) The plaintiffs argue that these statements show that there was no common understanding among the delegates who voted on the section. However, “the court is not justified in relying upon arguments against a proposed constitutional amendment ‘as seen by the minority,’ to determine its meaning after adoption. A precedent so holding would be mischievous in the opportunity it would afford a minority to frustrate the purpose of the [constitutional convention] and the voters.” *Hanley v. Kusper* (1975), 61 Ill.2d 452, 460, 337 N.E.2d 1.

Plaintiffs contend that the natural interpretation of the words “police power,” and that which the voters must have had in mind when considering section 22 under which all classes of firearms rather than merely military ones are protected, includes regulation of such firearms but not a prohibition of any class of arms. We see no basis for this argument. This court has long recognized that the police power comprehends laws “restraining or prohibiting anything harmful to the welfare of the people” (*People v. Warren* (1957), 11 Ill.2d 420, 425, 143 N.E.2d 28; see *Acme Specialties Corp. v. Bibb* (1958), 13 Ill. 2d 516, 518-19, 150 N.E. 2d 132; *cert. denied* (1958), 358 U.S. 840, 79 S.Ct. 64, 3 L.Ed.2d 74 (ban on sale of sparklers upheld as a proper exercise of the police power)), and no convincing evidence has been produced that the voters ascribed a different meaning to the term in the context of section 22.

The plaintiffs refer to newspaper articles and editorials which they argue led voters to believe that no class of weapons would be subject to complete prohibition. . . . These articles either expressed the general fear that the provision as debated and passed by the convention would nullify existing gun-control laws and prevent the passage of new ones or reported similar expressions of fear by convention delegates who had opposed the provision.

Consistent with *Client Follow-Up Co. v. Hynes* (1979), 75 Ill.2d 208, 224-25, 28 Ill.Dec, 488, 390 N.E.2d 847, we recognize that it may not be improper to ascertain the common understanding of a constitutional provision by reference to news reports. (See *Wolfson v. Avery* (1955), 6 Ill.2d 78, 89-92, 126 N.E.2d

701.) In this case, however, to support the plaintiffs' position on the basis of the materials offered in evidence would be neither fair nor accurate. With one exception, the relevant articles and editorials cited to us were contained in the Chicago Daily News and the Chicago Sun-Times. These were published in the same city and had several competitors in their home market. No evidence has been introduced as to the interpretation which newspapers in other parts of the State placed on the right-to-arms provision or the debates which produced it, nor are we told of the understanding communicated by the other newspapers or magazines which Chicago area residents who voted might have read. We are not aware of how many voters read the publications cited, how many of those read the particular articles in question, or how and to what extent those who did read the articles were influenced by them. By contrast, the text of the right-to-arms provision and the official explanation were made available to everyone who voted. Their import was that regulation consistent with the public welfare would be permitted; they did not suggest that such regulation would not include bans on discrete categories of weapons. For these reasons, we conclude that in this case, because of their inconclusive character, the newspaper articles on which the plaintiffs rely should not change our decision.

Based on the floor debates and the official explanation, as well as on the language of the provision, it is apparent to us that section 22, as submitted to the voters, meant that a ban on all firearms that an individual citizen might use would not be permissible, but a ban on discrete categories of firearms, such as handguns, would be. Convincing indications that the voters ascribed a different meaning to the provision not having been offered by the plaintiffs, we conclude, along with the Federal courts (*Quilici v. Village of Morton Grove* (7th Cir.1982), 695 F.2d 261, cert. denied (1983), 104 S.Ct. 194, 78 L.Ed.2d 170, that a reasonable prohibition of handguns is constitutional in this State.

* * * * *

Nor do we find merit in plaintiffs' argument that section 22 is a nullity if construed to permit a ban on some of the very categories of weapons it was enacted to protect. We emphasize again that section 22 bestows upon individual citizens for the first time a right

to possess some form of weapon suitable for self-defense or recreation, regardless of the adaptability of the weapon for use in an organized militia or of whether it is possessed for the purposes of forming a militia. The enactment of such a provision can scarcely be regarded as an idle gesture.

* * * * *

THOMAS J. MORAN, Justice, also dissenting:

* * * * *

This court has long adhered to the principle that a constitutional provision must be interpreted in accordance with the intent and understanding of the electorate who ratified the instrument. . . . In *Client Follow-Up Co. v. Hynes* (1979), 75 Ill.2d 208, 222, 28 Ill.Dec. 488, 390 N.E.2d 847, we stated that "[a]lthough the constitutional debates may often be helpful in understanding the meaning of doubtful constitutional provisions, the true inquiry concerns the understanding of its provisions by the voters who, by their vote, have given life to the product of the convention."

Today's opinion places considerable reliance on the comments of certain delegates to the constitutional convention to justify the conclusion that section 22 does not prohibit municipalities from enacting a flat ban on the possession of ordinary handguns. Although this court on occasion has consulted such debates when the meaning of the constitutional provision was in doubt, it has done so only when it appeared that the delegates reached a consensus as to the meaning of the provision. (*Client Follow-Up v. Hynes* (1979), 75 Ill.2d 208, 221, 28 Ill.Dec. 488, 390 N.E.2d 847.) Indeed, the court has approached such debates cautiously, since "[i]t is possible to lift from the constitutional debates on almost any provision statements by a delegate or a few delegates which will support a particular proposition; however, such a discussion by a few does not establish the intent or understanding of the convention." 75 Ill.2d 208, 221, 28 Ill.Dec. 488, 390 N.E.2d 847; see also *People ex rel. Consentino v. County of Adams* (1980), 82 Ill.2d 565, 569, 28 Ill.Dec. 488, 390 N.E.2d 847.

After considering the debates on section 22, I am of the opinion that, at most, the debates reflect a lack of consensus as to the meaning of section 22. . . .

Discussion Notes

1. Consider the various arguments based on legislative history in *Kalodimos* and evaluate them in light of Professor Levinson's observations

about "the record" of constitutional convention debates.

2. How do the opinions in the convention debates relate to what the voters thought the provision meant?

**Ann Lousin,
“Constitutional Intent:
The Illinois Supreme Court’s Use of the
Record in Interpreting the
1970 Illinois Constitution”**

**John Marshall Journal of Practice and Procedure
8 (Winter 1975): 190-91.**

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In recent years, it has become common to follow William Winslow Crosskey’s lead and debunk the value of the history of a constitutional provision as an aid to constitutional interpretation.⁵

Four years of observing the growth of the Illinois Constitution of 1970—from convention committee hearings through the three cases decided in June, 1974—have led me to agree in general with Professor Crosskey. Whatever history may be, the constitutional intent of the Illinois Constitution is indeed a fable agreed upon. To my knowledge, no member of the Sixth Illinois Constitutional Convention has ever stated that he thinks the formal records of the con-

⁵Professor Crosskey’s views are stated in his many works on the United States Constitution. For a good example, see Crosskey, *The ExPost-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. Chi. L. Rev. 248 (1968), and for a pithy summary, see Krash, *William Winslow Crosskey*, 35 U. Chi. L. Rev. 232 (1968).

Discussion Notes

1. State constitutional history materials are catalogued in Cynthia Browne, *State Constitutional Conventions, From Independence to the Completion of the Present Union, 1776-1959: A Bibliography* (Westport, Conn.: Greenwood Press, 1973) (the materials are contained in a microfiche collection accompanying the bibliography); Susan Rice Yarger, *State Constitutional Conventions, 1959-1975: A Bibliography* (Westport, Conn.: Greenwood Press,

vention—the committee reports, transcripts of debates, Official Explanation of the proposed document, the Address to the People—accurately reflected his own intent in voting for any given section. Every time the Illinois Supreme Court issues an opinion interpreting a new provision, a few Con-Con delegates exclaim: “The court just doesn’t understand what we meant. Why don’t they look at the record? The record makes it perfectly clear what we intended. . . .”

The main reason for this anguished confusion is that the record is seldom perfectly clear about anything more important than the time at which the delegates recessed for lunch—and sometimes even *that* point is unclear. The record is in fact a confusing and often contradictory potpourri of member proposals which were usually not adopted, committee reports written largely by staff, calculated attempts by sponsors of proposals to explain their views to future courts, sly attempts to amend a section substantively by suggesting stylistic changes, and carefully orchestrated campaigns to secure adoption or defeat of a proposal. Sometimes delegates made statements for the record in order to establish a given interpretation as the intent of the whole convention.⁶ Delegates sometimes purposely failed to discuss possible ramifications and problems of a section during debate in order to leave the text and constitutional intent of a section broad enough to give reviewing courts the widest possible latitude in interpretation.

⁶E.g., Delegate George J. Lewis’s statement at REC. OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION *Verbatim Transcripts*, vol. IV at 2882 (1969-70) [hereinafter cited as *Verbatim Transcripts*].

1976); Bonnie Canning, *State Constitutional Conventions, Revisions and Amendments, 1959-1976: A Bibliography* (Westport, Conn.: Greenwood Press, 1977).

2. Roscoe Pound noted that, with respect to state constitutions, “legislative history itself often needs interpretation.” Roscoe Pound, “Procedure Under Rules of Court in New Jersey,” *Harvard Law Review* 66 (November 1952): 28.

**American Fork City v. Crosgrove
701 P.2d 1069 (Utah 1985)**

DURHAM, Justice:

The defendant Crosgrove was convicted in the circuit court for Utah County of driving under the influence of alcohol in violation of U.C.A., 1953, sec. 41-6-44 (Supp.1982). The district court sustained the conviction. The defendant alleges on appeal that the results of a breathalyzer test he was required to take

should have been suppressed and that his conviction should be reversed.

* * * * *

The sole issue on appeal is whether a person who submits to a breathalyzer examination under the threat of having his driver's license revoked has been "compelled to give evidence against himself" in violation of article I, section 12 of the Utah Constitution. We note initially that, of all the jurisdictions that have considered the question under similar constitutional provisions, the great majority have held that compulsory chemical tests to determine intoxication do not violate the privilege against self-incrimination. The defendant maintains, however, that a contrary result is mandated by our decision in *Hansen v. Owens*, Utah, 619 P.2d 315 (1980).

* * * * *

The defendant in this case maintains that, having been compelled to take a breathalyzer test by the threat of the loss of his driver's license if he refused, he has been deprived of his right under article I, section 12 of the Utah Constitution as construed by this Court in *Hansen v. Owens*, Utah, 619 P.2d 315 (1980).

In *Hansen*, the petitioner sought to enjoin enforcement of a lower court's order requiring him to furnish a handwriting sample for use in his criminal prosecution for forgery. This Court held that the order, which required the accused "to do the affirmative act of writing," violated the petitioner's rights under article I, section 12. *Id.* at 317 (emphasis added). However, the Court noted that the case "went beyond making observations . . . of an accused's . . . body, or . . . substances obtained therefrom" and said that its decision was to be limited to its particular facts. *Id.* Therefore, in deciding whether to extend the "affirmative act" analysis of *Hansen* to breathalyzer tests, we must examine the underlying rationale for that decision.

The Court in *Hansen* noted that the type of evidence sought would not be privileged under the United States Constitution's self-incrimination provision, U.S. Const. amend. V. *Hansen*, 619 P.2d at 316. . . . The *Hansen* Court further noted, however, that the Utah Constitution gives expression to the privilege against self-incrimination in language that is different from that used in the fifth amendment. The fifth amendment says that no person can be compelled "to be a witness against himself," whereas article I, section 12 of the Utah Constitution says, "The accused shall not be compelled to give evidence against himself." (Emphasis added.) It is a cardinal rule of construction that constitutions should be construed in light of their framers's intent. The *Hansen*

Court reasoned that, since the Utah Constitution used different words to express the privilege, its framers must have meant the provision "to mean something different and broader than" its federal counterpart. 619 P.2d at 317.

This argument has little support in history, and as Justice Frankfurter noted with regard to the privilege against self-incrimination, "[A] page of history is worth a volume of logic." *Ullmann v. United States*, 350 U.S. 422, 438, 76 S.Ct. 497, 506, 100 L.Ed. 511 (1956), (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921)). In 1776, the common-law privilege against self-incrimination was first elevated to the status of a constitutional right in section 8 of Virginia's Declaration of Rights, which, like the Utah Constitution, provided that a man could not "be compelled to give evidence against himself." L. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 405-06 (1968). "[T]here is no evidence that [the provision] was taken literally or regarded as anything but a sonorous declamation of the common-law right of long standing." *Id.* at 409. This provision became a model for other state constitutions, at least six of which were adopted before the federal Bill of Rights. *See id.* at 409, 412. By the time the Utah Constitution was adopted in 1895, half the states that recognized the privilege expressed it in terms of giving "evidence." The constitutions of the remaining states, like the federal constitution, protected a person from being a "witness" or from "testifying" against himself. *See* 8 J. Wigmore, *Evidence* sec. 2252 at 319-23 (McNaughton rev. 1961).

It was generally accepted at the time that these differences in wording were insignificant. In 1892, the United States Supreme Court said:

[T]he manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon the constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution [of a state] . . . declares that the subject shall not be "compelled to accuse or furnish evidence against himself," such a provision should not have a different interpretation from that which belongs to constitutions . . . which declare that no person shall be "compelled in any criminal case to be a witness against himself."

. . . .

. . . [T]here is really, in spirit and principle, no distinction arising out of such differences of language.

Counselman v. Hitchcock, 142 U.S. 547, 584-86, 12 S.Ct. 195, 206-07, 35 L.Ed. 1110 (1892).

We can presume that the framers of the Utah Constitution were familiar with the prevailing view of the significance of these differences in wording when they drafted that document. There is no indication whatsoever that their choice of one widely used expression of the privilege over another was meant to broaden the privilege as it existed at that time.

This conclusion is borne out by the proceedings of the Utah Constitutional Convention. The self-incrimination provision of article I, section 12 was adopted without one word of debate. The comments of one delegate help explain this absence. In discussing the confrontation clause of article I, section 12, he explained:

The provisions of this section [which included the self-incrimination clause] are substantially those in every constitution, I believe. They have received judicial interpretation and construction for many years. . . .

. . . Why not leave [the section] as it is? Why not leave it within the ancient landmarks, so that every lawyer and every layman may know just what this does mean? Judicial decision after decision, all in one line, particularly have determined the meaning of this language as the committee have [sic] reported it here. Why should we stray away and put something in there that will tend to bring about and will doubtless bring about this confusion and conflict in interpretation?

1 Official Report of Proceedings and Debates of the Convention: 1895 307- 08 (1898) (comments by Mr. Varian).

Thus, if any intent can be derived from the proceedings of Utah's Constitutional Convention, it is that the framers intended the privilege to have the same scope that it had under similar constitutional provisions, which was the scope it had at common law. History supports the conclusion, accepted by the vast majority of authorities, that the common-law privilege is limited to testimonial and communicative evidence only and not to evidence of a real or physical nature such as that obtained from a breathalyzer test. It is widely acknowledged that the common-law privilege against self-incrimination was aimed directly at the inquisitorial system of the English ecclesiastical courts, traces of which began to creep into the civil

law system at an early date. See generally L. Levy, *supra*; 8 J. Wigmore, *supra*, sec. 2250. Under this system, the accused could be required to take an oath to answer truthfully all questions directed to him. Thus, he was placed in the "cruel trilemma" of having to answer truthfully (which, depending on how skillfully the questions were framed, could incriminate him even if he were innocent of the offense), commit perjury, or remain silent and be found in contempt of court. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964). The right against self-incrimination developed as a protection from such inquisitorial tactics. It provided only that a person could not be required to answer incriminating questions involuntarily. . . .

Of course, the scope of constitutional guarantees is not limited by their historical roots. In determining the proper scope of the privilege, we must also deal with underlying policy considerations that militate for or against an expansive construction. The primary basis of the privilege is the respect of government for its citizens. "[T]o respect the inviolability of the human personality, our accusatory system of criminal justice demands that government seeking to punish an individual produce the evidence against him by its own independent labors. . . ." *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966). Balanced against this is the duty of government to protect its citizens. The state has substantial interest in effective law enforcement and a legitimate need for the type of information provided by a breathalyzer test. Chemical tests for intoxication are at the heart of a state's efforts to deal with the serious and substantial menace presented by drunk drivers. What the United States Supreme Court has said with regard to blood tests for intoxication applies with equal force to less "intrusive" breathalyzer tests:

As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test . . . , must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity for such invasion of the body . . . is far outweighed by the value of its deterrent effect. . . .

Breithaupt v. Abram, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957).

Our task is to find the resolution that will best give effect to these conflicting interests. "In the final analysis, the argument boils down to the question of where the line limiting state power should be drawn." M. Berger, *supra*, at 40. In drawing that line here, we must examine what purpose would be served by continued adherence to the affirmative act standard used in *Hansen*, 619 P.2d at 317.

The affirmative act standard, as we interpret it, means that an accused may not be compelled to actively produce evidence against himself or to perform any affirmative act that will produce or create such evidence. Perhaps the best justification for the affirmative act standard is that it removes any incentive for the state to use cruelty in procuring evidence from the accused. As one commentator notes: "The whip would be just as effective in forcing the accused to place his foot in a shoe track [an affirmative act] as in forcing him to give up testimonial evidence." Note, *The Georgia Right Against Self-Incrimination: Historical Anomaly or Vanguard of Justice?* 15 Ga.L.Rev.1104, 1115 (1981). However, the Utah Constitution's due process provision, Utah Const. art. I, sec. 7, and its prohibition against unlawful searches and seizures, *id.* article I, sec. 14, may be better suited than the self-incrimination clause for dealing with such governmental excesses.

The affirmative act standard also avoids the basic unfairness of forcing a witness to "choose among the three horns of the triceratops—harmful disclosure, contempt [and] perjury." 8 J. Wigmore, *supra*, sec. 2251, at 316 (emphasis omitted). However, the standard is over-inclusive in this regard. Not every affirmative act that the state might compel presents the accused with the temptation of perjury. Defendant Crosgrove, for example, could not have falsified his blood alcohol content.

In contradistinction to the modest policy justifications for the affirmative act standard, its likely consequences are excessively detrimental to the administration of justice. "What constitutes affirmative and nonaffirmative acts is often merely a question of semantics providing enforcement officers very little guidance on which to base their decisions." Note, *supra*, at 1121. . . .

We are persuaded that the affirmative act standard suggested in *Hansen* has little to recommend itself. We therefore conclude that we can best give effect to the substantial state interests involved and at the same time adequately protect the rights of the individual by a construction, historically sound, of article I, section 12 that limits its scope to those situations where the state seeks evidence of a testimonial or communicative nature. Under this standard, the right of the individual not to reveal his thoughts in the face of accusations by the state—the most fundamental right sought to be protected by the privilege against self-incrimination—remains inviolate. We

therefore hold that the defendant's rights under the Utah Constitution's self-incrimination provision were not violated when, after his arrest, he was required to submit to a breathalyzer test under the threat of losing his driver's license. Because it is inconsistent with the result we reach today, *Hansen v. Owens*, Utah, 619 P.2d 315 (1980), is hereby overruled.

Affirmed.

* * * * *

HALL, Chief Justice (concurring and dissenting):

I join the Court in holding that the implied consent statute does not compel a driver to give evidence against himself in violation of article I, section 12 of the Constitution of Utah. However, I do not join the Court in overturning *Hansen v. Owens*, because I find no inconsistency in the rule of law laid down therein.

The decision of the Court in *Hansen v. Owens* was expressly limited to the particular facts of that case, yet the majority makes no effort to draw the factual distinction that plainly exists.

In *Hansen v. Owens*, the defendant had *refused* to perform the affirmative act necessary to provide a handwriting exemplar, and the Court was called upon to compel the defendant to furnish one. That factual scenario is completely foreign to that of the instant case wherein the defendant *voluntarily submitted* to the breathalyzer test. He simply exercised the *choice* afforded him by the implied consent statute and *opted* to submit to the test rather than face the possible loss of his license to operate a motor vehicle.

The implied consent statute does not *compel* a driver to do *anything*, and it is not vulnerable to constitutional attack because it contains no provisions that cannot reasonably be justified under the police power exercised in the best interest of the public welfare.

If *Hansen v. Owens* is no longer to be the law, are the courts then duty-bound to *compel* an accused to provide a handwriting exemplar absolutely against his will? If so, as a matter of practicality, how is this to be accomplished? By brute force? I should think not! By exercise of the contempt power? Possibly, but such may prove ineffective since an accused is likely to face contempt rather than run the risk of conviction for a greater felony offense.

It would be far better, as was pointed out in *Hansen v. Owens*, to obtain a sample of the accused's handwriting from some other source. To do so would preserve the time-honored doctrines of presumption of innocence and burden of proof.

The Court has this day reached a long way to overturn *Hansen v. Owens* and in so doing has done violence to the doctrine of *stare decisis*. Moreover, I remain unpersuaded that any legitimate purpose has been accomplished.

Discussion Notes

1. Reread *Hansen v. Owens*, which is in Chapter 3, page 81.

2. Could *Hansen* be seen as a “plain meaning” interpretation? If so, what is the approach in *American Fork City*?

E. Self-Executing State Constitutional Provisions

If reliance is to be placed on a provision of a state constitution in litigation, one must be careful to determine whether it is “self-executing” or whether it must be *implemented* in some way by legislation. This can be a crucial question for the outcome of cases, and requires judicial interpretation of the constitutional provision at issue. It also involves questions as to the relationship between constitutional provisions and statutes on the same subject.

What is the consequence of a judicial decision holding that a state constitutional provision is *not* self-executing?

Winchester v. Howard 136 Cal. 432, 439-40, 69 P. 77, 78-79 (1902)

TEMPLE, J.

1. As to the question whether the provision is self-executing, it is well to note, at the outset, that the presumption is not precisely as it would have been had such a matter been presented for consideration fifty years ago. When the Federal constitution and first state constitutions were formed, the idea of a constitution was, that it merely outlined a government, provided for certain departments and some offices and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created. The law-making power was vested wholly in the legislature. Save as to the assurances of individual rights against the government, the direct operation of the constitution was upon the gov-

ernment only. And such assurances were themselves in part but limitations upon governmental powers.

Latterly, however, all this has been changed. Through distrust of the legislatures and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character. These are in fact but laws, made directly by the people instead of by the legislature, and they are to be construed and enforced, in all respects, as though they were statutes. (*Winchester v. Mabury*, 122 Cal. 522.) It has been held that section 16 of article XII of the constitution is of the nature of code provisions in regard to procedure, and is to be construed as other code provisions are, except that it cannot be amended or repealed by the legislature. In effect, these constitutional provisions are but statutes which the legislature cannot repeal or amend.

Under former conditions it was natural that the court should presume that a constitutional provision was addressed to some officer or department of the government, or that it limited the power of the legislature, or empowered, and perhaps directed, certain legislation, to carry into effect a constitutional policy.

Now the presumption is the reverse. Recently adopted state constitutions contain extensive codes of laws, intended to operate directly upon the people as statutes do. To say that these are not self-executing may be to refuse to execute the sovereign will of the people. The different policy requires a different ruling. I should say the rule now is, that such constitutional provisions must be held to be self-executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not intended. If the legislature must, or even may, provide for the mode of executing such constitutional laws, it may to a great extent, and in some cases altogether, prevent their having any effect at all.

Discussion Notes

1. For a discussion of this and similar cases, see Orrin K. McMurray, “Some Tendencies in Constitution Making,” *California Law Review* 2 (March 1914): 209-11.

2. What are the implications of Justice Temple’s assertion that certain portions of state constitutions are “to be construed and enforced . . . as though they were statutes”?

People v. Carroll
3 N.Y.2d 686, 148 N.E.2d 875 (1958)

BURKE, Judge.

A single question, one of first impression, is presented by the appeal: whether section 2 of article I of the New York State Constitution which relates to the waiver of jury trials in certain criminal cases is self-executing or is dependent upon implementing legislation. Both courts below in consummately well-expressed opinions have held the provision effective despite the absence of legislation on the subject. Their conclusion, in our opinion, should be affirmed.

In an earlier proceeding defendant was brought to trial on an indictment charging him with grand larceny in the second degree. At the outset and after consultation with his attorney, defendant submitted a written stipulation signed by both defendant and his counsel whereby he purported to waive his right to a jury trial. The statement read: "Pursuant to Article one, Section two of the Constitution, I Valentine J. Carroll, the defendant under indictment 2061, 1955 do hereby waive jury trial [sic] on this indictment. I do so after consultation with my counsel Leon Kesner, and with full understanding of the rights and privileges which I waive herewith." Over objection by the assistant district attorney who argued that the constitutional provision had not received the necessary legislative implementation, the court accepted the stipulation and proceeded to hear the case without a jury. No question was raised as to the time, form or contents of the waiver.

* * * * *

Section 2 of article I reads: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."

The most compelling criterion in the interpretation of an instrument is, of course, the language itself. Particularly is this so in the case of a constitutional provision like the one before us where the writing is the deliberate product of a group of men specially selected for and peculiarly suited to the task of its authorship. It is obvious good sense, under such circumstances, to attribute to the provision's authors the meaning manifest in the language they used. When this language is clear and leads to no absurd conclusion there is no occasion, and indeed, it would be improper, to search beyond the instrument for an assumed intent. . . .

Here the language of the constitutional provision speaks its meaning with sufficient clarity to make further inquiry unnecessary. In pertinent part section 2 states flatly that "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death." Following directly upon the affirmative grant of this right is a specification of the form in which the waiver is to be made: "by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense." Aside from the prescribed form no contingencies or conditions precedent to the effectiveness of the grant of right are mentioned. Nothing in the language indicates that legislation would be imperatively necessary to given the right effect and the very fact that the writers did assume to supply the essential details indicates that supplementary legislation was not relied upon.

This impression is sharpened by the wording of the next sentence: "The legislature may enact laws, *not inconsistent herewith*, governing the form, content, manner and time of presentation of the instrument effectuating such waiver." (Emphasis supplied.) The use of the permissive "may" signifies, unless that word is to be denied its plain meaning, that supplementary legislation, though permitted for the purpose of procedural refinement, was not deemed essential. The careful insertion of the phrase "not inconsistent herewith" was designed to make it clear that the broad scope of the waiver right, extending by virtue of the main provision to all noncapital criminal cases, was in no way to be encroached upon by subsequent legislation.

The contrast within article I between the references to civil and criminal cases is the final confirmation. As to civil cases "a jury trial may be waived by the parties . . . in the manner to be prescribed by law." No effort was made to detail the method or procedure of implementation. That entire subject was left to the Legislature. Most likely the total absence of specifics indicated the delegation of power not to the public directly but merely to the Legislature (e.g., State ex rel.

Burnett v. Deck, 106 Kan. 518, 188 P. 238; Board of Education of City of Cincinnati v. Minor, 23 Ohio St. 211) and its only effect was to remove the constitutional bar to the Legislature's authority to enact a right to waive in civil cases. The same can be said for the sentence following which reads: "The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in a civil case." As to noncapital criminal cases, however, the language granting the right to waive was, as pointed out, by no means merely permissive to the Legislature. It states affirmatively that a defendant in these cases may waive; not that the Legislature may provide for waiver. The only permissive aspect to the provision is the delegation to the Legislature permitting them to supplement the waiver right by additional procedural requisites.

If we were to decide that the provision is not clear on its face and that recourse must be had to the traditional principles of construction, it would only serve to fortify the conclusion already reached.

Assuming the necessity of a construction, the process in this case would have to start with the presumption that the provision is self-executing. Originally, when the Federal Constitution and the first State Constitutions were written, their clear purpose was to establish a broad framework of basic principles within which the Nation and States should function. Actual administration and implementation was, in large part, left to departments created by the Constitution and was not attempted in those instruments. Since then, and particularly during the past 50 years, the function of the various Constitutions has evolved into one more like that of a legislative body. Construction of constitutional provisions has varied accordingly. Whereas initially the presumption was that provisions in a Constitution were merely general directions and that legislation was necessary to effectuate them, it is now presumed that constitutional provisions are self-executing (State ex rel. Russell v. Bliss, 156 Ohio St. 147, 101 N.E.2d 289; Morgan v. Board of Supervisors, 67 Ariz. 133, 192 P.2d 236; State ex rel. Noe v. Knop, La.App., 190 So. 135, 142-143; 11 Am.Jur., Constitutional Law, sec. 72, p. 689, and cases there cited). The approach is especially applicable here where the intent of the provisions' drafters to make specific and immediately effective the right to waiver is evidenced by the insertion of operational details.

This presumption, coupled with the history of the section's origins, points clearly to the conclusion that the provision, insofar as it related to criminal cases, was intended to be self-executing.

Because the history, debates and discussions have been so thoroughly reported and analyzed by

the courts below, we pause only to capsulize those portions which seem particularly persuasive.

A constitutional amendment prior to the instant one was adopted by the Legislatures of 1935 and 1937, Laws 1935, p. 1912, Laws 1937, p. 2095, approved by the People and became effective on January 1, 1938. This amendment, recommended by the Judicial Council, states: "a jury trial may be waived in the manner to be prescribed by law by the parties in all civil cases and by the defendant in all criminal cases, except those in which the crime charged may be punishable by death." It will be noted that the form of the grant in this amendment was the same as that in the present one except insofar as it relates to criminal cases. As indicated above the form in the original amendment, the same as to both civil and criminal cases, was probably not self-executing. It seems clear that its sponsors, at least, recognized a need for implementing legislation (see Second Report of Judicial Council, 1936, p. 97). The present provision is markedly different. Instead of placing criminal cases in the same class with civil cases wherein waiver could be effectuated only "in the manner to be prescribed by law," the two were deliberately separated. As to criminal cases details were supplied whereby the right might become immediately effective.

The history of these procedural requirements is significant. The Judicial Council, in its reports of 1936 and 1937, had suggested that the method of waiver, whether it should be made in writing, etc., should be left to the Legislature. The suggestion was rejected and the amendment which was finally adopted incorporated these matters. In the opinion of Judge Sears, Chairman of the Constitutional Convention's Judiciary Committee which proposed the amendment ultimately adopted the insertion of these details made the provision "complete." Thus, in the course of a discussion of the matter, he was asked:

"Is it intended that the Legislature may further develop this proposal by appropriate legislation or is it deemed to be complete as it stands?"

He answered: "It was originally deemed to be complete as it stands but I now propose as the result of conversations that I have had since we took the recess to add this section: 'The Legislature may enact laws not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.'" (Revised Record, Const.Conv. of 1938, Vol. II, pp. 1273-1286.)

As we read these remarks there was no indication that the provision was thought to *require* supplementary legislation before it could be effectuated. The meaning we gather is that the amendment as proposed was "complete" except that the Legislature

was expressly permitted (not required) to perfect and refine the form in which the waiver was to be exercised.

Considering, principally, the language of the section, and conjunctively the history of the provision and the presumption obtaining in these matters, it appears to us that the courts below properly found the relevant portion of section 2 of article I of the Constitution to be self-executing.

One final word need be said. Appellant's principal objection to the conclusion reached is that sufficient procedural detail has not been supplied by the Constitution and that so much has been left unprovided for by that section in application it would

lead to "chaotic individuality." We disagree. The basic and necessary procedural requirements have been provided. Whatever other questions arise can be competently handled by our courts until such time as the Legislature, pursuant to its constitutional permission, assumes to act. "The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing." (16 C.J.S. Constitutional Law sec. 48, p. 144 and cases there cited; see, also, 11 Am.Jur., Constitutional Law, sec. 75, p. 692.)

Accordingly, the order of the Appellate Division should be affirmed.

Discussion Notes

1. Does this opinion itself add anything to the specificity of the procedure for exercising this self-executing constitutional right?

2. To what extent could the legislature alter or add to that procedure?

3. Identify the various techniques of state constitutional interpretation evident in the *Carroll* opinion.

Plante v. Smathers 372 So.2d 933, 937 (Fla. 1979)

A constitutional provision is self-executing if it does not require legislative implementation. The test of whether a constitutional provision is self-executing is succinctly stated in *Gray v. Bryant*:

[W]hether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended accomplish may be determined, enjoyed, or

protected without the aid of legislative enactment. *State ex rel. City of Fulton v. Smith*, 1946, 355 Mo. 27, 194 S.W.2d 302. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. *City of Shawnee v. Williamson*, Okl. 1959, 338 P.2d 355. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing. *People v. Carroll*, 1958, 3 N.Y.2d 686, 171 N.Y.S.2d 812, 148 N.E.2d 875.

Discussion Notes

1. See also, *Peper v. Princeton U. Bd. of Trustees*, 389 A.2d 465, 476-78 (1978); *Cooper v. Nutley Sun Printing Co., Inc.*, 36 N.J. 189, 175 A.2d 639 (1961).

2. For an in-depth study of judicial implementation of a self-executing state constitutional right in the absence of statutory implementation, see Richard A. Goldberg and Robert F. Williams, "Farmworkers' Organizational and Collective

Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights," *Rutgers Law Journal* 18 (Summer 1987): 729.

3. Could a court order the legislature to implement a state constitutional provision it deemed not to be self-executing? See *Dade County Classroom Teachers Assoc. v. The Legislature*, 269 So. 2d 684 (Fla. 1972).

Chesney v. Byram 101 P.2d 1107 (Cal. 1940)

CARTER, Justice.

This is an appeal from a judgment of the superior court of Los Angeles county granting a writ of mandate against appellant, H.L. Byram, tax collector of the county of Los Angeles, compelling him to receive the sum of \$21.84 as the full amount of taxes due on the real property of respondent for the fiscal year 1936-37, in lieu of taxes in the sum of \$67 levied upon

and extended against said property on the assessment roll of said county for said year.

Respondent's property was assessed by the Los Angeles county assessor for the fiscal year 1936-37 at the value of \$1,350. He claims an exemption in the amount of \$1,000, by reason of his being a veteran within the meaning of section 1 1/4 of article XIII of the Constitution of California. He tendered payment to the appellant of taxes based upon the valuation of \$350, which tender was refused. Respondent then secured a writ of mandate compelling appellant to accept the amount tendered and to issue a receipt in full for respondent's taxes.

The provision of the Constitution above referred to reads as follows: "The property to the amount of one thousand dollars of every resident of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, . . . shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more. No exemption shall be made under the provisions of this act of the property of a person who is not legal resident of the State."

Section 3612 of the Political Code provides that every person entitled to such exemption from taxation shall give to the assessor under oath all information required upon forms prescribed by the State Board of Equalization and failure of any person entitled to such exemption so to do shall be deemed as a waiver of such exemption.

The allegations of the petition for a writ of mandate bring respondent within the constitutional provision for exemption, to-wit: that he is and was during the fiscal year 1936-37, a resident of California, that he served in the marine corps of the United States during the world war and received an honorable discharge therefrom, that he is married, that neither he nor his wife nor the two together owned property greater than \$5,000 in value, and that in 1936 he furnished a copy of his honorable discharge to the county assessor. Respondent further alleged that at no time did he file an application for exemption or any affidavit as required by section 3612 of the Political Code.

The appellant, tax collector of the county of Los Angeles, contends that the failure of respondent herein to make the exemption claim required by Political Code section 3612 constituted a waiver of said exemption. The respondent, however, maintains his right thereto, claiming that the provision in said section, that a veteran having failed to make proof of this constitutional right to exemption prior to completion

of the assessment roll "waives" such exemption, is unconstitutional and void, as being an invalid statutory "limitation" on such constitutional right.

The sole question then before this court is whether the waiver provision of section 3612 of the Political Code is an invalid infringement upon a constitutional right, or is a valid legislative provision regulating the exercise or assertion thereof.

Respondent contends that section 1 1/4 of article XIII of the Constitution is self-executing and that section 3612 of the Political Code is an attempt to limit the constitutional right to exemption from taxation granted to veterans under said provision of the Constitution. It has been held that "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." Cooley's Constitutional Limitations, 7th ed., p. 121; Winchester v. Howard, 136 Cal. 432, 439, 64 P. 692, 69 P. 77, 89 Am.St.Rep. 153; People v. Hoge, 55 Cal. 612.

We are disposed to hold that the constitutional provision above-mentioned is self-executing; that is, that it required no legislative enactment to put it into effect. If the legislature had failed to make any provision for a veteran to avail himself of the tax exemption provided for in said provision of the Constitution, we are of the opinion that the veteran would nevertheless be entitled to the exemption provided for. How such exemption could be obtained, would be a matter first for the determination of the assessors of the respective political subdivisions, and in case of their failure to recognize the right granted to the veteran, their action would be subject to review by the courts. However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right to the exemption granted by the Constitution, and if section 3612 of the Political Code constitutes such reasonable regulation and not an invalid limitation of the right thereby granted, the power of the legislature to enact said section should be upheld. Chester v. Hall, 55 Cal.App. 611, 204 P. 237; First M. E. Church v. Los Angeles County, 204 Cal. 201, 267 P. 703.

* * * * *

We are not impressed with the argument advanced by respondent to the effect that the provisions of section 3612 of the Political Code imposes an unreasonable restriction or limitation upon the exercise of the right to the exemption granted by the constitutional provision above mentioned. On the other hand, it appears to us reasonable and proper that

some method should be provided by the legislature for the determination of these who may be entitled to the exemption provided for in the Constitution. It is obvious that the burden should be upon the person claiming the exemption to establish his right thereto. The method provided for under section 3612 of the Political Code is a simple one and is available to all who desire to claim the exemption provided for under the above-mentioned provision of the Constitution; in fact, it would be much easier and simpler for a person claiming such exemption to comply with the provisions of section 3612 of the Political Code than to resort to the procedure followed by respondent in this case, even if the tax collector had complied with respondent's request to accept the sum of \$21.84 in full payment of the taxes due from respondent, and the latter has not been required to institute this action.

It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. . . .

Certainly, if the legislature has the power to pass statutes providing reasonable regulations and control over the constitutional right of a citizen to vote and the constitutional right of a citizen to recover compensation for his property which has been appropriated to a public use, it should likewise have the power to enact statutory provisions providing reasonable regulations and control over the exercise of rights granted by the Constitution for the exemption of property from taxation.

* * * * *

The provisions of section 3612 of the Political Code establishes a uniform system throughout the state for those desiring to claim the exemption granted by the Constitution under the provisions of section 1 1/4 of article XIII thereof. It amply safeguards the exercise of the right of those entitled to the exemption, facilitates the operation of the system of assessment and taxation now authorized by law, and protects that public against the fraudulent claims of those not entitled to the exemption who may nevertheless assert their claim thereto. Such legislation is clearly not in contravention of the constitutional right to which it relates.

That a right to have property exempted from taxation can be waived, there can be no doubt. Even counsel for respondent in the case at bar concedes that unless appropriate legal proceedings were instituted by the exemption claimant to resist the payment of the tax or the recovery of the tax after the same is paid within the time provided for in the statute of limitation applicable thereto, the exemption claimant would lose his right; in other words, the exemption claimant would waive his right to the exemption by failing to assert his claim in time to have his exemption noted on the assessment roll or by failing to take appropriate action thereafter within the period of time allowed by the statute for the recovery of taxes paid under protest.

It is well settled that a right granted by the Constitution may be waived by the inaction of the person entitled to exercise such right. . . .

Discussion Notes

1. Read Article I, sec. 27 of the Pennsylvania Constitution, ratified in 1971:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Is this provision self-executing, and therefore enforceable in the courts? *See Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.* 454 Pa. 193, 311 A.2d 588 (1973). See also *Johnson v. Wells County Water Resource Bd.*, 410 N.W. 2d 525 (N.D. 1987).

2. See generally A.E. Dick Howard, "State Constitutions and the Environment," *Virginia Law Review* 58 (February 1972): 193; Richard J. Tobin, "Some Observations on the Use of State Constitutions to Protect the Environment," *Environmental Affairs* 3 (No.3 1974): 473; Note, "A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens," *Florida State University Law Review* 5 (Fall 1977): 809.

F. Questions of Judicial Enforceability

In 1931 Walter Dodd noted that there were a number of state constitutional provisions that the courts simply would not enforce. Walter Dodd, "Judicially Non-Enforceable Provisions of Constitutions," *University of Pennsylvania Law Review* 80 (November 1931): 54. Read the following materials with this idea in mind.

D & W Auto Supply v. Department of Revenue 602 S.W.2d 420 (Ky. 1980)

STEPHENS, Justice.

The ultimate question to be decided on this appeal is the constitutionality of KRS 224.905-.970, commonly called the "Litter Control Act," which was enacted by the 1978 regular session of the Kentucky General Assembly. In arriving at our decision we must, perforce, reconsider the validity of a long line of decisions of this court which created and nurtured the so-called "enrolled bill" doctrine.

* * * * *

The Act in question is essentially an anti-littering statute. Its stated purposes are to consolidate and promote statewide programs for the reduction of litter and littering; to recover and recycle waste materials; to establish publicity as well as educational and motivational campaigns to build and sustain public awareness of the litter problem; and to create a litter-free ethic among Kentuckians. KRS 224.905, 224.930. The Kentucky Department for Natural Resources and Environmental Protection is given the responsibility of administering the Act. KRS 224.915.

To fund the efforts of state government in carrying out the purposes and mandates of this enactment,

the legislature determined that a portion of that cost should be borne by those industries whose products are "reasonably related to the litter problem." KRS 224.955(1). Sixteen specific categories of products are listed as examples of what is intended to be assessed, but, under the specific terms of the Act, the list is not exclusive. KRS 224.955(1)(a)-(p). . . .

The Act was initially introduced in the Kentucky House of Representatives and, as it wound its way through the legislative process, was known and identified as House Bill 253. It appears conclusively in the record that when House Bill 253 came before that body for final action, it "passed" by a vote of 48 "ayes" and 43 "nays."

Appellants make several arguments in challenging the validity of the Act: (1) The Act is unconstitutional because it did not receive a majority of 51 votes in the House, as is mandated by section 46 of the Kentucky Constitution for an appropriations bill. . . .

Section 46 of the Kentucky Constitution sets out certain procedures that the legislature must follow before a bill can be considered for final passage. In addition, that section mandates that no bill shall become law unless "it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting," with the following exception: "Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, *receive the votes of a majority of all the members elected to each house.*" Kentucky Constitution sec. 46 (emphasis added).

It is conceded by all parties and clearly established by the record that the Litter Control Act, HB 253 of the 1978 regular session of the Kentucky General Assembly, received only 48 votes on its final passage in the House of Representatives. Since there are 100 members of that House, if the Act is an appropriation, its passage did not comply with a clear constitutional mandate.

It is not seriously argued by the appellees that KRS 224.905—.970 does not contain an appropriation. . . .

Under both the legislative definition and the judicial definition, it is clear that the Litter Control Act is an appropriation act and falls within the aegis of section 46 of the Kentucky Constitution.

At this point, logic suggests that the decision of this Court is obvious, viz, since the Act makes an appropriation and since it received less than 51 votes in the House, it is violative of the Kentucky Constitution. However, we are immediately confronted with the huge stumbling block of what is described as the “enrolled bill” doctrine.

HB 253 was signed by the presiding officers of the House of Representatives, and was certified by the Clerk of the House as conforming with all House procedural rules and, in effect, as conforming with all constitutional requirements. Under the enrolled bill doctrine as it now exists in Kentucky, a court may not look behind such a bill, enrolled and certified by the appropriate officers, to determine if there are any defects.

From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeached by the [legislative] journals.

Lafferty v. Huffman, 99 Ky. 80, 35 S.W. 123, 126 (1896).

Thus spake Judge Hazelrigg in enunciating the enrolled bill doctrine.

Section 46 of the Kentucky Constitution requires that the final vote on a bill be taken by “yeas” and “nays.” In *Lafferty*, passage of the law in question violated this provision, yet the bill was properly enrolled and approved by the governor. In declining to look behind the law to determine the propriety of its enactment, the court enunciated three reasons for adopting the enrolled bill rule. First, the court was reluctant to scrutinize the processes of the legislature, an equal branch of government. Second, reasons of convenience prevailed, which discouraged requiring the legislature to preserve its records and anticipated considerable complex litigation if the court ruled otherwise. Third, the court acknowledged the poor record-keeping abilities of the General Assembly and expressed a preference for accepting the final bill as enrolled, rather than opening up the records of the

legislature. Since 1896, this court has concurred in the reasoning applied in *Lafferty*, regardless of what procedural or constitutional defects have been alleged and proved.

Kentucky is not alone in adherence to the enrolled bill doctrine. At least 19 of our sister states follow the rule which conclusively presumes the validity of a bill passed by the legislature and signed by the legislative officers. See I.C. Sands, *Sutherland Statutory Construction* sec. 15.03 et seq. (4th ed. 1972); 82 C.J.S. *Statutes* sec. 83 (1953); 72 Am.Jur.2d *Statutes* sec. 90 (1974); and 4 ALR2d 978 (1949).

Nowhere has the rule been adopted without reason, or as the result of judicial whim. There are four historical bases for the doctrine. (1) An enrolled bill was a “record” and, as such, was not subject to attack at common law. (2) Since the legislature is one of the three branches of government, the courts, being co-equal, must indulge in every presumption that legislative acts are valid. (3) When the rule was originally formulated, record-keeping of the legislatures was so inadequate that a balancing of equities required that the final act, the enrolled bill, be given efficacy. (4) There were theories of convenience as expressed by the Kentucky court in *Lafferty*.

The rule is not unanimous in the several states, however, and it has not been without its critics. From an examination of cases and treatises, we can summarize the criticism as follows: (1) Artificial presumptions, especially conclusive ones, are not favored. (2) Such a rule frequently (as in the present case) produces results which do not accord with facts or constitutional provisions. (3) The rule is conducive to fraud, forgery, corruption and other wrongdoings. (4) Modern automatic and electronic record-keeping devices now used by legislatures remove one of the original reasons for the rule. (5) The rule disregards the primary obligation of the courts to seek the truth and to provide a remedy for a wrong committed by any branch of government.

In light of these considerations, we are convinced that the time has come to re-examine the enrolled bill doctrine.²

This court is not unmindful of the admonition of the doctrine of *stare decisis*. The maxim is “*Stare decisis et non quieta movere*,” which simply suggests that we stand by precedents and not disturb settled points of law. Yet, this rule is not inflexible, nor is it of such a nature as to require perpetuation of error or illogic. As we stated in *Daniel’s Adm’r v. Hoofnel*, 287

²The 1980 General Assembly made its own examination of the doctrine, and enacted legislation providing for review of an enrolled bill in the limited situation where the *language* of the bill as enrolled differs materially from the language of the bill as passed by the legislature. House Bill 84.

Ky. 834, 155 S.W.2d 469, 471-72 (1941) (citations omitted):

The force of the rule depends upon the nature of the question to be decided and the extent of the disturbance of rights and practices which a change in the interpretation of the law or the course of judicial opinions may create. Cogent considerations are whether there is clear error and urgent reasons 'for neither justice nor wisdom requires a court to go from one doubtful rule to another,' and whether or not the evils of the principle that has been followed will be more injurious than can possibly result from a change.

Certainly, when a theory supporting a rule of law is not grounded on facts, or upon sound logic, or is unjust, or has been discredited by actual experience, it should be discarded, and with it the rule it supports.

It is clear to us that the major premise of the *Lafferty* decision, the poor record-keeping of the legislature, has disappeared. Modern equipment and technology are the rule in record-keeping by our General Assembly. Tape recorders, electric typewriters, duplicating machines, recording equipment, printing presses, computers, electronic voting machines, and the like remove all doubts and fears as to the ability of the General Assembly to keep accurate and readily accessible records.

It is also apparent that the "convenience" rule is not appropriate in today's modern and developing judicial philosophy. The fact that the number and complexity of lawsuits may increase is not persuasive if one is mindful that the overriding purpose of our judicial system is to discover the truth and see that justice is done. The existence of difficulties and complexities should not deter this pursuit and we reject any doctrine or presumption that so provides.

Lastly, we address the premise that the equality of the various branches of government requires that we shut our eyes to constitutional failings and other errors of our coparceners in government. We simply do not agree. Section 26 of the Kentucky Constitution provides that any law contrary to the constitution is "void." The proper exercise of judicial authority requires us to recognize any law which is unconstitutional and to declare it void. Without belaboring the point, we believe that under section 228 of the Kentucky Constitution it is our obligation to "support . . . the Constitution of this Commonwealth." We are sworn to see that violations of the constitution—by any person, corporation, state agency or branch of government—are brought to light and corrected. To countenance an artificial rule of law that silences our voices when confronted with violations of our constitution is not acceptable to this court.

We believe that a more reasonable rule is the one which Professor Sutherland describes as the "extrinsic evidence" rule. I Sutherland, supra, at sec. 15.06. Other jurisdictions have embraced this rule, which we hereby adopt as the law of this case and future cases. Under this approach there is a *prima facie* presumption that an enrolled bill is valid, but such presumption may be overcome by clear, satisfactory and convincing evidence establishing that constitutional requirements have not been met.

We therefore overrule *Lafferty v. Huffman* and all other cases following the so-called enrolled bill doctrine, to the extent that there is no longer a conclusive presumption that an enrolled bill is valid. With regard to the present case, we declare KRS 224.905—.970, the "Litter Control Act," void as violative of section 46 of the Kentucky Constitution.

* * * * *

**Robert F. Williams,
"State Constitutional Limits on
Legislative Procedure:
Legislative Compliance and
Judicial Enforcement"**

**Publius: The Journal of Federalism
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**Judicial Approaches to
Enforcing State Constitutional Restrictions
on Legislative Procedure**

State courts have developed a surprisingly wide range of approaches to enforcing restrictions on legislative procedure under circumstances where an act does not carry "its death warrant in its hand." Even within single jurisdictions, one can detect inconsistent doctrines and a lack of continuity over time. These widely varying judicial doctrines reflect what are essentially political decisions, made in the context of adjudicating actual controversies, about the extent of judicial enforcement of state constitutional norms.

The range of approaches can be viewed as a continuum. At one end of the continuum is the "enrolled bill rule" . . . This is marked by judicial passivity and

complete deference to the legislative enactment.⁷¹ At the other end is the “extrinsic evidence rule,” characterized by judicial activism and recognition of the written constitution as a binding source of law.⁷² In between these two extremes are three intermediate approaches to judicial enforcement. All of these have been developed by the courts as they have been called on by litigants to interpret and enforce state constitutional restrictions on legislative procedure. . . .

The Enrolled Bill Rule

The enrolled bill rule is also referred to as the “conclusive presumption rule” because when it is operative, it prevents any evidence, other than the final enrolled bill itself, from being produced to show constitutional violations occurring during the process of enactment.⁷³ In his 1977 commentary on the revised Texas Constitution, George Braden asserted that the enrolled bill rule was the majority view.⁷⁴ The most common argument advanced in favor of the rule is the separation of powers doctrine.⁷⁵ Because the legislature is a coordinate branch of government, the argument contends that the courts should not question the validity of its certified (enrolled) acts by going behind them to determine compliance with constitutional limitations. Another argument relies on the need for finality with respect to the validity of statutes, and the need for citizens to rely on such finality. These arguments inevitably leave it to the legislature itself to determine whether there has been compliance with limitation contained in the state constitution. . . .

Braden advocates the enrolled bill rule. . . . He states, “In any event, the members are fully capable of enforcing the rule, and it is their sole responsibility to do so under the enrolled bill doctrine.”⁷⁷ Texas

continues to follow the enrolled bill rule, which has been in effect in civil cases⁷⁸ since *Williams v. Taylor* in 1892.⁷⁹ The court in *Williams* refused to invalidate a statute even though the legislative journals showed that the bill had not been reported out of committee within three days of final adjournment, in violation of Article 3, Section 32 of the Texas Constitution.

The Supreme Court of Washington recently reaffirmed the enrolled bill rule in *Citizens Council Against Crime v. Bjork*⁸⁰ In continuing to apply the rule, the Court cited earlier Washington precedents⁸¹ and also stated:

An additional reason of public policy which supports the [enrolled bill] doctrine is that it is necessary in order that people may rely upon the statutes as setting forth the laws which have been enacted by the legislature. If the enrolled bill were not taken as conclusive evidence that it was regularly and constitutionally enacted, Judge John P. Hoyt (who had served as President of the Constitutional Convention) said, it would be practically impossible for the courts even to determine what was the law, and would render it absolutely impossible for the average citizen to ascertain that of which he must at his peril take notice.⁸²

The end result of the “finality argument” is that people have laws that they can rely on; but they have no guarantee that those laws were enacted constitutionally. Furthermore, as the experience of states which follow the “journal entry rule” or “extrinsic evidence rule” shows, the unfavorable consequences that Judge Hoyt foresaw have not come to pass.

The “Slightly Modified” Enrolled Bill Rule

If the enrolled bill rule is placed at the far left of the continuum, the current rule in New Mexico can be placed only a short step to the right of it. After observing the enrolled bill rule since 1915, the New

⁷¹Norman J. Singer, *Statutes and Statutory Construction*, Vol. 1 (4th ed., Wilmette, Ill.: Callaghan and Co., 1985), pp. 609-611.

⁷²*Ibid.*, pp. 617-618.

⁷³*Ibid.*, p. 609. This approach was adopted by the U.S. Supreme Court in 1892. See *Field v. Clark*, 143 U.S. 649, 669-680 (1892). There are, of course, relatively few procedural challenges to federal statutes. See *supra* notes 1 and 2, and accompanying text. For an exploration of the English antecedents of the enrolled bill rule, see William H. Lloyd, “Pylkinton’s Case and Its Successors,” *University of Pennsylvania Law Review* 69 (November 1920): 20-34.

⁷⁴George D. Braden, *The Constitution of the State of Texas, An Annotated and Comparative Analysis* (Austin: Texas Advisory Commission on Intergovernmental Relations, 1977), Vol. 1, p. 121.

⁷⁵Singer, *Statutes and Statutory Construction*, p. 609.

⁷⁷Braden, *The Constitution*, p. 162.

⁷⁸Interestingly, the Texas Court of Criminal Appeals had followed the “journal entry rule” (discussed in notes 95-104, and accompanying text), until 1971. In *Maldonado v. State*, 473 S.W.2d 26 (Tex. Crim. App. 1971) the Court of Criminal Appeals brought itself in line with the Supreme Court of Texas in adopting the enrolled bill rule and held, “We will not look behind the engrossed [enrolled] bill to see if the Governor issued a proclamation including the subject matter of the enacted legislation” (as required by Article 3, Section 40 of the Texas Constitution), 473 S.W.2d at 28.

⁷⁹83 Tex. 667, 19 S.W. 156 (1892).

⁸⁰84 Wash. 2d 891, 529 P.2d 1072 (1975).

⁸¹See, e.g., *Roehl v. P.U.D. No. 1 of Chelan County*, 43 Wash. 2d 214, 261 P.2d 92 (1953).

⁸²84 Wash.2d at 898, n. 1, 529 P.2d at 1076, n. 1 (citation omitted).

Mexico Supreme Court carved out a narrow exception in 1974.⁸³ The court struck down the statutes in question, enacted after the sixtieth calendar day of the legislative session in violation of Article 4, Section 5 of the New Mexico Constitution. The justices held that courts may examine “the question of whether or not the act or bill purportedly passed by the Legislature within the constitutional time limitation was in truth and in fact passed within that limitation.” The court explicitly held that its decision was to be prospective only, and only applicable to alleged violations of Article 4, Section 5 where “[T]he conclusive legal presumption that ordinarily attaches to enrolled bills simply would not attach.”⁸⁴

Acknowledging the separation of powers clause in the New Mexico Constitution,⁸⁵ and disclaiming any intention of “even suggesting to the Legislature how it should conduct its affairs,” the court concluded that “[i]t is nevertheless our function to say what the law is and what the Constitution means.” The court clearly stated that it did “not intend to herald the complete demise of the enrolled bill rule.”⁸⁶

The court’s arguments as to why it should look behind the enrolled bill to determine compliance with Article 4, Section 5 are persuasive. It noted that “[t]here is not the slightest doubt that the legislators are duty bound to comply with this constitutional directive.”⁸⁷ Of course, legislators are duty bound to comply with all constitutional directives. The New Mexico court still seems to leave the enrolled bill rule in place for challenges asserting that a bill “was altered or amended during its passage so as to change its original purpose.”⁸⁸ A violation of this or other provisions would arguably be as unconstitutional as if it had been passed after the constitutionally allotted time for the legislative session had come to an end. Why the court considered only violations of Article 4, Section 5 to be egregious enough to warrant an exception to the enrolled bill rule remains unexplained. All the arguments advanced in support of this exception seem equally applicable to abolishing the enrolled bill rule altogether.

The Modified Enrolled Bill Rule

On another step to the right of the continuum lies the “modified enrolled bill rule” adopted by the

Supreme Court of South Dakota in 1936.⁸⁹ Under this rule, the enrolled bill is conclusive evidence of proper enactment except when an alleged violation concerns a provision for which the constitution specifically requires that a journal entry be made. Only under these narrow circumstances will the court look to the journals to determine whether a challenged act was passed improperly.

The court’s latest consideration of the rule came in 1974.⁹⁰ One of the alleged improprieties was that the bill was not “read twice, by number and title once when introduced, and once upon final passage” as required by Article 3, Section 17. The court held that “[t]he modified enrolled bill rule precluded plaintiffs from introducing evidence of the legislature’s failure to comply with the requirements of Article 3, Section 17, because a journal entry noting compliance with that section is not *expressly required* by the Constitution.”⁹¹ Even though the journals showed that the bill never got a first reading, the journals did not lack any of the required entries on the day the bill was considered and passed. Therefore, the court held that the enrolled bill became conclusive proof of its proper enactment.

The weakness of the modified enrolled bill rule was exposed by Justice Frank Henderson in his dissenting opinion. That is, the rule effectively insulates even intentional violations of the constitution from judicial review, even if the violation appears on the face of the journals, unless the violation occurs with respect to one of the limited exceptions where a specific journal entry is required by the constitution. Henderson favored adoption of the “journal entry rule”⁹² In support of his view, Henderson cited Article 3, Section 13, which mandates that “each house shall keep a journal of its proceedings.” He also cited the rules apparently followed by the neighboring states of Minnesota and Michigan.⁹³ He concluded that, “making laws is the State Legislature’s business, but protecting the Constitution is this Court’s business. Viewing an enrolled bill as conclusive and blessing it as legal is to forsake, oftentimes, the truth.”⁹⁴

⁸⁹The rule was enunciated in *Barnsdall Refining Corporation v. Welsh*, 64 S.D. 647, 269 N.W. 853 (1936). The rule is discussed in Marion R. Smyser, “Constitutional Limitations on the Enactment of Statutes in South Dakota,” *South Dakota Law Review* 25 (Winter 1980): 33-35.

⁹⁰*Independent Community Bankers Assoc. v. South Dakota*, 346 N.W.2d 737 (S.D. 1984). Ohio recently adopted the modified enrolled bill rule in a thoughtful opinion. *Hoover v. Bd. of County Commissioners*, 19 Ohio St.3d 1, 482 N.E.2d 575 (1985).

⁹¹346 N.W.2d at 743 (emphasis added).

⁹²346 N.W.2d at 743, 748. The “journal entry rule” is discussed more fully in notes 95-104, and accompanying text.

⁹³*Bill v. King*, 205 Minn. 427, 286 N.W. 311 (1939); *McClellan v. Stein*, 229 Mich. 203, 201 N.W. 209 (1924).

⁹⁴346 N.W.2d at 749.

⁸³*Dillon v. King*, 87 N.M. 79, 529 P.2d 745 (1974) (overruling *Earnest, Trav. Auditor v. Sargent, Auditor*, 20 N.M. 427, 150 P. 1018, 1915).

⁸⁴87 N.M. at 85-86, 529 P.2d at 751-752.

⁸⁵New Mexico, *Constitution*, Article 3, Section 1.

⁸⁶87 N.M. at 85-86, 529 P.2d at 751-752.

⁸⁷N.M. at 85, 529 P.2d at 751.

⁸⁸New Mexico, *Constitution*, Article 4, Section 15.

The Journal Entry Rule

The middle of the continuum is represented by the “journal entry rule.”⁹⁵ This rule allows a court to consider an evidence appearing in the legislative journals to help determine the validity of a statute which has been challenged on constitutional grounds,⁹⁶ with the enrolled bill being considered only *prima facie* valid.

One state that follows the journal entry is Florida. In a 1983 case,⁹⁷ a Florida drug trafficking statute was challenged on the grounds that it had not been properly read before passage as required by Article 3, Section 7. The trial court had considered extrinsic evidence (voice recordings of the legislative proceedings and transcripts generated from those recordings) to contradict the journals. The journals indicated that both houses of the legislature had properly read the bills before their enactment.⁹⁸

In continuing to follow the journal entry rule, the Florida Supreme Court held that the legislative jour-

nals were the only evidence “superior in dignity” to enrolled bills.⁹⁹ The rationale for the court’s holding, and the basis of the journal entry rule, is that the legislative journals are considered to be “public records” because the constitution mandates that they be kept.¹⁰⁰ Under this view, the journals are at least as reliable as the enrolled bill as evidence of what procedure the legislature actually followed, or did not follow, in enacting legislation. Indeed, in Florida, if there is a conflict between an act and the journal, the journal controls.¹⁰¹

The court did list some specific exceptions where extrinsic evidence might be used to impeach the journals: ¹⁰² for example, where “clear and legally sufficient allegations of fraud are presented”¹⁰³ or when it is alleged that actions were taken by a legislature after it ceased to be a duly constituted legislature.¹⁰⁴ Absent a challenge based on circumstances like these, the legislative journals are the only evidence that can be used to overcome the presumption of constitutionality afforded to enrolled bills in states which, like Florida, follow the journal entry rule.

The Extrinsic Evidence Rule

At the right end of the continuum is the “extrinsic evidence rule.” This rule “accords the enrolled bill a *prima facie* presumption of validity but permits an attack by clear, satisfactory and convincing evidence establishing that the constitutional requirements have not been met.”¹⁰⁵ This rule was adopted by the Supreme Court of Kentucky in 1980,¹⁰⁶ in a challenge based on Section 46 of the Kentucky Constitution. Although the journals indicated, and all parties conceded, that only 48 votes in a 100-member house were cast in favor of a bill containing an appropriation, Section 46 sets out certain procedures, including: “Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all members elected to each house.”¹⁰⁷

⁹⁵It should be noted that there are different formulations of this rule. In Singer, *Statutes and Statutory Construction*, the journal entry rule is defined as the reverse of the conclusive presumption rule (i.e., “if constitutional compliance with mandatory provisions is not set forth in the journal there is a conclusive presumption that the proper proceedings were not followed and the presumption is against the validity of the act”); *Ibid.*, p. 616. This is a minority position (see cases cited therein). For purposes of this article, the “journal entry rule” means that where a statute is challenged on constitutional grounds, the court may look to the journal to determine compliance with the constitutional provision.

⁹⁶A further point of clarification is necessary to distinguish the “affirmative contradiction rule” (*Ibid.*, pp. 614-15). This rule “requires that validity be given to the enrolled bill unless there *affirmatively* appears in the journals of the legislature a statement that there has not been compliance with one or more of the constitutional requirements” (*Ibid.*, p. 614). “It generally results, as does the conclusive presumption rule, in sustaining every statute” (*Ibid.*). The main weakness of this rule is that “as a practical matter it would be remarkable for the journal to recite affirmatively that the bill was not read or a vote was not taken or that any required procedural step was not carried out” (*Ibid.*). So the main distinction, and an important distinction, between the affirmative contradiction rule and the journal entry rule is that only the journal entry rule allows a court to consider evidence of “defects in legislative procedure which appear *negatively* in the journal. That is, the journal may fail to show that the bill was read a second time or it may fail to show that a proper vote was recorded” (*Ibid.*). For an application of the affirmative contradiction rule, see *Jensen v. Matheson*, 583 P.2d 77 (Utah 1978).

⁹⁷*State v. Kaufman*, 430 So.2d 904 (1983). Rhode Island also follows the journal entry rule. See *State Terminal Corp. v. General Scrap Iron Inc.*, 107 R.I. 24, 264 A.2d 334 (1970). See also Elizabeth Hunter Cobb, “Judicial Review of the Legislative Enactment Process: Louisiana’s ‘Journal Entry Rule,’” *Louisiana Law Review* 41 (Summer 1981): 1187-1200.

⁹⁸430 So.2d at 905.

⁹⁹430 So.2d at 906.

¹⁰⁰See Florida, *Constitution*, Article 3, Section 4(c).

¹⁰¹430 So.2d at 905, n.3.

¹⁰²430 So.2d at 906.

¹⁰³*Ibid.* See *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771 (1928). A similar exception in cases of fraud is allowed in Utah. See *Jensen v. Matheson*, *supra*, note 96 (Ellett, Chief Justice concurring with reservations).

¹⁰⁴*Ibid.* See *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192 (1935). See also *Dillon v. King*, *supra*, note 83.

¹⁰⁵Singer, *Statutes and Statutory Construction*, pp. 617-618.

¹⁰⁶*D & W Auto Supply v. Dept. of Revenue*, 602 S.W.2d 420 (Ky. 1980). The extrinsic evidence rule is also followed by Illinois. See *Yarger v. Board of Regents of Regency Universities*, 98 Ill.2d 259, 456 N.E.2d (1983). See also *Jensen v. Matheson*, *supra*, note 96 (Maughan, J., dissenting).

¹⁰⁷602 S.W.2d at 422.

This case gave the Supreme Court of Kentucky the chance it apparently was looking for to reexamine, and abandon, the enrolled bill rule which had been in effect there since 1896.¹⁰⁸ Before abandoning the enrolled bill rule, the court examined the four historical bases of the doctrine and the criticisms of the rule. A major argument the court advanced in favor of adopting the extrinsic evidence rule was that it is the “sworn duty of the courts under Section 26 of the Kentucky Constitution to see that violations of the constitution . . . are brought to light and corrected.” The court stated, “[t]o countenance an artificial rule of law that silences our voices when confronted with violations of our constitution is not acceptable to this court.” The court concluded that the extrinsic evidence rule is “a more reasonable rule,” and one that will best allow the court to fulfill its obligation to “support the Constitution of the Commonwealth.”¹⁰⁹

¹⁰⁸The rule was announced in *Lafferty v. Huffman*, 99 Ky. 80, 35 S.W. 123 (1896).

¹⁰⁹602 S.W.2d at 424. Kentucky, *Constitution*, Section 26 provides:

To guard against transgression of the high powers we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

Discussion Notes

1. Is the enrolled bill rule akin to the “political question” doctrine? See generally, Nat Stern, “The Political Question Doctrine in State Courts,” *South Carolina Law Review* 35 (Spring 1984): 405.

2. With respect to other state constitutional restrictions on legislative procedure, see Chapter 9, section B.

3. A lengthy debate in the 1872-1873 Pennsylvania Constitutional Convention concerning the question of judicial enforceability of legislative procedure requirements in the state Constitution was illuminating, but inconclusive. The Legislation Committee had recommended the inclusion of the following provision in the legislative article:

Any bill passed in disregard of the provisions and directions prescribed in this article shall be void and of no effect; and when the validity of any law passed by

Conclusion

It should now be obvious, from this brief review, that there is a wide range of judicial attitudes toward enforcing state constitutional restrictions on legislative procedure.¹¹⁰ Litigants seeking an adjudication of a statute’s invalidity on the basis of procedural defects are not neutral, good-government watchdogs seeking enforcement of the state constitution as an abstract value. They are, rather, directly affected by, and opposed to, the challenged statute’s substantive outcome and are seeking a procedural “handle” to avoid its consequences. They appear to be seeking a judicial windfall after losing in the legislature. This may be what leads to judicial ambivalence about enforcing constitutional restrictions on legislative procedure.

The question still remains whether, in the absence of legislative adherence and executive enforcement (which may be common with respect to controversial statutes), courts should enforce apparently mandatory requirements of the written constitution. These are basic questions of justiciability and the judicial function in constitutional interpretation and enforcement.

¹¹⁰Justice Hans. A. Linde of Oregon has noted: “When a law is promulgated without compliance with the rules of legitimate lawmaking, is it not a law? Remarkably, we have no coherent national doctrine on this fundamental question.” Hans A. Linde, “Due Process of Lawmaking,” *Nebraska Law Review* 55 (1976): 242.

the Legislature is questioned in any court of record, it shall be competent for such court to inspect the Journals of either House, and if it does not appear thereon that all the forms of legislation, in both Houses, as hereinbefore prescribed, have been observed in the passage of such law, the same shall be adjudged by such court to be void.

2 Debates of the Convention to Amend the Constitution of Pennsylvania, 1872-1873, at 758.

A debate followed, during which the delegates fully discussed the pros and cons of judicial enforcement, together with alternatives, such as enforcement by the executive branch. *Ibid.* at 758-97. At the conclusion of the debate, the Convention simply voted not to accept the recommended language. *Ibid.* at 797.

G. Mandatory or Directory Provisions

Reread the provision of the South Carolina Constitution, Article I, Section 23, on page 180.

Arnett v. Sullivan 279 Ky. 720, 132 S.W.2d 76 (1939)

THOMAS, Justice.

The regular 1938 session of our General Assembly by chapter 20 of the acts for that session, duly submitted to the voters of the commonwealth for their ratification or rejection at the regular November 1939 election an amendment to our Constitution. The contemplated amendment made it the imperative duty of the General Assembly to "provide by law for assistance to the aged, to the blind, and to dependent children, and for other assistance in cooperation with the Federal Government under the Social Security Act and acts amendatory thereto," and which was done pursuant to the provisions of section 256 of our Constitution. Its next section (257) says: "Before an amendment shall be submitted to a vote, the secretary of state shall cause such proposed amendment, and the time that the same is to be voted upon, to be published at least ninety days before the vote is to be taken thereon in such manner as may be prescribed by law." (Our emphasis.)

At the first session after the adoption of our present constitution the general assembly enacted section 1459 of our present statutes, designed to carry into effect the two constitutional provisions embodied in its sections 256 and 257. A part of the section of the statutes dealing with the publication of the submitted amendment says: "Such publication shall be made so that the last publications shall be at least ninety days preceding the election at which said amendment is to be voted on, as provided in Const.

secs. 256 and 257." The regular election at which the proposed amendment should be submitted to the people was and is the regular election day in November, 1939, but the appellant, Charles D. Arnett, Secretary of State, for the Commonwealth of Kentucky, did not advertise or publish its submission until August 26, 1939, which, according to our calculation, left but 73 days intervening between the publication and the election day, and being 17 days less than the constitutional requirement.

* * * * *

The only argument made in brief of counsel for appellants for a reversal of the judgment is, that the language in section 257 requiring the publication of the submission to be "at least ninety days before the vote is to be taken thereon" and the corresponding language in section 1459, is directory and not mandatory. In support of that argument numerous cases from this and some from other courts are cited dealing with the rule applicable to the interpretation of *statutes* which counsel seek to apply to *constitutional* provisions; but which all courts, so far as we are aware, have uniformly declined to adopt—all of them declaring that the rule permitting courts to adopt directory or mandatory interpretations with reference to statutes is much more restricted or altogether lacking than when applied to constitutional provisions, as will be seen from this language taken from the text of volume 11 in the very recent work of American Jurisprudence, on page 686, section 69: "The analogous rules distinguishing mandatory and directory statutes are of little value in this connection and are rarely applied in passing upon the provisions of a Constitution." That excerpt is but a reiteration of the substance of the rule as stated by all authoritative texts writers and courts, including Mr. Cooley in Volume I, of the 8th Edition of his celebrated treatise on Constitutional Limitations. On page 160 of the vol-

ume referred to the text says: "There are some cases, however, where the doctrine of the directory statutes has been applied to constitutional provisions, but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." The learned author continues through following pages to fortify that statement by citing opinions of various courts, including that of some of the few ones adopting departures in some instance from the general rule—that all constitutional provisions are mandatory and none of them directory. Illustrating the holding of the latter class of constitutional interpretations the author cites cases wherein the involved constitutional provision required that an act pending before the legislature should be read "distinctly" the required number of times before it could be voted on by the legislative body, and the courts held that the word "distinctly" was more of a directory command than mandatory, since it necessarily was "addressed to the judgment of the legislative body, whose decision as to what reading is sufficiently distinct to be a compliance cannot be subject to review."

An enumeration (even without excerpts) of text authorities and judicial opinions of various courts of last resort in this country, approving the mandatory character of constitutional provisions would extend this opinion far beyond due limits, to avoid which we will not undertake the task but will content ourselves by saying that with few exceptions, and only where the provision under consideration was of such a nature as to scarcely present the question, the rule is declared that constitutional provisions are *mandatory* and never *directory*. This court is in complete accord therewith. . . . In fact, we have been cited to no domestic case, nor have we been able to find one, of contrary holding. All of the cases except the Speer case involved other constitutional requirements and limitations than the submission of constitutional amendments to a vote of the people for ratification or rejection, but in that case the identical question here involved was the only one submitted to and determined by the court. . . .

We in that case, as expressing our adopted rule, approved this excerpt from the Varney opinion *supra* [86 Ky. 596, 6 S.W. 459]: "By the term 'directory' it is meant that the statute gives directions which ought to be followed; but the power given is not so limited by the directions that it cannot be exercised without following the directions given. In other words, if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely. Should this rule of construction be applied to the

constitution of the state? We think not. The constitution of the state was adopted by the people of the state as the fundamental law of the state. This fundamental law was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it. It was intended by the people that all departments of the state government should shape their conduct by this fundamental law. Its every section was, doubtless, regarded by the people adopting it as of vital importance, and worthy to become a part and parcel of a constitutional form of government, by which the governors as well as the governed were to be governed. Its every mandate was intended to be paramount authority to all persons holding official trusts, in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be ingrafted in it; but each section and each article was solemnly weighed and considered, and found to be essential to the form of constitutional government adopted. Wherever the language used is prohibitory it was intended to be a positive and unequivocal negation." That same rule was expressly approved in the Bosworth opinion and all of which is in complete accord with the universally established rule for the interpretation of constitutional provisions.

To sustain the contention of counsel for appellants would not only require us to expressly overrule our former emphatically established position, but would also require us to depart from what we conceive to be the only logical one that should be approved by us, even in the absence of any precedent whatever, and though the question was one of first impression, either in this jurisdiction or in others. Appellant's counsel in their brief admit that the Speers case presented "a duplicate situation" to the instant one. They also admit that this court in that opinion went "extendedly and elaborately" into the question, and that "unless this court is persuaded to overrule the Speers case, *supra*, the judgment of the lower court must be affirmed." So that, there is no effort to differentiate the Speers case from the instant one. However, in order to induce us to recant from our holding in that case counsel has this to say: "At the time section 257 was adopted perhaps the ninety day provision of the Constitution was essential and necessary due to the sparsely settled rural communities of the State, the difficulty of communication and the infrequency of publication of newspapers and the slowness of their delivery. However, under conditions existing at present, communication between the people is swift and easy, newspapers reach the rural districts on the day they are published and they are published daily, while at the time the Constitution was adopted containing the provisions *supra*, communication was difficult and tedious, newspapers

were usually published weekly and in many cases did not reach the rural communities for many days after their publication. People had no opportunity to discuss the merits of a Constitutional amendment such as they now have. Telephone as a means of communication was not widely used. Roads were in very bad condition; automobiles were not in practical use; travel from one point to another was limited; radios were unheard of; and it can readily be seen that publication of the amendments was at that time about the only means of informing the voters of the proposed amendments to the Constitution. Today conditions are entirely different and a publication of a few days prior to an election would give to the people as much opportunity to discuss the amendment and inform themselves as to its merits as would have been given by the provision requiring publication ninety days prior to the election at the time the Constitution was adopted." The argument is unconvincing, either from a logical or precedent standpoint.

It is then insisted that the 73 days publication made in this case by the Secretary of State was and is a "substantial" compliance with the mandatory requirement of section 257 of the Constitution, and section 1459 of our Statutes, although both of them employ the emphatic language that the publication should be made "at least ninety days before the vote is to be taken," &c. Even if opinions dealing with the interpretation of *statutes* only were available in support of that position they would not apply, as we have seen, to the instant case wherein a constitutional instead of a statutory requirement is involved.

We stated above that to follow the argument of counsel for appellants and to hold that the language of the Constitution here involved was only directory would conflict with the only logical conclusion that could be reached by the courts, even in the absence of the teachings of text writers, and the almost universal determinations of courts. It requires but little comment to sustain that statement. Written constitutions in governments adopting them, charter the course to be followed by all agencies and departments operating under them, as well as the people composing the government. Human nature is such that many individuals, whether in or out of office, would if unrestrained, through selfish, ambitious or other motives, pursue a course destructive to orderly government

wherein justice as near as humanly possible should prevail. The purpose of constitutional restraint is to guarantee as far as possible that such action on the part of those so inclined should be prevented, and that the highway to be traveled under such forms of government is that mapped out by its constitution. To hold that its provisions are directory and not mandatory would enable the class of individuals (public or private) to whittle away such necessary constitutional restraints and barriers bit by bit until the constitution itself would be reduced to a state of disintegration and final annihilation, and the government would then be reduced to the condition of a ship without a rudder. There should be no such undermining. If a particular constitution contains provisions not adaptable to changed present conditions there is always found in it means and methods by which it may be amended, and no court should approve any other method of amendment than the one or ones so prescribed. However, there is a vast difference between "substantial" compliance and no compliance at all. If the attempt at compliance in this case had been made as much as ninety days before the election at which the submitted amendment was to be approved or rejected by a vote of the people—but not in the exact method pointed out by either the constitutional or statutory sections *supra*—we would then be called upon to determine whether or not a substantial compliance had been made. But in this case the effort at compliance (substantial or literal) was never taken by the Secretary of State within the minimum period, and therefore, there has been no "substantial compliance" with its provisions in the respect here involved. It follows, therefore, that the argument of substantial compliance has no relevancy upon the legal issue, even if applicable in the determination of constitutional questions.

Further elaboration of the question would serve no purpose other than to more convincingly confirm the correctness of the universal rule referred to, and which is, that constitutions should never be amended or disregarded either by public officials (including courts) or private individuals, except in the manner pointed out in the constitution itself, since its provisions are always mandatory and never directory.

Wherefore, for the reason stated, the judgment is affirmed.

Discussion Notes

1. Have we seen other contexts in which changes over time have supported changed state constitutional interpretation, even the overruling of precedent? If so, why is that argument not available in the *Arnett* case?

2. Is the view of the content of state constitutions presented in the *Arnett* case an accurate one?

3. The *Arnett* court, in 1939, held that state constitutional provisions are always mandatory, noting that "we have been cited to no domestic case, nor have we been able to find one, of contrary holding." Consider the following 1923 Pennsylvania decision.

Armstrong v. King
281 Pa. 207, 126 A. 263 (Penn. 1924)

SIMPSON, J.

On November 6, 1923, an amendment to the Constitution of the state was submitted to its qualified electors and approved by them. Because the defendant, as secretary of the commonwealth, proposes to advertise another amendment for submission to them at the election to be held on November 4th of this year, and to notify the county commissioners throughout the state, to print the official ballots accordingly, a taxpayer's bill was filed in the court below, asking that he be enjoined from so doing, because, inter alia, article 18 of our Constitution expressly provides that "no amendment or amendments shall be submitted oftener than once in five years." The court below dismissed the bill, and plaintiff appeals.

The constitutional provision (article 18) referred to is as follows:

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and, if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the secretary of the commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the secretary of the commonwealth shall cause the same again to be published in a manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the state in such manner, and at such time at least three months after being so agreed to by the two houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amend-

ments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.

It is clear that unless we wholly ignore the words "but no amendment or amendments shall be submitted oftener than once in five years," a conclusion for which no one does or reasonably can contend, we must either construe the language exactly as it is written, namely, as prohibiting the submission of any amendments "oftener than once in five years," or we must interpret it as referring to the amendments specified in the preceding part of the article, which would result in precluding only the resubmission of amendments once defeated by the people. We cannot take this latter alternative, however, because the language used will not permit us to do so. When it was intended to refer to the amendment or amendments dealt with in the earlier part of the article, the clause so providing was always preceded by the word "such." Thus it is said, if "any amendment or amendments" agreed to by the Legislature, "*such* proposed amendment or amendments" shall be entered on their journals and duly advertised, and if the next Legislature shall agree to "*such* proposed amendment or amendments" another publication shall be had, and "*such* proposed amendment or amendments" shall be submitted to the electors for approval, and if "*such* proposed amendment or amendments" are approved by a majority of those voting thereon, "*such* amendment or amendments shall become a part of the Constitution." On the other hand, the prohibiting clause does not use this or any similar word; it simply says: "But no amendment or amendments shall be submitted oftener than once in five years." This broadening of the language necessarily implies an intentional broadening of thought; hence it must be construed as it is written, namely, as a purpose on the part of the people that they shall not be asked to amend their Constitution "oftener than once in five years."

As bearing upon this question, though not conclusive of it, we have several supporting facts. In the constitutional convention of 1838, after a number of long debates on the general subject of amendments, the words "but no amendment or amendments shall be submitted to the people oftener than once in five years" were presented as an amendment to the pending article on the subject. Volume 12, Proceedings and Debates of Pennsylvania Constitutional Convention 1838, p. 307. It was repeatedly stated as a reason for its adoption by those favoring it and for its rejection by those opposing it that, if adopted, no amend-

ments of any kind could be submitted oftener than once in five years. Nevertheless, it was approved by the convention, ratified by the people, and for 36 years, during the entire time that Constitution was in force, the five-years limitation was never infringed; the Legislature thus apparently observing the construction expressed in the convention. The committee on future amendments of the constitutional convention of 1873 omitted those words from the article as reported by it, but the convention reinserted them (5 Debates of the Constitutional Convention. p. 13), the entire debate showing once more that they were considered as excluding any and all amendments within the period stated. Again the people ratified the action of their convention, and for 38 more years the five-year period was never infringed by amendments of any kind. We therefore have the fact that two constitutional conventions interpreted the language to mean exactly what it says, without any qualification whatsoever, and for 74 years this construction was apparently accepted as correct by the people acting through 57 of their Legislatures. It is of course true that possibly other reasons explain some of these facts, but it is improbable that all of them could be otherwise accounted for; be this as it may, however, the matter is of importance in considering the instant question, and certainly it wholly excludes any idea that those words, because of usage, should be given any other than their normal meaning.

For the purpose of antagonizing this inevitable conclusion, we are told that the practice has been to submit proposed amendments without reference to the five-years limitation; that large sums have been loaned on the faith of the people's approval of amendments thus submitted, and that these loans will be imperiled, if we sustain the contention made upon this point. If this were so, it would be a cause of much regret; but we would nevertheless be required to uphold the Constitution and ignore the erroneous practice, whatever the result might be (*Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 453, 118 Atl. 394, 24 A. L. R. 1215); especially as we have never heretofore decided, or even been asked to decide, what is the meaning of the constitutional provision. Evidently the court below was impressed by the argument thus presented, for although the trend of its opinion shows it believed the true construction of the provision to be as stated, this interpretation was not accepted because, while the Legislature's construction "is not binding on the courts, yet the fact that the Constitution has been thus amended, and large amounts of bonds issued on the strength of such amendments, without question, is, to some extent, in-

dicative of the intention of the people in adopting this Constitution." The effect of this statement is that, because the legislature on four different occasions, beginning in 1911, violated this clause of the Constitution, and no one legally attacked its action in so doing, these facts indicate what the people meant when they adopted it in 1838 and 1873. Of course such a conclusion could not be possible under any circumstances, but the facts already detailed show how especially inaccurate it is in the present instance. Moreover, although contemporaneous and long-continued uniform interpretation should and does assist in construction, if there is any doubt whatever as to the actual meaning, the courts cannot go beyond this, even in determining whether or not a statute is unconstitutional (*Cooley's Constitutional Limitations* [7th Ed.] 106; *Kucker v. Sunlight Oil & Gasoline Co.*, 230 Pa. 528, 79 Atl. 747, Ann. Cas. 1912A. 503; *Collins v. Kephart*, 271 Pa. 428, 117 Atl. 440); a fortiori they cannot in deciding the meaning of a constitutional provision.

The present Constitution was amended in 1901, 1909, 1911, 1913, 1915, 1918, 1920, and 1923, those of 1911, 1915, 1918, and 1920, being amendments of article 9, section 8, relating to municipal indebtedness. It will be noticed that the untimely submissions were in 1911, 1913, 1918, and 1923. Had injunctions been sought at an appropriate time against their then present submission, doubtless they would have been enjoined. No such action was applied for however, the people gave their approval to the amendments, and to this day no one has challenged the fact that they are properly a part of the Constitution. The affirmative action of two successive Legislatures, the form of submission, the approval by a majority of the electors, and all other steps necessary to give the amendments validity, were duly and properly taken; only the dates of submission were mistakes. It is now too late to directly attack the amendments on this ground, and they cannot be collaterally attacked for any reason.

Under what circumstances, if any, a direct attack can be made on a constitutional amendment, after adoption by the people, because of a failure to comply strictly with some procedural condition leading up to the submission, has been the subject of many and lengthy opinion, with results impossible of reconciliation. Usually the assaults upon proposed amendments have been made before submission; but the curious will find practically all of the cases decided prior to 1909 cited and reviewed in *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N.W. 408. One of the extreme authorities is *Koehler & Lange v. Hill*, 60 Iowa, 543, 14 N.W. 738, 15 N.W. 609, where the

state Constitution provided that a proposed amendment must be entered upon the legislative journals, and it was held that because it was not there entered at length the amendment was not effective, even though it had been adopted by the people. The opinion states (page 549 [14 N.W. 741]).

“It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the Constitution, it cannot be recognized as valid unless such vote was had in pursuance of, and in substantial accord with, the requirements of the Constitution,” including an exact entry on the journals.

That is to say, if the clerk in copying a proposed amendment by mistake or fraud omits even an immaterial part of it as was the omission in that case, and the members of the Legislature do not examine the journal to see that it is correct, the amendment would fail even though approved by the unanimous vote of all the electors.

Other courts of last resort have taken a more reasonable view, but we shall refer, at this time, to only two of their decisions. In the Constitutional Prohibitory Amendment Cases, 24 Kan. 700, 710, it is said in an opinion written by Justice Brewer, who later became a Justice of the Supreme Court of the United States, that—

“The two important, vital elements in any constitutional amendment, are, the assent of two-thirds of the Legislature and a majority of the popular vote. Beyond these other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials is secured. But they are not themselves the essentials.”

The other case to which attention is called, in this connection, is *State v. Winnett*, 78 Neb. 379, 387, 110 N.W. 1113, 1116 (10 L.R.A. [N.S.] 149, 15 Ann. Cas. 781), where it is said that, if a too strict adherence were given to some of the requirements—

“. . . the will of the people of the state would be defeated by an unimportant accident over which they had no control. If other provisions of the Constitution are mandatory and are to be taken literally, those provisions by which the people have consented to place restrictions upon their own power in adopting amendments to the Constitution should not be so construed [after approval by the people]. We should inquire into the fair purpose and meaning of such restrictions, and should regard the substance rather than the letter of such requirements.”

It would be idle to attempt to review the irreconcilable opinions on the subject. Our own decisions, while few in number, apply the “rule of reason” in construing constitutional provisions, as well as in interpreting statutes, and no just cause appears why this should not be so. The Constitution is, of course, the paramount law, and must be construed in that light; but after all, it is an instrument prepared by human beings, and contains within itself the proof of their frailties, as we are frequently advised by the arguments presented on the many questions arising under it. Although, being a Constitution, it should contain only that which is fundamental, we are constantly made aware of the fact that many details are embodied in it which more properly belong in legislation. See *Commonwealth v. Moir*, 199 Pa. 534, 553, 49 Atl. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801. Because of these facts, all that is said in the Constitution is not of the same mandatory force; in the nature of things, some of the detailed provisions must be treated as directory only, as we pointed out in *Commonwealth v. Griest*, 196 Pa. 396, 46 Atl. 505, 50 L.R.A. 568, when we were considering this article on amendments. Indeed, the Constitution itself expresses this inequality for by article 1, section 26, it is declared that the preceding 25 sections are “excepted out of the general powers of government and shall forever remain inviolate.”

For these reasons it is clear to us that, in matters pertaining to the Constitution, consideration must be given not only to the design of the particular provision under discussion, but also to the time when a judicial investigation must be applied for, if it is not to be deemed too late for consideration. As has already been pointed out, this is essential in the instance being considered, in order that the real purpose shall be conserved, and not defeated by a too rigid adherence to relatively unimportant details. If objection is made before an amendment has been voted on by the people, it may well be held to be in time to challenge a noncompliance with any of the preliminaries to the submission. Upon a complaint then made, no error or fraud of a clerk could defeat the legislative right to have an amendment submitted to the people. If, for instance, the proposed amendment was duly adopted by two Legislatures, but was not entered on their journals, steps could be taken to have the journals corrected, and the amendment submitted.

A new status has arisen, however, once the people have approved the proposed amendment.

Discussion Notes

1. Was the provision at issue in this case held to be mandatory, or directory?

2. As a constitutional drafter, what amendment would you propose to resolve the ambiguity addressed in *Armstrong v. King*?

3. Should the use of "shall" rather than "may" be conclusive of the mandatory/directory issue? The famous *Scopes* case held that "shall" could be read as only directory. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). Contra, *State ex rel. Fatzner v. Bd. of Regents*, 167 Kan. 587, 207 P.2d 373 (1949).

4. Professor Frank P. Grad noted, with respect to the question of whether state constitutional provisions are mandatory or directory:

Following Cooley, a number of cases have maintained that constitutional lan-

guage is *always* mandatory, unless *expressly* permissive, and have suggested that any other interpretation would allow violation of the constitution. These cases follow Cooley, too, in presuming "that the people in their constitution have expressed themselves in careful and measured terms . . ." and that the constitution truly contains only fundamental matter, each provision having been "solemnly weighed and considered." This presumption, unfortunately, is contrary to fact in all too many instances.

Frank P. Grad, *The Drafting of State Constitutions: Working Papers for a Manual* (National Municipal League, 1967).

H. Interpretation of State Constitutions by State Attorneys General

**1971 Report of the Attorney General,
New Mexico.
p. 152
Attorney General Opinion No. 71-102
August 26, 1971**

**Opinion of David L. Norvell,
Attorney General**

To: The Honorable Robert A. Mondragon
Lieutenant Governor
Executive-Legislative Building
Santa Fe, New Mexico 87501

Questions:

1. Does Article XII, Section 8, New Mexico Constitution require that the Legislature provide for the training of New Mexico teachers so that they may become proficient in both the English and Spanish languages?
2. If the answer to question No. 1 is in the affirmative, what has been done, should be done or could be done by the New Mexico legislature to comply with the constitutional mandate?
3. What was the intent of the founding fathers of our State in enacting Article XII, Section 8?

Conclusions:

1. Yes.
2. See analysis.
3. See analysis.

Analysis:

Article XII, Section 8, New Mexico Constitution reads as follows:

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become profi-

cient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

The wording of Article XII, Section 8 clearly indicates that the Legislature is to provide for the training of New Mexico teachers so that they may become proficient in both the English and Spanish languages. Thus the answer to the first question is in the affirmative.

Turning next to your third question, the exact intent of the founding fathers in enacting this Article is impossible to ascertain. Only the briefest outlines remain of what transpired during the drafting of the state Constitution. We must therefore determine the intent from the words themselves in this and related articles of the Constitution.

In Article XII, Section 8 the language used is imperative: "shall provide." However, the imperativeness of the first clause is somewhat obscured by the use of the word "may" in the second line. We feel that the phrase "so that they may become proficient" can be read as "in order that they become proficient," thus eliminating the confusion of the word "may." Thus the clause is imperative: the Legislature is *required* to provide for training of teachers in order that they become proficient in both languages.

The wording of the next phrase, "to qualify them to teach Spanish-speaking students," indicates that the framers felt that proficiency in both languages was essential for someone to be qualified to teach Spanish-speaking pupils. This leads us to the conclusion that the intent of the framers was that the Legislature provide trained teachers proficient in both English and Spanish. Thus, to comply with this provision, the Legislature would have to do more than es-

establish training programs; it would have to ensure that a sufficient number of teachers are trained in those programs "to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state." (Art. XII, section 8)

This conclusion is not consistent with that portion of Attorney General Opinion No. 68-15, dated February 1, 1968 which interprets Article XII, Section 8 to be a "directive to the legislature to provide training . . . to enable those *who so desire* to become proficient in both the English and Spanish languages." (Emphasis added.) We interpret the directive more affirmatively: that the Legislature must in fact provide *teachers*, not just training programs. To the limited extent that this conflicts with Attorney General Opinion No. 68-15, the latter is overruled.

Article XXI, Section 4 of the New Mexico Constitution states:

Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English.

The phrase "said schools shall always be conducted in English" is mandatory but must be read in light of Article XII, Section 8, *supra*. In the latter the framers specifically mandated the legislature to provide for the training of teachers in both languages, "so as to *qualify* them to teach Spanish-speaking pupils." (Emphasis added.) Given this expressed concern, we must conclude that the framers contemplated Spanish being used in the classroom. Correspondingly, we interpret the phrase "said schools shall always be conducted in English," to mean that English shall always be used, but not to the exclusion of every other language.

We thus conclude in answer to your third question that the intent of the founding fathers was to *require* the Legislature to provide trained teachers proficient in both English and Spanish so that they can "teach Spanish-speaking pupils and students in the public schools and educational institutions of the state." (Art. XII, section 8.)

The answer to your second question requires an analysis of the various actions of the Legislature which relate to Article XII, Section 8. There is no doubt that significant efforts have been made to provide training for new Mexico teachers in the area of bilingual education. As a part of the 1971 General Appropriations Act ch. 327, Laws of 1971) the Legislature appropriated \$109,000 to New Mexico Highlands University for a "bilingual language program" for the coming fiscal year. This was set at \$112,500 for the following fiscal year. Also we note that a portion of the funds appropriated in the past to Eastern New Mexico University and the University of New Mexico

have been used to train teachers for areas with large non-English-speaking populations. Unfortunately, these programs do not include the requirement that the trainees be *proficient* in Spanish, although the "Composite Minor in Bilingual Education" at the University of New Mexico does require twelve hours of foreign languages unless the student can demonstrate acceptable language proficiency.

In addition, two significant laws have been enacted within the past three years providing for the *utilization* of teachers trained and bilingual education:

1. Chapter 309, Laws 1971, which allocates \$100,00 for bilingual education programs; and
2. Chapter 161, Laws 1969 (Section 77-11-12, N.M.S.A., 1953 Comp.) which permits school districts to establish "bilingual bi-cultural programs."

Not all the actions of the Legislature over the years have been beneficial to the concept of providing teachers proficient in both English and Spanish. The transition through which the Northern New Mexico State School (formerly known as the Spanish-American School at El Rito) has passed is an example of this. Laws 1909, Chapter 97, Section 1 provided that:

The object of the Spanish-American School at El Rito shall be to educate Spanish-speaking natives of New Mexico for the vocation of teachers in the public schools of the counties and districts where the Spanish language is prevalent.

In 1955 this objective was changed and broadened as currently reflected in Section 73-22-34A., N.M.S.A., 1953 Comp. The objectives of the school no longer relate to training teachers, nor to the needs of Spanish-speaking pupils in Spanish-speaking communities.

Your second question also asks what should or could be done by the Legislature to comply with the constitutional mandate of Article XII, Section 8. As mentioned above, we read Article XII, Section 8 to include a mandate to the Legislature to provide teachers proficient in both English and Spanish, to teach Spanish-speaking pupils; we do not feel that this requires all teachers to have this proficiency. Obviously, the Legislature should comply with this mandate. It is not within the province of this office to state how this should be done. However, as a starting point, it would seem that a determination should be made of the number of areas of concentration of Spanish-speaking pupils and students in the state. From this it should be ascertained in how many classrooms of the state bilingual teachers are necessary. The various colleges and universities in the state

which train teachers should then be required by the Legislature to provide training so that a *sufficient number* of teachers can “become proficient in both the English and Spanish languages, to qualify them to

teach [these] Spanish-speaking pupils and students” in these areas of concentration. (Article XII, section 8).

Discussion Notes

1. This opinion is discussed in Comment, “Education and the Spanish-Speaking—An Attorney General’s Opinion on Article XII, Section 8 of

the New Mexico Constitution,” *New Mexico Law Review* 3 (May 1973): 364.

2. Is this opinion binding? If so, upon whom is it binding? What about the 1968 Attorney General’s opinion that it overruled?

Gershman Investment Corporation v. Danforth 517 S.W.2d 33 (Missouri 1974)

DONNELLY, Chief Justice.

This is a declaratory judgment action. Gershman Investment Corporation seeks a declaration: (1) that two opinions of the Attorney General (in which the Attorney General expressed his belief that section 362.195, RSMo 1969, V.A.M.S., is unconstitutional) are erroneous and should be ordered withdrawn; and (2) that section 362.195, *supra* is constitutional. . . .

The matters in issue were before this Court in *Gershman Investment Corporation v. Danforth*, 475 S.W.2d 36 (Mo.banc 1971). The essential facts were set forth therein as follows:

“The parties filed an agreed statement of facts. The following facts taken therefrom will disclose the situation which brought about the filing of this suit. The principal function of the Federal Housing Administration is to provide government insurance on real estate loans. There is a large number of ‘FHA approved mortgagees’ in Missouri and it is estimated that from 25 to 50% of the loans made in this state are insured by FHA. FHA regulations determine the maximum interest rate which a lender is permitted to charge on an FHA insured loan. From 1961 to and including 1969 the maximum rate varied from 5 $\frac{1}{4}$ % to 7 $\frac{1}{2}$ %. Plaintiff, since 1955, has been operating in St. Louis County, Missouri, in the mortgage banking business as an FHA approved mortgagee. Its manner of operation is to make FHA insured loans in this state and then sell them to various purchasers outside the State of Missouri, such as insurance companies, banks, and other investors.

Section 362.195 provides, among other things, that no law of this state limiting inter-

est rates upon loans shall apply to loans made pursuant to certain designated sections which relate to FHA loans. The defendant Attorney General, in opinions dated December 18, 1969, and January 9, 1970, stated that section 362.195, when considered in connection with section 362.180, is unconstitutional because it attempted to set up a particular class of lenders exempt from the usury statutes in violation of Art. 3, section 44 of the Missouri Constitution, V.A.M.S., and that any loan made at a rate of interest in excess of 8% would violate the Missouri usury statutes. On January 5, 1970, the maximum FHA rate was increased to 8 $\frac{1}{2}$ %. The parties agree that there has been no judicial determination as to the constitutionality of section 362.195, and that the opinions of the Attorney General in respect thereto received widespread publicity throughout the FHA mortgage market; that as a direct result of said opinions many investors have declined to purchase FHA loans originating in Missouri because they were able to purchase such loans originating in other states bearing interest at the rate of 8 $\frac{1}{2}$ %, whereas, any Missouri loans bearing more than 8% were of doubtful validity in view of defendant’s opinions, and therefore the market for Missouri FHA insured loans was substantially reduced.

The Court noted that the maximum allowable FHA interest rate no longer exceeded 8%, held that the case had become moot, and reversed and remanded with directions to the trial court to dismiss the case.

On July 1, 1974, the present case was filed and was decided on stipulated facts by the trial court, which: (1) declared Sections 362.180 and 362.195, RSMo 1969, constitutional; (2) declared the opinions of the Attorney General erroneous; and (3) ordered them withdrawn. We take judicial notice of the substantial increase in interest rates during the years

1973 and 1974, so that FHA loans at rates in excess of 8% are now authorized.

The Attorney General asserts that this case should be dismissed because there is no justiciable controversy. He states in his brief: "Attorney General's opinions are not law. Citizens are free to test the opinions in court. Public officials usually rely on these opinions and citizens often do so, also, but this does not change their status."

Section 27.040, RSMo 1969, deals with the matter of the giving of opinions by an Attorney General. It reads as follows:

When required, he shall give his opinion, in writing, without fee, to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, commissioner of education, grain warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties.

In *Fisher v. City of Independence*, 350 S.W.2d 268, 271 (Mo.App. 1961), *transf'd*, 370 S.W.2d 310 (Mo.banc 1963), the Kansas City Court of Appeals said:

While the Attorney General's opinions are entitled to great weight, are persuasive and should be followed, especially by state officials, boards and commissions, unless and until a proper court rules otherwise, such opinions do not become the law of the land.

This statement, if considered a *general* rule of law, is erroneous except insofar as it holds that opinions issued by an Attorney General "do not become the law of the land." An Attorney General is a member of the Executive Department (Mo. Const. Art. IV, section 12). He has no judicial power and may not declare the law. His opinions may be persuasive to some and not to others. In any event, the judicial power of the state is vested in the courts designated in Mo.Const. Art. V, section 1. The courts declare the law.

In *State ex rel. Wiles v. Williams*, 232 Mo. 56, 133 S.W. 1 (Mo.banc 1910), this Court held that an opinion of the Attorney General, to the effect that a statute was unconstitutional, was sufficient to give a county treasurer standing to raise the question of the constitutionality of the statute. However, an Attorney General may not *declare* a statute unconstitutional. This power is reserved to the courts by the Constitution.

* * * * *

Respondent urges that we are presented with a justiciable controversy in this case. Respondent acknowledges the general rule that courts do not render advisory opinions, but contends in its brief:

Since the Attorney General stipulated as to the facts in the trial court which acknowledged injury to the plaintiff resulting from the Attorney General's opinion, which obviously precipitated this controversy, we can only conclude that the Attorney General is now asking this Court to rule that the Attorney General's opinions cannot create any justiciable controversy whether the opinions are right or wrong. If this is the Attorney General's argument (and this is the only conclusion to which one can come), we must state that the Attorney General's position can lead to unforeseen mischief. If erroneous opinions of the Attorney General are not permitted to be judicially reviewed, this Court will have unwittingly set up a privileged sanctuary from which unrestrained public officials may operate with impunity.

We respectfully submit that it behooves this Court at this time to rule in clear and unmistakable terms that the Attorney General is not to be permitted to operate a private court of last resort from which there is no appeal to the constitutional courts of this state.

We agree that if opinions of an Attorney General were permitted to attain the stature, and impact, attributed to them by respondent, mischief could result. We trust our holding today will disabuse the Bench, the Bar, and the public, of the notion that such result needs to be anticipated.

The essential problem presented in this case is one of resolving certain viable, but conflicting, factors: (1) that the parties have stipulated that the opinions issued by the Attorney General are injurious to respondent; (2) that section 27.040 requires the issuance of opinions by the Attorney General to designated persons upon request; (3) that public officials usually rely on such opinions and citizens often do so; and (4) that reliance on such opinions by the public is unfounded and sometimes quite unfortunate.

We consider the opinions particularly unfortunate in this case, not only because they have harmed respondent, but, more importantly, because they have effectually, even though unintentionally, defeated the will of the General Assembly by expressing a belief that section 362.195, RSMo 1969, is unconstitutional. This statute was enacted in 1935. It may, or may not, be constitutional. In any event, a member of the Executive Department has no authority to *decide* the question.

We do not hold that a justiciable controversy can never arise from the giving of an opinion by an Attorney General. However, we hold there is no justiciable

controversy in this case, because the opinions issued by the Attorney General to the effect that section 362.195, supra, is unconstitutional, are entitled to no more weight than that given the opinion of any other competent attorney.

Accordingly, we believe, and hold: (1) that there exists a mere difference of opinion as to the constitutionality of section 362.195, RSMo 1969; (2)

that no justiciable controversy is presented; and (3) that the trial court does not have jurisdiction to grant, and respondent does not have standing to seek, a declaratory judgment in this case.

The judgment is reversed and the cause remanded with directions to dismiss the case.

All concur.

Discussion Notes

1. What is the value of opinions of the Attorney General in Missouri?

2. What remedy would a person who disagrees with a opinion of the Attorney General have?

Draper v. State 621 P.2d 1142 (Okla. 1980)

HODGES, Justice.

The petitioners, Daniel D. Draper, Jr., Gene C. Howard, Don Davis, and William J. Wiseman, Jr., members of the Oklahoma Legislature, filed an application to assume original jurisdiction, a motion to stay, and petitions for a writ of mandamus and prohibition. The petitioners request that the effectiveness of the Attorney General's Opinions, Nos. 79-311 and 79-313B be stayed; and that the Attorney General be prohibited from the issuance of similar rulings or, in

the alternative, an order be issued by this Court which would require the Attorney General to withdraw the opinion.

After the adjournment of the first session of the Thirty-Seventh Legislature, two legislators posed questions concerning the constitutionality of the appropriations bill, HB 1140. This bill contains appropriations to the State Board of Education for the funding of common schools. The Attorney General issued virtually identical Opinions Nos. 79-311 and 79-313B on April 15, 1980. Based on his interpretation of the Oklahoma Constitution art. 5, sections 56, 57,² the Attorney General determined that the appropriations bill commingled general appropriations with special appropriations in a hybrid bill which he found to be unconstitutional.³

²The Okla.Const. art. 5, section 56 provides:

The general appropriation bill shall embrace nothing but appropriations for the expenses of the executive, legislative, and judicial departments of the State and for interest on the public debt. The salary of no officer or employee of the State or any subdivision thereof, shall be increased in such bill, nor shall any appropriation be made therein for any such officer or employee unless his employment and the amount of his salary, shall have been already provided for by law. All other appropriations shall be made by separate bills each embracing but one subject.

Art. 5, Section 57 of the Okla.Const. states:

Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revised, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revised, amended, extended, or conferred shall be reenacted and published at length; Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof.

³The Attorney General concluded:

1. By reason of the requirements of Art. 5, Sections 56 and 57, Okla.Const., appropriations for the expenses of the executive, legislative and judicial departments of government must be contained in a single general appropriations bill which may not contain any other appropriations or general legislation.

2. All other appropriations of general laws except those lawfully encompassed within the general appropriations bill must be by separate bill embracing but one subject.

3. HB 1140 (First Regular Session of the Thirty-Seventh Legislature), Laws 1979, c. 282, codified in part as 74 O.S.Supp.1979, Section 285(46) is unconstitutional as said bill appropriates money in a separate bill for the expenses of an agency of the executive department which can only be provided for in the general appropriations bill specified in Art. 5, Section 56, Okla.Const.

4. Funds expended or incumbered for expenditure pursuant to appropriations made in HB 1140 are not invalidated by reason of the unconstitutionality of said bill as public officers may rely on the presumed constitutionality of a law until such law is judicially declared unconstitutional or until advisee [sic] by proper officer of the unconstitutionality of the law.

A hearing was held on the motion to stay on April 30, 1980. Following the hearing, the Court issued an order assuming original jurisdiction and entered the motion to stay the effectiveness of the Attorney General's Opinions Nos. 79-311 and 79-313B.

* * * * *

II

It is clear from a reading of art. 5, section 56 that certain things may be contained in a general appropriations bill, and other things must not be included. The quintessential query is whether the Oklahoma Constitution mandates a general appropriations bill. If it does, the Attorney General's Opinions are correct. If it does not, the Legislature may continue in its present pragmatic approach to state financing.

The Constitution, the bulwark to which all statutes must yield, must be construed with reference to the fundamental principals which support it. Effect must be given to the intent of its framers and of the people adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. Since H.B. 1140 makes an appropriation for the expense of an agency of the executive department in a separate bill and not in a single general appropriation bill, there is a presumption that the appropriation is constitutional and that the Constitution does not mandate a general appropriation bill for the expense of the executive, legislative and judicial departments of government.⁷

The Attorney General suggests that separate appropriation bills for the expenses of different departments of government are of recent development and that prior thereto, such appropriations were contained in a single appropriation bill.

The rule that where the Constitution confers the power to do a particular act and prescribes the means and manner of doing such act, such is exclusive of all others,⁸ and the fact that in construing constitutional provisions, great weight must be given to legislative interpretation,⁹ do not necessarily mean that the legislature, by enacting a single appropriations bill for the expenses of the several departments of government in prior years, must continue enacting a single appropriations bill. This is so because we do not look to the Constitution to determine whether the Legislature is authorized to do an act but rather to see

whether it is prohibited. If there is any doubt as to the Legislature's power to act in any given situation, the doubt should be resolved in favor of the validity of the action taken by the Legislature. Restrictions and limitations upon legislative power are to be construed strictly, and are not to be extended to include matters not covered or implied by the language used.¹⁰

Under our holding in *Tate*, if the legislature enacted separate appropriation bills for the expenses of the several departments for one fiscal year, and enacted a single appropriation bill for the expense of all departments for the next fiscal year, we would not look to the Constitution to determine whether the two types of appropriations are authorized, but to determine whether the Legislature is prohibited by the Constitution from making the two types of appropriations, or either of them.

We find no express limitations in our constitution upon the power of the Legislature to enact laws similar to HB 1140. Nor do we find that the passage of such appropriation bills is prohibited by the Constitution. The Constitution mandates certain requirements if there is a general appropriations bill, it does not dictate that there be one.

III

Although a writ of mandamus will lie to compel the Attorney General to perform a plain ministerial duty, it is inappropriate when the Attorney General has performed his duty. The statute, 74 O.S.Supp. 1979 section 18b(q), imposes the requirement that the Attorney General answer any question on any subject posed by any member of the Legislature. The Attorney General answered the questions. Mandamus will lie to compel the Attorney General to exercise his discretion, but it does not lie to control his action regarding matters within his discretion, unless his discretion has been clearly abused. A difference of opinion is not an abuse of discretion. Where there is room for two opinions, the action is not arbitrary or capricious when it is exercised honestly upon due consideration even though it may be believed that an erroneous conclusion has been reached. Before a writ of mandamus may be issued there must be: 1) a clear legal right vested in the petitioner, 2) refusal to perform a plain legal duty which does not involve the exercise of discretion, and 3) adequacy of the writ and inadequacy of other relief. Mandamus is an improper remedy.

IV

When a public officer exercises a judicial or quasi-judicial function, a writ of prohibition may be

⁷*Swanda v. Swanda*, 207 Okl. 186, 248 P.2d 575 (1952).

⁸*McCurtain County Excise Board v. St. Louis-San Francisco Ry. Co.*, 340 P.2d 213 (Okl. 1959).

⁹*Texas Co. v. State ex rel. Coryell*, 198 Okl. 565, 180 P.2d 631 (1949).

¹⁰*Tate v. Logan* 362 P.2d 670 (Okl.1961).

employed to control his actions. Prohibition is a preventive, rather than a corrective, remedy. It issues to prevent the threatened commission of a future act, not to undo a completed act nor to review or nullify an act which has already been performed. However, in public questions of great importance and interest, the Supreme Court may retain jurisdiction, and in a proper case grant prohibition. Even though the Attorney General may have exercised quasi-judicial powers in the interpretation of the statutes, and it is appropriate to issue a writ of prohibition to control

the performance of judicial and quasi-judicial activities, we choose not to issue a writ of prohibition but rather determine the opinions to be invalid and of no effect.¹⁵

Original Jurisdiction Assumed. Attorney General's Opinions Nos. 79-311 and 79-313B Held To Be Invalid And of No Effect. Writ of Mandamus and Writ of Prohibition Denied.

¹⁵*Oklahoma Ass'n of Mun. Attys. v. State*, 577 P.2d 1310, 1312 (Okla.1978).

Discussion Notes

1. In interpreting the Oklahoma Constitution does the court encounter a problem with "negative implication"? See p. 177, Discussion Notes 2 and 3.

2. Would an official be immune from liability if she acted in reliance on an opinion of the Attorney General? See Peter E. Heiser, Jr., "The Opin-

ion Writing Function of Attorneys General," *Idaho Law Review* 18 (Winter 1982): 21 n. 36.

3. On the range of issues arising when state attorneys general interpret state constitutions, see Thomas R. Morris, "State Attorneys General As Interpreters of State Constitutions," *Publius: The Journal of Federalism* 17 (Winter 1987): 133.

I. Interpretation of State Constitutions by Legislatures

In 1976 the Florida Legislature enacted the following statute:

222.19 Surviving spouse as head of family; defined—

(1) It is the declared intention of the Legislature that the purpose of the constitutional exemption of the homestead is to shelter the family and the surviving spouse and such purpose should be carried out in a liberal spirit and in favor of those entitled to the exemption.

(2) The head of family status required to qualify the owner's property for homestead exemption, permitting such property to be exempt from forced sale under process of any court as set forth in Article 10, Section 4 of the Florida Constitution, shall inure to the benefit of the surviving tenant by the entirety or spouse of the owner. The acquisition of this status shall inure to the surviving spouse irrespective of the fact that there are not two persons living together as one family under the direction of one of them who is recognized as the head of the family.

Chapter 76-36, Laws of Florida 1976.

Does the legislature have the power to make such a declaration?

In *Greater Loretta Improvement Ass'n v. Boone*, 234 So.2d 665, 669-70 (Fla. 1970), the Florida Supreme Court noted, with respect to a different legislative "interpretation" of the state constitution:

The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decision of the courts of Florida and other jurisdictions the word "lottery" may have either of several meanings, and that either is reasonable and

possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. As stated in *Fargo v. Powers* (D.C.), 220 F. 697, 709, it is said:

If the constitutional provisions in question are susceptible of two constructions—one being that contended for by complainants, the other that taken by the Legislature—the action of the Legislature in adopting one of those constructions and enacting a statute carrying it into effect, as thus construed, must be deemed conclusive. That rule is: "That the acts of a state Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution and never where serious doubt exists as to the conflict."

In *Jasper v. Mease Manor, Inc.* (Fla. 1968), 208 So.2d 821, this Court sustained a statute defining the word "charitable" as used in the Florida Constitution even though such definition conflicted with earlier decisions by this Court. Similarly, in *Ammerman v. Markham* (Fla. 1969), 222 So.2d 423, this Court upheld a legislative definition of the terms "real property" and "dwelling house" as used in the Constitution even

though such definitions were in conflict with earlier decisions of this Court.

Although the question of whether various transactions constitute lotteries have been considered by the Florida courts many times, the writer's search has revealed no decision holding a statute unconstitutional because it violates the provision of the Constitution prohibiting lotteries. None are cited in appellee's brief.

When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary.

Ammerman v. Markham
222 So.2d 423 (Fla. 1969)

ADKINS, Justice.

This is a direct appeal from the Circuit Court of Broward County which held that Ch. 67-339, Laws of Florida, is unconstitutional under the Fla.Const.1885 to the extent that it purports to grant homestead exemption to owners of condominiums and cooperative apartments beginning January 1, 1969.

* * * * *

Under Florida Statutes January 1st of the tax year is the date on which property is to be valued, the date on which the inchoate tax lien arises and the date on which certain facts must exist to entitle taxpayers to the various tax exemptions allowed by law.

Art. X, section 7, Fla.Const. 1885 contains the following provisions:

Every person who has the legal title or beneficial title in equity to *real property* in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, ex-

cept for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on said home and contiguous real property, as defined in Article 10, Section 1, of the Constitution, . . . but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or *on any one dwelling house*, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. *The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption.* (Emphasis added.).

Sec. 6, Art. X, Fla.Const.1885 provides that the Legislature shall enact such laws as may be necessary to enforce the provisions of the article relating to homestead and exemptions.

Ch. 67-339 amended Fla.Stat., sections 192.12 and 192.13, F.S.A. so as to provide homestead tax exemption to each owner-occupied condominium parcel and on each apartment occupied by a tenant-stockholder or member of a cooperative apartment corporation. . . . Sec. 3, of Ch. 67-339, provides as follows:

This act shall take effect on the first January 1st, after the house joint resolution amending section 7 of Article X of the constitution of Florida, which grants a homestead exemption up to five thousand dollars (\$5,000.00) on each owner-occupied condominium parcel and on each apartment occupied by tenant-stockholder or member in the building owned by a cooperative apartment corporation, is approved by a majority of the qualified electors voting in an election or after a revised constitution of Florida is approved by a majority of the qualified electors voting in an election, which grants a homestead exemption up to five thousand dollars (\$5,000.00) on each owner-occupied condominium parcel and on each apartment occupied by tenant-stockholder or member in the building owned by a cooperative apartment corporation.

The revised Constitution of 1968, Art. VII, section 6 of which grants homestead tax exemption to the plaintiffs' class was approved "by a majority of the qualified electors voting in an election" which was held in November, 1968. The Fla.Const. 1968 became effective on January 7, 1969, six days after the exemption status of the property was determined, and, therefore, does not apply to this case.

The sole question is whether Ch. 67-339 could constitutionally extend the provisions of the Fla.Const.1885 to the owners of cooperative and condominium apartments.

Art. X, Section 7, Fla.Const.1885 extends the homestead exemption from taxation to every person who has the legal title or beneficial title in equity to real property in this State, under the conditions specified therein.

At common law the term "real property" was deemed coextensive with lands, tenements, and hereditaments, corporeal and incorporeal. See Thompson on Real Property (1964), Vol. 1, Section 22, p. 93. The meaning and application of the term "real property" are generally declared by statute, and the term may be defined in different statutes or for different purposes. See 73 C.J.S. Property section 2, p. 152. For example, Fla.Stat., Section 421.03(12), F.S.A. defines "real property" for the purposes of the housing authorities law; Fla.Stat., Section 475.01(11), F.S.A. defines "real property" for the purposes of the real estate license law; Fla. Stat., Section 713.01(14), F.S.A. defines "real property" for the purposes of the mechanics lien law. These definitions vary, because the statutory definitions usually apply only to the term as used in the particular statutory provision.

In *Overstreet v. Tubin*, (Fla.1951), 53 So.2d 913, this Court defined "dwelling house" as used in the Fla.Const.1885 as "the whole structure of a multiple dwelling house, rather than each separate unit. . . ." This decision dealt with a duplex and granted the resident of each side a \$2,500.00 homestead exemption.

In *Gautier v. State ex rel. Safra* (Fla.App.1961), 127 So.2d 683, the Third District Court of Appeal held that the definition of "dwelling house" set by this Court in *Overstreet v. Tubin*, supra, also applied to multi-unit condominiums.

The Legislature by enacting Ch. 67-339 intended to and did include cooperative and condominium apartments within the meaning of the terms "real property" and "dwelling house," as used in the Constitution.

In *Jasper v. Mease Manor, Inc.* (Fla.1968), 208 So.2d 821, the Court considered a statute defining the word "charitable" as used in Fla.Const.1885, Art. IX, Section 1, limiting tax exemption statutes to those

properties used for "municipal, education, literary, scientific, religious or charitable purposes." The statute in question included within the exemption homes operated for aged persons without regard to such persons' financial dependence or independence. Earlier definitions by the Court of the word "charitable" as used in the Constitution were more limited. This Court, in sustaining the validity of the legislative act extending the definition, said:

The test for measuring such legislation against the constitutional restraints must be that of reasonable relationship between the specifically described exemption and one of the purposes which the Constitution requires to be served. The problem therefore differs significantly from that which has been presented in cases requiring judicial definition of the constitutional concepts in the absence of an explicit statute. Application in those cases of a more limited definition of charitable use, in the primary sense of relief for the indigent or helpless, does not require or justify rejection of the current statute on constitutional grounds. (Emphasis added.)

The framers of the Fla.Const. of 1885 had no concept of the condominium ownership of property. The Legislature modified the frozen common law concept of real property ownership and, in 1963, enacted a Condominium Act defining a condominium parcel as "a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law." See Fla.Stat., Section 711.04(1), F.S.A. Moreover, the Legislature has recognized the owners of condominium parcels and cooperative apartments as freeholders. Fla.Stat., Section 97.021(7), F.S.A.

This legislative approval of individual ownership of units in a multiple-dwelling structure bears a reasonable relationship to the purposes of Art. X, Section 7, Fla.Const. 1885. Ch. 67-339 is a valid legislative definition of "real property" and "dwelling house," as used in the Constitution, so as to extend homestead tax exemption benefits to owners of condominium and cooperative apartments beginning January 1, 1969.

Discussion Notes

1. How common is it for state legislatures to "interpret" the state constitution?
2. Do the Florida cases provide a reasonable test for evaluating the constitutionality of state

legislative "interpretations" of the state constitution?

3. Is this an exception to the standard opinion that state legislatures cannot "overrule" the courts' interpretations of the state constitution?

Chapter 6

Separation of Powers under State Constitutions

6

A. Introduction

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define with sufficient certainty its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

James Madison
The Federalist, No. 37

Are there any federal separation of power restrictions on state government? In *Prentis v. Atlantic*

Coast Line Railroad, 211 U.S. 210, 255 (1908) Justice Holmes said:

We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.

Can Congress mandate that certain functions be performed by a specified branch of state government? See Note, “Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,” *University of Pennsylvania Law Review* 128 (December 1979): 402.

Reread Chapter 1 Section B, paying particular attention to the origins of separation of powers and checks and balances features in state constitutions.

B. Specific Separation of Powers Problems

Alexander v. State **441 So. 2d 1329 (Miss. 1983)**

PATTERSON, Chief Justice, for the Court:

The separation of governmental powers is the basis of this suit. Article I, Sections 1 and 2 of the Mississippi Constitution provides:

The Constitution of the State of Mississippi Adopted November 1, A.D., 1890

Section 1. The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Section 2. No person or collection of persons, being on or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

In broad terms the issue presented is whether Article 1, Sections 1 and 2 should be interpreted faithfully to accord with its language or whether it should be interpreted loosely so that efficiency in government through permissive overlapping of departmental functions becomes paramount to the written word.

The executive, legislative and judicial departments of the state all serve the same constituency and

are, of course, subject to and bound by the terms of the same state constitution. The interpretation of the constitutions becomes the duty of the judicial department when the meaning of that supreme document is put in issue. As long ago as 1823, *Runnels v. State, Walker* (1 Miss.) 146, held it the duty of the judiciary to declare void any legislative enactment which may be repugnant to the provisions of the constitution and that this duty is paramount to the authority of the legislature. This coincides with the genesis federal case, *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803), which held that congressional enactments contrary to the constitution are void, thus establishing the great difference in this nation's government from that of other nations. See also, *State v. Wood*, 187 So.2d 820 (Miss.1966).

It is universally accepted that the highest judicial tribunal of a state is the paramount authority for the interpretation of that state's constitution, subject only to the Constitution of the United States. In *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 613, 57 S.Ct. 549, 552, 81 L.Ed. 835, 840 (1937), Justice Cardozo for the United States Supreme Court stated: "A judgment by the highest Court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

We are presently presented with interpretation of our constitution as it affects the rights and prerogatives of the executive and legislative departments of government.

We need express, to avoid misunderstanding, issues which are not presented. The litigants are each public officials having been duly elected to their respective positions. There is no intimation or charge of malfeasance, dishonesty or immorality in office or in the character of any litigant. Rather the issue is whether the members of the legislature have overstepped the restrictions imposed on them by the con-

stitution and thereby encroached upon the powers constitutionally vested in the executive department.

This cause originated on April 7, 1982, when the legislators filed suit against Bill Allain in his official capacity as the Attorney General of the State of Mississippi. In response to an opinion letter from the Attorney General, the legislators sought a declaratory judgment:

1. That their concurrent service on the named state boards and commissions did not violate Article 1, Sections 1 and 2 of the Mississippi Constitution of 1890; and,

2. That the statutes providing for such service were constitutional.

Later in the same day the Attorney General, in his official capacity, brought an action against the legislators seeking a declaratory judgment:

1. That the named boards were in the executive department of government;

2. That the named statutes were unconstitutional insofar as they authorized legislators to serve as or to appoint members of the boards;

3. That the legislators were in violation of Article I, Sections 1 and 2 of the Mississippi Constitution of 1890.

* * * * *

On appeal there are presented four major issues:

1. Whether the Mississippi Constitution forbids legislators to serve on the subject boards;

2. Whether and to what extent the Mississippi Constitution prohibits legislative involvement in appointments to the executive department; and

3. Whether the legislature may constitutionally vest in the senate the power to confirm certain executive appointments; and

4. Assuming answers favorable to the Attorney General on one or more of these questions, what should be the form and substance of the relief granted?

Our task is the application of Article I, Sections 1 and 2 of the Mississippi Constitution of 1890, as we interpret it, to the facts of this case. In this enterprise, we are guided by several maxims of constitutional interpretation.

First we note that the constitution is presumed capable of ordering human affairs decades beyond the time of ratification, under circumstances beyond the prescience of the draftsmen. *Albritton v. City of Winona*, 181 Miss. 75, 102-103, 178 So. 799, 806 (1938).

* * * * *

By 1890 separation of powers was no longer a mere political theory from the untested works of

Locke and Montesquieu. There was available years of experience by the federal sovereign whose constitution implied but did not express separation of powers. Additionally, there was the example of other states of the union, each of which had divided its powers of government into three branches.

Most important is Mississippi's history. Each of our previous constitutions—those of 1817, 1832, and 1869—explicitly required the executive, legislative and judicial powers be vested in separate and distinct departments of government. By 1890, our citizens had enjoyed 73 years of statehood with our government so organized.

With the knowledge and experience available to the draftsmen of the Constitution of 1890, this conclusion seems inescapable: By articulating the doctrine of separation of powers in our constitution, the framers avoided the vagueness of the implicit doctrine of the Constitution of the United States.

More significant are the changes made in 1890 in the statement of the doctrine. First, while the Constitution of 1869 reserved Article I for our bill of rights, regulating [sic] the separation of powers to Article III, the Constitution of 1890 reversed the order. This restructuring manifests the primacy of separation of powers in the state government.

The 1890 draftsmen made another meaningful change by adding to Section 2 the following sentence: "The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments." Three previous constitutional conventions, 1817, 1832, and 1869 had failed to make any such provision. The draftsmen of those Constitutions had merely declared the powers of government should be separated. The Constitution of 1890 for the first time provided a penalty, automatic and severe, for those who violate its provisions. We conclude, as we must, from this history and language that the drafters of the 1890 Constitution intended to strengthen the constitutional mandate for separation of powers in this state.

Not only was this convincing sentence added, but contemporaneously with it, there was an important deletion. The three predecessor constitutions had provided for exceptions to the requirement that the powers of government be kept separate. For example, Article II, Section 2 of the Constitution of 1817 provided:

No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*

Identical “except as otherwise provided” language appears in Section 2 of the article on separation of powers contained in the Constitutions of 1832 and 1869, but was deleted in the Constitution of 1890. We must conclude the intention of the draftsmen was that there be no exceptions to the mandates that the powers of government be held and exercised in three separate and distinct departments and that no person holding office in any one department should have or exercise any power properly belonging to either of the others.

Having decided the constitutional draftsmen intended that the three departments of government be separate and distinct, we comment of the purpose of the separation. We again refer to *Moore v. General Motors Acceptance Corp.*, 155 Miss. 818, 125 So. 411 (1930), wherein Justice Griffith stated that primary considerations for constitutional interpretation, “To ascertain and given effect to the intent of those who adopted it, to constantly keep in mind that objective desired to be accomplished and the evils sought to be prevented or remedied.” 155 Miss. at 822, 125 So. at 412.

The objectives desired to be accomplished and the evils sought to be prevented by separation of governmental powers were articulated by the authors of *The Federalist*. In that work James Madison stated:

... It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.

The Federalist, No. 48 (J. Madison) (J. Cooke ed. 1961).

Thomas Jefferson also wrote of the necessity of internal restraints on the powers of government:

... *An elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary depart-

ments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. Jefferson, “Notes on the State of Virginia,” 1781-1785, ch. 13, as reprinted in “The Complete Jefferson” by Padover, Ch. XIV, pp. 648, 649.

Book v. State Office Building Commission, 238 Ind. 120, 149 N.E.2d 273, 294 (1958).

In his farewell address George Washington observed,

The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position.

Book v. State Office Building Commission, 149 N.E.2d at 294.

* * * * *

The authorities acknowledge that inevitably, as government endures and enlarges, there will be areas in which the functions of the separate bodies will clash with the idealistic concept of absolute separation of powers. . . . Accepting the inevitability of such conflict we need to examine the scope and depth of the legislative intrusions, if there be such. Indeed, if the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument of appellants that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities of the boards and commissions are ongoing and are in the upper echelons of governmental affairs, as are the boards and commissions under consideration, then the legislative trespass reaches constitutional proportions. At all times, we heed the vice intended to be prevented by the draftsmen by choice of words written into the constitution.

The legislators rely heavily on *Jackson County v. Neville*, 131 Miss. 599, 95 So. 626 (1923). That case, however, is consistent with the view we take here.

Jackson County concerned the constitutionality of a statute that required both a circuit judge and the governor to pass on the correctness of a fee and expense claim submitted by an auditor concerned with the books and records of county officers. The court labeled this function “quasi-judicial,” relegating it to a minor administrative role without the potential of eroding the prerogative of either the executive or judicial departments.

Our only reservation regarding *Jackson County* is the inclusion of a quotation from Joseph Story's work on the Constitution of the United States in which he stated the "true meaning" of the doctrine of separation of powers was "that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." 131 Miss. at 624, 95 So. at 628.

Story was commenting upon the Federal Constitution, not the Mississippi Constitution of 1890. More importantly, he was interpreting a constitution which had no express mandate for the separation of powers. Moreover, the statements concerning the exercise of the whole power of one department of government by the other did not, and probably could not, envision a constitution such as ours wherein the separation is mandated. Story's statement has little power as controlling precedent for our consideration of the precise terms and meaning of our constitution.

The legislators also call to our attention *Broadus v. State ex rel. Cowan*, 132 Miss. 828, 96 So. 745 (1923). *Broadus* was a suit to oust from office a member of the Board of Supervisors of Harrison County on grounds that he had afterwards accepted the office of Trustee of a school district. The state argued that the office of supervisor was essentially judicial and that the office of school district trustee was essentially executive, and that *Broadus* was therefore constitutionally prohibited from simultaneously holding these two positions.

This Court rejected the claim that the constitution mandate for separation of powers had been violated. First the court noted the office of school trustee was largely "ministerial" and that the office of supervisor was in part "administrative in character." 132 Miss. at 833, 96 So. at 746. The court concluded that the office of school trustee "is not in a wholly different department of the government as meant by Section 2, Article I of our State Constitution." 132 Miss. at 833, 96 So. at 746.

* * * * *

The above authorities are distinguished from this case and therefore have little, if any, effect on the issues before us largely because the present problems are central to our representative and constitutional form of government.

* * * * *

I. THE BOARDS AND COMMISSIONS

We begin our analysis of the issue of legislative encroachment on the executive department by defining executive power as the power to administer and

enforce the laws as enacted by the legislature and as interpreted by the courts. *Quinn v. United States*, 349 U.S. 155, 161, 75 S.Ct. 668, 672, 99 L.Ed. 964, 971 (1954); *Mabray v. School Board of Carroll County*, 162 Miss. 632, 636, 137 So. 105, 106 (1931). Execution is at the core of executive power. We also find pertinent the following distinction: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202, 48 S.Ct. 480, 482, 72 L.Ed. 845, 849 (1927).

We next consider the agency which appears to be central to this controversy.

A. Commission on Budget and Accounting

1. DESCRIPTION OF THE COMMISSION

For 37 years, 1918 through 1955, the budget for the government of Mississippi was prepared by the Office of the Governor and submitted to the legislature for its consideration. See Laws of 1918, Ch. 225; Laws of 1932, Ch. 120; Laws of 1952, Ch. 320.

In 1955 the composition of the Budget Commission was altered when, by statute, four members of the Mississippi Legislature assumed positions on the Budget Commission and began to participate in all of its functions. See Laws of 1955, Ch. 24. In 1968, five additional legislators joined the commission, bringing the total to nine. Laws of 1968, Ch. 513.

* * * * *

The Commission of Budget and Accounting has the authority to appoint a director to administer its affairs, including, subject to the Commission's approval, the right to appoint and employ support personnel necessary to perform the duties of the Commission. Miss.Code Ann. Section 27-103-11 (1972).

The activities in which the Commission has been engaged may be divided into five general areas:

- (1) The preparation of a proposed state budget, called "the budgetmaking process";
- (2) The administration of appropriations after the enactment of appropriations bills, here called "the budget-control process";
- (3) Regulating purchases made by various state agencies;
- (4) Administering the state employees' life and health insurance plans; and
- (5) Miscellaneous duties.

The Attorney General contends each of these activities is an executive function belonging solely to the executive department of government and by virtue of Article I, Section 2, the above named appel-

lants are constitutionally forbidden to perform such functions, either directly or indirectly.

The Legislators contend otherwise. First, they argue the separation of powers article should be given a flexible construction to permit an overlap in the exercise of powers. Second, the Legislators vigorously contend the present system is efficient, that it works well. The legislators argue that the affairs of state have been well managed with our government structured so that legislators have substantial influence upon boards and commissions which exercise powers we regard as essentially executive in nature. If such boards and commissions are essentially executive, then, in that event, the legislators' degree of control is of practical benefit to the state in that efficiency is promoted, or so we are told.

The second point, in our opinion, is legally irrelevant. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, XX U.S. XX, XX, 103 S.Ct. 2764, 2780-81, 77 L.Ed.2d 317, 340 (1983). If the system be found efficient and nevertheless in violation of the constitution, our duty is clear. See *Runnels v. State*, Walker (1 Miss.) 146 (1823).

The first point is dispositive. Our ultimate inquiry is the correct meaning of Article I of the Constitution without regard to whether our interpretation be labeled flexible or rigid, liberal or conservative. We are engaged with what the people in convention assembled in 1890 intended and with what the document they made our supreme law means for us today.

We hold that the whole of the legislative power has been vested in the legislature of this state. We further hold that the whole of the executive power has been vested in a separate and distinct department of our government, and that no person a member of the legislative branch may consistent with the constitution exercise any powers essentially executive in nature.

2. THE BUDGET-MAKING POWERS.

Constitutionally, budget-making is a legislative prerogative and responsibility in Mississippi. The legislature has the power and prerogative to provide for the collection of revenues through taxation and other means and to appropriate or direct the expenditure of monies so raised. Though subject to gubernatorial veto, the primary budget-making responsibility vests in the legislature.

This premise has been unequivocally stated in *Colbert v. State*, 86 Miss. 769, 39 So. 65 (1905), as follows:

Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. . . . The right of the Legislature to control the public treasury, to determine the sources from which the public revenue shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpungably established in our political system. . . . The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their Legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power.

86 Miss. at 775, 39 So. at 66.

The Legislature of this State has the power and prerogative to create such committee as it may deem appropriate to assist it in its budgetmaking responsibilities. The only limitation on these powers is that no person a member of the executive department may serve as a voting member on any such legislative budget committee.

The legislature has acknowledged the right of the Governor to submit to it his recommendations upon the budget prepared by the Commission of Budget and Accounting, not excluding a recommendation for changes thought desirable by the executive. Apparently this enactment is in recognition of the general powers vested in the Governor by virtue of Article V, Section 116 and 122 of our Constitution. . . . Undoubtedly, the authorization for the executive budget came from Section 122 of Article V of the Constitution which provides, "The Governor shall, from time to time, give the legislature information of the state of the government, and recommend for consideration such measures as may be deemed necessary and expedient."

In sum, we are of the opinion the governor is constitutionally empowered each year to submit to the legislature an executive budget for its consideration in making appropriations for the government of this state. Implicit therewith the governor is entitled to establish within the executive department such committee as may be appropriate to assist him in this budget proposal/recommendation function. It necessarily follows that he has the prerogative to staff such commission or agency with persons whose loyalty is to the executive and not to the legislative department of government.

Ultimately, of course, the legislature has the power and prerogative to accept or reject the budget

recommendation of the governor, in whole or in part. Indeed, under our present arrangement, the legislature has unrestricted power to accept or reject the recommendation of the Commission of Budget and Accounting, in whole or in part. Under our Constitution the final budget-making power is vested in the legislature because it has the ultimate responsibility of appropriation by which it can honor the budget by appropriating, in whole or in part, or refusing a budget request by non-appropriation. *Colbert v. State*, 86 Miss. 769, 775, 39 So. 65, 66 (1905).

The constitutional imperative that the powers of government be divided into separate and distinct departments, however, renders unconstitutional the organization of any commission or agency on which both legislators and members of the executive branch serve as voting members.

We hold that the Commission of Budget and Accounting as presently structured violates the article on separation of powers in this state. Legislator Appellants . . . in our opinion, may not consistent with the constitution serve on a budget preparation commission or agency which also has as one of its voting members the Governor or other member of the executive department. Similarly, so much of Section 27-103-1(1), as creates a Commission of Budget and Accounting composed simultaneously of members of both the legislative and executive departments as voting members is hereby declared unconstitutional.

3. THE BUDGET CONTROL PROCESS.

The budget control process presents a different issue in that it is an executive function.⁴ Once taxes have been levied and appropriations made, the legislative prerogative ends, and executive responsibility begins to administer the appropriation and to accomplish its purpose, subject, of course, to any limitations constitutionally imposed by the legislature. See *INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We have held above that the constitution does not permit the legislature to directly or indirectly invade the powers and prerogatives of the executive branch of government. The legislature thus may not administer an appropriation once it has been lawfully made and is prohibited from imposing new limitations, restrictions or conditions on the expenditure of such funds, short of full legislative approval.

⁴By way of comparison, we note that the overwhelming majority of our sister states regard budget control as a purely executive power. See, e.g., *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978); *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976); *In Re Opinion of Justices*, 369 Mass. 990, 341 N.E.2d 254 (1976); *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970); *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929).

Accordingly, we are of the opinion that Appellants . . . may not consistent with the constitution perform any budget control functions after appropriation. Similarly, so much of Section 27-103-1, et seq., as vests budgetary control powers and responsibilities in a commission on which persons who are members of the legislative department serve is hereby held unconstitutional.

4. OTHER MISCELLANEOUS EXECUTIVE POWERS.

The statutes enacted by the legislature, coupled with the record of the proceedings below, reflect that the Commission on Budget and Accounting has numerous additional powers and in fact, performs multi-additional duties all of which are essentially executive.

These adjunctive powers include the administration of public purchasing statutes (Section 31-7-1, et seq.), and the administration of state employees group insurance program (Section 25-15-1, et seq.). Additional and assorted miscellaneous duties are also spread throughout the code, including the authority to approve rules adopted by the State Auditor for establishing a merit system for his employees (Section 7-7-7).

* * * * *

Consistent with what we have stated above, Appellants . . . may not constitutionally perform any of these functions because they properly belong to the executive department. Similarly, the statutes vesting in these appellants the powers and functions mentioned, or other functions which are in their essence executive, are hereby declared unconstitutional.

B. The Other Boards and Commissions

We turn now to the remaining eight boards and commissions in issue, first looking briefly at their functions and compositions.

* * * * *

Using the analysis we employed in our consideration of the Commission of Budget and Accounting, we are of the opinion the boards and commissions listed above exercise powers constitutionally vested in the executive department of government. Their primary functions, as revealed by their enacting legislation, are to carry out laws previously enacted. Once a law is enacted, the executive department has the duty to administer and enforce it. See *INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We find no constitutional authority for appellants' contention that their service as legislators on these boards is made constitutional by the delegation of the executive duties, if any, to the directors of the

boards. The directors are, of course, employed by the board and are subject to its every order. The primary functions of the boards and commissions are clearly the responsibility of their members, and since these duties are in essence executive duties, they may not be delegated by statute which would be contrary to the constitution.

Accordingly with what we have said above, appellants . . . may not constitutionally perform any of these executive functions. Similarly, so much of the following statutes as create executive boards and commissions with legislative members are declared unconstitutional. . . .

II. THE POWERS OF APPOINTMENT

We have held above that any enactment providing that legislators may serve as voting members on commissions, boards and agencies performing essentially executive functions contravenes Article I, Section 1 of the Constitution. We have further held that those legislators who are exercising powers we have held to be essentially executive are thereby violating Article I, Section 2. We turn now to the legislators' argument that they have the power to appoint others to serve on various commissions, boards and agencies which are performing essentially executive functions.

The legislators rely on Article IV, Section 103 of the Constitution which provides that the legislature shall determine the mode of filling vacancies in office. They argue that under our decision in *Clark v. State, ex rel. Miss. State Medical Association*, 381 So.2d 1046 (Miss.1980), the legislature is vested with all the powers of appointment not specifically granted to another branch of government. This argument is without merit, in our opinion, for it does not reach the critical issue, appointment to do what?

Article IV, Section 33 of the Constitution vests the legislative power in the legislative department of Government. Section 33 necessarily vests in the legislature the power and prerogative to appoint persons to assist in the discharge of its legislative duties.

Comparably Article V of the Constitution vests in the executive department the whole of the executive power. The chief executive power is vested in the Governor. Article V, Section 116. Other executive powers have been vested in the Lt. Governor, the Secretary of State, the State Treasurer and the Auditor of Public Accounts. Clearly the constitutional provisions creating and empowering these executive offices authorize their occupants to appoint persons to assist them in the discharge of their executive duties. These executive powers of appointment are also plenary and may be exercised as the executive wishes,

subject only to the power of senate confirmation hereinafter discussed. Section 103 provides nothing to the contrary.

In their brief, the appellants state, ". . . the Court may not have to address the power of appointment issue, depending on its holdings on the main issues of the propriety of the service by legislators on the boards and commissions. The only arguable power of appointment question which may be presented is whether the Speaker of the House can appoint legislators to boards and commissions, and this question may well be subsumed by the Court's holding on whether legislators may in fact serve on the boards and commissions." Page 15, Note 5.

We have held the boards and commissions in issue to exercise powers constitutionally vested in the executive department. This would, of course, prohibit legislators from serving on such boards and commissions. Nevertheless we think we should briefly address *Clark v. State, ex rel. Mississippi State Medical Association*, 381 So.2d 1046 (Miss.1980), inasmuch as it is otherwise contended to vest all appointive powers in the legislature which are not specifically placed within the executive power. We first note that Section 103 of the Constitution addresses the "mode" of filling vacancies in all offices and not the appointive prerogative itself. The question in *Clark*, as we view it, was not the right to appoint but rather did the legislature in enacting the "mode" for filling a vacancy act unconstitutionally? Without citation of authority or, apparently, a review of other sections of our Constitution, the trial court held, "It is my opinion that the power here questioned is, by our Constitution, vested in the legislative department of government, and so the questioned statute does not encroach upon the governor's constitutional powers." 381 So.2d at 1050.

This Court affirmed the mode of filling vacancies was constitutionally placed within the legislative realm. Both the trial court and this Court approved the *mode* enacted for filling the particular vacancies. Neither the trial court nor this Court addresses the ultimate right of appointment. Thus, *Clark* is not authority for the issues presently before the court. We therefore think the appellants' limited reliance on it is without merit.

By the same token the attorney general's reliance on Section 99 is misplaced. That section provides that "The legislature shall not elect any other than its own officers, state librarian, and United States Senators. . . ." Nothing in this section inhibits the power and prerogatives of the legislature to ap-

point persons to assist it in performing its legislative functions.

Clark holds that the Mississippi Medical Association, a private voluntary association, may appoint three members of the State Board of Health, an agency whose duties are executive. Appointment of persons to an executive agency by a voluntary association with no ongoing vital connection with prerogatives of the legislative or executive departments of government and with no potential of weakening either of the departments does not reach constitutional proportions as do the charges presently in issue.

Further, the talk in *Clark* of *general* and *limited* powers of appointment is less than helpful, for it is constitutionally determined that the legislative and executive departments are both vested with general and limited powers of appointment. The legislative department possesses a *general* power to appoint persons to exercise legislative or quasi-legislative powers. This appointment power is constitutionally *limited* in that the legislature may not appoint persons to perform functions at the core of the executive or judicial power.

Similarly, Article V of the Constitution vests in the officers of the Executive Department the general power to appoint persons to assist them in carrying out their duties. We find this power of appointment at the core of Article V provisions creating and empowering the executive offices in our government. Therefore, we are of the opinion the power of the executive department to appoint executive subordinates is exclusive and legislative encroachment is prohibited by the language of Article I. . . .

III. SENATE CONFIRMATION POWER

This alleged legislative usurpation of executive power must be considered separately. A number of statutes provide gubernatorial appointments to executive offices are to be made with the advice and consent of the senate. The attorney general claims this statutory confirmation power is a violation of Article I, Sections 1 and 2 of the Constitution.

Our pattern of analysis is the same as we have previously employed. Is the power being exercised by the members of the legislative department at the core of the executive power or is the legislature affirmatively appointing persons who will then exercise powers at the core of the executive power? As we have stated above, where the answer to either of these questions is in the affirmative, there is a violation of Article I, Sections 1 and 2.

The senate confirmation power, however, in our view is different. It does not result in invasion of executive power.

First, the senate has been vested with no power to make appointments, its power being wholly negative. While it may withhold for any reason approval of an executive appointee, it may not affirmatively force on the executive department persons unacceptable to the governor or other members of the department.

Second, the senate maintains no control over the appointee once he has been confirmed; it has no power to discharge short of impeachment. Once confirmation is given the prerogatives of the senate are concluded. The loyalty of the employee or the appointee remains with the chief executive.

It is true the power to confirm executive appointments has not been vested in the senate or the legislature as a whole by any provision of the constitution. By the same token the exercise of this confirmation power is in no way the exercise of a power central to the executive. In the context of the structure of government of United States and of the states which was known to the draftsmen in 1890, we think the confirmation of [sic] power is commonly understood to be within the legislative prerogative. For example, the Constitution of the United States provides that the power of the president to appoint members of his cabinet and other top executive officials shall be "by and with the advice and consent of the senate." Article II, Section 2, Clause 2, Constitution of the United States.

The legislature has the constitutional power to vest in the senate the confirmation prerogative, so long as the prerogative is exercised in the essentially negative fashion as provided in the statutes here under attack. This prerogative must be limited to top discretion exercising officials of executive or administrative agencies. It may not be enforced so that the legislature substantially exercises or controls functions at the core of the executive power. Of course, the personal staffs of elected executive officers are not subject to confirmation, nor are the members of advisory commissions or boards.

We are of the opinion the confirmation power, insofar as it has been put in issue by the facts of this case, is not invasive of the power vested in the executive department by Article I, Section 1 and by Article V. We hold that the challenged statutes authorizing the exercise of this confirmation power are within the constitutional power of the legislature to enact. . . .

Basic to our holding is our recognition that there is another side to the coin labeled on one side "separation of powers." This other side, commonly re-

ferred to as “checks and balances,” is the mandate that important checks be placed upon each department’s exercise of its power.

For example, legislative power is checked by the governor’s veto power [Article IV, Sections 72-73; See *Jackson County v. Neville*, 131 Miss. 599, 625, 95 So. 626, 628 (1923)], and by the judicial power of this Court to declare acts of the legislature unconstitutional. [Article VI, Section 144; *Albritton v. City of Winona*, 181 Miss. 75, 96, 178 So. 799, 803 (1938)].

The power of the judiciary is checked by the governor’s pardon power [Article V, Section 124], and by the legislature’s powers of impeachment and removal of judges. Article IV, Sections 49-53.

It is consistent with our constitutional system that the departments of government have powers to check and balance the other departments. This confirmation power is a legislative check on executive power.

Discussion Notes

1. Is the question of efficiency ever relevant in separation of powers analysis?
2. How could the holdings in *Alexander v. State* be overcome?

3. Can the state constitution itself violate the doctrine of separation of powers as a matter of state constitutional law?

Esteybar v. Municipal Court **95 Cal.Rptr. 524, 485 P.2d 1140 (1971)**

WRIGHT, Chief Justice.

In this case of first impression we are called upon to decide whether a magistrate, pursuant to Penal Code, section 17, subdivision (b) (5)¹ may determine that an offense is a misdemeanor without first obtaining the consent of the prosecuting attorney. Since a prosecutor may not be vested with authority to foreclose the exercise of a judicial power, we have concluded that requiring his consent to determine that an offense is a misdemeanor violates the doctrine of separation of powers set forth in article III, section 1, of the California Constitution.

Petitioner, Dolores Mantes Esteybar, was charged with possession of marijuana (Health & Saf.Code, Section 11530), an offense which, in the absence of any prior felony convictions, may be treated as either a felony or a misdemeanor. After hearing the evidence at the preliminary hearing the magistrate attempted to hold petitioner to answer on a misdemeanor charge in the municipal court, but he

was prevented from exercising his discretion because the prosecuting attorney insisted that petitioner be held to answer on a felony charge in the superior court. Petitioner now seeks a writ of mandate to compel respondent, the Municipal Court for the Long Beach Judicial District, to proceed upon her case as if she had been arraigned on a misdemeanor complaint.

Petitioner was arrested at a Safeway supermarket in the City of Long Beach and was charged with petty theft, a violation of section 484 of the Penal Code. She was accused of having wrongfully taken a package of plastic forks, a bar of soap and a tube of shampoo, all of which had a total value of \$1.58. During the booking procedure following petitioner’s arrest, a search of her purse revealed a single hand-rolled marijuana cigarette. Petitioner was then charged with possession of marijuana, which charge is the subject of the instant proceeding.

At the preliminary hearing it was stipulated that petitioner had no criminal or arrest record. Because of the nature of the offense and the fact that petitioner had no prior record, the magistrate wished to determine that the offense was misdemeanor and hold petitioner to answer in the municipal court, rather than holding her to answer in the superior court on a felony charge. The deputy district attorney, however, refused to consent. He stated that it was the policy of the district attorney’s office not to consent to the prosecution of such offense as misdemeanors unless the defendant first agreed to enter a plea of guilty. The magistrate then reluctantly concluded that he had no authority to hold the matter for trial in the lower court in the absence of the district attorney’s consent. The case was continued, however, in order to permit the instant petition to be filed. The discussion of court and counsel at the preliminary

¹The statute provides: “. . . (b), When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: . . . (5) When, at or before the preliminary examination and with the consent of the persecuting attorney and the defendant, the magistrate determines that the offense is a misdemeanor, in which event the case shall proved as if the defendant had been arraigned on a misdemeanor complaint.” (Pen.Code, Section 17, subd. (b) (5), as amended in 1969.)

hearing, which is quoted in its entirety in the margin, clearly sets forth the problems which arise if a prose-

cutor is permitted to foreclose the exercise of this judicial power.²

²“THE COURT: I don’t think the defendant should be held to answer to a felony in the Superior Court because under the circumstances here it seems clear that no judge would send this defendant to state prison even if she were found guilty at the time of trial or pleaded guilty to a violation of Section 11530.

“Of course this is one of those cases where the judge may treat it as a felony or a misdemeanor depending on the sentence imposed.

“Because of the nature of the offense and the lack of any prior record by the defendant I find that there is only probable cause to believe the defendant committed a misdemeanor by possessing a single marijuana cigarette; but that there is no probable cause to believe that she has committed a felony in respect to it.

“At this time I would like to hold her to answer in the Municipal Court for a violation of Section 11530 of the Health and Safety Code, a misdemeanor and prepare this case for trial in this court rather than hold her to answer in the Superior Court. For that reason I would ask the District Attorney’s office if there is any objection to my holding her to answer here in the Municipal Court under Section 11530 of the Health and Safety Code, a misdemeanor rather than holding her to answer in the Superior Court on a felony.

“MR. PANTOJA [prosecutor]: Your Honor, there would be an objection. The People would argue that the judge’s discretion in this matter would be under—solely under Section 17, Subdivision 5 [17 (b) (5)] of the Penal Code which requires a consent of the District Attorney’s office and prosecuting attorney. And the District Attorney’s office will not consent in this matter, Your Honor, to anything less than holding Defendant to answer in the Superior Court on a felony.

“THE COURT: Will you tell me why the District Attorney’s office will not agree to holding the defendant to a misdemeanor? Why will you not agree to that?

“MR. PANTOJA: For the specific reason behind the failure to agree I would not be capable of saying. What I could say is that it is the overall policy of the District Attorney’s office that in this type of matter where a felony complaint has been filed that if there is any disposition to be made, Your Honor, if should be done at the Superior Court level, at which time if it is to be handled as a misdemeanor it should be handled as such by the sentencing.

“THE COURT: You haven’t answered my question. Maybe you don’t wish to. Let me put it this way: Isn’t it a fact that it is the policy of the District Attorney’s office not to agree or consent to the reduction of any felony to a misdemeanor, first of all, unless the defendant intends to plead guilty to the misdemeanor? Is that not the policy of the District Attorney’s office under certain circumstances?

“MR. PANTOJA: As to policy, of course I am not free to speak because I don’t make it. But I will say this: In the normal course of events a plea of guilty to a misdemeanor or the crime can be recategorized as a misdemeanor only in a plea of guilty.

“THE COURT: You correct me if I am wrong but I have seen a memorandum of the District Attorney’s office and according to my best recollection it is a policy memo which states that the District Attorney’s office will not consent to the reduction of any felony to a misdemeanor first of all unless the defendant agrees to plead guilty to a misdemeanor and then only in certain circumstances. And those situations

are, for example, if there is no more than one marijuana cigarette involved—and then it goes on to list various situations. Is that not correct?

“MR. PANTOJA: That is correct, Your Honor.

“THE COURT: All right.

“MR. WISE [defense counsel]: May I say something, your Honor? . . . First let me say that under Section 17a, Subdivision 5 [17 (b) (5)] that I would prefer that this matter be arraigned on a misdemeanor rather than a felony.

“THE COURT: Let me get this straight: You would prefer this matter be treated as a misdemeanor, would you not, on behalf of the defendant?

“MR. WISE: That is correct. And I would believe that the Court has authority to do so despite Section 17a, Subdivision 5 [17(b) (5)], in the light of the case of *People versus [Tenorio]*.

“And the determination of whether a particular offense is a felony or a misdemeanor is purely a determination of the Court and is a judicial determination. I don’t believe the District Attorney or any prosecuting attorney can be clothed with that judicial authority to bar the Court from doing what the Court has indicated he wants to do, and I would therefore ask the Court—possibly over the objection of the District Attorney—to proceed as though this case were based on a misdemeanor complaint.

“THE COURT: I would certainly like to do it and I think it is a shame that the Superior Courts are cluttered with cases of this type wherein we spend all this money for preliminary hearings transcripts and hearings at the Municipal level. And then, in the Superior Court—as well as the Municipal Court—we have the expense of appointing attorneys, and the defendant ends up invariably in such cases receiving a sentence for a misdemeanor and receiving a fine of a hundred dollars after the taxpayer has spent hundreds and hundreds of dollars unnecessarily in prosecuting it.

“I am sure the Legislature had in mind eliminating that expensive procedure and eliminating the necessity of cluttering up the Superior Court calendar with this type of case when they passed and adopted this Section 17 of the Penal Code.

“However, in view of the wording of that section I have grave doubt that I have a right to keep it here and reduce it without the consent of the District Attorney’s office. So, I am going to reluctantly hold the Defendant to answer in the Superior Court. At least that is my feeling now.

“MR. WISE: If the Court intends to do so, your Honor, may I ask that the matter be held in abeyance by way of a continuance until such time I can obtain a writ from the California Supreme Court to see if the Court doesn’t have such authority?

“THE COURT: I would appreciate it if you would do that. And unless I am restrained from doing so and unless the Appellate Court agrees that I have the jurisdiction to reduce it to a misdemeanor without the consent of the District Attorney then I intend to hold the defendant to answer to the Superior Court.

“And I hope you are successful in having it determined that I do have the right to reduce this to a misdemeanor even in the absence of consent from the District Attorney’s office.

“So for the purposes of giving you a chance of getting a writ I will continue this matter, if the defendant will consent to giving up her right to a speedy trial, and continue it for one month from today which will be November 20th.”

In *People v. Tenorio* (1970) 3 Cal.3d 89, 89 Cal.Rptr. 249, 473 P.2d 993, we dealt with Health and Safety Code, section 11718, which prevented a court from exercising its power to strike prior convictions without first obtaining the approval of the district attorney. We held that this section constituted an improper invasion of the constitutional province of the judiciary and was therefore violative of the California constitutional separation of powers. As we stated in *Tenorio*, "The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor. The judicial power must be independent, and a judge should never be required to pay for its exercise." (*Tenorio*, supra, at p. 94, 89 Cal.Rptr. at p. 252, 473 P.2d at p. 996.) Although we are confronted with a different set of circumstances, nevertheless, the rationale underlying our decision in *Tenorio* applies with equal force to the instant case. The judicial power is compromised when a magistrate, who in the interests of justice and in strict compliance with statutory requirements is of the opinion that an offense should be determined to be a misdemeanor, wishes to exercise his power to hold the defendant to answer in the municipal court but finds that before he may do so he must bargain with the prosecutor.

In determining whether a defendant should be held to answer on a felony or a misdemeanor, a committing magistrate exercises a judicial power which must be based upon an examination of the circumstances of the particular case before him. Nevertheless, section 17, subdivision (b) (5), purports to vest in the prosecutor, admittedly an advocate, a power which may be exercised in a totally arbitrary fashion without regard to the circumstances of individual cases. Indeed, the prosecutor in the instant case admitted that it was a county-wide policy of the district attorney's office to refuse to consent to the prosecution of such offenses as misdemeanors unless the defendant first agreed to plead guilty. Under our system of separation of powers, we cannot tolerate permitting such an advocate to possess the power to prevent the exercise of judicial discretion as a bargaining tool to obtain guilty pleas. A defendant is entitled to have an independent determination of whether he should be held to answer on a felony or a misdemeanor, and this is not possible when the exercise of judicial discretion depends on the "pleasure of the executive." (*Tenorio*, supra, at p. 93, 89 Cal.Rptr. 249, 473 P.2d 993.)

The People contend that the judicial power exercised by a magistrate is not the kind of judicial power contemplated by *Tenorio*, and that this power is not judicial power within the constitutional meaning of

separation of powers because the functions of a magistrate are legislatively determined rather than derived from the Constitution. The People rely on a long line of cases which hold that the system of prosecution by information is subject to control and regulation by the Legislature and that the functions of a magistrate at a preliminary hearing are solely those given by statute. . . . They also rely on the differences between the powers of constitutional courts (those established in art. VI, Section 1) and the powers of judges of constitutional courts acting solely in the capacity of magistrates. These arguments, however, are not persuasive. Article I, section 8 of the California Constitution provides that offenses formerly required to be prosecuted by indictment may now be prosecuted by information after examination and commitment by a magistrate. Thus while the Legislature may prescribe the detailed duties of a magistrate, the magistrate's authority to conduct a preliminary examination is derived from the Constitution and not from the Legislature. Furthermore, while the powers of a magistrate are not the same as those exercised by a court, his act of holding a defendant to answer a felony or a misdemeanor charge is a judicial act and involves an exercise of judicial discretion. Contrary to the People's argument, the fact that a particular power has been conferred on a magistrate by statute does not prevent the exercise of the power from being a judicial act for purposes of the doctrine of separation of powers. Within the statutory framework, the magistrate at a preliminary hearing acts as an independent arbiter of the issues presented by the adversaries. He weighs evidence, resolves conflicts and gives or withholds credence to particular witnesses (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 667, 94 Cal.Rptr. 289, 483 P. 2d 1241), and just as these are judicial acts, so is the act of holding a defendant to answer. To accept the People's contention would be to reduce this function to an *ex parte* act and render meaningless the magistrate's independent determination.

The People also contend that since the Legislature was not required to give this power to the magistrates, the Legislature may therefore condition the exercise of the power in any manner it wishes. This argument is likewise not persuasive. Article III, section 1 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The prosecution of a case by the district attorney involves an exercise of executive power, and as previously stated, the magistrate's act of holding a defendant to answer is a judicial act for the purposes of this section of the Constitution. Since the exercise of a judicial power

may not be conditioned upon the approval of either the executive or legislative branches of government, requiring the district attorney's consent in determining the charge on which a defendant shall be held to answer violates the doctrine of separation of powers. While it may be conceded that the Legislature in the first instance was not required to give the power to a magistrate to determine whether to hold a defendant to answer to a felony or a misdemeanor charge, having done so, the Legislature cannot condition its grant upon the approval of the district attorney.

The People contend that our holding constitutes an invasion of the charging process, an area traditionally reserved to the prosecutor, because we have abridged his discretion in deciding "what crime is to be charged or if any crime is to be charged." (*People v. Sidener*, 58 Cal.2d 645, 658, 25 Cal.Rptr. 697, 375

P.2d 641.) This argument overlooks the fact that the magistrate's determination *follows* the district attorney's decision to prosecute. As stated in *Tenorio*, "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." (*Tenorio*, supra, at p. 94, 89 Cal.Rptr. at p. 252, 473 P.2d at p. 996.)

Thus we have concluded that Penal Code, section 17, subdivision (b) (5), violates article III, section 1 of the California Constitution insofar as it requires the consent of the prosecutor before a magistrate may exercise the power to determine that a charged offense is to be tried as a misdemeanor.

Let a writ of mandate issue compelling respondent to proceed upon the case as if petitioner had been arraigned on a misdemeanor complaint.

Discussion Notes

1. See also, *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977), with respect to legislative interference with judicial discretion.

2. Would mandatory sentencing statutes violate the separation of powers? What about sentencing "guidelines"? See *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987).

3. Does the federal constitution contain a provision analogous to Article III, section 1 of the California Constitution or Article I, sections 1 and 2 of the Mississippi Constitution? Must that result in a difference in the way separation of powers cases are treated under state constitutions (with a California-type provision) and the federal constitution?

Application of Nelson 163 N.W.2d 533 (S.D. 1968)

PER CURIAM.

To settle disputes arising from competition between suppliers of electricity in certain areas the legislature passed Ch. 254, Laws of 1965. A brief outline of parts of the act will assist in indicating its plan. Section 12 creates the South Dakota Electric Mediation Board "with quasi-judicial powers for the sole purpose of determining which electrical supplier shall provide electric service in certain areas as herein provided." Section 13 provides for six state members of the Board to be appointed by the governor: Two are from a list of three names submitted by the S.D. Municipal Electric Association known as Municipal members; two from a list submitted by the S.D. Electric Information Institute known as Investor Owned members and two from a list submitted by the S.D. Rural Electric Association known as Rural Electric members. Section 14 provides the person or supplier directly involved desiring to protest electric service, actual or contemplated in certain areas around municipalities, may file a petition for hearing with the senior circuit judge of the judicial circuit setting forth

the dispute. Section 15 provides each of the electrical suppliers involved in the dispute shall certify to the circuit judge the name of a person to serve on the Board, known as local members. These two local members, the four state members representing the

. . . two segments involved in the dispute (here the city and rural members) and the Circuit Judge, acting as the chairman and secretary, shall constitute the Mediation Board for the purpose of settling the dispute in question.

It also directs the judge to fix a time and place for hearing and give notice to all members, persons and suppliers involved.

The City of Miller and Ree Electric Cooperative, herein called City and Ree, both in the electric distribution business in or adjacent to the City, became involved in a dispute as to which was to be the electrical supplier of consumers on a tract of land annexed by the City. The City filed a petition under Ch. 254, asking the senior circuit judge of the Ninth Judicial Circuit to assemble the Mediation Board created thereby to hear and settle the dispute. Each of them selected their local member and these two, with four statewide members two representing the S.D. Municipal Electric Association and two representing the S.D. Rural Electric Association met with the circuit

judge for the hearing on the petition. In the meantime Dayton and Carroll Nelson, owners of the annexed land and consumers of electricity thereon, who had requested and contracted for service by Ree, filed an application for an alternative writ of prohibition against the Board as defendant. Nelsons asserted the unconstitutionality of Ch. 254. The City and Attorney General intervened. RCP 24. After a hearing, the trial court entered a judgement granting the writ enjoining the Board from determining the dispute between the City and Ree. This result followed the trial court's conclusion that the part of Ch. 254 which made the circuit judge a member of the Board of Mediation was unconstitutional in that it attempted to clothe a member of the judicial department of government with administrative duties properly exercised by the executive department. The City appealed.

In considering the question it is important to single out the question that is presented and those which are not. The authority of an administrative board to exercise legislative, executive or quasi-judicial powers is not presented. The difficulty of sifting or cataloging these powers is mentioned by Professor Davis in Section 1.09 of his Administrative Law Treatise. . . .

What is involved is the designation or appointment of a circuit judge to act as one member of a Board of Mediation of seven members to mediate, settle and determine a dispute between two corporations as to which is to provide future electrical service to the consumers of the territory involved. Prior to statehood this court's predecessor, the Territorial Court of Dakota, in *Champion v. Board of County Commissioners*, 5 Dak. 416, 41 N.W. 739, recognized the existence and some of the limitations of our form of government when it wrote:

. . . all the judicial power . . . is expressly conferred upon the courts. . . . The legislature can create no other court; and can confer judicial power, *strictly such*,—that which 'deprives of life, liberty, or property,'—upon no other tribunal. *Quasi* judicial powers involving judgment and discretion are often, and must necessarily be, exercised by administrative and executive bodies and officers. A *judicial power*, as such, can be exercised only by the courts. The three great departments of the government are intended to be, and must be, separate and distinct. The legislature has no power to confer a strictly executive and administrative or legislative power upon the judiciary, and whenever it has sought to do so the courts have declared it void. . . . The courts hold, and must continue

to hold, that they cannot and will not exercise other than judicial power.

The South Dakota Constitution thereafter adopted by the people preserved this distinction by Art. II which provides:

The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this constitution.¹

Art. V, Section 1 provides the "judicial powers of the state . . . shall be vested" in the courts therein mentioned, including the circuit courts: section 14 for the jurisdiction and powers of circuit courts and judges thereof; section 15 for the election of circuit judges and section 18 that writs of error and appeals may be allowed from decisions of the circuit courts to the supreme court. This court likewise adopted the reasoning of the Territorial Court by thereafter quoting the *Champion* statements above in *Codington County v. Board of Com'rs of Codington County*, 1927, 51 S.D. 131, 212 N.W. 626, and *Bandy v. Mickelson*, 1950, 73 S.D. 485, 44 N.W.2d 341, 22 A.L.R.2d 1129.

Plaintiffs urge Ch. 254 is violative of the separation of powers doctrine implanted in our constitution by the provisions heretofore cited and also by Art. V, section 35 which provides:

No judge of the supreme or circuit courts shall be elected to any other than a judicial office, or be eligible thereto, during the term for which he was elected such judge.

Some of the decisions cited by counsel holding a judge is prohibited from acting as a member of a board were based on specific prohibitions or on constitutional provisions differing somewhat from our own.

In *Abbott v. McNutt*, 218 Cal. 225, 22 P.2d 510, 89 A.L.R. 1109, a statute made it the duty of two judges or their nominees to be members of a board of five persons to select candidates for the position of county manager. The court held the judges were precluded from serving on the board under a constitutional provision declaring they were "ineligible to any other office or public employment than a judicial office."

A New York statute authorized the governor to direct a justice to conduct an investigation into proceedings for removal of a public officer. It was held such service of a justice was nonjudicial and prohib-

¹Article III vests legislative power in the legislature and Article IV vests executive power in the governor.

ited by the constitution which provided judges “ ‘shall not hold any other office or public trust.’ ” The court said the policy is to conserve the time of the judges in the performance of their work as judges, and “to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.” In *Re Richardson*, 247 N.Y. 401, 160 N.E. 655.

In *Local 170, Transport Workers Union of America, C.I.O. v. Gadola*, 322 Mich. 332, 34 N.W.2d 71, the act named a judge as one of three members and chairman of an arbitration board to mediate a labor dispute. The Michigan constitution provided “No person belonging to one department shall exercise the powers properly belonging to another,” Art. 4, section 2, and “Circuit judges shall be elected . . . (and) shall be ineligible to any other than a judicial office,” Art. 7, section 9. The court said the act added a new duty not judicial in nature to the office of circuit judge and then quoted from Judge Cardozo’s *Richardson* opinion, *supra*, as follows:

“The statute annexes or seeks to annex to the office of a judge, not a temporary power to be exhausted by a single act . . . but a continuing power to be exercised whenever occasion shall arise. . . . As often as the need arises, the call is to be met.”

We have quoted those parts of this opinion with reference to whether a single act or some length of time was involved, for the reason it is apparent the issues and duties set out in Ch. 254 do not involve a single act and with the hearings will be extensive and time consuming. This is apparent from the record and the fact that court now has before it four appeals from two of the proceedings pending under the act.

In the New York statute the judge acted alone; by the California and Michigan statutes the judges acted as minority members of an administrative board. Ch. 254, Laws of 1965, likewise makes the circuit judge, acting in a nonjudicial capacity, a minority member of an administrative board. An examination of the act discloses the Mediation Board is created “with quasi judicial powers,” section 12; that in “acting as chairman, secretary and a member of the Board, the Circuit Judge is not acting in his judicial capacity,” section 15; and, upon conclusion of the hearing, “the Board shall determine its findings and decisions by a majority vote recorded in the record,” section 19. These clauses recognize the fact the judge is not acting in his judicial capacity by the declaration he is not so acting and that his vote is only as an individual member of the Board acting in a nonjudicial capacity.

Historical and scholarly discussions of the separation of governmental powers appear in *State ex rel.*

White v. Barker, 116 Iowa 96, 89 N.W. 204, 57 L.R.A. 244, and *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N.W. 294, 639. It has been said it exists by virtue of the organization and the grants of legislative, executive, and judicial powers to each of the three departments of government. 16 Am.Jur.2d, Constitutional law, section 212. Our court has recognized the constitutional separation of powers doctrine and declared it cannot be done away with by legislative action. *Dunker v. Brown County Board of Education*, *supra*.

The Board created by the act contains seven members, i.e., one representative from each of the disputants and two members from each of the groups or segments involved in the dispute, with the circuit judge as the only member without a connection or allegiance to either contender. If a circuit judge on appeal is limited to and may exercise judicial power only and has no power to consider the merits of decisions involving the exercise of administrative or legislative power as our decisions hold, then it would be an anomaly to permit a judge to be a member of such a board which exercises nonjudicial power. *Codington County v. Board of Com’rs. of Codington County*, *supra*. *Dunker v. Brown County Board of Education*, *supra*. Meritorious and important as the challenged act may be and mindful of the confidence the legislature and sponsors have in the judges designated, we must conclude the act, by designating a judge as one member of a seven member administrative board, violates this separation of powers² doctrine fundamental to our form of government, for, as the court in *Local 170, Transport Workers Union of America, C. I. O. v. Gadola*, 322 Mich. 332, 34 N.W.2d 71, wrote:

. . . the absolute independence of the judiciary from executive or legislative control is of transcendent import. Our form of government cannot be maintained without an independent judiciary; and, if we as a people submit to a mingling of governmental power, we then accept in fact that which we most abhor—one-man autocratic control—and the constitutional safeguards of our Nation and State would then be abrogated.

As in the *Richardson* opinion we reach the stage of whether, granting that functions nonjudicial may not be cast upon a judge so as to impose a duty of acceptance, he has a privilege to assume the performance of the duty, not in his capacity as a judge—but in his private or individual capacity. This latter sugges-

²This conclusion is supported by the policy announced, if not compelled, by the wording of Art. V. section 35, South Dakota Constitution, *supra*.

tion may seem plausible when first presented. However, the reasons given by Judge Cardozo in the Richardson opinion demonstrate the choice is not given to the judge in the act nor may it constitutionally be made such a choice by him. The Michigan court in *Gadola* so concluded stating, "To argue that we may separate a judge as the individual servant of the State from a judge sitting as a judicial officer is too specious to stand the constitutional test." 34 N.W.2d at 78 and see in accord *State ex rel. Young v. Brill*, 111 N.W. at 650.

Section 30 of the act states:

If any provisions of this act or any severable provision of a section of this act, or the application of such provision to any person or circumstance, shall be held invalid the remainder of the act or section thereof and the application of such provision to persons and circumstances other than those as to which it is held invalid shall not be affected.

The doctrine of separability requires the court to uphold any phase of the measure if the legislature would have enacted that much without the part the constitution rejects. *State ex rel. Mills v. Wilder*, 73 S.D. 330, 42 N.W.2d 891. However, as the act requires a majority vote and it appears the circuit judge is the key member of the Board, we conclude the leg-

islature would not have passed the act without the circuit judge as the seventh member.

* * * * *

We conclude Ch. 254, Laws of 1965, in naming a circuit judge as a member of this Mediation Board is an attempt to impose nonjudicial duties on him, which duties he shares with administrative members appointed by the disputants and the executive department, which members may overrule his decision and thus it violates our constitutional provisions as to separation of powers; that his membership is an integral part of the operation of the act and the legislature would not have passed it without that provision as to his membership and therefore the whole act must be held unconstitutional. *State v. Wilder*, 73 S.D. 330, 42 N.W.2d 891.

This is not to say, as the opinions cited indicated, a judge may not perform administrative duties incidental to the exercise of judicial powers or which have some reasonable connection with a judicial purpose (*Richardson* opinion, *supra*) or which involve a single act such as approval of a bond, *State ex rel. Patterson v. Bates*, 96 Minn. 110, 104 N.W. 709, 113 Am.St.Rep. 612. Nor do we express any opinion whether or not a Mediation Board properly constituted may determine such disputes under appropriate guidelines.

Discussion Notes

1. How does the interference with judicial power in this case differ from that in the preceding California case?

2. Does the "single-act" exception recognized by the South Dakota court make sense? What other examples are there of such single acts that legislatures might require of judges?

C. Delegation of Legislative Authority

Under federal constitutional separation of powers doctrine, limitations on the delegation of legislative authority to administrative agencies are virtually non-existent. See Bernard Schwartz, "Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power," *Northwestern University Law Review* 72 (September-October 1977): 445-46. Although some state courts have followed this approach, *ibid.*, p. 445 n. 13, it is important to note that a number of state courts interpret their state constitutional separation of powers doctrine to impose strict limits on legislative delegation of authority to administrative agencies. See Frank E. Cooper, *State Administrative Law* (Indianapolis: Bobbs-Merrill, 1965), 2 vols., 1: 31.

Department of Business Regulation v. National Manufactured Housing Federation, Inc. 370 So.2d 1132 (Fla. 1979)

BOYD, Justice.

This appeal is from a judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County. It comes directly to use because the trial court, in announcing its judgment, declared a state law invalid. Art. V, section 3(b)(1), Fla.Const. The proceeding was begun when the appellees sought declaratory and injunctive relief from the effect of chapter 77-49, Laws of Florida. The action was defended by the governor, the attorney general, and the Department of Business Regulation. The plaintiffs based their claim for relief upon three grounds: that the statute unlawfully delegates legislative authority. . . .

Section 1 of the act contains a recitation of legislative findings and a statement of the purposes of the enactment:

The Legislature finds that there exists an emergency in rental accommodations in mobile home parks. The Legislature further finds that this condition, coupled with the inordinate expense of relocating a mobile home causes tenants in such parks to be placed in an unequal bargaining position with respect to increases in charges imposed by the owners or managers of such parks. The Legislature further finds that this inequality can only be alleviated by the enactment of reasonable legislative restraints which provide both a reasonable return [on] a park owner's investment and a safeguard to tenants against exorbitant rental or service charges.

To accomplish this purpose, section 4 of the act creates the State Mobile Home Tenant-Landlord Commission to regulate rental increases in mobile home parks. The commission is placed within the Department of Business Regulation.

Section 8 sets out the essence of the regulatory scheme. Subsection (1) provides that if a park owner proposes a charge increase, in the form of an increase in rent or service charges or a decrease in service, "in any calendar year in excess of the net United States Department of Labor Consumer Price Index increases since the last rental increase," then, upon petition of fifty-one percent of the park tenants the commission is required to act. It is to hold a hearing to determine whether the charge increase is "unconscionable or not justified under the facts and circumstances of the particular situation." Subsection (2) provides a list of certain costs that may be passed on to the tenants if they are reasonable and justified.

Subsection (3) provides that by November 1 of the year preceding a charge increase, the park owner must notify the tenants of the proposed amount of any increase. Without notice no increase is to be allowed.

Section 9, subsection (1), requires that the hearings be held in accordance with chapter 120, Florida Statutes (1977), the Administrative Procedure Act, and gives the commission the power to rule on a contested charge increase in one of four ways. It shall require the owner "to either reduce the rental or service charges to a rate set by the commission, to continue rental or service charges as they existed under the former lease or agreement, to increase the rental or service charges to a rate set by the commission or to increase the rental or service charges" to the rate proposed by the owner.

Section 9, subsection (2), gives the commission power to adopt rules governing its proceedings and directs the commission to adopt rules providing that increases collected but subsequently held to be unauthorized "shall be either returned to the tenants or credited toward future rental charges."

Section 11 permits appeal of the decisions of the commission to circuit court. An increase approved by the commission, however, is to be paid by the tenant. If the increase is overturned on appeal, it is to be returned or credited. If the park owner appeals, then the proposed charge, even if disapproved by the commissions, must be paid but is to be deposited in the court registry. The court is authorized to make disbursements of such funds to the park owner pending the appeal if the owner is in danger of suffering hardship, such as losing the premises.

The commission, under the legislative plan, is to be composed of seven members, including two mobile home park owners or operators, two mobile home park tenants, and three members of the general public.

For the following two reasons, we hold that the circuit court was correct in ruling that chapter 77-49 is unconstitutional.

The court held that subsections (1)(a) and (2)(a) of section 83.784, Florida Statutes (1977), unlawfully delegate legislative power to an administrative body. As was made abundantly clear by our decision in *Askew v. Cross Key Waterways*, Nos. 52,251-52,252 (Fla. Nov. 22, 1978), announced in an opinion by Justice Sundberg, the doctrine against delegation of legislative power is of continuing vitality in Florida. We held that the legislature must take heed of article II, section 3, Florida Constitution, which provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other two branches

unless expressly provided herein." The opinion explained why strict adherence to the above constitutional admonition is imperative:

A corollary of the doctrine of unlawful delegation is the availability of judicial review. In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

Askew v. Cross Key Waterways, slip. op. at 9-10.

The interests of a mobile home park owner and a mobile home park tenant necessarily compete. Similar to the posture of a buyer and seller in the commercial arena, a mobile home park tenant has as his goal affordable living accommodations, while a park owner endeavors to maximize his profits. Rent control legislation seeks a balance between these competing interests by stabilizing rentals under emergency conditions in order to prevent extortionate increases in rent resulting from housing shortages, while at the same time allowing landlords a fair and equitable return upon their investments. *City of Miami Beach v. Forte Towers, Inc.*, 305 So.2d 764 (Fla.1974) (Dekle, J., concurring specially). Because of the fundamental nature of these concerns and the pervasiveness of mobile home living in Florida, the point where rent control legislation strikes this balance is undoubtedly of great public moment.

The criteria for determining the validity of rental or service charge increases in subsections (1)(a) and (2)(a) of section 83.784 are constitutionally defective because they charge the commission with the fundamental legislative task of striking this balance between mobile home park owner and mobile home park tenant, without any meaningful guidance. See *Askew v. Cross Key Waterways*, slip op. at 10. The subsections provide:

(1)(a) Upon petition of 51 percent of the tenants of any dwelling units in a mobile home park who will be subject to a rental or service charge increase or a decrease in services in any calendar year in excess of the net United States Department of Labor Consumer Price Index increases since the last rental increase, the commission shall hold a

hearing at the mobile home park or at such other facility selected by the commission, so long as it is reasonably accessible to all parties, at a date to be set by the commission, to determine whether or not the rental or service charge increase or a decrease in services is so great as to be unconscionable or not justified under the facts and circumstances of the particular situation.

* * * * *

(2)(a) The increased costs to the owner of a mobile home park attributable to:

1. Increases in utility rates;
2. Property taxes;
3. Fluctuation [sic] in property value;
4. Governmental assessments;
5. Cost of living increases attributable to and relevant to incidental services, normal repair, and maintenance; and

6. Capital improvements not otherwise promised or contracted for may be passed on to the tenants or prospective tenants in the form of increased rental or service charges if such increases are reasonable and justified under the facts and circumstances of the particular case. The terms “unconscionable or not justified under the facts and circumstances” in (1)(a), and the terms “reasonable and justified under the facts and circumstances of the particular case” in (2)(a), are not accompanied by any standards or guidelines to aid a court or administrative agency in ascertaining the true legislative intent underlying the act. The legislature may have wanted to afford the word “unconscionable” in (1)(a) a liberal construction, so as to circumscribe narrowly a park owner’s ability to pass on costs to tenants beset by inflation. As written, the act gives no hint whether this is a correct interpretation. It is thus left to the “unbridled discretion or

whim”¹² of the commission to formulate basic legislative policy. . . .

Moreover, “unconscionability” is a term which has meaning in the context of an equitable proceeding in our courts between two adverse parties. A chancellor sitting in equity is guided in the exercise of his discretion in this regard by sound principles of law which have been articulated and applied on a case-by-case basis over a long period of time during the development of our rich common law heritage. . . . No such guiding principles are supplied by the legislature here. Furthermore, the joining of that term with the phrase “or nor justified under the facts and circumstances of the particular situation” makes the legislative standard even more nebulous.

In *Sarasota County v. Barg*, this Court invalidated portions of the act creating the Manasota Key Conservation District. Employing language similar to that contained in section 83.784, the act prohibited “undue or unreasonable dredging, filling or disturbance of submerged bottoms,” as well as “unreasonable destruction of natural vegetation.” In finding the above provisions violative of article II, section 3, Florida Constitution, the Court stated:

The Act does not contain any standards or guidelines to aid any court or administrative body in interpreting these terms. The determination of what conduct falls within the proscription of these ambiguous provisions is left to the unbridled discretion of those responsible for applying and enforcing the Act. This amounts to an unrestricted delegation of legislative authority. . . .

302 So.2d at 742.

See also *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla.1972).

* * * * *

¹²Dickinson, v. State, 227 So.2d 36, 37 (Fla.1969).

Discussion Notes

1. In *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978), which was relied on in the instant case, the Florida Supreme Court noted:

It should be noted that Article II, Section 3, Florida Constitution, contrary to the Constitutions of the United States and the State of Washington, does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.

* * * * *

Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State.

372 So. 2d at 924, 925.

2. Does this view necessarily follow from the specific *textual* inclusion of the separation of powers doctrine? Read the next case with this question in mind.

Brown v. Heymann
61 N.J. 1, 297 A.2d 572 (1972)

WEINTRAUB, C. J.

This case involves the Reorganization Plan for the Department of Labor and Industry adopted by the Governor under the Executive Reorganization Act of 1969, N.J.S.A. 52: 14C-1 et seq. . . .

I

Plaintiffs attack the constitutionality of the reorganization act. Under that act, the Governor is authorized to prepare a reorganization plan and deliver it to both houses of the Legislature, N.J.S.A. 52: 14C-4. A plan will take effect unless both houses shall within 60 days after such delivery pass a concurrent resolution "stating in substance that the Legislature does not favor the reorganization plan," N.J.S.A. 52: 14C-7(a). The plan, if not thus disapproved, "shall have the force and effect of law" and will be published with the public laws, N.J.S.A. 52: 14C-7(c). The reorganization act further provides that all acts or parts of acts "inconsistent . . . with a reorganization plan adopted hereunder, are, to the extent of such inconsistency, hereby repealed." N.J.S.A. 52: 14C-11.

Plaintiffs . . . contend also that under the reorganization act the Governor would exercise legislative power in violation of Art. III, 1, which reads:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

Plaintiffs do not say the delegation to the Governor of authority to adopt a reorganization plan is defective for lack of adequate standards for the exercise of the delegated power. The standards are plainly sufficient. They are found in the statement of the purposes to be achieved, N.J.S.A. 52: 14C-2(a), and in the specification of what a reorganization plan may do, N.J.S.A. 52: 14C-4(a), and may not do, N.J.S.A. 52: 14C-6(a). Rather plaintiffs contend the power to reorganize is nondelegable, that is, it must be exercised by the Legislature itself, and perhaps also that the reservation of the authority in both houses to disapprove a plan renders invalid a delegation of power which, but for that reservation, would be constitutionally permissible.

Our statute, as the statement annexed to the bill reveals, was patterned upon the federal Executive Reorganization Act, 5 U.S.C.A. section 901 et seq. There, too, the chief executive is authorized to prepare plans for reorganizations within his branch of government, to become effective unless disapproved by either house of the Congress rather than by both houses as under the New Jersey statute, 5 U.S.C.A. section 906 (a).

The constitutionality of the federal act was sustained by three-man courts. . . .

In both cases, the United States Supreme Court found it unnecessary to pass upon the constitutional issue. The question has not since been raised. It is safe to say the constitutionality of the federal statute is now accepted.

Apparently the only other opinion involving such statutes is Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (Sup.Ct. 1950). There the Governor called for an advisory opinion as to the constitutionality of the New Hampshire executive reorganization act. The statute, as revealed by the opinion, was the same as ours in relevant aspects. The New Hampshire court split 3 to 2, the majority finding the statute to be invalid.

* * * * *

Plaintiffs would distinguish the federal cases cited above upon still another approach. They point out that although the Federal Constitution vests the "legislative Powers" in the Congress, Art. I, section 1, and the "executive Power" in the President, Art. II, section 1, and the "judicial Power" in the Supreme Court and the inferior courts created by the Congress, Art. III section 1, the Federal Constitution does not expressly call for a division of the total power "among three distinct branches" as does Art. III, section 1, of the State Constitution quoted above, or explicitly bar, as does that provision of the State Constitution, a person belonging to or constituting one branch from exercising any of the powers properly belonging to either of the other branches. Plaintiffs say that our Constitution is therefore more restrictive and sufficiently so to prevent the delegation here involved even though a like delegation by the Congress may not offend federal organic law.

There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution. It seems evident that in this regard the design spelled out in our State Constitution would be implied in constitutions which are not explicit in this regard. . . . We have heretofore said our State Constitution is "no more restrictive" in this respect than the Federal Constitution. Shelton Col-

lege v. State Board of Education, 48 N.J. 501, 518, 226 A.2d 612 (1967). Indeed in our State the judiciary has accepted delegations of legislative power which probably exceed federal experience. *Masset Building Co. v. Bennett*, 4 N.J. 53, 59-61, 71 A.2d 327 (1950); *In re Schragger*, 58 N.J. 274, 278-279, 277 A.2d 212 (1971). Hence the federal precedents cannot be discounted upon the thesis plaintiffs advance.

Chief Justice Marshall noted that "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 43, 6 L.Ed. 253, 263 (1825). If the line could be drawn, surely it would move in response to the growing complexity of government.

For present purposes, we think it enough to ask whether the statute so enhances the executive power as to threaten the security against aggregated power which the separation-of-powers doctrine was designed to provide. We must assume the Legislature found there is no such threat, and we must accept that evaluation unless it is plainly wrong. We cannot say it is. We note that the Governor is limited to rearranging what already exists. He is not empowered to decide what new or different authority should be vested in his branch of government. N.J.S.A. 52:14C-4(a) provides that the legislative objectives may be accomplished by transfer or abolition of the whole or a part of any agency or its functions; or by consolidation, merger or coordination of agencies or their functions; or by authorization of an officer to delegate his functions. Even within that prescribed area, the statute confines the delegated authority by providing that a reorganization plan may not create a new principal department in the executive branch or abolish a principal department or consolidate two or more of them; or extend the life of an agency; or authorize an agency to exercise a function not then expressly authorized by law; or increase the term of an office. N.J.S.A. 52:14C-6(a). We need not say a reorganization statute could not go further. We note the limitations in the statute to explain our finding that the statute as it stands is not vulnerable.

It was for the legislature to decide whether to delegate the power or to attempt itself to initiate plans of reorganization. The Legislature declared the purposes to be achieved by reorganization plans "may be accomplished in great measure by proceeding under this act, and can be accomplished more speedily thereby than by the enactment of specific legislation." N.J.S.A. 52:14C-2(b). There being authority to delegate the legislative power, it does not rest with us to quarrel with the legislative decision to make the delegation.

Plaintiffs assail the wisdom of certain aspects of the reorganization plan here involved. But the constitutionality of the statute does not turn upon whether a plan is wise or unwise in a judge's view. We cannot condemn the statute because mistakes might be made under its auspices. The responsibility for such policy decisions rests with the other branches of government, and this because of the very doctrine of separation of powers upon which plaintiffs rely.

It is well to repeat that while the doctrine of separation of powers is designed to prevent a single branch from claiming or receiving inordinate power, there is no bar to cooperative action among the branches of government. On the contrary, the doctrine necessarily assumes the branches will coordinate to the end that government will fulfill its mission. *In re Zicarelli*, 55 N.J. 249, 264-265, 261 A.2d 129 (1970), affirmed, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). The statute before us is not unique in thus delegating power to the head of another branch. The Congress has provided since 1789 that the federal judiciary shall have the power to prescribe rules of procedure. 28 U.S.C.A. sections 2071, 2072, 2075; 18 U.S.C.A. sections 3771, 3772. The constitutionality of that delegation was readily accepted long ago. *Wayman v. Southard*, *supra*, 10 Wheat. at 42-43, 6 L.Ed. at 262-263 (1825). Mention may also be made of N.J.S.A. 2A:84A-33 et seq., which provides that the State Supreme Court may adopt rules dealing with the admission or rejection evidence, subject to disapproval by joint resolution of the Legislature signed by the Governor, N.J.S.A. 2A:84A-36.

* * * * *

Discussion Notes

1. Does the presence of an explicit, textual reference to separation of powers seem to influence the Florida court? The New Jersey Court? For a comparison of the Florida and New Jersey approaches see Robert W. Martin Jr., "Legislative Delegations of Power and Judicial Review—

Preventing Judicial Impotence," *Florida State University Law Review* 8 (Winter 1980): 43.

2. For a case exploring the relationship between legislative guidelines or standards for administrative agency action, on the one hand, and procedural safeguards for agency decisions, on the other hand, see *Westervelt v. Natural Resources Comm.*, 263 N.W.2d 564 (Mich.1978).

Fink v. Cole
302 N.Y. 216, 97 N.E.2d 873 (1951)

LEWIS, Judge.

An appeal in each of the two proceedings captioned above presents for our decision a challenge to the constitutionality of section 7512 of McKinney's Unconsolidated Laws (Laws 1936, c. 440 section 9-b, added by Laws 1934, c. 310, section 5, as amended) which purports to delegate to The Jockey Club, a private corporation, certain powers which the appellant asserts the Legislature may not delegate within the framework of the Federal and State Constitutions. . . .

Insofar as appears from the records before us The Jockey Club's corporate charter has at no time empowered it to grant licenses of any kind. The only authority for the licensing power exercised by The Jockey Club came with the enactment of section 5 of chapter 310 of the Laws of 1934. . . . Under authority which had its origin in the statute, L.1934, ch. 310, section 5, as amd., The Jockey Club, a private corporation—for the purpose—as declared by the Legislature—of “. . . maintaining a proper control over race meetings conducted pursuant to section seven of this act [Unconsol. Laws section 7508]” was authorized to “license owners, trainers and jockeys at running races. . . .” Under section 7508 *id.* the Legislature provided further that “*Every such license shall contain a condition that all running races or race meetings conducted thereunder shall be subject to the reasonable rules and regulations from time to time prescribed by the Jockey Club, a corporation organized under the laws of the state of New York. . . .*” (Emphasis supplied.) The rules prescribed by The Jockey Club are known as the “Rules of Racing” of which “Rule 34,” bearing the caption “Powers of the Stewards of The Jockey Club,” provides in part as follows:

“34.(a) The Stewards of The Jockey Club shall have power, *at their discretion*, to grant licenses to Owners, Trainers and Jockeys and to such other persons, exercising their occupations or employed at race meetings as the State Racing Commission may determine to require a license from The Jockey Club; and such Stewards may revoke or suspend such licenses in accordance with the then existing laws of the State of New York. Every such license issued by The Jockey Club shall provide that the licensee shall comply with the Rules and Regulations of the Commission and these Rules of Racing, and that violation thereof may be punished by fine, suspension of the privileges accorded thereby, or revocation of the license. No license shall be issued by said Stewards to a

person shown *to the satisfaction of said Stewards* to be engaged, or to have been engaged in practices detrimental to the best interests of racing, including book-making or pool-selling, or to anyone so shown to be or to have been connected with any such person in any such practice, provided that, in cases in which the Stewards shall find that such occupation or connection has ceased for a sufficiently long period of time, they may, *in their discretion*, issue such license. Nor shall a license be issued by said Stewards to a person so shown to be *undesirable or financially irresponsible or otherwise unqualified*.

“(b) Upon application to the State Racing Commission of a person whose license has been refused or revoked, made within such period as may be prescribed by the then existing laws of the State of New York, such person shall be entitled to a prompt hearing before a joint session of the State Racing Commission and two Stewards of The Jockey Club in accordance with said laws, which joint session, acting as a board, shall take final action thereon.

“The State Racing Commission and two Stewards of The Jockey Club at a joint session, and acting as a board, shall have the power to suspend and/or revoke any license granted under Rule 34(a) after giving a licensee a reasonable opportunity to be heard. . . .” (Emphasis supplied.)

It thus appears that for the declared purpose of maintaining a proper control over race meetings within the State, the Legislature by sections 7512 and 7508 of the Unconsolidated Laws (*supra*) has delegated to The Jockey Club the power to license horse owners, trainers and jockeys at running races and, as an incident to that licensing power and under subdivision (a) of rule 34 of The Jockey Club's “Rules of Racing,” the stewards of that club are authorized to grant such licenses “*at their discretion*.” In fact, in the exercise of the broad discretion vested in them in the issuance of licenses—essentially a sovereign power—the stewards are officers of The Jockey Club who are neither chosen by, nor responsible to the State government. They are not sworn as public officers, nor are they removable as such.

The respondents rely chiefly upon *Grannan v. Westchester Racing Ass'n.* 153 N.Y. 449, 47 N.E. 896. There this court ruled that the Westchester Racing Association could lawfully exclude from its track the plaintiff who admitted he had bribed a jockey and had thereby violated one of the association's rules. In that case, however, the Westchester Racing Association was licensed pursuant to statute, L.1895, ch. 570, by the State Racing Commission—a governmental administrative body—rather than by a private corporation such as The Jockey Club. Accordingly, that case can hardly be invoked as authority for a view contrary to that indicated herein.

We are told that benefits of great worth to the maintenance of proper control over race meetings and to the improvement of the breed of horses have been derived from action by The Jockey Club. Even assuming that fact we are mindful that "... nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power." *Carter v. Carter Coal Co.*, 298 U.S. 238, 291, 56 S.Ct. 855, 864, 80 L.Ed. 1160.

In our view the delegation by the Legislature of its licensing power to The Jockey Club, a private cor-

poration, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of section 1 of article III of the Constitution of this State which provides: "The legislative power of this State shall be vested in the Senate and assembly. . . ."

Even if the Legislature's power to license had been delegated to a governmental agency, the statute now challenged would have to be stricken down for lack of guides and proper standards. . . .

Discussion Notes

1. See also *Group Health Insurance of New Jersey v. Howell*, 40 N.J. 436, 193 A.2d 103 (N.J. 1963); *State Bd. of Chiropractic Examiners v. Life Fellowship of Pennsylvania*, 441 Pa. 293, 272 A.2d 478 (1971); Louis L. Jaffe, "Law Making By Private Groups," *Harvard Law Review* 51 (December 1937): 201.

2. *Fink v. Cole* and other similar cases are discussed and analyzed in Note, "The State Courts and Delegation of Public Authority to Private Groups," *Harvard Law Review* 67 (June 1954): 1398. See also Note, "Delegation of Power to Private Parties," *Columbia Law Review* 37 (March 1937): 447.

People ex rel. Thomson v. Barnett 344 Ill. 62, 176 N.E. 108 (1931)

We hold that, under the Constitution of Illinois, the General Assembly is the sole depository of the legislative power of the state; that it has no power to delegate its general legislative power, and may not refer a general act of legislation to a vote of the people of the state to decide whether it shall have effect as a law except where the Constitution requires such reference; that the rule against the delegation of leg-

islative power is not violated by vesting in municipal corporations, certain powers of legislation on subjects of purely local concern connected with their municipal affairs, nor by local option laws the application of which to particular localities is made dependent upon their adoption by the voters of such localities, and that the act of June 14, 1929, to amend section 2 of an act to authorize judges of courts of record to appoint jury commissioners, and prescribing their powers and duties, is an unconstitutional delegation of legislative powers, and had no effect to change the Jury Commissioners Act or to authorize the selection of women as jurors.

Discussion Notes

1. This case is discussed in "Constitutional Law—Delegation of Legislative Power to the Peo-

ple," *University of Pennsylvania Law Review* 80 (November 1931): 129.

2. For the contrary view, see *Hudspeth v. Swayze*, 85 N.J.L. 592, 89 A. 780 (1914).

The Supreme Judicial Court of Massachusetts, in *In re Municipal Suffrage to Women*, 160 Mass. 586, 36 N.E. 488 (1894), had taken the same position as Illinois. Justice Oliver Wendell Holmes, Jr., however, filed the following opinion:

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

In reply to your order, I respectfully submit the following answer:

If the questions proposed to the justices came before us as a court, and I found myself unable to agree with my brethren, I should defer to their opinion, without any intimation of dissent. But the understanding always has been that questions like the present are addressed to us as individuals, and require an individual answer.

It is assumed in the questions that the legislature has power to grant women the right to vote in town and city elections. I see no reason to doubt that it has that power.

1. I admit that the constitution establishes a representative government, not a pure democracy. It establishes a general court, which is to be the

law-making power. But the question is whether it puts a limit upon the power of that body to make laws. In my opinion, the legislature has the whole law-making power, except so far as the words of the constitutions, expressly or impliedly, withhold it; and I think that, in construing the constitution, we should remember that it is a frame of government for men of opposite opinions, and for the future, and therefore not hastily import into it our own views, or unexpressed limitations derived merely from the practice of the past. I ask myself, as the only question, what words express or imply that a power to pass a law subject to rejection by the people is withheld? I find none which do so. The question is not whether the people of their own motion could pass a law without any act of the legislature. That, no doubt, whether valid or not, would be outside the constitution. So, perhaps, might be a statute purporting to confer the power of making laws upon them. But the question, put in a form to raise the fewest technical objections, is whether an act of the legislature is made unconstitutional by a proviso that, if rejected by the people, it shall not go into effect. If it does go into effect, it does so by the express enactment of the representative body. I see no evidence in the instrument that this question ever occurred to the framers of the constitution. It is but a short step further to say that the constitution does not forbid such a law. I agree that the discretion of the legislature is intended to be exercised. I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal, if it thinks that course to be wise. It has been asked whether the legislature could pass an act subject to the approval of a single man. I am not clear that it could not. The objection, if sound, would seem to have equal force against all forms of local option. But I will consider the question when it arises. The difference is plain between that case and one

where the approval required is that of the sovereign body. The contrary view seems to me an echo of Hobbes' theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory in language which almost is borrowed from the *Leviathan*. *Rice v. Foster*, 4 Har. (Del.) 479, 488. Hobbes urged his notion in the interest of the absolute power of King Charles I., and one of the objects of the constitution of Massachusetts was to deny it. I answer the first question, "Yes." I may add that, while the tendency of judicial decision seems to be in the other direction, such able judges as Chief Justices Parker, of Massachusetts, Dixon, of Wisconsin, Redfield, of Vermont, and Cooley, of Michigan, have expressed opinions like mine.

2. If the foregoing view of the power of the legislature is right, I am of opinion that the second question also should be answered, "Yes." I find nothing which forbids the legislature to establish a local option upon this point, any more than with regard to the liquor laws. Under the circumstances, I do not argue this or the following question at length.

3. The act suggested by the third question is open to the seeming objection that it might take a part of their power out of the hands of the present possessors, without their assent, except as given by their representatives. But if, as I believe, the legislature could give to women the right to vote, if they accepted it by a preliminary vote, and could impose as a second condition that the grant should not be rejected by the voters of the commonwealth, I do not see why it might not combine the two conditions into one, although, as a result, the grant might become a law against the will of a majority of the male voters. I answer this question, also "Yes."

OLIVER WENDELL HOLMES, Jr.

Discussion Notes

1. May the legislature condition the effectiveness of a law upon the approval at a referendum of an amendment to the state constitution that would remove some limitation on the enactment of such a law? See *Ammerman v. Markham*, 222 So.2d 423, 426-27 (Fla. 1969).

2. Why would a legislature want to submit a statute providing women with voting rights or the right to serve on juries to a vote of "the people"?

3. Consider the materials in Chapter 9, Section D.

Chapter 7

The State Judicial Branch

A. Introduction

The range of powers allocated to the judicial branch under state constitutions differs both quantitatively and qualitatively from the “judicial power” enumerated in Article III of the federal Constitution. The United States Supreme Court does, of course, have “supervisory” power over the federal courts. Alfred Hill, “The Bill of Rights and the Supervisory Power,” *Columbia Law Review* 69 (February 1969): 181. The range of policy-making powers of state supreme courts, however, goes far beyond this type of supervisory power.

For an exhaustive review of the evolution of state supreme courts and the nature of their workload and opinions, see Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler, “The Evolution of State Supreme Courts,” *Michigan Law Review* 76 (May 1978): 961; “The Business of State Supreme Courts, 1870-1970,” *Stanford Law Review* 30 (November 1977): 121; “State Supreme Courts: A Century of Style and Citation,” *Stanford Law Review* 33 (May 1981): 773; and “Do the ‘Haves’ Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970,” *Law and Society Review* 21 (No. 3 1987): 403. Recent books concerning a range of issues on state supreme courts include G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (New Haven, Yale University Press, 1988); *State Supreme Courts: Policymakers in the Federal System*, eds. Mary Cornelia Porter and G. Alan Tarr (Westport, Conn.: Greenwood Press, 1982).

One of these studies concluded that state supreme court justices

... have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.

“The Business of State Supreme Courts,” 155.

One of the most important innovations in state court structure in the Twentieth century is the advent of intermediate appeals courts, which are often the courts of last resort for many matters, thereby freeing state supreme courts from some of the pressure of caseloads. See generally, Project, “The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination,” *Stanford Law Review* 33 (May 1981): 951; Note “Courting Reversal—The Supervisory Role of State Supreme Courts,” *Yale Law Journal* 87 (May 1978): 1191. For an in-depth study of the Florida District Courts of Appeal, see John M. Scheb, “Florida’s Courts of Appeal: Intermediate Courts Become Final,” *Stetson Law Review* 13 (Spring 1984): 479.

William F. Swindler, “Seedtime of an American Judiciary: From Independence to the Constitution”

William and Mary Law Review
17 (Spring 1976): 503.

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The Closing of the Royal Courts

In the increasing disputes between the colonies and the mother country preceding the war for independence, the nature of law and of the courts in British North America periodically came into question. Colonial leaders pointed retrospectively to the assumption, embodied in the earliest colonial charters, that the common law, modified to apply to the local needs of each settlement or “plantation,” was the root stock of American jurisprudence. Once the issue of the authority of the common law in the colonies was belatedly raised, English authorities countered with the declaration that neither the common law nor

the English Constitution followed the flag except as England decreed. Essentially, this was the impasse on which the hope of avoiding revolution ultimately perished.

Although their authority to do so might be called into question, the colonies proceeded to adopt or adapt the common law, setting up systems of courts resembling the judicial structure remembered from England, but modified to the needs of each colony.³ Whatever the particular variations at the level of courts of first instance, one feature of the colonial judicial system was consistent: appeals lay from each colony directly to the Privy Council in London.⁴ Thus, when independence was declared, that appellate system became extinct for practical purposes. A new state constitution might undertake to create a new internal judicial system, both trial and appellate, but it could not fill completely the vacuum left by the defunct system of royal justice; beyond the individual jurisdiction of the state, there was no judicial machinery for the settlement of issues involving interstate and international questions.

The Declaration of Independence finalized the suspension of royal administration of justice in the colonies, but when that instrument was adopted by the Second Continental Congress in the summer of 1776, the royal courts had been closed for varying periods of time. The Massachusetts Government Act of 1774⁵ had reorganized the administration of justice in that recalcitrant province, and the action of the provincial ad hoc assembly that responded to the parliamentary coercion marked the effective end of the royal court system in the colony. In the fall of 1775 Lord Dunmore extinguished the royal court system in Virginia by placing the colony under martial law. Indeed, the actions of all the colonies the previous winter, in assembling to elect delegates to the Second Continental Congress, had evidenced the end of the royal system.

Once before, in the Stamp Act crisis, the courts had closed their doors and suspended business.⁶ The finality of the break with England led to similar action; in Virginia the last session of the colonial assembly, acting in response to Dunmore's general suspension of civil power, pronounced it impossible for the civil courts to continue. Eighteen months later,

³Among various studies on the colonial judicial system, see J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* (1944); G. Haskins, *Law and Authority in Early Massachusetts* (1960); W. Nelson, *The Americanization of the Common Law* (1975); A. Stokes, *A View of the Constitution of the British Colonies in North America and the West Indies* (1783), reprinted 1969.

⁴See J. Smith, *Appeals to the Privy Council from the American Plantations* (1950).

⁵*Geo.*, 3, c. 39.

⁶See E. Morgan, *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-66*, at 104-26 (1959).

the assembly enacted legislation to permit their reopening.⁷ In most states where similar action was taken, the structure and procedure of the courts remained unchanged. What did change was the extrajudicial situation, from a relation between colony and Crown on a colony-by-colony basis, to an interstate, and finally to a national state, relation. Independence had broad consequences for the administration of justice in the new United States. Not only did the official hiatus between the colonial system and the new federal-state system of judicial organization create disputes that required settlement following the Revolution,⁸ but there was also the problem of discontinuity of the system of law itself. The "reception" of the common law and the retention in force of selected parliamentary enactments required affirmative initiative by the new legislatures.⁹ Further, the question of judicial independence had to be resolved. Although some constitutional theorists assumed that the English concept of justice as an ingredient of the executive function would be retained, the prevailing doctrine of separation of powers moved in an opposite direction.¹⁰ What was of greater importance was the independence of judiciary, not from the other branches of government, but from the electorate.¹¹

⁷Statutes at Large of Virginia 368 (ch. 3, 1777) (W. Hening ed. 1819-23, reprinted 1969 [hereinafter cited as *Hen. (Va.)*]):

Whereas the troubles in which this commonwealth hath been involved, and its distressed circumstances, included the general convention, by several resolutions, to recommend it to the courts of justice not to proceed to the trial of suits, . . . and it is now judged indispensably necessary that all the said courts should be opened, for the general administration of justice: *Be it therefore enacted*. . . . That all the said resolutions of convention . . . are hereby repealed.

⁸A common form of controversy involved claims of English creditors against colonial debtors; such disputes were exacerbated by wartime sequestering statutes purporting to extinguish the liability. *See, e.g.* 9 *Hen. (Va.)* 377 (ch. 9, 1777). Like the proliferating interstate questions that awaited a national forum for adjudication, the adjustment of pre-Revolutionary claims by postwar settlements was not finally effectuated until a viable national power had been established under the Constitution of 1787. *Cf. Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

⁹*See, e.g.* 9 *Hen. (Va.)* 126, section 6 (ch. 5, 1776). *See also* E. Brown, *Survival of British Statutes in American Law, 1776-1836* (1964).

¹⁰*See* 1 J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 50-142 (1971).

¹¹Although the first state constitutions did not provide for electoral control over the judiciary, the impetus of Jacksonian democracy, a half century later, would cause many state judicial articles to be rewritten. For a general discussion of this development, see *Justice '76* (G. Winters ed.) (to be published in 1976 by the American Judicature Society [hereinafter cited as *Justice '76*]).

Thus, the nascence of the American judiciary was not an effortless duplication of English forms. States were required to develop judicial structures suited to their needs, and the new nation was obliged to devise judicial machinery to substitute effectively for the jurisdiction of the Crown over interstate and international disputes. The steps taken to lay this foundation commenced the evolution of the American judiciary.

Judicial Structures in the New States

Eleven of the thirteen states drafted constitutions for themselves following independence; Connecticut and Rhode Island were content to continue their governments under their colonial charters. The constitutional provisions generally eschewed innovative efforts to restructure the judicial power; the language assumed a continuation of the pre-Revolutionary court system. Another assumption was that the paramountcy of legislative power would limit and define the jurisdiction and authority of the judiciary. Thus, in the first decade after independence, the constitutional references to the court structure were concerned with general functions, and the details of organization, procedure, and jurisdiction were adjusted eventually by legislation.

* * * * *

Students of the first state constitutions insist that the documents comprised two classes, those trying to preserve the existing order and those attempting to

replace it,¹⁶ but the provisions on the judicial power generally continued the organizational principles of the colonial era.

* * * * *

The Theory of the Judicial Function

The state constitutions implicitly or explicitly accepted the doctrine of separation of powers, though in many documents some control of the judicial process was vested in the legislative branch. . . . [T]he independence of judges generally was accepted, despite the animosity bred by the royal judges in the last years before the Revolution. Original and appellate jurisdictions, as one writer has observed, rarely were sharply distinguished,²¹ and few of the first constitutions made as definite a provision for last resort as did the Delaware instrument of 1792. Four states, Delaware, Georgia, New Hampshire, and South Carolina, scarcely mentioned the judiciary in their first sketchy constitutions; their succeeding instruments, however, generally set out in detail provisions on their courts.

¹⁶See, e.g., A. Nevins, *The American States During and After the Revolution, 1775-1789*, at 139, 157 (1927); G. Wood, *The Creation of the American Republic, 1776-1787*, at 391-469 (1969).

²¹See L. Friedman, *A History of American Law* 123-125 (1973).

Discussion Notes

1. The New Jersey Constitution of 1776, Article IX, provided:

That the Governor and Council, [the upper house of the legislature] (seven whereof shall be a quorum) be the Court of Appeals, in the last resort, in all clauses of law, as heretofore; and that they possess the power of granting pardons to criminals, after condemnation, in all cases of treason, felony, or other offenses.

This mechanism, which provided *political* review of *legal* decisions, remained in place until 1844. Chief Justice Hornublower, a delegate to the 1844 Constitutional Convention, commented that the Court of Appeals had "long since been christened by eminent counsel, not the Court for the correction of errors but the Court of high errors!" John Bebout, "Striking a Balance: Demand for an Independent Judiciary, 1776-1844," in *Jersey Justice: Three Hundred Years of the New Jersey Judiciary*, ed. Carla Vivian Bello and Arthur T. Vanderbilt II (Newark, N.J.: Institute for Continuing Legal Education, 1978) p. 122.

2. A major argument of Alexander Hamilton in *The Federalist* No. 81, in support of the

independent federal judiciary, was that it did not follow states like New Jersey, but was rather "a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia; and the preference which has been given to those models is highly to be recommended." *The Federalist* No. 81, at 525 (A. Hamilton) (Modern Library Ed. 1937).

3. Article XXIX of Massachusetts' 1780 Declaration of Rights provided:

Art. XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.

B. Judicial Review under State Constitutions

The doctrine of judicial review in federal constitutional law dates from Chief Justice Marshall's famous opinion in *Marbury v. Madison*, 5 U.S. 137 (1803). Interestingly, a number of state courts had exercised this power well before 1803, and even before the federal constitution was ratified. Edward S. Corwin contended that "[A]s a practice, judicial review made its initial appearance in independent America in 1780, in the case of *Holmes v. Walton*." Edward S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review* 30 (April 1925): 521. *Holmes v. Walton* was a New Jersey decision striking down a statute providing for only six-man juries for persons accused of trading with the British, despite the 1776 constitutional guarantee of jury trial rights, which at common law required a twelve-man jury. See generally, Austin Scott, "*Holmes v. Walton*: The New Jersey Precedent," *American Historical Review* 4 (April 1899): 456.

Justice Gibson of the Pennsylvania Supreme Court wrote one of the most thoughtful arguments against the exercise of judicial review by state courts under state constitutions, although supporting it under the federal constitution, in 1825. *Eakin v. Raub*, 12 Sergeant and Rawle (Pa.) 330, 343-58 (1825) (Gibson, J., dissenting). See generally Robert Clinton, "*Eakin v. Raub*: Refutation or Justification of *Marbury v. Madison*?" *Constitutional Commentary* 4 (Winter 1987): 81. Twenty years later, after becoming Chief Justice, Gibson interrupted counsel who had cited *Eakin v. Raub* and said:

I have changed that opinion for two reasons. The late Convention [the 1838 Pennsylvania Constitutional Convention], by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the

legislature; and from experience of the necessity of the case.

Norris v. Clymer, 2 Pa. St. Rep. 277, 281 (1845).

For studies of the early development of judicial review under state constitutions, see Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9 (December 1910): 102; James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (October 1893): 129; William E. Nelson, "The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (May 1978): 893; "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1800," *University of Pennsylvania Law Review* 120 (June 1972): 1166.

In the waves of revision of state constitutions over the years, there seems to have been little controversy over increasingly prevalent practice of judicial review. Finally, a number of modern state constitutions contain explicit textual recognition, or even mandates, of judicial review:

Georgia Constitution, Art. I, Sec. 2, para. 5.

Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.

North Dakota Constitution, Art. VI, Sec. 4.

A majority of the supreme court [consisting of 5 justices] shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment

unconstitutional unless at least four of the members of the court so decide.

Does the presence of such a provision in a state constitution change the nature of the debate over the "legitimacy" of judicial review? For discussions of this debate at the federal level, see Symposium, "Constitutional Adjudication and Democratic Theory," *New York University Law Review* 56 (May-June 1981): 259; Symposium, "Judicial Review Versus Democracy," *Ohio State Law Journal* 42 (No. 1, 1981): 1.

**Robert F. Williams,
"In the Supreme Court's Shadow:
Legitimacy of State Rejection of
Supreme Court Reasoning and Result"**

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**C. The Position and Function of the
State Judiciary**

The typical state court system occupies a different institutional position and performs a different judicial function from its federal counterpart. The typical state constitution also differs from its federal counterpart in many ways. Consequently, state court judicial review of state statutes or executive actions is or should be qualitatively different from the Supreme Court's judicial review of the same statutes or actions. . . .

First, the typical state court's institutional position in the state system is different from the Supreme Court's position in the federal system. That is, the relationship between state supreme courts and state legislatures is fundamentally different from the Supreme Court's relationship to Congress. Beginning soon after independence, the balance of power between state legislatures and judiciaries has been gradually shifting, increasing judicial authority at the expense of legislative authority. In fact, the legislative article of most state constitutions contains many procedural and substantive restrictions on the legislature's once unrestricted, plenary authority. The original state constitutions did not include these restrictions, but they were later added in response to perceived abuses of state legislative authority. Most of these restrictions are enforceable by state courts.

Also, state courts quite obviously occupy a stronger position vis-a-vis the state legislative and ex-

ecutive branches than does the United States Supreme Court. This is not to discount the judicial deference to which state legislative and executive actions are entitled, but to highlight the extra measure of deference, based upon federalism and other institutional concerns, which the Supreme Court accords to state legislative and executive action.

Further, state court decisions directly affect only the state in which they are rendered. Judges and commentators often note this fact in support of the idea of states as "laboratories"; in other words, ill-advised experiments will affect only the citizens of the experimenting state. . . . For all these reasons, state courts are often deeply involved in the state's ongoing policymaking process (constitutional and nonconstitutional).²²⁶ Although the extent of this involvement may vary from state to state, such judicial involvement nevertheless reflects a very different institutional position from that occupied by the United States Supreme Court.

Second, the typical state court's judicial function is different from the Supreme Court's. For example, state courts have traditionally performed much non-constitutional lawmaking. As Justice Linde observed:

When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in contracts of adhesion, its action is rarely attacked as "undemocratic." Nor is this judicial role peculiar to matters of common law subject to legislative reversal. The accepted dominance of courts in state law extends to their "anti-majoritarian" role in review of their coordinate political branches in state and local governments.²²⁸

²²⁶H. Glick, *Supreme Courts in State Politics* 5 (1971): "State supreme courts are not simply duplications of the national court at a lower level of the judicial hierarchy. Instead, they are distinctive institutions which are integral parts of state political and legal systems." See also H. Jacob & K. Vines, *Politics in the American States: A Comparative Analysis* 246 (3d ed. 1976) ("[I]t becomes apparent that the state courts make significant policies in many of the same substantive areas as the other organs of government.").

²²⁸Linde, *supra* note 22, at 248. See also Baum and Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in M. Porter & G. Tarr, *supra* note 90, at 83. The "legitimacy" of such common-law decisions is sometimes attacked as invading the province of the legislature. See Generally Bischoff, *The Dynamics of Tort Law: Court or Legislature?* 4 *Vt. L. Rev.* 35 (1979).

State Supreme Courts also pursue policy initiatives outside their formal judicial role in the adversary process, including direct and indirect contact with legislators. See Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 *Law & Soc. Rev.* 271 (1970).

Federal courts have been denied this general²²⁹ law-making power since 1938.²³⁰

Most state supreme courts promulgate law through rulemaking powers. They also exercise various "inherent powers," usually at the expense of the legislative branch. Once thought to be legislative in nature, these powers have devolved upon state judiciaries during this century.

State supreme courts do not face the same overwhelming caseload pressures and jurisdictional restrictions as does the United States Supreme Court. Some state courts even have "reach down" provisions,²³³ enabling them to obtain jurisdiction quickly over state constitutional conflicts requiring early resolution. Therefore, state courts are able to approach state constitutional analysis on a narrower, more incremental basis²³⁴ than the Supreme Court, which labors under intense pressure for broader, more sweeping pronouncements.

Further, state courts may be viewed as closer to state affairs and more accountable²³⁵ than federal courts. Standing and justiciability barriers are usually lower at the state level.²³⁶ And in certain areas, such as criminal procedure, state trial judges are more experienced than federal judges in the problems of administering Supreme Court formulations on a daily basis. Many state judges now view their roles as some

times requiring controversial constitutional rulings.²³⁷

Third, state constitutional rights may differ qualitatively from federal constitutional rights. Some state constitutions, for example, grant or are judicially interpreted to provide citizens with certain affirmative rights.²³⁸ These rights may require different and more aggressive judicial enforcement than is necessary in federal constitutional law, which is concerned primarily with limiting governmental power.²³⁹

Also, the text of a state constitution may provide for state judicial review of legislative and executive action.²⁴⁰ This is certainly true with respect to state supreme courts' advisory opinions.²⁴¹ In fact, judicial review itself was a phenomenon of state law before *Marbury v. Madison*.²⁴² And contrary to the federal experience, most judiciary provisions of state constitutions have been revised and ratified in this century without a serious struggle over the exercise of judicial review.

State constitutions are generally longer and more detailed than their federal counterpart. Many state constitutions directly regulate or restrict state government activities. The state constitution is a document that primarily limits the legislature.²⁴³ State courts interpreting state constitutions are therefore thrust more deeply, and more often, into the affairs of the coordinate branches of government²⁴⁴ than is the Supreme Court.

²²⁹As of the remaining areas of "federal common law," see Friedly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U.L. Rev. 383 (1964).

²³⁰*Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²³³See, for example, England, Hunter and Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147, 193-96 (1980); England and Williams, *Florida Appellate Reform One Year Later*, 9 Fla. St. U. L. Rev. 221, 250-53 (1981).

²³⁴*Cf.* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 Harv.L.Rev. 769, 778-79 (1971).

²³⁵See *Developments in the Law*, *supra* note 2, at 1351. See also Ladinsky and Silver, *Popular Democracy and Judicial Independence*, 1967 Wis. L. Rev. 128; Moser, *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 Marq. L. Rev. (1982) (tracing various methods of ensuring judicial accountability); *But see* Canon, *The Impact of Formal Selection on the Characteristics of Judges Reconsidered*, 6 Law & Soc'y Rev. 591 (1972) (citing lack of difference between elected and appointed judges); Flango and Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 Just. Sys. J. 25 (1979) (same).

In 1808 two Ohio judges were impeached apparently because they held a legislative act unconstitutional. See T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 193 n.3 (6th ed. 1890).

²³⁶Linde, *supra* note 22, at 248; Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 Harv. L. Rev. 1373, 1400-02 (1978).

²³⁷Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 Wm. & Mary L.Rev. 789, 791 (1981). See also Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 Case W. Res. L.Rev. 158, 159 n.8 (1981). *But see* Karst, *Book Review*, 28 Stan. L. Rev. 829, 834-35 (1976) (correlating the method of judicial selection with state constitutional activism). . . .

²³⁸*Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wash. 2d 230, 240-43, 635 P.2d 108, 114-15 (1981).

²³⁹Handler, *supra* note 164, at 205 (citing *Right to Choose v. Byrne*, 91 N.J. at 331-32, 450 A.2d at 948-49 (Pashman, J., concurring in part and dissenting in part)). *See also Alderwood Assocs.*, 96 Wash. 2d at 240, 635 P.2d at 114.

²⁴⁰See, e.g., Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief for Violations of Rights*, 10 U. Balt. L. Rev. 102, 107-11 (1980); Ill. Const. Art. IV sec. 13 (1970) (whether a special act of the legislature is or could be governed by general law is a judicial question).

²⁴¹See generally Williams, *supra* note 2, at 212-13; Comment, *The State Advisory Opinion in Perspective*, 44 Fordham L.Rev. 81 (1975).

²⁴²5 U.S. (1 Cranch) 137 (1803). *See generally* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. Pa. L. Rev. 1166 (1972).

²⁴³Williams, *supra* note 2, at 178-79.

²⁴⁴See generally Grad, *The State Constitution: Its Function and Form for Our Time*, 54 Va. L. Rev. 928 (1968).

State judicial review, therefore, is not simply a miniature replication of Supreme Court judicial review. Federal judicial review since *Marbury*²⁴⁵ takes place in a unique institutional setting.

²⁴⁵See *supra* note 242 and accompanying text. Of course,

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), invalidated a federal, not a state, statute. But the Marshall Court soon invalidated state laws in cases such as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See generally J. Nowak, R. Rotunda, & N. Young, *Constitutional Law* 15-21 (2d ed. 1983).

C. Judicial Rulemaking under State Constitutions: Practice and Procedure

These materials are primarily concerned with the decisions of state courts in *adjudicated* cases. This is, generally speaking, what we think of courts doing—resolving controversies between litigants, or adjudicating disputes. A major component, however, of the judicial powers of state supreme courts under state constitutions is exercised through nonadjudicatory policymaking—the rulemaking power.

Early in this century commentators began to assert that the power to regulate practice and procedure in the courts was an *inherent* judicial power. John Henry Wigmore argued in 1928 that “*the legislature . . . exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary’s duties; and that therefore all legislatively declared rules for procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution.*” John Henry Wigmore, “All Legislative Rules for Judiciary Procedure are Void Constitutionally,” *Illinois Law Review* 23 (November 1928): 276. See also Roscoe Pound, “The Rulemaking Power of the Courts,” *American Bar Association Journal* 12 (September 1926): 599.

In more modern times, state constitutions have been amended specifically to include this power for state supreme courts.

Article 6, Section 2, Paragraph 3 of the New Jersey Constitution provides:

The Supreme Court shall make rules governing the administration of all courts in the State and *subject to law*, the practice and procedure in all such courts. . . .

In the following case, the court confronted the question of whether the time period in which an appeal may be taken was governed by a court rule or by a conflicting statute.

Winberry v. Salisbury
5 N.J. 240, 74 A.2d 406 (1950),
cert. denied
340 U.S. 877 (1950)

* * * * *

The phrase “subject to law” is not only ambiguous, but elliptical. No word in the law has more varied meanings than the term “law” itself. Nor is the phrase “subject to” crystal clear, for the phrase implies a limitation rather than a grant of power. It is argued by the plaintiff that “subject to law” means subject to statute law or legislation. If this is what the Constitutional Convention intended, it would have been easy for it to say so. We must take the phrase as we find it and endeavor to ascertain its meaning in the light of the entire Constitution and of the intent of the people in adopting it. There can be no doubt in the mind of anyone familiar with the work of the Constitutional Convention or with the ensuing election at which the Constitution was adopted by the people that, along with the desire to strengthen the powers of the Governor and to amplify the powers of the Legislature, there was a clear intent to establish a simple but fully integrated system of courts and to give to the judiciary the power and thus to impose on them the responsibility for seeing that the judicial system functioned effectively in the public interest. Indeed, in the minds of many, if not a majority, of our citizens this was the primary reason for their desire for a new constitution.

If “subject to law” were to be interpreted to mean subject to legislation, it would necessarily follow that once the Legislature had passed a statute in

conflict with a rule of court, the rule-making power of the Supreme Court would be *functus officio*, for it would be intolerable to hold, as has been suggested to us, that after the Legislature has passed an act modifying a rule of court, the Supreme Court might in turn adopt a new rule overriding the statute, and so on *ad nauseam*. Such an unseemly and possibly continuous conflict between these two departments of the state government could never have been contemplated by the people. And yet if “subject to law” means subject to legislation, any other construction of the rule-making power would be in conflict with the fundamental rule of constitutional construction that unless the context clearly requires otherwise, a constitutional grant of authority is to be interpreted as a continuing power. As one studies the Judicial Article of the Constitution and its carefully designed provisions for an efficient judicial organization with unusual powers of effective administration, it is evident that the people of this State thought of the rule-making power in the Supreme Court as a continuous process. In this connection it is significant to note that neither the Constitution of 1776 nor that of 1844 contained any provisions whatsoever as to rule-making, admission to the practice of law, the discipline of the bar, an administrative head of the courts, or the assignment of judges. All of these powers are necessarily of a continuing nature if the judges are to be held responsible for the functioning of the courts. It is inconceivable that the people granted continuing power to the courts in all these respects but withheld it with reference to rule-making, which is quite as essential to the operation of an integrated judicial establishment as are any of the other powers.

Article VI, Section II, paragraph 3 of the new Constitution not only gives the Supreme Court the rule-making power, but it imposes on the Supreme Court an active responsibility for making such rules—“The Supreme Court *shall* make rules.” If there were any doubt as to the continuous nature of the rule-making power, such doubt would be resolved by this imposition of the positive obligation on the Supreme Court to make rules for all the courts.

An analysis of all of the pertinent provisions of the Constitution serves to convince us that the phrase “subject to law” cannot be taken to mean subject to legislation. . . .

What, then, is the meaning of “subject to law”? The only interpretation of “subject to law” that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice. The distinction between substantive law, which defines our rights and duties, and the law of pleading and practice,

through which such rights and duties are enforced in the courts, is a fundamental one that is part of the daily thinking of judges and lawyers. Substantive law includes much more than legislation, it comprehends also the rights and duties which have come down to us through the common law. The phrase “subject to law” in Article VI, Section II, paragraph 3 of the Constitution thus serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such. While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power.

The only contrary authority that has been cited to us is the statements contained in the Report of the Judiciary Committee of the Constitutional Convention. Thus, it said at pages 7 and 8 of its report:

The third shortcoming of the existing judicial organization, and perhaps the most costly, is the total lack of business-like organization, coordination and supervision of the courts as a whole. A corollary feature of this condition is the practice of resigning responsibility for the formulation of practice and procedure to intermittent revision by the Legislature. . . . This Court was given the power to make rules for administration, practice and procedure in all courts, subject to the overriding power of the Legislature with respect to practice and procedure.

But this report of the Judiciary Committee, though dated August 26, 1947, was not handed to the members of the Convention until August 28th, I *Convention Proceedings Record* 809, two days after the Judicial Article had been adopted by the Convention on August 26th, I *Convention Proceedings Record* 809, two days after the Judicial Article had been adopted by the Convention on August 26th, I *Convention Proceedings Record* 793. The report of the Judiciary Committee therefore cannot be deemed a part of the parliamentary history of the Constitution, for it was not known to and was not acted upon by the members of the Constitutional Convention in voting in favor of Article VI, creating a new judicial system. The report, moreover, while signed by all of the members of the Committee, concludes by saying, “Although the foregoing is the report of the Judiciary Committee, it is not necessarily to be inferred that the comments therein contained express the views of all members.” Thus not only was the report of the Judiciary Committee from which we have quoted not before the Convention at the time that it acted on Article VI, but a search of the entire proceedings fails to disclose any debate on the meaning of the phrase “subject to law.” The chief debate on the Judicial Article was be-

tween the merits of the proposal submitted by the Judiciary Committee and another proposal submitted from the floor.

* * * * *

CASE, J. (concurring). I concur in the finding that the initial authority to make rules lay with the court, that the appeal from the judgment of May 25, 1949, was not taken within the time fixed by rule. . . .

However, the court has taken this opportunity to consider at length the constitutional authority of the court to make rules, and as I do not agree in an important respect with the majority opinion I am constrained to state my views and my reasons. The questions are—Do the words “subject to law,” as used in Article VI, Section II, paragraph 3 of the 1947 Constitution mean anything? And if they mean something, what do they mean?

* * * * *

I believe that most students of the law, following the usual rules of construction and interpretation,

and not being swerved by the impulse to find a way of reaching a desired result, will find little to criticize in the learned and human opinion written herein by Judge Bigelow for the Appellate Division in which it is said: —

In our opinion, it was the intention of the people of the State thereby to vest in the new Supreme Court a power to regulate procedure that would be unhampered and unrestricted by the common law or by statute enacted prior to the adoption of the Constitution. The expression ‘subject to law’ referred to statutes that might thereafter be enacted by the legislature pursuant to the general grant of legislative power contained in Article IV of the new Constitution. The legislature is given the final word in matters of procedure; it may expressly or by implication nullify or modify a procedural rule promulgated by the Supreme Court, or it may take the initiative in a matter of procedure when it deems that course wise.

Discussion Notes

1. *Winberry v. Salisbury* led to a spirited debate in the *Harvard Law Review*. See Benjamin Kaplan and Warren J. Greene, “The Legislature’s Relation to Judicial Rule-Making: An Appraisal of *Winberry v. Salisbury*,” *Harvard Law Review* 65 (December 1951): 234; and Roscoe Pound, “Procedure Under Rules of Court in New Jersey,” *Harvard Law Review* 66 (November 1952): 28.

2. An attempt to overrule *Winberry* by state constitutional amendment in 1951 failed. Kaplan and Greene, “The Legislature’s Relation to Judicial Rule-Making,” 252-53.

3. See generally Leo Levin and Anthony G. Amsterdam, “Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,” *University of Pennsylvania Law Review* 107 (November 1958): 1; Charles W. Joiner and Oscar J. Miller, “Rules of Practice and Procedure: A Study of Judicial Rule-Making,” *Michigan Law Review* 55 (March 1957): 623; Kenneth S. Gallant, “Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,” *Oklahoma Law Review* 38 (Fall 1985): 447.

In re Florida Rules of Criminal Procedure 272 So.2d 65 (Fla. 1973).

* * * * *

ADKINS, Justice (concurring):

The question of whether a rule relates to substantive law or practice and procedure is one which constantly arises. In *State v. Garcia*, 229 So.2d 236 (Fla.1969), we said:

As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishments therefor, while procedural law is

that which provides or regulates the steps by which one who violates a criminal statute is punished. See *State v. Augustine*, 197 Kan. 207, 416 P.2d 281 (1966). (p. 238)

Similar definitions were used in *Gaspin v. State*, 76 Ga.App. 375, 45 S.E.2d 785 (Ga.App.1947); *State v. Rodosta*, 173 La. 623, 138 So. 124 (1931); *Roberts v. Love*, 231 Ark. 886, 333 S.W.2d 897 (1960); *State v. Augustine*, 197 Kan. 207, 416 P.2d 281 (1966); *State v. Capaci*, 179 La. 462, 154 So. 419 (1934).

Practice and procedure pertains to the legal machinery by which substantive law is made effective. *Herberle v. P.R.O. Liquidating Co.*, 186 So.2d 280 (Fla.App. 1st, 1966); *State v. Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964); *Woodward v. Southern Pac. Co.*, 35 Cal.App.2d 130, 94 P.2d 1028 (1939); *Allen v.*

Bailey, 91 Colo. 260, 14 P.2d 1087 (1932); Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953); Jones v. Erie Railroad Co., 106 Ohio St. 408, 140 N.E. 366 (1922); Jones v. Garrett, 192 Kan. 109, 386 P.2d 194 (1963); King v. Schumacher, 32 Cal.App.2d 172, 89 P.2d 466 (1939); and Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948). It has also been said that substantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights. Meagher v. Kavli, 251 Minn. 477, 88 N.W.2d 871 (1958); Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1928); Baker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371 (1937); State v. District Court, 399 P.2d 583 (Wyo. 1965).

Substantive rights are those existing for their own sake and constituting the normal legal order of society, i.e., the right of life, liberty, property and reputation. Remedial rights arise for the purpose of protecting or enforcing substantive rights. Estate of Gogabashvele v. Kapanadze, 195 Cal.App.2d 503, 16 Cal.Rptr.77 (1961).

We have said that "practice" means the method of conducting litigation involving rights and corresponding defenses, Skinner v. City of Eustis, 147 Fla. 22, 2 So.2d 116 (1941), or the manner in which the power to adjudicate or determine is exercised, Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930). It has also been said that "practice" is the method of conducting litigation. Dadswell v. State ex rel. Phillips, 186 So.2d 274 (Fla.App.2d 1966).

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure."

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution. See Kellman v. Stoltz, 1 F.R.D. 726 (N.D., Iowa, 1941).

The Revised Criminal Rules of Procedure describe the machinery by which substantive rights are protected and enforced. They are within the purview of the term "practice and procedure" as used in Fla. Const., art. V, sec. 3, F.S.A.

Discussion Notes

1. Article 5, Section 2(a) of the Florida Constitution provides:

The supreme court shall adopt rules for the practice and procedure in all courts . . .

These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The Florida Supreme Court has held this does not authorize repeal by *implication* in statutes not by their terms repealing a court rule. *Carter v. Sparkman*, 335 So. 2d 802, 808 (Fla. 1976), *cert denied*, 429 U.S. 1041 (1977). Further, the legislature may only veto, but not amend, a court rule. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973).

2. The Florida court has, *sua sponte*, ruled statutes unconstitutional as infringing on the Court's rulemaking power even in the absence of an adversary proceeding. *Ibid.*; *In re The Florida*

Bar—Code of Judicial Conduct, 281 So. 2d 21, 22 (Fla. 1973).

3. The Court has been willing, however, to accept policy judgments contained in legislation which, although unconstitutional as an incursion into the Court's rulemaking power, reflect a needed change or addition to "practice and procedure." It does this by adopting the legislative provision as a court rule. See, e.g. *Avila South Condominium Assn. v. Kappa Corp.*, 347 So. 2d 599, 607-08 (Fla. 1977); *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973).

4. Could the legislature thereafter amend the "statute/court rule"? *Compare In re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204, 205 (Fla. 1973) ("The fact that this Court may adopt a statute as a rule does not vest the Legislature with an authority to amend the rule indirectly by amending the statute. In other words, an attempt by the Legislature to amend a statute which has become a part of rules of practice and procedure would be a nullity") *with* Chapter 75-148, *Laws of Florida* 1975.

People v. McKenna
585 P.2d 275 (Colo. 1978)

CARRIGAN, Justice.

The appellant was convicted by a jury of first-degree sexual assault. He appeals, raising four principal issues. We affirm.

A detailed factual discussion of this sexual attack would serve no useful purpose. Only those facts necessary to our decision will be discussed.

1. *Constitutionality of Section 18-3-407*, C.R.S. 1973 (1977 Supp.).

The appellant first questions the constitutionality of Colorado's "rape shield" statute, section 18—3—407, C.R.S. 1973 (1977 Supp.). That statute provides that, except in certain instances not pertinent here, in rape and sexual assault cases, evidence of the victim's prior or subsequent sexual conduct is presumed to be irrelevant. The statute further prescribes a pretrial screening procedure, much like the in camera hearing conducted on a motion in limine, to review proposed evidence on such matters for relevancy before it can be presented publicly at the trial. Appellant contends that the statute amounts to a legislative attempt to create rules of procedure for the courts and therefore violates the separation of powers doctrine by invading this court's constitutional rulemaking power. . . .

A. Separation of Powers and Court's Rulemaking Power

The concept of separation of powers is well established in Colorado. The Colorado Constitution, in Article III, generally provides that the executive, legislative, and judicial departments each shall exercise only its own powers. In addition, *Colo. Const.*, Art. VI, sec. 21, expressly recognizes this court's rulemaking power:

The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing *practice and procedure in civil and criminal cases*, except that the general assembly shall have the power to provide simplified procedures in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors. (Emphasis added.)

Before adoption, in 1962, of the above-quoted constitutional provision, this court's rulemaking authority was acknowledged as an inherent power essential for the administration of the court system. . . . In this case, the question is whether section 18-3-407, *supra*, represents a legislative usurpation of powers belonging exclusively to the supreme court. We hold that it does not.

Even in states such as Colorado, in which the constitution expressly grants to the supreme court the power to promulgate rules governing court procedure, the question remains whether a particular rule or statute is "procedural" or "substantive." *See, e.g., People v. Smith*, 182 Colo. 228, 512 P.2d 269 (1973). Although numerous tests have been proposed to assist in making such a determination, none has been uniformly accepted. *See Peterson, Rule Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U.Colo.L.Rev. 137 (1965) (hereinafter referred to as Peterson). *See also Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich.L.Rev. 623 (1957) (hereinafter referred to as Joiner & Miller); Levin and Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U.Pa.L.Rev. 1 (1958).

One basic and widely-recognized test for distinguishing procedural from substantive matters has been stated as follows:

If the purpose of [a rule's] . . . promulgation is to permit a court to function and function efficiently, the rulemaking power is inherent unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business.

Joiner & Miller, supra, at 629-630.

Even under such a test, however, the characterization of any particular rule or statute can be subjected to substantial disagreement, and the characterization may vary depending on the application of rule or statute to the facts of a particular case. *Peterson, supra* at 162-63. *See People v. Smith, supra*.

The statute here at issue cannot be characterized as either purely substantive and thus entirely within the legislature's power, or purely procedural and thus subject solely to this court's rulemaking power. Rather it is "mixed" in nature. Obviously, to a certain extent it regulates the judicial function of designating the method for determining the relevance, and thus the admissibility, of evidence. In so doing it changes

established rules governing admissibility of the kind of evidence with which it deals.

Prior to the enactment of this statute, defense counsel in a rape case was accorded wide latitude in cross-examining the prosecutrix. Since her credibility was placed in issue when she testified, her prior sexual conduct was considered admissible to undermine her credibility. See *Struna v. People*, 121 Colo. 348, 353, 215 P.2d 905 (1950) (dictum); 3A J. Wigmore, Evidence sec. 929a (Chadbourn rev.ed. 1970). Moreover, where consent was a defense, as it frequently was, it was thought that the fact that she had consented to sexual relations with others on other occasions might justify a factfinder in concluding that she probably had consented to the sexual act giving rise to the prosecution. 1 J. Wigmore, Evidence sec. 62 (3d Ed. 1940). Little or no analysis was applied to attempting to discern whether her sexual habits actually had any logical connection with her credibility or whether her prior consent to intercourse with another at a different time had any logical bearing on whether she had consented to sexual relations with the particular man on trial at the time charged.

As critical thought and analysis have been brought to bear on these issues, it has become apparent that in many instances a rape victim's past sexual conduct may have no bearing at all on either her credibility or the issue of consent. In fact in many cases, cross-examination probing her sexual history has served only to put her on trial instead of the defendant.

The basic purpose of section 18-3-407, therefore, is one of *public policy*: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public "fishing expeditions" into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. The statute represents one means chosen by the general assembly to overcome the reluctance of victims of sex crimes to report them for prosecution. Thus it reflects a major public policy decision by the general assembly regarding sexual assault cases. In effect the legislature has declared the state's policy to be that victims of sexual assaults should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders.

This statute represents the Colorado General Assembly's response to a national trend which began in 1974 to reform procedures governing state prosecutions of various sexual assaults. These reforms constitute legislative recognition of the changing perception of rape as, not primarily a sex offense, and

certainly not a crime of passion, but rather a hostile crime of violence and domination "calculated to humiliate, injure and degrade the female." Moreover, these statutes are a response to statistics indicating that, while the incidence of rape is increasing, both the percentage of rapes committed which are prosecuted, and the percentage of prosecutions resulting in convictions, remain very low when contrasted with comparable statistics for other serious crimes.

Seen in the light of the policy it embodies, the statute represents far more than merely a legislative attempt to regulate the day-to-day procedural operation of the courts. Undoubtedly it would have been well within this court's rulemaking power to have adopted by rule the procedure set forth in the statute. But we have not adopted such a rule, nor have we promulgated any rule in conflict with the statute. We must decide whether our duty to uphold the state constitution, and our rulemaking power there granted, compel us to invalidate this statute and thus not only undo its procedural provisions but also frustrate the policy changes it represents.

As Chief Justice Marshall declared:

No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."⁶

Although certain aspects of the instant statute necessarily touch upon judicial matters we recognize that legislative policy and judicial rulemaking powers may overlap to some extent so long as there is no substantial conflict between statute and rule. *Peterson, supra*, at 162. While the three branches of our government are separate, equal and coordinate, they are nevertheless branches of one government, and they cannot operate in mutually exclusive, watertight compartments. If government is to serve the people each must seek to cooperate fully with the other two. Confrontations of constitutional authority are seldom in the long-term public interest and therefore are to be avoided where possible. Rather, mutual un-

⁶J. Thayer, *John Marshall* 105 (1974). Chief Justice Marshall further declared that the one primary duty of a court is never to seek to "enlarge the judicial power beyond its proper bounds, nor [fear] to carry it to the fullest extent that duty require[s]." *Id.* at 106.

derstanding, respect and self-restraint, the lubricants of good government, are to be sought. While our duty may occasionally require us to declare unconstitutional a statute adopted by the general assembly, we hold that power in reserve to be exercised only when the statute at issue cannot be reconciled with the constitution.

Therefore, in the absence of any conflicting rule adopted by this court, and in view of the instant statute's mixed policy and procedural nature, we hold that section 18-3-407, C.R.S. 1973 (1977 Supp.), does not unconstitutionally intrude into matters exclusively judicial nor violate *Colo. Const.*, Art. III, or Art. VI, sec. 21.

Discussion Notes

1. Can you make alternative arguments that a rape shield statute is, first, procedural, and second, substantive, under the definitions set forth in *In re Florida Rules of Criminal Procedure*?

2. Does the Colorado Court's discussion of public policy fit the substance/procedure dichotomy?

Busik v. Levine
63 N.J. 351, 307 A.2d 571 (1973)

WEINTRAUB, C.J.

The principal charge is that prejudgment interest is a matter of "substantive" law and as such beyond the constitutional grant to the Supreme Court of the power to "make rules governing . . . the practice and procedure" in all courts, Art. VI, sec. 2, para. 3. Hence, it is argued, we trespassed upon the legislative domain in adopting the rule, in breach of the principle of separation of powers embodied in Art. III, sec. 1, of the Constitution. The argument is supplemented with the proposition that defendants were thereby deprived of the opportunity to be heard required by due process of law.

* * * * *

We repeat there is no conflict with any statute; there is no statute on the subject. Nor can it be doubted that the Court has the power and the continuing responsibility to change these judge-made rules of law as justice may require. In short, had the proposition in paragraph (b) been announced in case of A against B, there could be no claim that the Court lacked the power or in any way transgressed upon the area constitutionally allotted to the Legislature. Thus it is not our power to act that is questioned; it is the method we chose to exercise that power.

But if we erred in adopting that method (we will demonstrate in Point II below that we did not), this litigation would not end. For plaintiffs here are entitled to ask for the same result which the challenged rule provides. They cannot be denied their due merely because we mistakenly expressed our view in a rule of court. The underlying issue is thus before us. The merits have been argued fully, and the litigants

thus afforded a hearing. Nothing new, however, emerged. This is not surprising, for the subject is not new, and was fully explored at a public hearing before we adopted the rule.

* * * * *

II

A

Defendants point out that the rule-making power granted the Supreme Court in Art. VI, sec. 2 para. 3, relates to "practice and procedure," and from this grant defendants would infer that this constitutional provision inferentially dictates the mode whereby the Supreme Court may make "substantive" law. But the constitutional provision is what it purports to be—a grant of power with respect to "practice and procedure." It does not purport to deal with substantive law or to prescribe a format for the discharge of the Court's responsibility as to that topic. Limitations of course do exist, but they arise, not from the cited section of the Constitution, but from the nature of the judicial process and of the Court's responsibility.

Nor, for that matter, is the constitutional grant of power with respect to "practice and procedure" a mandate that that subject may be dealt with only in a rule-making process. Many matters of practice and procedure repose in case law. Sometimes the procedures established in a judicial opinion will later be embodied in a formal rule of practice and procedure.¹ Commonly they are not.² Or a formal rule may

¹For example, the procedure outlined in *New Jersey Dept. of Health v. Roselle*, 34 N.J. 331, 169 A.2d 153 (1961), for the handling of contempt matters was thereafter incorporated in the formal rule, R. 1: 10. In *State v. Abbott*, 36 N.J. 63, 77-78, 174 A.2d 881 (1961), we dealt with the problem of offers of proof in criminal matters and thereafter incorporated the suggested practice in R. 1: 7-3.

²For example, in *State v. Guido*, 40 N.J. 191, 199-200, 191 A.2d 45 (1963), we suggested a procedure to deal with the problem of the recalcitrant witness.

expressly call for a case-by-case exposition, as for example, R. 4: 4-4(i) relating to service of process which expressly leaves the outer reaches of substituted service to “due process of law.” Indeed the most valued rights upon which life, liberty, and property depend are “procedural” and are embedded in the Constitutions of the United States and of this State. Although those rights are procedural, the courts have not chosen to particularize those rights by way of a rule-making process. Cases are legion which expound their meaning and the consequences of infringement. And, finally, a matter of practice may be prescribed in an administrative directive.

The constitutional grant of rule-making power as to practice and procedure is simply a grant of power; it would be a mistake to find in that grant restrictions upon judicial techniques for the exercise of that power, and a still larger mistake to suppose that the grant of that power impliedly deprives the judiciary of flexibility in the area called “substantive” law.

B

“Substantive” law of course is regularly established in cases brought before the Court. But there is no constitutional mandate that a court may not go beyond what is necessary to decide a case at hand. Whether an issue will be dealt with narrowly or expansively calls for a judge’s evaluation of many things, including the need for guidance for the bar or agencies of government or the general public. To that end, the Court may express doubts upon existing doctrines, thereby inviting litigation, or may itself raise an issue it thinks should be resolved in the public interest, or may deliberately decide issues which need not be decided when it believes that course is warranted. So a court may decide an issue even though the litigation has become moot, again in the public interest. . . .

Defendants refer to the statement in *Winberry v. Salisbury*, 5 N.J. 240, 248, 74 A.2d 406, 410 (1950), cert. denied, 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950), that “While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law *wholesale* through the exercise of the rule-making power” (emphasis ours). There can be no quarrel with that proposition, but one might note in passing that *Winberry* is a classic example of a deliberate decision upon a far-reaching issue, involving the respective powers of the Supreme Court and the Legislature, which no doubt could have been avoided but which the majority believed should be decided then in the public interest.

C

And finally it is simplistic to assume that all law is divided neatly between “substance” and “procedure.” A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account. Speaking of the proposition that a court may not promulgate rules governing substantive law in the exercise of their rule-making power, Professors Levin and Amsterdam agreed that “rational separation is well-nigh impossible.” “Legislative Control over Judicial Rule-making: A Problem in Constitutional Revision,” 107 U.Pa.L.Rev. 1, 14-15 (1958). See also *State v. Otis Elevator Co.*, 12 N.J. 1, 24, 95 A.2d 715 (1953) (Jacobs, J., dissenting). As said in *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed. 2d 8, 16-17 (1965), “The line between ‘substance’ and ‘procedure’ shifts as the legal context changes. ‘Each implies different variables depending upon the particular problem for which it is used.’” One context is conflict on laws; another is retrospective application of statutes: and a third is law-making, the subject at hand.

* * * * *

And, finally, in the context of rule-making, other factors may come into play. The Court may be spurred by the needs of the judicial system measured, not only by the private interests of all litigants, but also by the interest of public. Or the Court, mindful of the problem of exclusivity and its impact upon the delicate relations among the co-equal branches of government, may be reluctant to move or to go as far as it would if the Legislature retained the power to disagree.

To illustrate, what is the statute of limitations? For conflict of laws purposes, it is usually said to be “procedural,” meaning that the law of the forum will be applied, *Marshall v. Geo. M. Brewster & Sons, Inc.*, 37 N.J. 176, 179-182, 180 A.2d 129 (1962); see Restatement (2d) of Conflict of Laws (1971) sec. 142, although even there the just course may be to apply the law of another State if the parties were there throughout its period of limitations and the suit was brought after that period had run. In the context of retrospective application of a statute, there may be no substantial reason to refuse to apply a change in a period of limitations retrospectively so long as a barred cause of action is not thereby revived or an existing cause of action is not thereby barred without a fair opportunity to sue. But when we turn to the third context, whether the statute of limitations is within the Court’s rule-making power, the considerations may well be different. We need but say that thus far it

has not been suggested that this subject matter is “procedural” within the meaning of our constitutional provision. On the other hand, time for appeal, which must resemble a statute of limitation, may confidently be said to come within the Court’s rule-making power. R. 2: 4.

What is “evidence”? It arguably is “procedural,” “substantive” or a hybrid. It smacks of “procedure” insofar as it controls what may enter the mix, but it is quite “substantive” as an ingredient of the end product, the judgment. Some rules of evidence, particularly those relating to privileges, may themselves be thought to generate rights or values of a “substantive” cast. In the context of conflict of laws, evidence generally would be for the forum. Restatement (2d) of Conflict Laws (1971) sec. 138 adopts that view, with, however, certain exceptions. In the context of retrospective application of a statute, it would likely again be “procedural” in most respects. But the third context, the respective powers of the legislative and judicial branches, brings other values into view.

We participated in a process whereby a code of evidence was adopted “wholesale,” to use a word in the quotation above from Winberry. The rules of evidence were adopted cooperatively by the three branches of government under the Evidence Act, 1960 (L.1960, c. 52; N.J.S.A. 2A: 84A-1, et seq.) after the Supreme Court and the Legislature conducted their separate studies. Under the statutory arrangement, some of the rules, notably those embodying privileges, were fixed in the statute itself while other rules, prepared by the Court after consideration at a Judicial Conference, were filed with the legislature to become effective unless disapproved by a joint resolution signed by the Governor. Thus we did not pursue to a deadlock the question whether “evidence” was “procedural” and therefore, according to the Winberry dictum, the sole province of the Supreme Court. Nor were we deterred by the specter of the criticism that, if “evidence” is “substantive,” it was unseemly or worse for the Court to participate in the “wholesale” promulgation of substantive law. The single question was whether it made sense thus to provide for the administration of justice, and the answer being clear, we went ahead. We add that the United States Supreme Court, which does not have a constitutional grant of rulemaking power as to practice and procedure, is pursuing a similar project in cooperation with the Congress. 18 U.S.C.A. sections 3402, 3771, 3772 (1964); 28 U.S.C.A. sections 2072, 2075 (1958).

D

What then is “interest”? As we have said, it is

compensatory as to the parties and represents “damages” for delay in payment. “Damages” constitute a “remedy.” And “remedy” promptly connotes “procedure.” 1 Am.Jur.2d, Actions, sec. 6, p. 546. But in the context of conflict of laws, the majority view is that “damages” go to the substance, i.e., that it would disserve the values involved to apply the law of the forum rather than the law of the place of the wrong. . . .

In the light of the foregoing it surely cannot be said to have been palpably inappropriate to think of prejudgment interest as a matter of procedure in the context of law-making. The question was of general concern, affecting many thousands of pending tort actions. The issue could have been raised in any of those cases, at the instance of the litigant or on the court’s own motion. Had the issue been raised that way, all litigants would have been bound by the result notwithstanding that they were not heard upon the merits. One of the consequences of the stubborn myth that courts do not make law is the continuing failure to develop a technique whereby all may be heard who are interested in a legal proposition and might contribute to an informed decision. In this respect the rule-making approach is clearly superior. Here all interests were heard at a public meeting. Surely the litigants themselves lost nothing in that process. And when there is added the signal fact that the rule, while serving the cause of justice as between litigants, has the equally important objective of expediting the disposition of cases, thereby to advance the welfare of all litigants and the welfare of the taxpayers who must support the system, we have no doubt of the propriety of the course we followed. The rule concerns the practice and procedure in the courts in any view of that subject notwithstanding that the rule has also a “substantive” impact upon the dollar result. It made sense to invoke the rule-making process in such circumstances. It was a responsible exercise of our responsibility.

* * * * *

It is insisted we cannot uphold the rule for prejudgment interest without also deciding whether the rule comes within the Winberry dictum that the Court’s authority as to practice and procedure is exclusive. We see no need to meet that issue. The sole question is whether the Court may treat the subject by a rule rather than by a judicial decision despite the substantive aspect of the subject. The issue of exclusivity involves a touchy matter, the relations among the three branches of government. It will be time enough to talk about exclusivity when there is an

impasse and no way around it.¹⁰ A coordinate branch should not invite a test of strength by proclamation. Our form of government works best when all branches avoid staking out the boundaries which separate their powers.

¹⁰In some instances our rules expressly accept statutory pro-

visions relating to the same subject matters. See R. 4: 27-2; R. 4: 42-8(a); R. 4: 52-7; R. 4: 59-1; R. 4: 83-1. After the adoption of the prejudgment interest rule here involved, the Legislature enacted the New Jersey Tort Claims Act, N.J.S.A. 59: 1-1, *et seq.*, which provides in N.J.S.A. 59: 9-2a that "No interest shall accrue prior to the entry of judgment against a public entity or public employee." We have approved an amendment to our rule of Court which will except that situation.

Discussion Notes

1. What are the implications of a ruling that a subject is procedural rather than substantive? Does it really not matter, as the Court in *Busik* seems to say, whether the court relies on its power to make "substantive" rather than "procedural" law?

2. In section 9 of chapter 77-312, *Laws of Florida*, 1977, the legislature provided:

Section 9. Admission and release procedures and treatment policies of the department are governed solely by this act. Such procedures and policies shall not be subject to control by court procedural rules. The matters within the purview of this act are deemed to be substantive, not procedural.

The act provided for a bifurcated trial system for guilt and insanity in criminal trials, and for disposition of defendants found not guilty by reason

of insanity or incompetent to stand trial. What would be the purpose and effect of section 9?

The act itself was declared unconstitutional, on due process grounds, and the court rule reinstated in *State ex rel Boyd v. Green*, 355 So. 2d 789 (Fla. 1978). The legislature made another attempt in 1979. See chapter 79-336 sec. 4, *Laws of Florida* 1979, and *In re Transition Rule 23: Competency to Stand Trial and Be Sentenced: Insanity as a Defense*, 375 So. 2d 855 (Fla. 1979).

3. As to the question of whether the law of evidence is substantive or procedural, see *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979); *In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979).

4. See also *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977) (concerning the validity of the Pretrial Intervention Program and mechanisms for its enforcement); Joseph M. Lynch, "The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?" *Seton Hall Law Review* 4 (Fall-Winter 1972): 19, 421.

Jeffrey A. Parness, "Public Process and State-Court Rulemaking"

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Professor Hazard, in his review of Judge Jack Weinstein's *Reform of Court Rule-Making Procedures*,¹ finds the judge's proposed reforms of federal rulemaking procedure to be "restrained to the point of being exiguous."² Yet, Professor Hazard fails to mention Judge Weinstein's attack on unfettered judicial rulemaking in the state courts, that is, state-court

rulemaking free from subsequent legislative intervention.³ This failure is noteworthy. Whatever the virtues of the status quo in the federal context, the sweeping scope of judicial autonomy in many state court rulemaking procedures renders Judge Weinstein's call for more "public process"⁴ especially apt in the state context. The frequent insulation of state-court rulemakers from both the legislature and the electorate underscores the need for new modes of public participation in state rulemaking, particularly when state courts exercise quasi-legislative authority, as, for example, in regulating the practice of law.

Before proceeding to explore this topic, it should be noted that Judge Weinstein's description of state rulemaking suffers from several factual inaccuracies. In one instance, the autonomy of a judiciary's rulemaking power is exaggerated. Florida is said to be "one of four states whose constitution does not seem to subject judicial rulemaking power to legislative

¹J. Weinstein, *Reform of Court Rule-Making Procedures* (1977).

²Hazard, *Book Review*, 87 *Yale L.J.* 1284, 1287 (1978).

³See J. Weinstein, *supra* note 1, at 82-83.

⁴*Id.* at 87. . . .

control.⁵ Yet a 1972 revision of the Florida constitution now permits procedural rules adopted by the Florida Supreme Court to be repealed by a two-thirds vote in both houses of the state legislature.⁶ More often, however, Judge Weinstein understates the extent of judicial autonomy in state rulemaking. For example, Judge Weinstein fails to note that many more than four state constitutions expressly grant state high courts at least some rulemaking powers that lie beyond final legislative control.⁷ In addition, the trend over the past two decades has been toward placing more final rulemaking authority in state judiciaries⁸ and not, as Judge Weinstein suggests,⁹ toward vesting ultimate responsibility for rulemaking in state legislatures.

These factual inaccuracies might be unimportant were it not that Judge Weinstein also miscalculates the significance of autonomous judicial control of rulemaking procedures in the states. When Judge Weinstein examines a state in which the judiciary exercises absolute rulemaking authority, he finds “the same practical balance in rule-making as [in] other American jurisdictions.”¹⁰ In his view, the practical need to bridge the formal separation of powers in state governments has made talk of unfettered judicial rulemaking authority “illusory.”¹¹ This position

has some basis, for one study suggests that even where state judiciaries exercise rulemaking authority that is immune from legislative veto, legislatures still retain some ability to affect judicial rules.¹² Nevertheless, the ability to affect judicial rules falls well short of the ultimate power to determine judicial rules.¹³ Recent events indicate the state judiciaries can, and will, block legislative attempts to subvert ultimate judicial authority in rulemaking.¹⁴

In 1976, the Michigan legislature passed an Open Meetings Act¹⁵ that provided for greater public access to governmental bodies. The Act specifically applied to “a court while exercising rule-making authority and while deliberating or deciding upon the issuance of administrative orders.”¹⁶ However, shortly after the Act took effect, the Michigan Supreme Court, in a direct address to the legislature, declared that the portion of the Act dealing with the judiciary constituted “an impermissible intrusion into the most basic day-to-day exercise of the constitution

⁵J. Weinstein, *supra* note 1, at 82.

⁶Fla. Const. art. 5, sec. 2(a) (adopted Mar. 4, 1972). The Florida Supreme Court exercises exclusive rulemaking authority over admission to the practice of law. *Id.* sec. 15.

⁷Such powers involving rules of procedure can be found, for example, in Ariz. Const. art. 6, sec. 21 (effective 1965); Ky. Const. sec. 116 (effective 1976). Powers involving rules regulating the practice of law can be found, for example, in Ark. Const. amend. 28 (effective 1938); Ind. Const. art. 7, sec. 4 (effective 1970). And, such powers involving superintendence or administrative control can be found, for example, in Colo. Const. art. 6, sec. 21 (effective 1965); Mich. Const. art. 4, sec. 4 (effective 1963). Other state constitutions have been read to grant unfettered rulemaking authority to the state’s highest court. See, e.g., *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971) (interpreting Idaho Const. art. 5, sec. 13); *Southwest Underwriters, v. Montoya*, 80 N.M. 107, 452 P.2d 176 (1969) (interpreting N.M. Const. art. 3, sec. 1).

⁸See note 7 *supra*; Dodge & Cashman, *The ABA Model Judicial Article*, State Court J., Winter 1979, at 43.

⁹J. Weinstein, *supra* note 1, at 78-79.

¹⁰*Id.* at 82.

¹¹*Id.* Notwithstanding this illusion, Judge Weinstein cites a commentator who criticized the Connecticut Supreme Court for making “extravagant claims of exclusive power over rules.” *Id.* 79-80 (citing Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 Conn. L. Rev. 1 (1975)). Even if commentators were able to transform reality into illusion, the commentator in question had no such intent. See Kay, *supra*, at 41-42 (“the constitutional law of Connecticut appears to have established the final and complete authority of the supreme and superior courts to establish their own rules of procedure”) (citation omitted).

¹²See Ashman, *Measuring the Judicial Rule-making Power*, 59 Jud. 215, 219-20 (1975).

¹³Judge Weinstein underplays this difference in the scope of legislative power over judicial rulemaking. He repeats the dubious observation of an earlier commentator that, among the states, the ascendant policy is one of judicial rulemaking authority limited by ultimate accountability to the legislature. J. Weinstein, *supra* note 1, at 78-79 (quoting Kaplan & Green, *The Legislature’s Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 Harv. L. Rev. 234, 251 (1951)). But see note 7 *supra* (citing constitutional provisions vesting ultimate rulemaking authority in judiciary).

By overlooking the continuing vitality of unfettered judicial rulemaking, Judge Weinstein may misinterpret Wigmore’s position. See J. Weinstein, *supra* note 1, at 79 (“[n]o serious student would today accept Wigmore’s thesis that the legislature has no power to affect judicial procedure”). Wigmore did assert at one point that “all legislatively declared rules for procedure . . . are void, except such as are expressly stated in the Constitution.” Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 Ill. L. Rev. 276, 276 (1928) (emphasis in original). Yet in the same piece, Wigmore acknowledged that legislatively declared procedural rules have “such effect as the comity of the judiciary may give them in the absence of any rule made by the judiciary.” *Id.* at 279. Thus Wigmore recognized legislative power to affect rulemaking, although this power was constrained by accountability to the judiciary.

¹⁴What constitutes a legislative attempt to undermine a court’s ultimate authority will depend on the extent to which that ultimate authority is exclusive. See Kaplan & Green, *supra* note 13, at 250 (“Whatever . . . the precise limits on the legislature’s power, to assert that it may not stop . . . rule-making by blanket legislation is different from asserting . . . it cannot effectively repeal or modify particular court rules and . . . cannot act effectively, except by the court’s sufferance, in an area . . . left untouched by the rules.”)

¹⁵Mich. Comp. Laws Ann. sections 15.261-275 (Supp. 1978).

¹⁶*Id.* sec. 15.263(7). What better way to make rulemaking a “public process?” See J. Weinstein, *supra* note 1, at 87.

ally derived judicial powers,” which included “rule-making, supervisory and other administrative powers as well as traditional adjudicative ones.”¹⁷

Tennessee provides a second example of a state judiciary successfully retaining ultimate authority over the judicial rulemaking process. In March 1978, Tennessee voters rejected a judicial article that would have limited the supreme court’s rulemaking power by requiring legislative concurrence before judicial rules became effective.¹⁸ However, even if the voters had approved the proposed article, it is not certain that they would have succeeded in constraining the absolute rulemaking authority of the Tennessee Supreme Court. Chief Justice Henry strongly criticized the proposal on the ground that “[i]t did not lie within the power of the constitutional convention to strip any branch of government of its coequal status nor to render its operation so ineffectual that it would cease to exist as an independent branch of our state’s government.”¹⁹

The continuing vitality of unfettered judicial rulemaking in some states has an important implication for Judge Weinstein’s call for greater public process in judicial rulemaking; in many instances, the power to reform state rulemaking procedures lies exclusively in the hands of state high courts. Fortunately, however, state courts may be receptive to public participation in the formulation of judicial rules. In North Dakota, for example, the supreme court recently invoked its newly granted, absolute rulemaking authority to promulgate two rulemaking procedures—one governing its own rulemaking process and the other regulating local rulemaking by the lower courts. Both mechanisms sanction broad participation by all persons interested in judicial rules. Indeed, these court-established procedures may prove more effective in providing public access to the rulemaking process than earlier procedures instituted by the state legislature.²⁴

The North Dakota experiment demonstrates that judicial rulemaking, unfettered by other branches of government, may be consistent with greater public process in state rulemaking. However, this indication of judicial receptivity also raises a series of broader questions surrounding public participation in rulemaking procedures—questions that both Judge Weinstein and Professor Hazard consider only in the context of federal rulemaking.

A first question concerns the kind of judicial rule that ought to be the subject of public deliberation and debate. Certainly some rules merit less public participation than others. For example, emergencies may on occasion require the immediate promulgation of a rule without any public process; in addition, narrow, technical rules obviously have less claim to formal public deliberation than rules affecting “sensitive issues of social policy.”

A second question of particular importance in the state context concerns the consequences that the balance of rulemaking authority between the legislative and judicial branches should have for the nature of public participation in judicial rulemaking. The various state constitutions and statutes support not only unfettered judicial rulemaking,²⁸ but, in many instances, judicial rulemaking constrained either by legislative veto power²⁹ or by concurrent legislative rulemaking authority.³⁰ Arguably, a broad legislative role in rulemaking diminishes the need for judicial creation of other modes of public participation, particularly when state legislatures provide a reliable forum for open debate.

When the public lacks an effective legislative channel for participation in the rulemaking process, however, a final question concerns the selection of alternative channels for public participation. Experience suggests that these channels should vary with the range of potential participants and the nature of the rules under consideration. Advisory committees selected from among the ranks of the professional elite—the elite whose skills are so amply celebrated

¹⁷*In re 1976 PA 267*, 400 Mich. 660, 663, 255 N.W.2d 635, 636 (1977). This was only the third time in the state’s history that the supreme court was motivated “to communicate directly” about legislative action profoundly affecting the court. *Id.* at 661, 255 N.W.2d at 636. The Act was passed despite the Michigan Supreme Court’s laudable prior efforts to open up judicial decisionmaking on rules and administrative orders. *See id.* at 663, 255 N.W.2d at 637.

¹⁸*See* Tennessee votes to reject proposal for new judicial article, 61 *Jud.* 431, 431 (1978).

¹⁹*Id.* *See generally* Sweet, *Anatomy of a “Court Reform,”* 62 *Jud.* 37 (1978) (describing genesis, content, and defeat of proposed Tennessee judicial article).

²⁴For example, N.D. Cent. Code sec. 27-02-11 (1974) requires the high court, *inter alia*, to mail to all attorneys copies of any proposed rules relating to either the practice of law or to pleading, practice, and procedure.

²⁸Some judicial rulemakers possess both fettered and unfettered powers in different areas. *Compare* Ohio Const. art. 4, sec. 5(A) *with id.* sec. 5(B).

²⁹The veto may require a majority vote, *see* Md. Const. art. 4, sec. 18; Ohio Const. art. 4, sec. 5(B), or it may require a two-thirds vote, *see* Alaska Const. art. 4, sec. 15; Fla. Const. art. 5 sec. 2(a).

³⁰Wis. Stat. Ann. sec. 751.12 (West Supp. 1978). This division of authority between legislature and judiciary is apparently working. *See Supreme Court Order: Adoption of Rules Relating to the Office of Chief Judge, Judicial Administrative Districts and Assignment Judges*, 51 *Wis. B. Bull.*, Aug. 1978, at 31-32; Parness & Korbakes, *A Study of the Procedural Rulemaking Power in the U.S.* 61 (*Am. Jud. Soc’y mimeo* 1973).

by Professor Hazard in the federal context³³—might be delegated the task of ensuring adequate levels of public participation in the formulation of most procedural rules. Similarly, committees selected from among state-judiciary administrative officers should exercise responsibility for uncontroversial rulemaking that focuses on court administration. By contrast, rulemaking that implicates sensitive issues of social policy warrants well-publicized open hearings, and perhaps even hearings at multiple locations, in

³³See Hazard, *supra* note 2, at 1294.

order to maximize accessibility to potential participants. Finally, the need for differentiated forms of public participation in state rulemaking suggests that the formalization of rulemaking procedures should also receive the careful attention of judicial rulemakers. Unless notice requirements, responsible officials, and the structure of public access to rulemaking will generate uncertainty at best and, at worst, will reduce the very access that it attempts to facilitate. It is my hope that these few observations will help to spur the reform of all American rulemaking systems, now that Judge Weinstein has urged further dialogue.

Discussion Notes

1. Professor Parness has written widely about public and legislative participation in judicial rulemaking. See, for example, "The Legislative Roles in Florida's Judicial Rulemaking," *University of Florida Law Review* 33 (Spring 1981): 359; Jeffrey A. Parness and Curtis B. Copeland, "Access to Judicial Rulemaking Procedures," *Arizona State Law Journal* 1982 (No. 3, 1982): 641; Jeffrey A.

Parness and Christopher C. Manthey, "Public Process and Ohio Supreme Court Rulemaking," *Cleveland State Law Review* 28 (No. 2, 1979): 249.

2. Could litigants claim a *right* to participate in judicial rulemaking?

3. Compare the judicial rulemaking in the following area with that concerning practice and procedure in the courts.

D. Judicial Regulation of the Practice of Law through Rulemaking

In *Petition of Florida State Bar Association*, 40 So.2d 902, 905-06 (Fla. 1949) the Florida Supreme Court held it had *inherent* power to create an integrated bar, with mandatory membership and dues for lawyers. The court relied on a number of cases from other jurisdictions for this proposition. See also *Bd. of Overseers of the Bar v. Lee*, 422 A. 2d 998 (Me. 1980).

Often state constitutions specifically grant to the highest court the exclusive power to regulate admission to the bar and the practice of law. Many such provisions were adopted after the highest court's ruling that it had such inherent powers.

The United States Supreme Court has indicated it is generally up to the states to define the "practice of law." *Ferguson v. Skrupa*, 372 U.S. 726 (1963). But see, *United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967); *Sperry v. Florida*, 373 U.S. 379 (1963); *In re Petition to Amend Code of Professional Responsibility*, 327 So.2d 15, 17-18 (Fla. 1976).

See generally Stephen E. Kalish, "The Nebraska Supreme Court, The Practice of Law and the Regulation of Attorneys," *Nebraska Law Review* 59 (No. 3 1980): 555.

The range of a court's authority in regulating the "practice of law" is illustrated by *In re Interest on Trust Accounts, A Petition of the Florida Bar*, 356 So. 2d 799 (Fla. 1978). There the Florida Supreme Court authorized lawyers to place their trust accounts in interest-bearing accounts and, with client consent, make the interest revenue available to a non-profit foundation to support programs aimed at improving the administration of justice. See Comment, *St. Mary's Law Journal* 10 (No. 3 1979): 539; 11(No. 1 1979): 113.

Courts have also ruled that the judicially adopted Canons of Ethics *take precedence* over statutes seeking to govern lawyers' behavior. *Times Publishing Co. v. Williams*, 222 So. 2d 470, 475-76 (2d D.C.A. Fla.

1969). The Pennsylvania Supreme Court recently ruled the State Ethics Act, as it applied to retired judges, was an unconstitutional infringement on the Court's authority to regulate the practice of law. *Wajert v. State Ethics Comm.*, 420 A. 2d 439 (Pa. 1980). See also, *Ballou v. State Ethics Commission*, 424 A. 2d 983 (Pa. Comm. Ct. 1981); *Kremer v. State Ethics Commission*, 424 A. 2d 968 (Pa. Comm. Ct. 1981) (judges). Criminal statutes proscribing solicitation of legal business, however, have been upheld against the argument that they encroach on the Supreme Court's power to discipline lawyers. *Pace v. State*, 368 So. 2d 340, 345 (Fla. 1979).

American Trial Lawyers Association v. New Jersey Supreme Court 66 N.J. 258, 330 A.2d 350 (1974)

HUGHES, C.J.

This litigation challenges the authority of the Supreme Court under its rulemaking power, N.J.Const. (1947), Art. VI, sec. II, par. 3,¹ to establish a graduated schedule of maximum contingent fees applicable to certain tort litigation conducted by New Jersey attorneys. It thus suggests to the Court an introspective look at its constitutional power to regulate the practice of law as well as its consequent responsibilities in that regard.

¹N.J.Const. (1947), Art. VI. sec. II. par. 3. reads:

3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The contingent fee rule, R. 1: 21-7, was adopted by this Court in December 1971, to be effective January 31, 1972. Its limitation clause (c) was promptly challenged on federal and state constitutional grounds by litigation instituted by several highly respected associations of trial lawyers (hereafter "plaintiffs"). Plaintiffs may be considered, *arguendo*, to be representative of a class, namely the entire New Jersey trial bar; we are not so clear as to their standing to represent the poor, but that is not necessary to decide now. . . .

In 1947, the people of New Jersey adopted a new Constitution to replace that of 1844 (the successor to the Revolutionary Constitution of 1776), recognizing that over the span of that century-plus the state had emerged from its largely agricultural past to become a more complex component of the American community. Heavily industrialized, congested by dynamic population and business growth, suffering pains of unprecedented and largely unplanned urbanization, crisscrossed by the travel of millions of visitors or transients, choked by an archaic tax system, New Jersey had become, in the words of Woodrow Wilson (who served as its Governor part way through that interval) a kind of "laboratory" of the nation's problems and its hopes.

By Article VI of the 1947 Constitution, the people discarded the former court system, attenuated and overburdened as it was by the developments and complexities of the years. The new charter had at its core the creation of a modern system of courts. That court system, in its political independence, its design of administrative self-government, its hoped-for efficiency and consequent productivity potential in the public interest since has come to be regarded as something of a model by other jurisdictions. W.J. Brennan, Jr., *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 499 (1957); M. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 Minn.L.Rev. 815, 823-24 (1956); R. Pound, *Procedure Under Rules of Court in New Jersey*, 66 Harv.L.Rev. 28 (1952). Central to this system was a unique administrative flexibility, largely accommodated by the rulemaking power, soon to be vindicated (in the context of procedural and practice, vis-a-vis substantive, matters) in *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950), cert. den. 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950).

In this context, then, we come to the basic question of this case: What is the nature and extent of the Court's regulatory power over those who practice law?

One source of the power of the Court to regulate practice and procedure therein, of course, is its traditional, inherent and integral relationship to the very existence and the functioning of the court. But so precisely and unmistakably (as held below) did Arti-

cle VI, sec. II, par. 3 of the Constitution, *supra*, make "the Supreme Court the exclusive repository of the State's power to regulate the practice of the law, investing it 'with exclusive responsibility in this area,' *State v. Rush*, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966)," *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, *supra*, 126 N.J. Super. at 585, 316 A.2d at 23, that the existence and exclusivity of the power would seem quite beyond question.

As to its nature: we must remember that there is a manifest conceptual kinship between "power" as such, and the obligation for responsible use of the power, and that, never from a myopic viewpoint, but fully and truly in the public interest. The people's constitutional reposition of power always carries with it a mandate for the full and responsible use of that power. When the organic law reposes legislative power in that branch, for instance, it is expected that such power will be used, lest it wither and leave the vacuum of a constitutional exigency, requiring another branch (however reluctantly) to exercise, or project the exercise of, that unused power for the necessary vindication of the constitutional rights of the people. . . . So it is with the unparalleled executive authority vested by the 1947 Constitution.

And so it has been with the judicial branch of this government. Since 1948 (the Judicial Article became effective September 15, 1948, Article XI, sec. IV, par. 14) the Supreme Court has not hesitated to meet its responsibility for the use of the judicial and administrative power reposed in it by Article VI. Thus, it has "legislatively" adopted Rules of general application regulating the professional conduct of attorneys and their relationships to their clients and to the courts. The wide range of such rules was noted by the Appellate Division.⁵

Nor has the judiciary forgotten to regulate the conduct of its own members, as by our adopting of the Code of Judicial Conduct and our creation of an Advisory Committee on Judicial Conduct to aid in its enforcement. R. 2: 15-1 et seq.

⁵... rules: regulating bar examinations and the licensing of attorneys (R. 1: 23 to 27); specifying who may practice law and appear in court (R. 1: 21-1 to 4); authorizing attorneys to form 'professional corporations' to engage in the practice of the law (R. 1: 21-1A); creating a committee on the unauthorized practice of the law (R. 1: 22); setting forth limitations on the practice of law by attorneys holding various public offices and positions (R. 1: 15); adopting a canon of professional ethics (R. 1: 14); creating an advisory committee on professional ethics (R. 1: 19); regulating ethics committees and disciplinary proceedings (R.1: 20); requiring attorneys to maintain separate trustee and business bank accounts and specified bookkeeping records (R. 1: 21-6) and providing for the creation and maintenance of a 'client's security fund' to which each member of the bar must annually contribute the sum of \$15 (R. 1: 28)." [126 N.J. Super. at 584-585, 316 A. 2d at 23]

In their able brief, plaintiffs suggest that the nature and reach of the disciplinary power are of "first, critical importance," and we agree. We are also quite clear that the people, in their constitutional grant of the power of superintendence of those admitted to practice law, did not express a mere gesture or formality. On the contrary, we think they intended that responsibility to extend to every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the Court to the practice of the law. We believe the people intended that the Court should cope as best it might with interstices, wherever they appear, in the pattern of honest and ethical practice of the law. In this grant of power and reposing of responsibility the people of New Jersey trusted and commissioned the Supreme Court, in effect, to "keep the house of the law in order." See, *Gair v. Peck*, 6 N.Y.2d 97, 111, 188 N.Y.S.2d 491, 502, 160 N.E.2d 43, 51 (1959), appeal dismissed 361 U.S. 374, 80 S.Ct. 401, 4 L.Ed.2d 380 (1960). The Court intends to fulfill that responsibility, and to fulfill it within the framework of constitutional rights. To do less would degrade the Court, weaken the profession and impede the administration of justice, eventualities against which we believe the profession, as well as this Court, to be fully dedicated.

Plaintiffs argue that in its adoption of R. 1: 21-7(c) the Court acted, not in a legislative but in an adjudicatory role, and that an evidentiary hearing should have preceded and justified its action. Again, we think the constitutional grant of power and lodgement of responsibility were not so limited. For instance, the people surely did not intend that the court would require an evidentiary hearing to prove to itself the wrongness and danger of an attorney commingling his personal funds and those entrusted to his care by his client, before it could have guarded against that evil by its adoption of r. 1: 21-6, *supra*, n. 5. . . .

To adopt the view suggested would seem quite illogical, as though the people intended to vest responsibility for superintendence of the ethical practice of the law, yet to withhold from the Court the power to make rules to effectuate that very superintendence.

Without further examples, we may concede [sic] at once that the rule here discussed was not bot-tomed on an evidentiary hearing, nor even on anything approaching the lengthy investigation by Justice Wasservogel to reveal the abuse of the contingent fee system in New York. That scrutiny preceded the adoption there of the control rule later held valid

by decision of the Court of Appeals in *Gair v. Peck, supra*. It is unrealistic to suppose that cupidity and overreaching end at the banks of the Hudson, and we do not indulge that aberration. Our Supreme Court, as the natural recipient of clients' complaints against the conduct of lawyers, has accumulated experience over the years, as briefly mentioned by Chief Justice Weintraub at the November 6, 1971 hearing.⁸ This, of course, absent documentation and hearing, could not constitute an evidentiary hearing in the adjudicatory sense. But for the reasons mentioned above, and as carefully explicated by the Appellate Division, we are quite clear that such an evidentiary hearing was not constitutionally required.

Too, it is proposed that the Court has adjudicatory power to discipline a lawyer who violates DR 2-106, overreaching his client unconscionably, even to the extent of disbarment of the attorney, and that this suffices to discharge its constitutional responsibility. But it would appear to require some implementation of this power to reach the otherwise unreported and undiscovered violation. Whatever the enormity or frequency of rarity of such concealed offenses, it is the obligation of the Court to try to prevent them.

We conclude with a word of cautionary explanation. Both this opinion and that of the Appellate Division, here adopted, are carefully confined to the discussion and resolution of two issues: whether this Court possessed the power to adopt R. 1: 21-7 and whether it had the right to do so without first holding an evidentiary hearing. As has been indicated, we have no doubt that the power exists and are equally certain that its exercise need not be conditioned upon or accompanied by such a hearing. The Court remains extremely mindful of the abuse this regulation seeks to control and of the Court's constitutional responsibility in this regard. But whether R. 1: 21-7 should continue as an ongoing rule of court, whether it should be modified or whether it should be repealed and the problem attacked in some other way are matters to which this decision has not addressed itself. Our rules are never immutable. Applications for their review are never foreclosed. In *re NBC*, 64 N.J. 476, 317 A.2d 695 (1974). The Court does not adopt its rules to promote or brook injustice but, as best it can, to secure justice, and justice under Constitution and law.

Affirmed.

⁸At an open meeting of the Court with representatives of the Bar to elicit views as to the adoption of the rule.

Discussion Notes

1. Could the legislature change the rule promulgated by the court and upheld by it in this case?

2. Could the legislature have adopted such a rule, by statute, prior to the promulgation of the court rule?

E. Inherent Powers of the Courts

Commonwealth ex rel. Carroll v. Tate 442 Pa. 45, 274 A.2d 193 (1971)

BELL, Chief Justice.

On June 16, 1970, President Judge Vincent A. Carroll, individually and on behalf of all the Judges of the Court of Common Pleas of Philadelphia, instituted this suit by a Complaint in Mandamus to compel the Mayor and City Council of Philadelphia to appropriate the additional funds requested by them for the important and necessary administration of the Court of Common Pleas of Philadelphia for the fiscal year commencing July 1, 1970 and ending July 1, 1971.

We shall hereinafter set forth the intricate facts involved in this suit, but, initially, we deem it important to focus on the fundamental questions involved: (1) whether the Judicial Branch of our Government has the inherent power to *determine* what funds are *reasonably necessary* for its efficient and effective operation; and (2) if the Judiciary has the power to determine what funds are reasonably necessary, does it then have the power to *compel* the Executive and the Legislative Branches to provide such funds after the requested amount has been reduced in, or wholly or partially eliminated from, the budget proposed by the Executive Branch and approved by the Legislative Branch.

The Court of Common Pleas . . . submitted to the City's Finance Director (on the necessary forms) its operating budget estimates of the financial needs of the Court of Common Pleas and the Municipal Court. The total amount of requests submitted was \$19,706,278. After several meetings between the Finance Director and representatives of the said Court, the sum was reduced to \$16,488,263, and, on April 1, 1970, this amount was finally sent to City Council by the Mayor in his proposed annual operating budget message. On May 4, 1970, President Judge Carroll,

Judge D. Donald Jamieson (now President Judge), and Administrative Judge Frank J. Montemuro, together with several members of their administrative staffs, gave extensive testimony before City Council, seeking to document their requests. The Court at this time also requested an increase of \$5,230,817 over the amount proposed in the Mayor's aforesaid budget of April 1st. Of this sum of \$5,230,817, \$2,012,801 had not previously been requested of either the Finance Director or the Mayor prior to the time the Mayor submitted his budget. City Council denied this additional request and approved by ordinance, on May 28, 1970, the amount recommended by the Mayor, i.e., \$16,488,263. This total was divided and allocated as follows:

Municipal Court Judicial Staff	\$ 451,532
Common Pleas Court Judicial Staff	2,126,839
Common Pleas Court Administration	<u>13,909,892</u>
Total	\$16,488,263

This present mandamus action was instituted on June 16, 1970 to compel the appropriation and payment of the Court's additional request of \$5,230,817.

Proceedings Before Judge Montgomery

On June 23, 1970, Judge Harry M. Montgomery, of the Superior Court of Pennsylvania, was specially designated by this Court to hear and decide this case. Judge Montgomery promptly held a pre-trial conference, at which time the legal issues were delineated and an agreement was worked out by the parties that defendants would hold and keep available sufficient funds to pay any sums ultimately awarded to the Court. On July 27, 1970, Judge Montgomery issued a Pre-Trial Order, ordering the parties to argue and brief certain issues and temporarily enjoining the defendants from enforcing a "job freeze" ordered by the Mayor against the Court, and also from reducing the Court's budget. Oral argument was held on August 4,

1970, and Judge Montgomery filed a "Supplemental Pre-Trial Order" on August 12, 1970. In this Order, Judge Montgomery ruled, inter alia: (1) the Court had the burden of proof to establish the reasonable necessity of its financial requests and none of the parties could take advantage of the usual presumption of reasonableness by virtue of their public office; (2) defendants, as a defense to plaintiff's demand for additional funds in this action of mandamus, could not "reopen" the earlier budget figures, which had been approved by the Mayor and for which appropriations had been made by the City Council, in order to prove that the present appropriation was being used inefficiently or that a more efficient use of present appropriations would cover some or all of the additional requested items. . . . The record was closed on August, 21, 1970, after extensive testimony had been taken and exhibits produced. At this time, the Court amended its request for funds by reducing the sum of \$5,230,817 it had requested in the complaint to \$3,962,532, mainly because of the delay in time from the start of the fiscal year (July 1, 1970).

On September 30, 1970, Judge Montgomery issued a mandamus Order against defendants to appropriate and pay the amount of \$2,458,000, and made final his injunctive Order of July 27, 1970. . . .

Court's Inherent Power

It is a basic precept of our Constitutional form of Republican Government that the Judiciary is an independent and co-equal Branch of Government, along with the Executive and Legislative Branches. . . . The line of separation or demarcation between the Executive, the Legislative and the Judicial, and their respective jurisdiction and powers, has never been definitely and specifically defined, and perhaps no clear line of distinction can ever be drawn. However, we must, of necessity, from time to time examine and define some of the respective powers within these undefined boundaries.

Because of the basic functions and inherent powers of the three coequal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof. See *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & S. 403, supra; *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577, supra; *Wilson v. Phila. School Dist.*, 328 Pa. 225, supra.

Expressed in other words, the Judiciary *must* possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government. This principle has long

been recognized, not only in this Commonwealth but also throughout our Nation. . . .

The very genius of our tripartite Government is based upon the proper exercise of their respective powers together with harmonious cooperation between the three independent Branches. *Leahey v. Farrell*, 362 Pa. page 57, 66 A.2d 577, supra. However, if this cooperation breaks down, the Judiciary must exercise its inherent power to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed. *Leahey v. Farrell*, 362 Pa. pages 57-58, 59-60, supra. . . .

Reasonable Necessity

In the leading case of *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577, supra, the Court of Common Pleas of Cambria County entered a mandamus Order against the County Commissioners and County Controller to compel the payment of funds necessary for salary increases given to the Court stenographers. The Court of Common Pleas had entered the Order *without* first complying with the provisions of Section 23 of the Act of July 5, 1947, P.L. 1308, 16 P.S. sec. 304, which required submission of salary increases of Court personnel to the County Salary Board. This Court reversed the lower Court Order because there was no attempt to first comply with the statutory provisions of administrative procedure for salary increases. However, in *Leahey*, we reaffirmed the inherent powers of the Judiciary to mandamus the payment of sufficient funds out of the public treasury for the efficient administration of the Judicial Branch of Government. The Court pertinently said 362 Pa. pages 57-58, 66 A.2d 579-580: "Should Commissioners, however, neglect or refuse to furnish funds, or sufficient funds, for reasonable judicial functions, and in consequence the efficient administration of the judicial branch of the government is thereby impaired or destroyed, the courts possess the inherent power to require such necessities to be furnished and to direct payment therefore out of the public treasury. . . ."

" . . . Should the legislature, or the county salary board, act arbitrarily or capriciously and fail or neglect to provide a sufficient number of court employes or for the payment of adequate salaries to them, whereby the efficient administration of justice is impaired or destroyed, the Court possesses inherent power to supply the deficiency. Should such officials neglect or refuse to comply with the reasonable requirements of the court, they may be required to do so by mandamus."

Leahey correctly holds (by necessary implication) that the burden is on the Court to establish that the money it requests is reasonably necessary for "the efficient administration of justice." If a Court is unable to provide an efficient administration of Justice because of insufficient funds to have adequate personnel, or reasonable salaries for personnel, or for other

necessary Court administration services, or for construction and maintenance of essential Court facilities, then our whole system of Justice and its administration will undoubtedly be greatly impaired, if not destroyed.

The confidence, reliance and trust in our Courts and in our Judicial system on the part of the Bench and the Bar, as well as the general public, have been seriously eroded. We cannot permit this to continue. In order to improve and expedite Justice, it is both important and imperative that we re-examine and re-evaluate our Courts and their administration, our judicial processes and our entire Judicial system.

The demands upon our Judicial system have increased tremendously in the last decade, especially in the criminal field. Violent crimes have increased 10% or more every year. The increase in criminal and civil trials, and the number of required pre-trial, presentencing and post-trial hearings have virtually swamped the Courts of this Commonwealth, particularly in Philadelphia. New programs, techniques, facilities, and expanded personnel have been and will continue to be necessary to meet the mandate of providing and administering a more efficient Judicial system and making Justice for all speedier and more certain.

Defendants contend, inter alia, that the overall problem of financial difficulties which undoubtedly confront and harass the City of Philadelphia should be considered in determining what is "reasonably necessary" for the "efficient administration of Justice by the Courts." The demand, often amounting to necessity, for additional funds for both the maintenance and the improvement of public services and general public welfare, and the unfortunate rise in costs of nearly every description, is widespread. Nevertheless, the deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice.

The Court does not have *unlimited* power to obtain from the City whatever sums it would like or believes it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be "reasonably necessary" for its proper functioning and administration, and this is always subject to Court review.

Mr. Chief Justice Marshall said in *McCulloch v. Maryland*, 17 U.S. 316, 431, 4 Wheat 316, 4 L.Ed. 579, ". . . the power to tax involves the power to destroy; . . ." A Legislature has the power of life and death over all the Courts and over the entire Judicial system. Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches—the Executive, the Legislative and the Judicial.

We have carefully considered all of the defendants' contentions, as well as all of the Court's contentions, but deem further discussion thereof unnecessary.

We agree with Judge Montgomery's conclusion that "the amount recommended by Mayor Tate and approved by Council is inadequate to meet the reasonable needs of the Court [of Common Pleas] for the present fiscal year." We also agree with his Order of September 30, 1970, allowing the Court \$2,458,000. This represents his allowance and specific allocation of certain of the amounts requested by the Court and his disallowance of certain items which the Court had requested. Judge Montgomery's award was based upon nine months remaining in the City's fiscal year, July 1, 1970 to July 1, 1971. We accordingly reduce the award to reflect the amount of time remaining in this fiscal year (five months from February 1, 1971) and awarded the Court of Common Pleas the sum of \$1,365,555.

Judgment, as modified, is affirmed.

Discussion Notes

1. Regarding *Tate* and its progeny, see Comment, "State Court Assertion of Power to Determine and Demand its Own Budget," *University of Pennsylvania Law Review* 120 (June 1972): 1187. See generally, Note, "Judicial Financial Autonomy and Inherent Power," *Cornell Law Review* 57 (July 1972): 975; Geoffrey C. Hazard, Jr., Martin B. McNamara, and Irwin F. Sentilles III, "Court Finance and Unitary Budgeting," *Yale Law Journal* 81 (June 1972): 1286; Carl Baar, "Judicial Activism in State Courts: The Inherent Powers Doctrine," in *State Supreme Courts: Policymakers in the*

Federal System, eds. Mary Cornelia Porter and G. Alan Tarr (Westport, Conn.: Greenwood Press, 1982), p. 129.

2. In 1981, the New Jersey Supreme Court promulgated a rule establishing a procedure for resolution of budget impasses such as occurred in *Tate*. Rule 1: 33-9, *New Jersey Court Rules of General Application* (1988). See *In Re Hudson County 1982 Judicial Budget*, 91 N.J. 412, 452 A.2d 202 (1982); *In re Union County Judicial Budget Impasse*, 87 N.J.1, 432 A.2d 807 (1983).

3. Which procedure seems preferable, Pennsylvania's or New Jersey's?

**Commonwealth v.
Pennsylvania Labor Relations Bd.
479 Pa. 440, 388 A.2d 736 (1978)**

ROBERTS, Justice.

This appeal presents the question whether court reporters of Philadelphia are "public employes" enjoying rights under the Public Employee Relations Act (Act 195), and, if so, whether Act 195 unconstitutionally interferes with the independence of the judiciary. We hold that court reporters are "public employes," and Act 195 is constitutional.

I

Procedural History

On August 5, 1974, the American Federation of State, County, and Municipal Employees (AFSCME) filed with the Pennsylvania Labor Relations Board a petition for representation, alleging that it represented at least thirty per cent of the court reporters of Philadelphia. The petition named the City and the Court of Common Pleas of Philadelphia as employer. Despite notice, the City did not appear at hearing before the Board concerning the petition. AFSCME amended its petition to exclude the City as a named employer.

Finding that Act 195 applies to the employment relationship between judges and court reporters, the Board ordered an election, following which the Board, on June 19, 1975, certified AFSCME as the exclusive bargaining representative of court reporters. The Board dismissed the judges' continuing objection that Act 195 does not apply to their court reporters, and entered a final order of certification.

Appellants Philadelphia judges appealed the Board's order to the Court of Common Pleas of Philadelphia and petitioned this Court to assume plenary jurisdiction over the controversy. We granted the petition and transferred the proceedings to the Commonwealth Court. The Commonwealth Court affirmed the order of the Board and we granted appellants' petition for allowance of appeal.

* * * * *

III

**The Constitutionality of
Applying Act 195 to the Courts**

Appellants argue that subjecting "wages, hours and other terms and conditions of employment," see Act 195, sec. 701, 43 P.S. sec. 1101.701, to bargaining will interfere with their ability to administer justice.

Appellants contend that arbitrators called upon whenever bargaining reaches an impasse could render decisions removing judges' control over important considerations such as starting times, overtime work, and appointment of court reporters. They also contend that the Board would be empowered to create too many bargaining units and, through unfair labor charge procedures, see Act 195, sec. 1201, 43 P.S. sec. 1101.1201, decide that courts have discharged or disciplined an employee illegally.

On this record, appellants' fear for the continued independence of the judiciary is unjustified. As we concluded in *Ellenbogen v. County of Allegheny*, supra, so long as judges retain authority to select, discharge, and supervise court personnel, the independence of the judiciary remains unimpaired. These crucial areas of judicial authority are not infringed by collective bargaining, which here will resolve matters involving wages and other financial terms of employment. See Act 195, secs. 701 and 702, 43 P.S. secs. 1101.701 and 1101.702; see generally *Pennsylvania Labor Relations Board v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975). Moreover, should collective bargaining impair the independence of the judicial function, nothing in Act 195 nor our decision in *Ellenbogen* prohibits courts from taking reasonable, appropriate measures to maintain their independence. See *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971); *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949).⁶

IV

Conclusion

Because no dispute exists here concerning the proper managerial representative for purposes of proceedings under Act 195, we are not called upon to decide whether appellants are to sit as the managerial representative in bargaining and representation proceedings with court reporters. We decide only that the Legislature intended Act 195 to apply to court reporters of Philadelphia and, on the present record, such application is constitutional.

⁶Relying on *Passaic County Probation Officers' Ass'n. v. County of Passaic*, 73 N.J. 247, 374 A.2d 449 (1977), amicus Court Administrator of Pennsylvania contends that Act 195 constitutes an impermissible attempt by the Legislature to regulate judicial administration, a subject assertedly within the exclusive province of this Court. The Court Administrator further argues that implementation of numerous bargaining agreements throughout the Commonwealth pursuant to Act 195 will thwart this Court's effort to unify the judicial system of Pennsylvania. We do not agree. For all the reasons stated in text, Act 195 does not impose any threat to the unification of the judicial function because collective bargaining involving court personnel does not alter judges' authority to administer justice. See *Ellenbogen v. County of Allegheny*, ___ Pa. ___, 388 A.2d 730 (1978).

Accordingly, the order of the Commonwealth Court is affirmed and the case is remanded to the

Pennsylvania Labor Relations Board for proceedings consistent with this opinion.

Discussion Notes

1. Would the Pennsylvania courts be required to follow labor arbitrators' awards concerning judicial employees? See *Beckert v. American Federation of State, County and Municipal Employees*, 56 Pa.

Cmwlth. 572, 425 A.2d 859, aff'd 501 Pa. 69, 459 A.2d 756 (Pa. 1983).

2. See generally David Weinstein, "Collective Bargaining in the Judicial Branch: Current Legal Developments," *Justice System Journal* 4 (Spring 1979): 304.

F. Advisory Opinions

Justice Frankfurter warned about the problems caused by courts rendering advisory opinions. "It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay." Felix Frankfurter, "A Note on Advisory Opinions," *Harvard Law Review* 37 (June 1924): 1008.

Many state constitutions, however, provide for, and under certain circumstances, require, the issuance by the state's highest court of advisory opinions to the other branches of government. See generally Comment, "The State Advisory Opinion in Perspective," *Fordham Law Review* 44 (October 1975): 81.

In re House Resolution No. 12. 88 Colo. 569, 298 P. 960 (1931)

Per Curiam.

This court is in receipt of House Resolution No. 12 of the House of Representatives of the Twenty-Eighth General Assembly now in session, adopted and transmitted under that portion of section 3, article 6 of our Constitution which reads: "The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives."

This resolution sets forth that "there is now pending before the 28th General Assembly a proposed income tax law which has passed the House on 3rd reading"; that the constitutionality of such a law "has been questioned"; and that the House has obtained from the Attorney General an opinion upholding said constitutionality, which opinion is attached. It next recites the reasons for the passage of

the act and states the necessity for an opinion of this tribunal. Then follows the request of "the House of Representatives" that we decide "for the direction and guidance of the General Assembly and the Governor," three questions, i.e.: (1) Has the legislature authority to adopt a flat or graduated income tax? (2) Has it authority to use the proceeds thereof for certain specified purposes? (3) Has it authority to provide certain exemptions therefrom?

We have held that said section 3 authorizes an inquiry by the House or Senate only when a bill involving a constitutional or publici juris question is before the body. In re Senate Bill No. 416, 45 Colo. 394, 101 P. 410. Also that it authorizes an inquiry by the Governor only when such a bill has been passed by both House and Senate, and is before him for signature. In re Proposed Amendments to the Constitution, 50 Colo. 84, 114 P. 298.

Assuming, but not deciding, that these questions are such as are contemplated by the Constitution, the "solemn occasion" has passed, or has not arisen. The bill is no longer before the House, and will never again be if its action be rejected or approved in toto by the Senate. The latter may be unanimously of the opinion that the bill is or is not constitutional. If so, no such "occasion" will confront that body. If otherwise, the Senate may not wish our opinion. If the Senate rejects the bill, no questions in relation thereto can confront the Governor. If it passes the bill, he may not wish our opinion.

Since said constitutional provision is our only authority for answering questions not presented in litigated cases, and since these interrogatories do not fall within that section, we respectfully request that the honorable House of Representatives withdraw them.

Discussion Notes

1. See also, *In re Opinion of the Justices*, 49 N.E.2d 252 (Mass. 1943).

2. In rendering advisory opinions are state courts exercising the “judicial power”? Are their opinions “binding” upon persons not before the court?

3. The New Hampshire Supreme Court noted that advisory opinions “express . . . such tentative views on the subject as we now have, with a repetition of the caution that the opinion given is *not a judicial decision* of the questions propounded.” *In re Opinion of the Justices*, 138 A. 284, 291 (N.H. 1927) (emphasis added).

4. The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Welasky*, 177 N.E. 656 (Mass. 1931), described advisory opinions as follows:

As the jurors were about to be impaneled for the trial of this complaint, the defendant filed a challenge to the array. . . . The ground on which that challenge rests is that there were no women on the lists from which the jurors were drawn. The contention in support of the challenge raises two inquiries: (1) Whether under the laws of the commonwealth the names of women ought to have been placed upon the jury lists; and (2) whether by such exclusion the constitutional rights of the defendant under the Fourteenth Amendment to the Constitution of the United States have been infringed.

Both these questions were answered in the negative by the justices in an opinion rendered to the honorable the House of Representatives in accordance with the duty imposed by part 2, c. 3, art. 2, of the Constitution. Opinion of the Justices, 237 Mass. 591, 130 N.E. 685. It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisers of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis. When the same questions are raised in litigation, the justices then composing the court are bound sedulously to guard against any influence flowing from the previous consideration, to examine the subject anew in the light of arguments presented by parties without reliance upon the views theretofore expressed, and to give the case the most painstaking and impartial study and determination that an adequate appreciation of judicial duty can impel.

5. Do these points answer Justice Frankfurter’s criticism? Could the legislature grant the power to render advisory opinions by statute?

6. Article IV, Section (1) (c) of the Florida Constitution provides for “interested persons to be heard on the questions presented . . .” when the governor seeks an advisory opinion.

Arthur Prentice Rugg: A Memorial 302 Mass. 625, 635 (1939)

Bentley W. Warren, Esquire, addressed the court as follows:

May it please Your Honors: The Memorial which has just been presented to your Honors admirably sets out the career and character of the late Chief Justice. . . .

Many features of the judicial branch of our government, as represented in the Supreme Judicial Court, have promoted the development and the stability of its role of a balance wheel in the government itself. Two attributes of this court stand out preeminently. One is the practical life tenure of its members, imparting to the court a quality of permanence and continuity foreign to either the executive or legislative branches. The other is the rather unusual provision, in judiciary organization, for advisory opinions by the court to the executive and legislative

departments of government. In submitting such opinions, greater freedom is possible in considering the questions of law involved, as the justices are unhampered by the principle early enunciated and always adhered to, that every presumption must be entertained in favor of the validity of any statute under consideration and that only the clearest reasons against its validity will suffice to set it aside. Moreover, a different situation is presented when the court is asked to give an abstractly correct advisory opinion as to the constitutionality of a proposed bill than when it is asked in a litigated case to hold invalid the provisions of a statute solemnly enacted by the General Court and first brought to the attention of the justices in a controversy between actual litigants and after rights have accrued and been exercised and duties and responsibilities have arisen under the provisions of that statute. The distinction between the two kinds of opinion is not unlike that governing the necessary degree of proof for the entry of judgement in a civil action and that required to warrant a verdict of guilt in a criminal proceeding. This flexibility possible in advisory opinions has without question headed off

and prevented the enactment of many measures of doubtful constitutionality, which, nevertheless, had they been enacted, might, under the application of the principle just mentioned, have become imbedded in our statutory law.

It is of interest to study the record of the late Chief Justice in passing upon questions of constitutionality in advisory opinions and such questions in litigated cases. . . . The results are significant and reflect his intelligent and discriminating reaction to the two sets of circumstances.

Without a complete and exhaustive examination of all instances of the two classes of opinions, it appears that he participated in approximately eighty advisory opinions. Of such of these as dealt with the constitutionality of proposed legislative measures, thirty-seven, or nearly half of the total, held that the measures submitted to the court were beyond the constitutional power of the Legislature to enact. On

the other hand, in litigated cases in which statutes came before the court on an issue of constitutionality, so few as to be really negligible have been set aside. Indeed, it is probably the general judgment of the bar that an attack upon the constitutionality, or a defense based on the unconstitutionality, of a statute while Rugg presided over this court represented a last resort of a litigant. Whether this comparative immunity of enacted statutes is due to the winnowing out of doubtful measures through their prior submission to the analysis of the court in requests for advisory opinions, or whether it is due to the different rules applicable in consideration of constitutional questions in advisory opinions and in actual litigated cases upon enacted statutes, it must be clear that the provision for such advisory opinions has proved of great value to the orderly and constitutional exercise of the powers entrusted to the executive and legislative branches of the government.

Discussion Notes

1. Why does Mr. Warren conclude that the usual presumption of validity accorded to statutes is not present in the context of advisory opinions?
2. Would an official be required to accept the advice rendered in an advisory opinion?
3. How do advisory opinions fit into separation of powers theory?
4. Could a state supreme court render an advisory

opinion on a *federal* constitutional question? See *In re Advisory Opinion to the Governor*, 509 So.2d 292, 302 (Fla. 1987). If a state supreme court did render an advisory opinion on a federal constitutional question, could it be reviewed by the United States Supreme Court?

5. Reread the opinion of Justice Holmes in *In re Municipal Suffrage to Women*, Chapter 6, Section C., page 258.

The State Executive Branch

At this point the reader should review the material in Chapter 1, Section A on the evolution of executive power during the founding decade. The executive branch began in disfavor, and has gained more power and authority over the years. For a recent analysis of the measures of gubernatorial power, see Nelson C. Dometrius, "Changing Gubernatorial Power: The Measure vs. Reality," *Western Political Quarterly* 40 (June 1987): 319; Keith J. Mueller, "A Rejoinder," *ibid.*, 329; Nelson C. Dometrius, "Reply," *ibid.*, 333.

Throughout the evolution of executive power, a recurring dilemma arose. How were executive powers to be described in a constitution? In the words of Charles C. Thach, Jr.:

The matter of definition of powers was a vital one to the executive department. The only powers explicitly conferred on the executive thus far were the veto power, the power to make appointments, though not of

judges, and a power, which perhaps was only a duty, to execute the laws. . . . Should the great political powers, such as control of the military, control of foreign negotiations, the power of pardon, be left to the will of future legislatures, or be fixed by the Constitution beyond legislative control? Even more fundamental was the question of the vesting clause. Should executive power be possessed by the chief executive subject to the law of the land, or on the same footing as the legislature possessed its powers? Again, should a complete enumeration of powers be undertaken? If not, should the unenumerated power be left to the legislature to grant or withhold? State constitutions furnished examples of each method of procedure.

Charles C. Thach, Jr., *The Creation of the Presidency 1775-1789* (Baltimore: Johns Hopkins Press, 1923, 1969 reprint), pp. 105-06.

A. The Nature of Executive Power

Rapp v. Carey **44 N.Y. 157, 375 N.E. 2d 745 (1978)**

BREITEL, Chief Judge.

Defendants, the Governor and the State Board of Public Disclosure, appeal from the Appellate Division's unanimous affirmance of an order granting summary judgment to plaintiffs, State employees, and declaring the Governor's Executive Order No. 10.1 (9 NYCRR 3.10) unconstitutional. The disputed order purports to require a wide range of State employees within the executive branch to file multi-detailed personal financial statements with the Board of Public Disclosure, and to abstain from various political and business activities.

The issue is whether under the State Constitution the Governor may, by executive order, without benefit of authorizing legislation, mandate on State employees, many not subject to removal by the Governor, the filing of financial disclosure statements, and the abstention from activities not prohibited by statute. Not at issue is the wisdom of requiring such statements and prohibiting the proscribed activities, or the hardly doubted power to impose such requirements by appropriate legislation.

There should be an affirmance. Neither in the Constitution nor in the statutes is there express or implied authority for the Governor to exact of State employees compliance with the requirements of Executive Order No. 10.1. Nor does the Governor's order merely implement existing legislation relating to conflicts of interest. The order reaches beyond that, and assumes the power of the Legislature to set State policy in an area of concededly increasing public concern.

The executive order was promulgated by the Governor on October 22, 1976. Paragraph II, which requires annual filing of a financial disclosure state-

ment, prohibits service in political party office, and regulates outside employment and activity, applies to the following employees: (1) employees of the executive department and other State departments and agencies headed by gubernatorial appointees or nominees (a) whose annual State salary is at least \$30,000; or (b) who hold nonsecretarial, nonclerical positions classified as managerial or confidential; and (2) members of the governing bodies of State entities, if the member is appointed or nominated by the Governor and receives more than \$15,000 per year in compensation from the State. Paragraph III, which also requires filing of a financial disclosure statement, but does not contain the same prohibitions on outside activity, applies to members of governing bodies of State entities, if the member is appointed by the Governor and receives State compensation which amounts to no more than \$15,000. The State Board of Public Disclosure, first established by the Governor in Executive Order No. 10 (9 NYCRR 3.10), an earlier more limited attempt to regulate potential conflicts of interest, was continued to administer the new executive order.

The agencies purportedly covered by the executive order are not confined to the executive department, a department that is but one of many in the executive branch. It also extends to other State departments and many so-called independent agencies, such as public authorities, over which the Governor had no general control or powers of supervision or operation.

On November 1, 1976, the State board directed covered employees to complete financial disclosure statements and return them to the board by December 1. This action was brought by covered employees to have the order declared unconstitutional and to enjoin its enforcement. Special Term granted the requested relief, and a unanimous Appellate Division affirmed.

* * * * *

The executive power of the State, vested in the Governor, is broad (see N.Y. Const., art. IV sections 1, 3; Executive Law, arts. 2,3). In his capacity to oversee, even beyond his responsibility to operate, the Governor may investigate the management and affairs of any department, board, bureau, or commission of the State (Executive Law, sec. 6). This investigatory power, which includes the power to subpoena witnesses, as well as to require the production of books and papers, and which authorizes the Governor to delegate the investigatory function to persons appointed by him for that purpose, permits the Governor to exercise considerable vigilance, but not necessarily direction, in protecting against conflicts of interest. The Constitution and statutes thus recognize explicitly the need for and the power in the Governor to oversee, but again not necessarily to direct, the administration of the various entities in the executive branch.

The Governor may also direct the Attorney-General to inquire into matters "concerning the public peace, public safety and public justice" (Executive Law, sec. 63, subd. 8). Implementation of this power is illustrated by Governor Dewey's creation in 1951 of the New York State Crime Commission to investigate the relationship between organized crime and State government (see *Matter of Di Brizzi [Proskauer]*, 303 N.Y. 206, 211-216, 101 N.E.2d 464, 466-468).

There are, however, limits to the breadth of executive power. The State Constitution provides for a distribution of powers among the three branches of government (see N.Y. Const., art. III, sec. 1; art. IV, sec. 1; art. VI). This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards (*Packer Coll. Inst. v. University of State of N.Y.*, 298 N.Y. 184, 189, 81 N.E.2d 80, 81). Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities.

Defendants cite numerous instances, reaching far back into the State's history, in which the Governor has acted by "executive order," although not usually so denominated. But, until 1950, none of those orders had any rule-making component. They were emergency measures later submitted to the Legislature for ratification, actions taken pursuant to an unchallenged constitutional or statutory power of the Governor, or proclamations without significant legal effect. (See, e.g., 3 Lincoln, Messages from the Governor, pp. 38-40 [proclamation calling Legislature

into Extraordinary Session].) After 1950, there were a number of different types of orders which were seemingly cast in a rule-making mold, but were repetitive of existing legislation as to standards and implemented the enforcement of those standards by voluntary arrangements, directions for co-ordination or the interposition of mediatory bodies (see, e.g., Executive Order Establishing Code of Fair Practices, 1960 Public Papers of Governor Nelson. A. Rockefeller, p. 1130; Executive Order for Resolution of Employee Complaints, 1950 Public Papers of Governor Thomas E. Dewey, p. 613). Assuming they were valid, as they undoubtedly were in large measure, the order in this case goes beyond any of them.

It is true that in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement (see N.Y. Const., art. IV, sec. 3). But he may not, as was recently said of the Mayor of the City of New York, "go beyond stated legislative policy and prescribe a remedial device not embraced by the policy" (*Matter of Broidrick v. Lindsay*, 39 N.Y.2d 641, 645-646, 385 N.Y.S.2d 265, 267, 350 N.E.2d 595, 597). And, as noted in the *Broidrick* case, decided unanimously by this court, the flexibility allowed the executive in designing an enforcement mechanism depends upon the nature of the problem to be solved (*id.*, p. 646, 385 N.Y.S.2d p. 267, 350 N.E.2d p. 597). Where it would be practicable for the Legislature itself to set precise standards, the executive's flexibility is and should be quite limited.

Defendants seek to justify the executive order as an implementation of section 74 of the Public Officers Law. That statute, called a code of ethics for State officers and employees, provides guidelines designed to eliminate substantial conflicts of interest between State duties and private interests. Together with section 73 of the Public Officers Law, which, as opposed to guidelines, contains absolute rules and proscriptions, section 74 constitutes the legislative policy of the State in the conflict of interest area.

Crucial is the contrast between sections 73 and 74, enacted together in 1954 (L.1954, chs. 695, 696). In section 73 the Legislature enacted a blanket prohibition of conduct by State employees thought to be detrimental to State interests. The prohibited conduct and the employees to which each prohibition applies are carefully described. In addition, subdivision 6 of the statute mandates public disclosure of a circumscribed category of investments by certain State employees and officers. Thus, in section 73 the legislature demonstrated its ability and readiness to proscribe specified transactions peculiarly vulnerable to conflicts of interest, transactions in "definable areas on which there should be no disagreement" (Governor

nor's Memorandum on Approval, 1954 Public Papers of Governor Thomas E. Dewey, pp. 304, 305).

Section 74 is a different type of statute. Designed to cover "areas where distinctions are close, and the differences between right and wrong not always easily ascertainable, [it] establish[es] broad standards of conduct, leaving to advisory committees the process of developing a body of rules and precedents on the basis of continuing experience and trial and error" (*id.*).

As Mr. Justice Harold J. Hughes succinctly stated at Special Term in holding the executive order invalid, first quoting from the declaration of legislative intent accompanying enactment of section 74 (L.1954, ch. 696, sec. 1), "'Government is and should be representative of all the people who elect it, and some conflict of interest is inherent in any representative form of government. Some conflicts of material interests which are improper for public officials may be prohibited by legislation. Others may arise in so many different forms and under such a variety of circumstances, that it would be unwise and unjust to proscribe them by statute with inflexible and penal sanctions which would limit public service to the very wealthy or the very poor. For matters of such complexity and close distinctions, the legislature finds that a code of ethics is desirable to set forth for the guidance of state officers and employees the general standards of conduct to be reasonably expected of them' . . . [t]he inflexible proscriptions of the Executive Order are clearly at variance with this declaration of legislative intent" (*Rapp v. Carey*, 88 Misc.2d 428, 431, 390 N.Y.S.2d 573, 575). In short, this order is not an implementation of section 74; it is a nullification of it—a nullification, however benevolent in purpose, without benefit of legislative action.

The challenged order presumes to prohibit service in political party office by all State employees covered by paragraph II, not just by the small group of officials of high rank named in subdivision 8 of section 73 of the Public Officers Law. The order, again without any apparent statutory authority, would also prohibit, except on permission of the Board of Public Disclosure, all types of privately compensated employment by State employees. That the dual loyalties engendered by this dual employment may rightly be condemned is not the issue. The crux of the matter is the determination by the Legislature, implicit in its enactment of the code of ethics, that the existence of conflicts in these areas is to be determined on a case-by-case basis, not by use of blanket prohibitions.

None of this is to say that the Governor may not require that his appointees, serving at his will, abstain from transactions or business associations that potentially conflict with State duties. The Governor is, of course, free to regulate the business activities of em-

ployees serving at his pleasure. The same cannot be said, however, of employees who have civil service tenure, or even gubernatorial appointees who serve for fixed terms. These employees may not be removable except for cause, and are thus not subject to summary dismissal by the Governor. The challenged executive order exceeds the Governor's power of appointment and reaches employees who could be neither directly appointed nor summarily dismissed by the Governor. As to these employees, the Governor is without power to impose the strictures contained in the executive order.

The restriction on political activities is particularly troublesome. While the restriction on the merits would be supported by many or even most, it involves a broad question of policy, hardly resolvable by other than the representatively elected lawmaking branch of government, the Legislature.

The out-of-State cases relied upon by defendants are not on point. True, in *Illinois State Employees Assn. v. Walker*, 57 Ill.2d 512, 315 N.E.2d 9, cert. den. *sub nom. Troopers Lodge No. 41 v. Walker*, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656, the Illinois Supreme Court upheld the Governor's power to issue an executive order requiring financial disclosure statements. But that holding rested squarely on the Illinois Constitution which provided that all "holders of state offices and all members of a Commission or Board created by this Constitution shall file a verified statement of their economic interests, as provided by law" (Ill. Const., art. XIII, sec. 2, quoted in 57 Ill.2d p. 518, 315 N.E.2d 9, 12). No similar provision may be found in the Constitution or statutes of this State.

Shapp v. Butera, 22 Pa.Cmwlth. 229, 348 A.2d 910 involved the status under the Pennsylvania "Right to Know Act" of financial disclosure statements filed pursuant to an executive order issued by the Governor. The Commonwealth Court of Pennsylvania, in concluding that the statements filed were not subject to public examination, inspection, and copying, noted that "[t]he financial statements requested by the Governor had no more legal effect than a request by the Governor to have birthday greetings sent to him" (*id.*, p. 237, 348 A.2d p. 914). By contrast, the present executive order was designed to be mandatory, not merely an invitation to voluntary compliance.

In *Opinion of Justices*, N.H., 360 A.2d 116 the New Hampshire Supreme Court sustained a resolution adopted by the Governor and council to the extent that the resolution stated a policy prohibiting employment of elective officials in the executive branch, but struck down provisions restricting the right of elective officials to do business with the State. The court concluded "[h]owever desirable comprehensive legislation in the area of conflict of interest may be, the enactment of such legislation is

the prerogative and responsibility of the legislature and not the executive” (N.H., 360 A.2d, p. 122).

The sister State cases, therefore, present problems different from the ones created by the instant executive order. Moreover, they do not and could not bear significantly on the issue in this case, arising as it does under this State’s particular constitutional and statutory provisions. The sister State cases are useful principally to show how other States have reacted to the use of executive orders in the conflict of interest area, and as such, they are either inconclusive, or largely supportive of the general principles here discussed.

The crux of the case is the principle that the Governor has only those powers delegated to him by the Constitution and the statutes. On the principle, there is general agreement (see, e.g., *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, supra; Opinion of Justices, N.H., 360 A.2d 116, 122, supra; *Opinion of the Justices*, N.H. 360 A.2d 116, 122, supra; cf. *Illinois State Employees Assn. v. Walker*, 57 Ill.2d 512, 518, 315 N.E.2d 9, supra). There should be no less agreement on application of the principle to the facts of this case. On no reasonable reading of the Constitution, the Executive Law, or the relevant provisions of the Public Officers Law can the Governor’s exercise of legislative power, exemplified in the executive order, be sustained.

Under our system of distribution of powers with checks and balances, the purposes of the executive order however desirable, may be achieved only through proper means. No single branch of government may assume a power, especially if assumption of that power might erode the genius of that system. The erosion need not be great. “Rather should we be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department” (*People v. Tremaine*, 252 N.Y. 27, 57, 168 N.E. 817, 827 [concurring opn. per Crane, J.]).

Finally, it is quite significant that in the *Hunter* case (supra) in which this court has sustained, in large part, the validity of the local law, the City Council of the City of New York enacted, as a legislative matter, the financial disclosure requirements imposed on city employees. The Governor’s objective may be achieved by obtaining the requisite legislation. Critical, however, is that any difficulty or even impossibility of obtaining legislation through the constitutionally prescribed mechanisms may not be made a source of executive law-making power where none otherwise exists.

Accordingly, the order the Appellate Division should be affirmed, with costs.

COOKE, Judge (dissenting in part).
I respectfully dissent. The power and position of the

Governor of the State of New York should not be thwarted by a declaration that his order is unconstitutional and invalid—either as a matter of law or State policy. Executive power of the State is vested constitutionally in the Governor and by statute he is authorized at any time to examine and investigate the management and affairs of any department, board, bureau or commission of the State. The Governor was empowered within this framework, therefore, to issue the order requiring applicable officers and employees of the State to file financial statements, the exercise of this power being consistent with and in implementation of the State code of ethics. Far from nullifying and completely counteracting the force and effectiveness of the code of ethics, the order in this respect would implement its provisions and thus breathe life into the legislative scheme. When acting in the exercise of his executive powers, as in this respect, the Governor of the State should be immune from judicial interference (*Gaynor v. Rockefeller*, 21 A.D.2d 92, 98, 248 N.Y.S.2d 792, 800, affd 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627).

As a matter of law, as head of the executive department, the Governor is authorized to regulate the activities of those officers and employees functioning wholly within that department. From the standpoint of policy alone, it would be anomalous indeed to hold the Governor responsible for the faithful execution of the laws, if at the same time he is refused control over the human agencies whom he must necessarily employ for that purpose.

Executive Order No. 10.1 represents an attempt by the Governor to provide a framework pursuant to which he might ascertain whether certain State officers and employees (hereafter referred to as “employees”) are abiding by high ethical standards required of them in the performance of their duties. That order, to the extent that it is grounded on powers conferred expressly or by necessary implication either by the Constitution or by statute, thereby voicing the will of the people or the Legislature, should be upheld and enforced.

* * * * *

JASEN, Judge (dissenting).

I would reverse the order of the Appellate Division and hold the challenged executive order constitutional in its entirety.

The Governor of the State of New York derives his power from the State Constitution, which declares that “[t]he executive power shall be vested in the governor” (N.Y.Const., art. IV, sec. 1), and that “[h]e shall expedite all such measures as may be resolved upon by the Legislature, and shall take care that the laws are faithfully executed” (N.Y.Const., art. IV, sec. 3). Not only do these constitutional man-

dates vest broad powers in the Chief Executive, but they also charge him with far-reaching responsibilities to effectuate the laws enacted by the Legislature. (*Matter of Broidrick v. Lindsay*, 39 N.Y.2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595.) Performance of so demanding a task would indeed be impossible if executive power were not commensurate with executive responsibility. Although broad, the powers of the executive are, of course, not unbounded; the Legislature alone is constitutionally empowered to enact law (N.Y. Const., art. III, sec. 1), and while the Governor is forbidden to trespass into the legislative sphere, where the Legislature has spoken he is mandated to implement its will.

Executive Order No. 10.1 is not an executive incursion into the legislative realm, for it finds ample support in a legislative predicate—the code of ethics. (Public Officers law, sec. 74.) In broad but clear language, the code prescribes ethical standards for officers and employees of *all* State agencies. “No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.” (Public Officers Law, sec. 74, subd. 2.) This statute announces the policy of the State, to prevent even the slightest taint of a con-

flict of interest from infecting any governmental agency. No qualification attaches to this policy; its scope is not limited to one branch of government or one sort of activity. It is rather a sweeping pronouncement that ethics in government must be scrupulously promoted and preserved. Executive Order No. 10.1 is unquestionably consistent with this policy. All of its provisions—the requirement of financial disclosure, the proscriptions against holding positions in political organizations and engaging in private employment for compensation or holding other public office or employment unless authorized by the Board of Public Disclosure—implement the statutorily mandated policy of the State. In helping to assure that the legislative purpose will be achieved, the challenged executive order, rather than an unconstitutional arrogation of power, is a constitutional discharge of executive responsibility.

Since the executive order owes its validity to its legislative underpinning, the continued existence of supportive legislation is imperative to the continued validity of the order. The Legislature’s exclusive law-making powers, however, are in no way circumscribed by this or any other executive action. Should the Legislature adopt further measures relating to ethics in government, the executive order would have to be measured against those enactments. Only so long as the order implements the will of the Legislature, as expressed by statutes, will it remain valid.

Discussion Notes

1. For a similar analysis, see *Buettell v. Walker*, 59 Ill.2d 146, 319 N.E.2d 502 (1974).
2. How does the New York Court of Appeals’ description of gubernatorial power compare with descriptions we have seen earlier, characterizing state governmental power as “plenary”? Which would be the more often occurring questions with

respect to executive power, those relating to implied powers or implied limitations?

3. On executive orders generally, see Note, “Gubernatorial Executive Orders as Devices for Administrative Discretion and Control,” *Iowa Law Review* 50 (Fall 1964): 78.

4. What is different about the nature of the executive power asserted in the following case from that which was asserted in *Rapp v. Carey*?

People v. Herrera **516 P.2d 626 (Colo. 1973)**

LEE, Justice.

In these eight cases, consolidated for appeal, appellants seek post-conviction review of their sentences, under 1971 Perm.Supp., C.R.S.1963, 40-1-101 et seq. Section 40-1-510(1)(f), as amended, authorizes post-conviction review where it is alleged:

That there has been a significant change in the law, applied to applicant’s conviction

or sentence, allowing in the interest of justice retroactive application of the changed legal standard. (Emphasis added.)¹

The Colorado Criminal Code, effective July 1, 1972, redefined many offenses and completely revamped the penalty provisions. Sentences were reduced for most offenses. The appellants, all of whom had been convicted and sentenced under prior criminal statutes, sought a review of their sentences under Section 40-1-510(1)(f), as amended. The trial courts denied review in all eight cases.

¹Prior to the amendment of April 19, 1973, the word “allowing” read “requiring.”

* * * * *

It is clear that the legislature intended by Section 40-1-510(1)(f) to confer a right of review of sentences, to the end that sentences might be equalized in light of the changes in the Colorado criminal laws. All appellants qualify for review under the terms of the statute, in that their sentences either exceeded the maximums authorized by the new code for the same offenses, or exceed by three years the minimums provided by it. 1971 Perm.Supp., C.R.S.1963, 40-1-509.

We recognize and agree with the laudable, beneficent purposes motivating the enactment of Section 40-1-510(1)(f). We also are aware that the criminal justice process sometimes results in imperfect justice which in extreme cases cries out for correction. This is particularly so in the area of imposition of sentences for criminal misconduct. The methods and means by which correction of such inequities and injustices may be attained, however, are circumscribed by constitutional limitations.

Article III of the Colorado Constitution divides “[t]he powers of the government of this state . . . into three distinct departments,—the legislative, executive and judicial” and further provides that:

[N]o person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as is in this constitution expressly directed or permitted.

* * * * *

The judiciary can no more exercise a power constitutionally conferred upon the legislature than can

the executive. Also, it seems obvious that the legislature is equally powerless to confer executive powers upon the judiciary.

Article IV, Section 7, of the Colorado Constitution provides:

The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason. . . .”

The power of commutation, with which we are here concerned, is the power to reduce punishment from a greater to a lesser sentence. . . .

By Section 40-1-510(1)(f) the legislature sought to confer upon the courts the express power to review sentences after conviction and exhaustion of appellate remedies. Implied in this provision is the authority to reduce a sentence after a final conviction—the power of commutation. Nowhere does the constitution vest the power of commutation in the courts.²

In *People v. District Court, Colo.*, 502 P.2d 420, we observed that the governor has the *exclusive power* to grant reprieves, commutations and pardons after conviction. We affirm that declaration. Any attempt, therefore, to exercise such power by the judicial department, even though legislatively sanctioned, would be a violation of the doctrine of separation of powers under Article III of the Colorado Constitution. Other states with similar constitutional provisions have reached like conclusions. . . .

²By contrast, the legislature provided in Section 40-1-509 for appellate review of sentences during the appeal process, which imports the exercise of a proper judicial function before finality of a judgment of conviction.

Discussion Notes

1. With respect to the gubernatorial clemency power, and its relationship to legislative power,

see also *In re Advisory Opinion of the Governor*, 334 So.2d 561 (Fla. 1976).

2. Can you make an argument against the outcome in the Colorado case?

B. Executive Veto Power

Although, in the early history of state constitutions, the executive veto was not favored, now all state constitutions except that of North Carolina authorize governors to veto legislation. The specific provisions vary in their details. See generally John A. Fairlie, "The Veto Power of the State Governor," *American Political Science Review* 11 (August 1917): 473.

The states of Alabama, Illinois, Massachusetts, Montana, New Jersey, South Dakota and Virginia have further refined the gubernatorial veto to provide for a "conditional" or "amendatory" veto. For example, Article VI, section 10(2) of the Montana Constitution provides:

(2) The governor may return any bill to the legislature with his recommendation for amendment. If the legislature passes the bill in accordance with the governor's recommendation, it shall again return the bill to the governor for his reconsideration. The governor shall not return a bill for amendment a second time.

In all but a few states, though, the governor must exercise the veto in an "all-or-nothing" fashion. In other words, he or she must either accept or reject a bill as a package, without being about to approve certain sections while rejecting others. One of the few exceptions to this rule is in Washington. See Timothy P. Burke, "The Partial Veto Power: Legislation By the Governor," *Washington Law Review* 49 (February 1974): 603; Note, "Washington's Partial Veto Power: Judicial Construction of Article III, Section 12," *University of Puget Sound Law Review* 10 (Spring 1987): 699.

The general "all-or-nothing" quality of the veto power began to cause significant problems in the area of gubernatorial review of appropriation bills, which often include many, even hundreds, of appropriations of government funds for various programs. As a

response to this problem, the "item veto" was devised, whereby the governor could disapprove of items or parts of appropriation bills. Interestingly, it first appeared in the provisional constitution of the Confederate States, adopted on February 8, 1861. Subsequently, the item veto mechanism, with some variations, has been adopted in the constitutions of more than 40 states. House Committee on Rules, *Item Veto: State Experience and its Application to the Federal Situation*, 99th Cong., 2d Sess. (Comm.Print 1986) pp. 201-202.

In 1921, Oregon amended its constitution to add the following provision to the item veto power contained in Article 15, section 15a:

The Governor shall have power to veto single items in appropriation bills, *and any provision in new bills declaring an emergency, without thereby affecting any other provision of such bill.*

For the reasons behind this change, see *Lipscomb v. State of Oregon*, in Chapter 5, Section C, p. 184.

The item veto has been the subject of a wide range of rulings by the courts. The following two cases illustrate some of the issues that can arise, and the judicial approaches that have been applied to the item veto.

State ex rel. Sego v. Kirkpatrick **86 N.M. 359, 524 P.2d 975 (1974)**

OMAN, Justice.

* * * * *

We are here concerned with vetoes and attempted vetoes of certain language contained in the General Appropriations Act of 1974, commonly and hereinafter referred to as House Bill 300 (Ch. 3,

Laws of 1974, passed by the Special Session; section 11-4-4, N.M.S.A.1953 (Int.Supp.1974). In accomplishing these vetoes and attempted vetoes, the Governor was acting under the authority vested and claimed to be vested in him by Art. IV, sec. 22, Constitution of New Mexico, which provides:

Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval. If he approves, he shall sign it, and deposit it with the secretary of state; otherwise, he shall return it to the house in which it originated, with his objections, which shall be entered at large upon the journal; and such bill shall not become a law unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal. Any bill not returned by the governor within three days, Sundays excepted, after being presented to him, shall become a law, whether signed by him or not, unless the legislature by adjournment prevent such return. Every bill presented to the governor during the last three days of the session shall be approved by him within twenty days after the adjournment and shall be by him immediately deposited with the secretary of state. Unless so approved and signed by him such bill shall not become a law. *The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto, as herein provided. (As amended September 15, 1953.)* [Emphasis added]

It is the emphasized language of this section of our constitution with which we are particularly concerned. The disapproval by the Governor of an item or part of a bill under this authority is commonly referred to as a "line item veto." However, the word "line" does not appear in the constitutional language conferring this authority, and the use thereof in relation to a veto under this authority is misleading and has caused some confusion.

* * * * *

We shall next consider the remaining seven challenged vetoes. However, before undertaking an individual consideration of these challenged vetoes, a resolution, insofar as necessary, as to what is meant by the following quoted language from Art. IV, sec. 22, supra, would be helpful, since all of these vetoes and attempted vetoes were accomplished pursuant to

the authority vested in the Governor by this language:

... The governor may ... disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items ... as are disapproved shall be void unless passed over his veto, ...

The legislative power of the State of New Mexico is vested in the Legislature. Article IV, sec. 1, Constitution of New Mexico. Except for interest or other payments on the public debt, money shall be paid out of the treasury of the State only upon appropriations made by the Legislature, and every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied. Article IV, sec. 30, Constitution of New Mexico. The supreme executive power of the State is vested in the Governor, whose principal function, insofar as legislatively enacted law is concerned, is to faithfully execute these laws. Article V, sec. 4, Constitution of New Mexico. He does, however, have the power to exercise veto control over the enactments of the Legislature to the extent that this power or authority is vested in him by Art. IV, sec. 22, supra. As to bills appropriating money, he clearly has the power to veto a "part or parts" or "item or items" thereof. The Legislature may not properly abridge that power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the Governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation.

What is meant by "part or parts" and "item or items" in the context and manner in which these terms appear in the above quoted language from Art. IV, sec. 22, supra, and what is the nature and purpose of the veto power conferred upon the Governor by this section of our constitution? Respondents call attention to dictionary definitions of "item" and "part" and conclude that there is considerable difference between an "item," which they say "denotes a detail of expenditure or income, a distinct sum of money," and a "part," which they say "clearly denotes any portion, division, element, contingency, fraction, fragment' or piece of a bill appropriating money." In disposing of a like argument as to the difference between "item" and "part," as these words appear in the provisions of the Iowa Constitution relative to the partial veto of appropriation bills, the Supreme Court of Iowa stated:

... Both plaintiff and defendants emphasize the distinction between the words 'item' and 'part' or 'parts' as the same appear variously in the item veto provisions of our Constitu-

tion and of the constitutions of sister states. We are not persuaded there is any significant distinction between or among these terms, nor are we disposed to import to the word 'item' any technical meaning. . . .

State ex rel. Turner v. Iowa State Highway Com'n, 186 N.W.2d 141, 149 (Iowa 1971).

We agree with the Iowa court. This view is consistent with the language of our opinion in Dickson v. Saiz, supra, in which the question for decision was:

. . . whether Art. IV, sec. 22, of the Constitution in giving the Governor power as to bills presented to him during the last three days of a legislative session, to veto 'any part or parts, item or items, of any bill appropriating money' which he disapproves, limits him in any exercise of the power to action on general appropriation bills.

The bill there in question was not a general appropriation bill but a bill in which money was appropriated. In reaching the conclusion that "item or items, part or parts" was incorporated in our Constitution with the intent to give it broader meaning than merely "items of appropriation," we quoted in part from the brief of amici curiae as follows:

"It [the Constitutional Convention] specifically rejected a proposal which limited the partial veto power to items of appropriations. It specifically adopted a proposal which increased the partial veto power to parts of bills of general legislation which contained incidental items of appropriation."

This and other language in our opinion in the Saiz case, as well as the result reached, indicate the purpose or purposes for the inclusion of the terms "part or parts," "item or items" and "parts or items" in our Constitution were to extend or enlarge the partial veto power thereby conferred beyond the partial veto power conferred by the constitutions of other states wherein that power is limited to (1) items of appropriation, and (2) to general appropriation bills. However, the extension or enlargement of the partial veto power to cover (1) bills of general legislation, which contain incidental items of appropriation, as well as general appropriation bills, and (2) to "items or parts" thereof in addition to "items of appropriation," does not mean there are no limitations on the partial veto of bills appropriating money.

The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of

the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. *Bengzon v. Secretary of Justice*, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed. 312 (1937); *Fitzsimmons v. Leon*, 141 F.2d 886 (1st Cir. 1944); *State v. Holder*, 76 Miss. 158, 23 So. 643 (1898); *State ex rel. Cason v. Bond*, supra; *Veto Case*, 69 Mont. 325, 222 P. 428 (1924); *Fulmore v. Lane*, supra. Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences.

We now turn our attention to the challenged vetoes. We shall consider them in the order in which they were presented and argued by the parties in their respective briefs.

The Legislature unconditionally appropriated for the State Planning Office the sum of \$324,800 from the State's general fund and \$712,800 from Federal funds. This appropriation of both State and Federal funds in the total amount of \$1,037,600 has not been questioned. It was followed by a contingent appropriation to this office of \$150,000, which was stated as follows:

In addition to the above appropriation, there is appropriated the sum of \$150,000 from the general fund for the purpose of saving harmless the state planning office from loss of federal funds available for continuing the present operations of the office. ~~This contingent appropriation shall be disbursed only upon certification in writing by the state planning officer, approved by the director of the department of finance and administration, that federal funds to continue the agency's operation are not available; provided, however, that no funds shall be disbursed from this appropriation which would allow an operating budget greater than \$1,037,600.~~

The language shown as stricken or lined out in this and in the hereinafter quoted portions of House Bill 300 are the portions purportedly vetoed by the Governor. He gave as his reasons for this particular veto:

. . . This language would have had the effect of negating the contingent appropriation made [in the first quoted sentence] in that no part of the contingent appropriation could be utilized if any federal funds continued to be available to the Planning Office. I do not believe that it was the intent of the legislature to so restrict this contingent appropriation.

It is plain to us that the Legislature placed a very explicitly worded contingency upon the disbursement of this appropriation and a very explicitly worded limiting or restrictive proviso, provision or condition upon the amount of funds from this appropriation which could be disbursed. We do not question the sincerity of the Governor's effort to evaluate the intent of the Legislature, and we do not purport to know upon what he based this evaluation. However, as already stated, we find the language to be very clear, and we have no reason to believe the Legislature meant something other than what is plainly expressed in its language. The Legislature stated that the appropriation should become effective only upon certain conditions, and the funds therefrom could be used only to the extent necessary to increase the operating budget of the agency to \$1,037,600. The effect of this attempted veto was to affirmatively appropriate \$150,000 without conditions and without regard to the limitation on the amount thereof which could be disbursed.

We have heretofore held that the Legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated. *State v. State Board of Finance*, 69 N.M. 430, 367 P.2d 925 (1961); *State ex rel. L. v. Marron*, supra. The Governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, re-

strictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. He would thereby create new law, and this power is vested in the Legislature and not in the Governor. Therefore, the attempted veto was invalid. See the following cases from other jurisdictions in which this question has arisen and in which the decisions are in accord with our view. In *Re Opinion of the Justices*, 294 Mass. 616, 2 N.E.2d 789 (1936); *State v. Holder*, supra; *State ex rel. Cason v. Bond*, supra; *Veto Case*, supra; *Commonwealth v. Dodson*, supra. See also Attorney General Opinion No. 69-25, Report of the Attorney General of New Mexico.

* * * * *

The final matter to be considered in these proceedings is respondent's contention that "a finding that the governor's veto authority has been unconstitutionally applied nullifies the Appropriation Bill [House Bill 300] as a whole." Respondents cite no authority for this contention, and we are not impressed with their arguments in support thereof. An unconstitutional veto must be disregarded and the bill given the effect intended by the Legislature. *Opinion of the Justices*, 306 A.2d 720 (Del.1973); *State ex rel. Turner v. Iowa State Highway Commission*, supra; *In Re Opinion of the Justices*, supra; *State ex rel. Cason v. Bond*, supra; *Commonwealth v. Dodson*, supra.

Discussion Notes

1. The Florida Constitution, Article III, section 8 (a) provides, in pertinent part:

The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

This provision was added in 1968 to overturn the decision in *Green v. Rawls*, 122 So.2d 10, 16 (Fla. 1960), which had permitted the governor to veto restrictions or "proviso language" without also vetoing the appropriation. On the Florida provision as it operates now, see *Brown v. Firestone*, 382

So.2d 654 (Fla. 1980); Comment, "A Hard Case Makes Good and Bad Law," *Florida State University Law Review* 8 (Spring 1980): 345. See generally Richard A. Givens, "The Validity of a Separate Veto of Nongermane Riders to Legislation," *Temple Law Quarterly* 39 (Fall 1965): 60.

2. What is the status of legislation which has been vetoed, but the courts have declared the veto invalid? See Comment, "Effect of Court's Declaring Governor's Veto Unconstitutional," *Harvard Law Review* 41 (January 1928): 407.

3. How does the following Wisconsin decision compare with the New Mexico decision in *Kirkpatrick*?

State ex rel. Kleczka v. Conta
82 Wis.2d 679, 264 N.W.2d 539 (1978)

HEFFERNAN, Justice.

The petitioners in this original action are Gerald D. Kleczka, a member of the Wisconsin Senate, and

John C. Shabaz, a member of the Assembly. On December 2, 1977, they filed a petition for leave to commence an original action in this court for the purpose of securing this court's declaration in respect to the validity of a purported partial veto of an enrolled bill which originated as Assembly Bill 664. The petitioners contend that the partial veto was legally defective and, accordingly, the entire bill as enacted by the legislature was required to be published as law.

* * * * *

The legislation which was vetoed in part deals with financing of election campaigns by a legislatively created campaign fund. It is legislation the validity of which is of concern to the state as a whole, and the issue posed here involves the constitutional prerogatives of both the Governor and the Legislature.

The material facts are agreed to by the parties, and no fact-finding procedure is necessary. The action is appropriate for disposition as a matter of law in an original action.

Assembly Bill 664, as subsequently amended, was concurred in by the Senate on September 28, 1977. The enrolled bill was presented to the Governor on October 11, 1977. On that same day the Governor purported to exercise the partial-veto authority conferred upon him by art. V, sec. 10, of the Wisconsin Constitution. A message and a letter from the Governor was sent to the Assembly Chief Clerk on that same date. He stated that he had exercised his partial veto "to restore the check-off provision that existed in the original bill" (sec. 51) and exercised his partial veto "in Section 53 of the bill because the September 30, 1977, effective date is unnecessary to implement the law for the 1978 elections."

After the veto no part of the enrolled bill was physically delivered to the Assembly.

In the Governor's message to the Assembly, he stated that the bill as partially vetoed and partially approved was deposited in the Secretary of State's office.

* * * * *

Subsequent to the commencement of this action and following the date of oral arguments in this court, the legislature on January 24, 1978, acted on the Governor's partial veto, but failed to secure the necessary two-thirds vote to override the veto.

The petitioners' contentions are directed principally to the partial vetoes of the Governor of secs. 51 and 53 of the enrolled bill. Sec. 51 of the enrolled bill created sec. 71.095 of the Wisconsin Statutes to provide in part as follows:

(1) Every individual filing an income tax statement may designate that their income tax liability be increased by \$1 for deposit into the Wisconsin Election Campaign Fund for the use of eligible candidates under s. 11.50.

Acting Governor Schreiber exercised his partial veto by lining out the words, "that their income tax liability be increased by," and the words, "deposit

into." The section as changed by the partial veto reads:

(1) Every individual filing an income tax statement may designate \$1 for the Wisconsin Election Campaign Fund for the use of eligible candidates under s. 11.50.

It is conceded that the bill as enrolled would require taxpayers to "add on" to their tax liabilities the sum of \$1 if they wished that sum to go to the campaign fund. As changed by the Governor's partial veto, a taxpayer instead elects to designate that the sum of \$1 be "checked off" or expended from the state general funds for the purposes of the Election Campaign Fund.

The parties have stipulated that the change made in sec. 51 will result in approximately \$600,000 in tax funds being expended directly for political purposes per annum. Under the bill as passed by the legislature, only the sum which taxpayers agreed to have added to their tax liability would have been used for political purposes. Under the provisions of sec. 51 as partially vetoed, the sums used for political purposes will come out of general tax revenues.

The change in sec. 53 was made by the veto of the portion which provided:

(1) Section 71.095 of the statutes, as created by this act, shall apply to all individual income tax returns for any calendar year or corresponding fiscal year which commences not more than 6 months preceding the effective date of this act, and to each calendar year or corresponding fiscal year thereafter.

It is alleged by the Attorney General that the partial veto of sec. 53 accelerated the effective date of the bill by one year.

The attack on the partial veto is three-fold. The petitioners, Senator Kleczka and Representative Shabaz, contend that the partial vetoes were totally ineffective, because neither the enrolled bill nor the part partially vetoed was returned to the Assembly within the time limited by the Constitution. They are joined in this contention by the Attorney General.

The petitioners also contend that Bill 664 was not an appropriation bill and, therefore, not subject to the partial-veto provisions of art. V, sec. 10. The Attorney General, although he contends that the partial veto was unauthorized, acknowledges that Bill 664 was an appropriation bill within the meaning of the Constitution.

The petitioners also contend that, even were the bill held to be "returned" in accordance with the Constitution and even were it an appropriation bill, the vetoes attempted here were unauthorized by the Constitution, because the Governor may not, in the

exercise of a partial veto, strike language from a bill unless it is severable and cannot strike from the bill provisos or conditions on an appropriation that were placed thereon by the Legislature. The Attorney General joins in this contention.

It is our conclusion that Enrolled Bill 664 was an appropriation bill and that a proper return was made to the originating house of the Legislature within the six days allowed by the Constitution. We conclude that the portions stricken were severable from the enrolled bill; and corollary to the latter conclusion, we conclude that the bill as partially vetoed by the Governor and published by the Secretary of State was a complete, workable bill, which meets the requirements heretofore stated by this court to be mandated by the Constitution. The portion approved by the Governor became effective upon publication by the Secretary of State.

We give attention to each contention in turn, considering first whether the bill was an appropriation bill in the terms of the Constitution.

The constitutional provision applicable is art. V, sec. 10. The Constitution as amended by the referendum of November 30, 1930, provides:

Governor to approve or veto bills; proceedings on veto. Section 10. [As amended Nov. 1908 and Nov. 1930] Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill or the part of the bill objected to, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law un-

less the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.

Under the Constitution only appropriation bills are susceptible to a partial veto. In the event Bill 664 was not an appropriation bill and not subject to a partial veto, the petitioners are correct and the Governor was not authorized to disapprove less than the whole of the bill.

Because we find that Bill 664 is an appropriation bill, we do not decide the effect of a Governor's attempted partial veto of a bill that is not an appropriation bill.

The petitioners concede that the bill as it left the Governor's hands was an appropriation bill, but they contend, properly, that it is not in that posture that the nature of a bill should be determined. The question is whether it was an appropriation bill when it was delivered to the Governor. They argue that the bill in its enrolled form as submitted to the Governor was not an appropriation bill.

Under the provisions of the enrolled bill, the sums added on to the taxpayers' liability and paid into the treasury are to be deposited to the general funds. The Secretary of Revenue is designated to certify the amount of money deposited in the general fund as the result of the add-on to tax liability. The amount determined under sec. 71.095, Stats., by the Secretary is then to be paid into the Wisconsin Election Campaign Fund annually, on August 15, by the State Treasurer. From that fund, there is made a continuing appropriation of money as certified under sec. 71.095 to provide for payments to the candidates who qualify under sec. 11.50.

It is clear, from these provisions, that the bill as it went to the Governor authorized the expenditure of public moneys. The bill set apart a portion of the public funds for a public purpose—the financing of election campaigns. This meets the definitions of an appropriation bill as set forth in *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 148, 264 N.W. 662 (1936). . . .

The argument that Enrolled Bill 664 was not an appropriation bill is unfounded. It was a bill subject to the exercise of the Governor's partial-veto power.

The petitioners additionally claim that the Governor failed to comply with the mandatory procedures of art. V, sec. 10. That section of the Constitution provides that any bill presented to the Governor and not returned by him within six days becomes law without his approval if the Legislature is in session. Petitioners insist that the Governor did not make the return mandated by the Constitution. It is argued that, because the required return was not made, the six-day rule applies, and despite the partial

veto, Enrolled Bill 664 has become a law because the Governor failed to act, as the Constitution requires, within the time period allowed.

The stipulation of the parties recites:

7. The enrolled bill, as signed by the Acting Governor, was not delivered to the Assembly nor was any part of the signed, enrolled bill delivered to the Assembly by the Acting Governor. The Acting Governor caused nothing to be deposited with the Assembly or the clerk thereof in relation to said bill other than the aforesaid message and a letter dated October 11, 1977 from the Acting Governor . . . stating that bill 664 was partially vetoed and approved, signed and deposited in the Secretary of State's office. These documents were deposited with the Assembly Clerk on October 11, 1977. The Assembly Journal, dated October 12, 1977, makes reference to the aforesaid message and letter.

The petitioners, by this stipulation, acknowledge that a writing setting forth the fact of the partial veto and the reasons for the Governor's objections was timely filed with the legislature, but they point out that the agreed facts undisputably show that neither the bill nor the part of the bill disapproved was delivered to the originating house.

The petitioners rely upon the language of the Constitution which states that, in respect to total vetoes, the Governor, if he shall not approve a bill "shall return it, with his objections, to that house in which it shall have originated." The same requirement, petitioners contend, is mandated upon the Governor in respect to partial vetoes, because the Constitution states, "the part objected to shall be returned in the same manner as provided for other bills."

From the juxtaposition of these two clauses in art. V, sec. 10, the petitioners argue that, although a part of the bill—the part not subjected to the partial veto—will become law without further action of the Legislature, nevertheless the entire bill, including the portion of the bill of which the Governor approved, must be returned.

This conclusion, on its face, is contrary to the express words of the Constitution. Without a doubt, the most the Constitution requires in respect to a partial veto is that "the part objected to shall be returned." There is no requirement that the part approved be resubmitted to the legislature. To require such a resubmission would be meaningless and superfluous. The Legislature had already exhausted any authority

it had in respect to the portion of the enrolled bill which was approved by the Governor.

This interpretation has previously been approved by this court in the case of *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 448, 289 N.W. 662, 664 (1940). The court in that case, in referring to the contentions there that the entire bill, a portion of which had been partially vetoed, must be returned by the Governor to the house in which it originated, stated:

The interpretation would destroy the whole purpose and effect of the 1930 amendment . . . the argument entirely overlooks the following provision that 'the part objected to shall be returned in the same manner as provided for other bills.' If the legislature had remained in session, only the parts of Bill No. 563, S. to which the governor objected would be returned to the legislative body.

* * * * *

Having concluded that Enrolled Bill 664 was an appropriation bill, and having concluded that the Governor complied with the mandatory constitutional procedures in making his return of the partial veto to the originating house of the Legislature, the question remains whether the words excised were appropriately removed by partial veto.

The words removed had the effect of replacing taxpayers' voluntary add-on to their personal tax liabilities the sum of \$1 for political purposes, with an election by the taxpayer to direct that \$1 be paid out of general funds and general tax revenues.

The additional charge to the general fund is estimated to be \$600,000 per annum. This the petitioners claim created an appropriation where none existed before. Implicit in the petitioners' argument and explicit in the argument of the Attorney General is the additional argument that *voluntary* contributions were a proviso or condition upon which the appropriation depended and that such proviso or condition was *ipso facto* inseverable from the appropriation itself.

The petitioners acknowledge that the Legislature cannot, by a statement incorporated in the legislation, frustrate the Governor's partial-veto power by declaring that certain portions of a bill are inseverable. In that respect, the petitioners are correct. Severability, petitioners acknowledge, is the test of the partial-veto power. Petitioners concede that what is severable may be excised from the legislation by the Governor's partial veto.

The petitioners correctly assert that severability must be determined, not as a matter of form, but as a matter of substance. The brief of the petitioners ar-

gues that a partial veto which would make an appropriation where none existed before is not a severable change.

As stated above, we conclude that, for a Governor to exercise a partial veto, the bill must, as it comes to the Governor, contain an appropriation. The principal thrust of the petitioners is based on the assumption that this bill contained no appropriation when it reached the Governor. We have concluded that assumption is incorrect. The bill clearly provided for an appropriation of funds obtained by a voluntary add-on option afforded a taxpayer. Those funds were then appropriated for election purposes by the bill.

Hence, it is incorrect, under the facts, for the petitioners to assert that the bill as altered by the Governor created an appropriation where none existed before. The Governor's veto left the appropriation untouched. Rather, it affected the source from which the appropriated funds were to be derived. Accordingly, to conclude, as the petitioners would have us do, that this bill is inseverable because it created an appropriation where none existed before is patently incorrect.

Severability is indeed the test of the Governor's constitutional authority to partially veto a bill, but the test of severability is that established by the Wisconsin court and not by courts which operate under a different constitution. We reaffirm the conclusion reached by this court in *State ex rel. Sundby v. Adamany*, 71 Wis.2d 118, 128, 237 N.W.2d 910, 914 (1976):

... that analysis of the use made of the power in the instant circumstances must be limited to application of principles expressed by this court in previous cases in which the exercise of the partial veto was challenged.

Three major Wisconsin cases have discussed the power of the Governor to partially veto a bill under the authority of art. V, sec. 10: *State ex rel. Wisconsin Telephone Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940); *State ex rel. Sundby v. Adamany*, 71 Wis.2d 118, 237 N.W.2d 910 (1976).

Each of these cases emphasizes that the power of the Governor to approve or disapprove a bill "in part" is a far broader power than that conferred upon Governors under the partial-veto provisions of most state constitutions. In most instances, the power of the Governor is confined to the excision of appropriations or items in an appropriation bill.

The *Henry* case, *supra*, extensively discussed the distinction between the Wisconsin Constitution and other state constitutions which give a more limited power to the Governor. The *Henry* case sanctioned the Governor's exercise of the partial veto of appropriations, general legislation, and other parts of an appropriation bill which did not contain specific ap-

propriations. The court concluded that any portion of an appropriation bill was severable and could be excised so long as it left, in respect to "the parts approved, as they were in the bill . . . a complete, entire, and workable law." *Henry*, 218 Wis. at 314, 260 N.W. at 491.

In the *Henry* case, one of the provisions vetoed by the Governor was the express statement of the legislative intent. The court acknowledged that the powers conferred on the Governor by the Constitution in respect to the partial veto were broad indeed. . . .

Accordingly, the court in *Henry* stated that the Governor's power to disassemble legislation by the partial veto was as broad as the legislature's power initially to join the legislation into a single bill. It put but one limitation on the Governor's power, and that is that the remainder after partial veto be a "complete, entire, and workable law." It found in *Henry* that the part approved by the Governor constituted, independently of the disapproved portions, a complete, entire, and workable law.

In the subsequent case of *Martin, supra*, the rationale of *Henry* was followed. . . .

The court in *Martin* made clear that what must survive the Governor's veto was an enactment which could have been passed initially in the exercise of the Legislature's power and was a workable law. The test of severability was set forth in those terms only. . . .

The workable-law test was reemphasized in *Sundby, supra*. . . .

We conclude that the test of severability has clearly and repeatedly been stated by this court to be simply that what remains be a complete and workable law. The power of the Governor to disassemble the law is coextensive with the power of the Legislature to assemble its provisions initially.

* * * * *

In the present case it is undisputed that what remained after the Governor's partial veto is a complete, entire, and workable law. As such, it is severable and reflects the proper exercise of the partial-veto power conferred on the Governor by the Constitution of the state.

In addition, the cases decided by this court have repeatedly pointed out that, because the Governor's power to veto is coextensive with the legislature's power to enact laws initially, a governor's partial veto may, and usually will, change the policy of the law. The *Martin* case specifically recognized that:

It must be conceded that the governor's partial disapproval did effectuate a change in policy; so did the partial veto of the bill involved in the case of *State ex rel. Wisconsin Tel. Co. v. Henry*. (233 Wis. at 450, 289 N.W. at 665.)

In *Sundby, supra*, we pointed out that the Wisconsin case law recognizes that the Governor has a con-

stitutionally recognized role in legislation. We stated in *Sundby*:

Some argument is advanced that in the exercise of the item veto the governor can negate what the legislature has done but not bring about an affirmative change in the result intended by the legislature. We are not impressed by this argued distinction. Every veto has both a negative and affirmative ring about it. There is always a change of policy involved. We think the constitutional requisites of art. V, sec. 10, fully anticipate that the governor's action may alter the policy as written in the bill sent to the governor by the legislature.

(71 Wis.2d at 134, 237 N.W.2d at 918.)

Thus, the fact that the Acting Governor's partial veto in the instant case changed the policy of the legislation from that of encouraging add-ons to a taxpayer's personal liability to that of imposing a charge on the general fund does not lead to the conclusion that the veto power was unconstitutionally exercised. It reflected a change of policy which the Governor had the authority to make under the Constitution because his authority is coextensive with the authority of the Legislature to enact the policy initially.

It should be borne in mind, of course, that the very section of the Constitution which gives to the Governor the authority to change policy by the exercise of a partial veto also gives the final disposition and resolution of policy matters to the Legislature. The Governor's changed policy can ultimately remain in effect only if the Legislature acquiesces in a partial veto by its refusal or failure to override the Governor's objections.

There remains yet another facet of the authority of the Governor to exercise a partial-veto power that should be explored. It is urged by the petitioners and by the Attorney General that provisos and conditions of an appropriation may not be severed from the appropriation itself. It is argued that, even when a workable bill remains after the exercise of the partial veto, the fulfillment of that test alone does not make what remains a properly severable and independent bill. The position of the antagonists to the Governor's partial veto in this case is that, whenever an appropriation is made on the basis of a legislatively established proviso or condition, the provisos themselves may not be separately vetoed, but the entire appropriation, including the provisos, must be excised by the Governor.

In the instant case it is argued that the appropriation of moneys for political purposes was conditioned by the Legislature upon the voluntary contribution to be made by taxpayers and that proviso or condition is inseverable from the appropriation itself.

The conclusion urged by the petitioners and the Attorney General reasonably could be reached from the dicta of Wisconsin cases. We are satisfied, however, that those pronouncements are dicta only and, more importantly, have no relevance to interpretation of the partial-veto provisions of the Wisconsin Constitution.

In *Henry, supra*, the first case to come before the court on the partial veto, petitioners therein relied upon *State ex rel. Teachers and Officers v. Holder*, 76 Miss. 158, 23 So. 643 (1898).⁴ The objectors to the exercise of the governor's partial-veto power in *Henry* contended that the governor was not empowered to disapprove a proviso or a condition placed upon an appropriation. The court in *Henry* found, however, that the portions vetoed were neither a proviso nor a condition which the legislature had placed upon the appropriation. The court said:

... we find it unnecessary to decide in this case whether the Governor is empowered to disapprove a proviso or condition in an appropriation bill, which is inseparably connected with the appropriation, because, upon analyzing the terms of the bill in question, we have concluded, for reasons hereinafter stated, that the parts which were disapproved by the Governor were not provisos or conditions which were inseparably connected to the appropriation. If they had been, the decision in *State ex rel. Teachers and Officers v. Holder*, 76 Miss. 158, 23 So. 643, would afford support for the plaintiff's contention.

(218 Wis. at 309-10, 260 N.W. at 490.)

This is dicta, because the issue was not raised in the *Henry* case. The *Henry* case does not hold that the governor cannot disapprove a condition placed upon an appropriation by the legislature.

The dicta in *Henry* is typical of the custom, unfortunately too often indulged in by courts, of telling a

⁴*Holder* is one of the earliest and most influential cases on the scope of the partial-veto power. It is clearly the seminal case on the issue of the governor's power to veto a proviso or condition to an appropriation and has been cited frequently by other courts. Many of the cases relying on *Holder*, however, have arisen in states where the governor's partial-veto power is limited to vetoing "items" as opposed to "parts" of the bill. . . . Reliance on *Holder* even in the context of an "item veto" power is misplaced and is a mere "make-weight." In an "item veto" state, it would appear that provisos or conditions may not be vetoed, because such veto would subdivide the item, contrary to the constitutional provision. *Holder*, which rests in part on a specific constitutional reference to the power of the legislature to impose conditions (see text, *infra*), is *sui generis* and was unnecessary as authority in "item veto" states, and is inappropriate and irrelevant to the partial-veto powers of the Wisconsin Governor.

disappointed litigant that, "You are wrong in this case, but if the facts were different you might be right." The *Henry* case represents an inconsidered statement by the court on an issue not before it and has no precedential value. . . .

No provision of art. V, sec. 10, of the Constitution limits the Governor's authority to veto appropriations because of any legislatively imposed conditions. The alleged limitation arises from the language of *Henry*. The source of the dicta which has led to the contention of the petitioners is apparent from the text of *Henry*. *Henry* relies upon the Mississippi case of *Holder, supra*, for the contention that the governor's partial-veto power cannot be exercised when there are legislatively imposed provisos or conditions on an appropriation. The *Holder* case itself, however, cites no authority for a general proposition that a governor cannot veto a proviso or condition to an appropriation. It should be noted that, although the Mississippi Constitution is similar to the Wisconsin Constitution in that it provides that the governor may veto "parts" of an appropriation bill, another portion of the Mississippi Constitution, sec. 69, specifically provides that the legislature has the power to set conditions under which appropriated money is to be paid. This is a constitutional provision which has no counterpart in the Wisconsin Constitution. Sec. 69 may well justify in *Holder* the language in respect to "conditions," for in Mississippi the governor apparently may not veto a proviso or a condition to an appropriation. That concept, however, finds no support in the Wisconsin Constitution.

We are satisfied that, had the Wisconsin court in *Henry* found that there was indeed a condition to the appropriation which had been vetoed by the governor, it would have been obliged to look to the rationale of *Holder*, and it would have concluded that that rationale, although arguably appropriate to Mississippi and its constitutional provisions, was inapplicable as a limitation of the partial-veto power of the governor under the Wisconsin Constitution.

* * * * *

CONNOR T. HANSEN, Justice (concurring in part, dissenting in part).

The majority of the court holds that Assembly Bill 664 was an appropriation bill and that, under the facts of this case, the partial veto should not be invalidated because the governor did not timely return the enrolled bill or the part partially vetoed to the assembly. I concur in the result reached by the majority on these issues.

* * * * *

I respectfully dissent from the holding of the majority that the power of partial veto, as exercised in this case, is a valid exercise of that authority.

In the Wisconsin Constitution, as in the federal constitution, the principle of separation of powers is nowhere expressly stated, but it is recognized as implicit in the provisions vesting the legislative, executive and judicial powers of the state in the respective branches of government. Our constitution provides for three branches of government, separate and coordinate, each supreme in its sphere and independent of the others. None may perform the functions or exercise the powers of another. This court has jealously guarded this concept, in the belief that an invasion of the province of one branch by another is an attack upon the constitutional foundation of the government itself, and in a sense, upon the liberty of our citizens. . . .

Article IV, section 1, of our constitution provides that "The legislative power shall be vested in a senate and an assembly." The constitutional role of the governor in the legislative process includes the power to convene special sessions of the legislature; to communicate with, and make recommendations to, the legislature; to direct the preparation of the financial budget; and to veto bills which have been passed by the legislature, art. V, secs. 4 and 10, Wisconsin Constitution. . . . Nevertheless, the fundamental concept of art. IV, sec. 1, is that the legislative power of this state is confided exclusively to the legislature. . . . Unless we are prepared to abandon that concept—and I am not prepared to do so—then there must be some palpable limit to the power of the governor to rewrite, by the device of the partial veto, bills which have passed the legislature.

In recent years, partial vetoes have not only increased greatly in number; they have been applied to ever smaller portions of bills. Several years ago, an attempt was made to exercise the power so as to strike the digit "2" from a \$25 million bonding authorization. Even this may not mark the limits of the use of the power. Advisors to a recent governor were reported to have considered striking the letter "t" from the word "thereafter" in order to alter the effective date of a liquor tax increase. Only the limitations on one's imagination fix the outer limits of the exercise of the partial veto power by incision or deletion by a creative person. At some point this creative negative constitutes the enacting of legislation by one person, and at precisely that point the governor invades the exclusive power of the legislature to make laws.

Long before the advent of the partial veto, the father of the doctrine of separation of powers, Baron de Montesquieu, warned that liberty would be endangered if the executive were to have the power of ordaining laws by his own authority or of amending what had been ordained by others, and he urged that the executive should have no part in legislating other than the privilege of rejecting what had been enacted by the legislature.¹ I believe Montesquieu was correct. In the scheme of our constitution, the governor

is to review the laws and not to write them. He is not, by careful and ingenious deletions, to effectively "write with his eraser" and to devise new bills which will become law unless disapproved by two-thirds of the legislators who are elected by the people of the state.

* * * * *

The original purposes of the partial veto power, and the language of this court's early decisions defining that power, suggest an alternative solution, a solution that, in my opinion, would be consistent with the purposes of the partial veto power, provide a neutral benchmark from which the actions of the governor might be measured, and also preserve the prerogatives of the legislature.

The purpose of the partial veto power was described in *State ex rel. Martin v. Zimmerman, supra*, at 447, 448, 289 N.W. at 664:

Art. V, sec. 10, of our state constitution is not ambiguous. As amended in 1930, it must be construed as a whole. In so construing it, we entertain no doubt either as to the reason for, or the meaning of, the 1930 amendment. . . . Its purpose was to prevent, if possible, the adoption of omnibus appropriation bills, logrolling, the practice of jumbling together in one act inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits, with riders of objectionable legislation attached to general appropriation bills in order to force the governor to veto the entire bill and thus stop the wheels of government or approve the obnoxious act. Very definite evils were inherent in the lawmaking processes in connection with appropriation measures. Both the legislature and the people deemed it advisable to confer power upon the governor to approve appropriation bills in whole or in part. . . .

The partial veto power was therefore directed toward the legislative practice of uniting in a single bill various proposals, each of which would have constituted a complete and workable bill in itself.

Prior to the constitutional amendment, the improper joinder of such proposals prevented the governor from dealing separately with each "part" which would otherwise have constituted a separate proposal. The partial veto provisions gave the governor

power to unpack omnibus appropriations bills, and to pass separately upon each of the constituent parts which, if not for the practice of jumbling bills together, would have been enacted individually, and would have constituted a complete, entire and workable bill.

The governor's power to dismantle an appropriations bill was made as extensive as the legislature's power to construct such a bill from independent proposals capable of separate enactment.

I believe this is what this court had in mind when, in the first case to consider the scope of the partial veto power, it described the power to be "coextensive as the legislature's power to join and enact separable pieces of legislation in an appropriation bill." *State ex rel. Wisconsin Tel. Co. v. Henry, supra*, 218 Wis. at 315, 260 N.W. at 492. . . .

This, in my opinion, is an accurate statement of the purposes and nature of the partial veto power of the governor. The power thus conferred is not a power to reduce a bill to its single phrases, words, letters, digits and punctuation marks. Rather the partial veto power should be exercised only as to the individual components, capable of separate enactment, which have been joined together by the legislature in an appropriation bill. That is, the portions stricken must be able to stand as a complete and workable bill.

* * * * *

The approach here set forth would effectively define the limits of the constitutional role of the governor. He would be able to veto independent elements of multi-subject appropriation bills, and would in most cases be unable to effectively add elements to the bills enacted by the legislature. His veto would be directed to portions of an appropriation bill which were grammatically and structurally distinct, and he would not be able to deal individually with numbers or words, or single digits or letters.

Equally important, this standard would be capable of even-handed and predictable application, and this court would not be required to mediate policy disagreements between the two other coordinate branches of our government. Most important, this approach would protect the prerogatives reserved to the legislature by the constitution and would fulfill the responsibility of this court to determine when the exclusive territory of one of our independent branches has been invaded by another.

It appears that we have now arrived at a stage where one person can design his own legislation from the appropriation bills submitted to him after they have been approved by the majority of the legislature. The laws thus designed by one person become the law of the sovereign State of Wisconsin unless disapproved by two-thirds of the legislators. I am not persuaded that art. V, sec. 10, was ever intended to produce such a result.

¹Montesquieu, *The Spirit of the Laws*, Vol. I, Book XI, Chapter 6 (Hafner, New York, 1966), 156, 159, 160.

There can be no question that the partial vetoes presently before the court do not meet the standard herein set forth. The governor partially vetoed section 51 of the bill as passed by the legislature by striking the words "that their income tax liability be increased," by and the words "deposit into." There is no method by which these portions can be said to con-

stitute an independent legislative proposal capable of separate enactment, and I would therefore hold that the governor has exceeded the limits of the power conferred upon him by the partial veto provision, and has improperly assumed power reserved to the legislature.

Discussion Notes

1. Try to draft an amendment to the Wisconsin Constitution, as interpreted in the *Conta* decision, that would overturn that interpretation.

2. Should a governor, using the item veto, be able to *reduce* the dollar amount in an item in an appropriation bill? Compare *Commonwealth v. Barnett*, 199 Pa. 161, 48 A. 976 (1901) (permitting reduction), with *Wood v. State Administrative Board*, 255 Mich. 220, 238 N.W. 16 (1931) and *Mills v. Porter*, 69 Mont. 325, 222 P. 428 (1924) (refusing to permit reduction). Concerning the Pennsylvania rule, see M. Nelson McGeary, "The Governor's Veto in Pennsylvania," *American Political Science Review* 41 (October 1947): 941. A number of state constitutions have been amended specifically to permit gubernatorial *reduction* of appropriation items. See Note, "Item Veto, Reduction of Items, Elimination of Items Included in a General Sum," *Southern California Law Review* 12 (March 1939): 321.

3. See generally Ada E. Beckman, "The Item Veto Power of the Executive," *Temple Law Quarterly* 31 (Fall 1957): 27; Arthur J. Harrington, "The Propriety of the Negative—The Governor's Partial Veto Authority," *Marquette Law Review* 60 (Spring 1977): 865; Roger H. Wells, "The Item Veto and State Budget Reform," *American Political Science Review*, 18 (November 1924): 782.

4. The item veto is a feature of state constitutions which has been receiving serious consideration for adoption at the federal level. This is an area where the "laboratory" metaphor for state constitutional experiments seems particularly appropriate. For an exhaustive review of the state experience and an evaluation of its adaptability to the federal government, see House Committee on Rules, *Item Veto: State Experience and its Application to the Federal Situation*, 99th Cong., 2d Sess. (Comm. Print 1986).

Two recent commentators on the question of adopting the item veto at the federal level cautioned:

[T]he granting of item veto authority to the President may fundamentally alter the constitutional balance between Congress and the President.

The "state analogy" suffers from a

number of serious deficiencies. The item veto exercised by the governors of many states is sustained by a governmental design unique to the states and cannot be severed from it. State constitutions differ dramatically from the federal Constitution, especially in their distribution of executive and legislative powers. There is a much greater state bias against legislatures than exists at the national level. State budget procedures differ substantially from federal procedures. Appropriations bills in the states are structured to facilitate item vetoes by governors. Appropriations bills passed by Congress contain few items. Finally, state judges have experienced severe problems in developing a coherent and principled approach to monitoring the scope of item veto power. Many of those problems would be duplicated and possibly compounded at the federal level.

More fundamentally, the adoption of what might appear to be a relatively modest reform proposal could result in a radical redistribution of constitutional power. The item veto has significance beyond the budgetary savings that may, or may not, be realized. At stake are the power relationships between the executive and legislative branches, the exercise of Congress' historic power over the purse, and the relative abilities of each branch to establish budgetary priorities.

Louis Fisher and Neal Devins, "How Successfully Can the States' Item Veto Be Transferred to the President?" *Georgetown Law Journal* 75 (October 1986): 161-62.

5. For earlier discussions of the item veto at the federal level, see Note, "Separation of Powers: Congressional Riders and the Veto Power," *University of Michigan Journal of Law Reform* 6 (Spring 1973): 735; Note, "The Legislative Rider and the Veto Power," *Georgetown Law Journal* 26 (May 1938): 954; Note, "The Item Veto in the American Constitutional System," *Georgetown Law Journal* 25 (November 1936): 106.

C. The “Constitutionalization” of Executive Agencies and Officers

Many state constitutions specifically provide for the creation of governmental agencies and offices, and enumerate their powers. In addition, most state constitutions provide for executive officers, such as an Attorney General, who exercise a portion of the executive power instead of the governor. Do such agencies or officers enjoy a status any different from those created by the more usual method of legislative enactment?

Florida Department of Natural Resources v. Florida Game and Fresh Water Fish Commission 342 So.2d 495 (Fla. 1977)

The circuit court declared unconstitutional Section 17 of Chapter 75-22, Laws of Florida, which provides:

Section 17. Subsection (17) of section 20.25 Florida Statutes, is amended to read:

20.25 Department of Natural Resources.—There is created a Department of Natural Resources.

(17) The Game and Fresh Water Fish Commission functions, prescribed by chapter 372, are transferred by a type one transfer to the Department of Natural Resources. The Department of Natural Resources shall have authority pursuant to the type one transfer to directly supervise, review, and approve the commission’s exercise of executive powers in the area of budgeting.

The statute was found to violate Article IV, Section 9, Florida Constitution (as amended 1974), which provides:

Section 9. Game and fresh water fish commission.—There shall be a game and fresh water fish commission, composed of five members appointed by the governor subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute. The legislature may enact laws in aid of the commission, not inconsistent with this section. The commission’s exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from such license fees shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water aquatic life.

The circuit court held that the constitutional provision that the Commission’s “exercise” of certain of its executive powers shall be as provided by law did not mean that the legislature could, by making the exercise of these powers subject to the approval of the Department of Natural Resources, deprive the Commission of its authority. Defendant appeals from the judgement below, alleging that the statutory provisions for a type one transfer of Game and Fresh

Water Fish Commission functions to the Department of Natural Resources and for Department review of the Commission's exercise of executive powers in the area of budgeting are free of constitutional defect. For the reasons set forth below, we agree with the circuit court that the statute is unconstitutional.

A type one transfer is defined by Section 20.06, subsection (1), Florida Statutes, as follows:

(1) Type One (1) Transfer. — A type one (1) transfer is the transferring intact of an existing agency or of an existing agency with certain identifiable programs, activities, or functions transferred or abolished so that the agency becomes a unit of a department. Any agency transferred to a department by a type one (1) transfer shall henceforth exercise its powers, duties, and functions as prescribed by law, subject to review and approval by, and under the direct supervision of, the head of the department.

Section 20.06, subsection (1), Florida Statutes, authorizes the transferee department to review the exercise of the powers, duties, and functions of the transferred agency. It is clear that, absent qualification, a type one transfer places the transferred agency under the absolute control of the department head. Such an arrangement in the instant case is constitutionally impermissible. Defendant does not dispute the unconstitutionality of an unqualified type one transfer to plaintiff; it is instead defendant's contention that Chapter 75 22, Section 17, Laws of Florida, effectuated a qualified type one transfer. Based upon a comparison of the statute presently under consideration and its predecessor law, we cannot agree.

The predecessor law, Section 20.25, subsection (17), Florida Statutes, provided:

(17) The game and fresh water fish commission functions, prescribed by chapter 372, are transferred by a type one transfer to the Department of Natural Resources, *except that the commission shall exercise its powers prescribed by sec. 9 of Art. IV of the state constitution independently of the head of the Department of Natural Resources.* (Emphasis supplied.)

The second clause of the previous law clearly qualifies the type one transfer announced in the first clause so as to preserve all of the Commission's con-

stitutional authority. The statute in question contains no such saving clause, and, by giving the Department authority to "directly supervise, review, and approve the Commission's exercise of executive powers in the area of budgeting," the statute is inconsistent with the mandate of Article IV, Section 9. Since Chapter 75-22, Section 17, Laws of Florida contains no language modifying the type one transfer set forth in the first sentence, it must be considered unconstitutional as an attempted unqualified type one transfer of a constitutional agency. Article IV, Section 9, Florida Constitution; Section 20.06(1), Florida Statutes (1976).

Article IV, Section 9, Florida Constitution (as amended 1974), specifically authorized the legislature to make laws concerning the Commission's budgeting. The Department contends that if the trial court's findings were correct, any law directing the processing of the Commission's budget would be difficult to uphold since any mandatory budgetary process, even if performed directly by the legislature without involving any agencies, could be viewed as a diminishing of the Commission's alleged absolute power. We are not prepared to say at this time that, under the present constitution, the legislature may not pass any law regarding the commission's budgeting which may result in some diminution of the Commission's budgetary autonomy. However, Chapter 75-22, Section 17, Laws of Florida, renders the constitutional grant to the Commission of executive power in the area of budgeting totally meaningless. We hold that the statute is an impermissibly broad intrusion upon that grant.

The Constitution assigns to the Commission the executive power of the state with respect to wild animal life and fresh water aquatic life, with the exception of license fee and penalty determination, and provides that "the commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law." Such laws cannot, however, be inconsistent with other provisions of this section. Article IV, Section 9, Florida Constitution. Thus, while the legislature may pass laws affecting the Commission's exercise of its executive budgetary authority, it may not pass laws depriving the Commission of such authority. A statute placing final approval of the Commission's budget out of the hands of the Commission itself is clearly a deprivation of constitutional authority, rather than merely a "law affecting the Commission's exercise of its budgetary authority."

Accordingly, the judgment of the circuit court is affirmed.

Discussion Notes

1. Why would the Florida Game and Fresh Water Fish Commission be created in the *constitution*?

2. Why would the legislature seek to “transfer” the Commission into the Department of Natural Resources? Consider art. IV, sec. 6 of the Florida Constitution, added in 1968:

SECTION 6. Executive Departments. All functions of the executive branch of state government shall be allotted among not more than twenty-five departments exclusive of those specifi-

cally provided for or authorized in this constitution. . . .

Why would such a provision be placed in a state constitution?

3. See also, *Whitehead v. Rogers*, 223 So.2d 330 (Fla. 1969) (*statute* prohibiting hunting on Sundays invalidated as inconsistent with *rule* of Game and Fresh Water Fish Commission providing for a one-month hunting season, including Sundays).

4. Compare *Burns v. Butscher*, 187 So.2d 594 (Fla. 1966) with *School Board v. Askew*, 278 So.2d 272, 275 (Fla. 1973) (“constitutional officers”).

5. Consider the materials in Chapter 12, Section C.

The State Legislative Branch

To a certain extent, legislative powers have been considered throughout these materials. In this Chapter specific constitutional *restrictions* on such powers, together with special types of legislative powers, will be considered. Initially, however, we must review the nature of legislative power under state constitutions.

A. The Nature of State Legislative Power

State courts have summed up the nature of state legislative power in a number of ways. For example, in *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 849 (Ill. 1979), the Illinois Supreme Court stated:

Under traditional constitutional theory, the basic sovereign power of the State resides in the legislature. Therefore, there is no need to grant power to the legislature. All that needs to be done is to pass such limitations as are desired on the legislature's otherwise unlimited power.

In *State ex rel. Schneider v. Kennedy*, 225 Kan. 13, 587 P.2d 844, 850 (1978), the Supreme Court of Kansas observed:

It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.

In 1926 the Supreme Court of Illinois said:

The State constitution is not a grant of, but is a limitation upon, legislative power. All legislative power is vested in the General Assembly, subject to the restrictions contained in the State constitution and the constitution of the United States. Every subject within the scope of civil government which is not within such constitutional limitations may be acted upon by it.

The Italia American Shipping Corp. v. Nelson, 323 Ill. 427, 439, 154 N.E. 148, 203 (1926).

In 1915 Walter Dodd had the following observations about state legislative power:

The view is frequently expressed that state legislatures have inherently all power not denied to them by state and national constitutions. This view is based upon the notion that state legislatures inherited the powers of the British parliament and possess such powers in full unless denied.

On the other hand it has been said that state legislatures possess no inherent powers, but only such power as has been granted to them by the state constitutions under which they act. This view is supported by the political theories of those who framed the first state constitutions. Certainly the political philosophy of 1776 was based very largely on the notion of social compact and did not recognize the existence of inherent governmental power in either legislative, executive or judicial department. The notion that state legislatures exercise delegated or granted powers is to some extent borne out by the texts of the first state constitutions.

* * * * *

The result is very nearly the same whether we say (1) that the state constitution confers "legislative powers," and that this means all power not denied by constitutional texts, or (2) that "legislative power" is inherent, and unlimited except as restricted by constitutional texts. The first statement is perhaps the better, for there is little ground in our history since the Revolution for inherent or original powers in any department of

government. In fact, when reference is made to inherent power, what has usually been meant is that "legislative power," granted in general terms, must be interpreted as conferring all governmental power, except so far as restricted by constitutional texts, i.e.,

that all such power inheres in the general grant.

Walter F. Dodd, "The Function of a State Constitution," *Political Science Quarterly* 30 (June 1915): 201, 205.

B. Procedural Limitations on State Legislatures

Robert F. Williams, "State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement"

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Constitutions, both state and federal, impose a number of substantive limits on what may be enacted by their respective legislative branches. A major factor distinguishing the state and federal constitutions, however, is their differing attention to the procedure of legislative enactment. The Congress is relatively unfettered in the process of enacting law. Unrelated measures may often be included in one bill or resolution, and unrelated "riders" may be attached to virtually any measure, including appropriations bills. Although House and Senate rules may, to a certain degree, restrict these practices, the U.S. Constitution does not contain such restrictions.

By contrast, the legislative articles of virtually all state constitutions contain a wide range of limitations on state legislative processes. Generally speaking, these procedural limitations did not appear in the first state constitutions. Instead, they were adopted throughout the nineteenth century in response to perceived state legislative abuses. One observer during this era noted that "one of the most marked features of all recent State Constitutions is the distrust

shown of the legislature."³ Last-minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions to bills in the amendment process—to name a few of these abuses—led to the adoption of constitutional provisions restricting the legislative process. These constitutional provisions seek generally to require a more open and deliberative state legislative process, one that addresses the merits of legislative proposals in an orderly and rational manner.

Georgia's famous Yazoo land scandal, where a virtual giveaway of land was authorized in a bill "smuggled" through the legislature, led to the requirement that a bill contain a title disclosing its subject.⁴ Other familiar examples of state constitutional limitations on the legislature include the requirement that a bill contain only matters on a "single subject";⁵ that all bills be referred to committee;⁶ that the vote on a bill be reflected in the journal;⁷ that no bill be altered during its passage through either house so as to change its original purpose;⁸ and that

³Amasa M. Easton, "Recent State Constitutions," *Harvard Law Review* 6 (October 1892): 109-124. See also James Quayle Dealey, *Growth of American State Constitutions From 1776 to the End of the Year 1914* (1915; reprint, New York: DaCapo Press, 1972), pp. 120, 188-193, 277, 282-283.

⁴Millard H. Ruud, "No Law Shall Embrace More Than One Subject," *Minnesota Law Review* 42 (1958): 391-392.

⁵See generally Ruud, "No Law Shall." Apparently the concern about "omnibus" bills dates back to Roman times. See Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (December 1928): 160, n. 36.

⁶See, for example, Pennsylvania, *Constitution*, Article 3, Section 2.

⁷See, for example, Ohio, *Constitution*, Article 2, Section 9.

⁸See, for example, Pennsylvania, *Constitution*, Article 3, Section 1.

appropriations bills contain provisions on no other subject.⁹ These procedural restrictions must be distinguished from the common substantive limits on state legislation, such as those prohibiting statutes limiting wrongful death recoveries or mandating a certain type of civil service system,¹⁰ and from the general limits contained in state bills of rights.

There is much criticism of the continued inclusion of procedural restrictions in modern state constitutions. One commentator noted in 1968 that:

Commonly, state constitutions provide that the legislature shall determine its own rules of procedure, and then deny it the effective exercise of that right by providing for the conduct of legislative business in such detail as to leave very little to rulemaking. While it may be appropriate to settle constitutionally and inflexibly such essential matters of representative government as the kind of majority required to pass a law, or the vote required to override a veto by the governor, the constitutional requirement of three readings of a bill is clearly obsolete, and requirements governing the style to be followed in a bill, or limiting a bill to single subject, have caused considerable damage through invalidation of noncomplying laws on technical grounds.¹¹

Despite such criticism, the limits on state legislative procedure survived the wave of state constitutional revision that occurred during the middle of the

twentieth century;¹² therefore, the limits should be taken seriously by the legislative, executive, and judicial branches of state government. These provisions continue to reflect important policies relating to the nature of the deliberative process in state legislatures.

* * * * *

The Pennsylvania Constitution contains, among many other limits, two typical limitations on legislative procedure:

Article 3, Section 1. Passage of laws.

No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.

Article 3, Section 3. Form of bills.

No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.

These restrictions, together with others contained in Article 3 of the Pennsylvania Constitution, are similar to those inserted in nearly all state constitutions during the nineteenth century.¹³ The provision contained in Article 3, Section 3 was added to the Pennsylvania Constitution in 1864. The provision now contained in Article 3, Section 1 was inserted by the constitutional convention that framed the 1873 constitution. This later provision is obviously narrower than Article 3, Section 3, and is aimed at a different perceived evil.

¹²Illinois in 1970 removed the title requirement from its constitution. See "State Statutes: The One Subject Rule Under the 1970 Constitution," *John Marshall Journal of Practice and Procedure* 6 (Spring 1973): 359-381. Proposals in other states, such as in New Jersey in 1947, to remove some of these provisions have not been adopted.

¹³See, generally, Williams, "State Constitutional Law Processes," 201, 203-205. Interestingly, in Pennsylvania, the history of state constitutional provisions concerning openness and fairness in legislative procedure goes back to 1776. See Cecelia M. Kenyon, "Constitutionalism in Revolutionary America," *Nomos XX: Constitutionalism*, eds. Roland J. Pennock and John W. Chapman (New York: New York University Press, 1979), pp. 101, 103. See also, J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Philadelphia: University of Pennsylvania Press, 1936), pp. 184-185, 192. Jackson Turner Main made the following comment about Pennsylvania's 1776 legislative procedure requirements: "Prevented from doing harm, it [the legislature] might then be trusted with power to do good." *The Sovereign States, 1775-1783* (New York: Franklin Watts, 1973), p. 152.

⁹See, for example, Florida, *Constitution*, Article 3, Section 12.

¹⁰Frank P. Grad, "The State Constitution: Its Function and Form for Our Time," *Virginia Law Review* 54 (March 1968): 955, n. 92, 961-962.

¹¹*Ibid.*, p. 963 (footnotes omitted). By contrast, Ruud concluded that the benefits of the single-subject rule "are obtained at comparatively little cost in negative results" and recommended that the provisions be retained in state constitutions, "No Law Shall," 452. For further criticisms, see Robert F. Williams, "State Constitutional Law Processes," *William and Mary Law Review* 24 (Winter 1983): 204, n. 157. Another commentator has noted: "Students of legislation believe that most legislative procedure requirements could be stricken from constitutions without impairing the legislative process in the slightest." William J. Keefe, "The Functions and Powers of the State Legislatures," *State Legislatures in American Politics*, ed. Alexander Heard (Englewood Cliffs, N.J.: Prentice Hall, 1966), p. 50. For similar perspectives, see Frederick M. Wirt, "The Legislature," *Salient Issues of State Constitutional Revision*, ed. John P. Wheeler (New York: National Municipal League, 1961), pp. 77-78 (suggesting exclusion from judicial review); Charles W. Shull, "The Legislative Article," *Major Problems in State Constitutional Revision*, ed. William Brooke Graves (Chicago, Ill.: Public Administration Service, 1960), pp. 209-210.

Article 3, Section 3 (single subject and title) was the culmination of efforts dating back to the 1830s to eliminate the evils of “logrolling” and “omnibus bills,” and to ensure separate consideration by the legislature for distinct proposals.¹⁴ The title requirement is a disclosure device to give notice of the contents of the bill. Thus, a violation of this provision can take place even if a separate bill is drafted, introduced, and passed if it contains “more than one subject” (not reasonably germane to each other) or if the subject is not “clearly expressed” in the bill’s title. These restrictions concern the authorized *content* of acts of the legislature. Any asserted violation could be judged by examining the final legislative enactment, or enrolled bill, on its face.

¹⁴Jefferson B. Fordham and Carroll C. Moreland, “Pennsylvania’s Statutory Imbroglia: The Need of Statute Law Revision,” *University of Pennsylvania Law Review* 108 (June 1960): 1100-1103. See generally, Ruud, “No Law Shall.”

The more recent Article 3, Section 1, however, is more specific. It is aimed at the procedure by which the legislature may enact laws. Its primary limitation is that once a bill has been introduced, it may not be “so altered or amended, on its passage through either House, as to change its original purpose.”¹⁵ By contrast to Article 3, Section 3, a violation cannot be detected by examining the enrolled bill on its face. Any alteration by amendment will have already taken place and will be “masked” by the process of engrossing the amendments into the final version of the bill for presentation to the governor.

¹⁵A leading commentator referred to Article 3, Section 1 as a “technicality of scant policy content” and stated: “The ban on amendments changing the purpose is designed to assure full deliberation on the stuff of a measure. The object is good but I prefer my faith in a body of able representatives than in hard-to-apply procedural restrictions.” Jefferson Barnes Fordham, *The State Legislative Institution* (Philadelphia: University of Pennsylvania Press, 1959), p. 56.

Discussion Notes

1. Reread the materials at the beginning of Chapter 5, Section F, relating to the judicial enforceability of state constitutional restrictions on legislative procedure.

2. In *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 181, 507 A.2d 323, 335 (1986), the Pennsylvania Supreme Court stated that the purpose of Article 3, Section 1 of the Pennsylvania Constitution, discussed above, was to “put the members of the General Assembly and others interested on notice so that they may act with circumspection.” Do you agree that this is the *only* purpose of the provision? See Williams, “State Constitutional Limits,” 105-06.

3. In *In Re Department of Transportation*, 511 Pa. 620, 626-27, 515 A.2d 899, 902 (1986), the Pennsylvania Supreme Court stated that the purpose of Article 3, Section 3 of the Pennsylvania

Constitution, discussed above, was “to provide adequate notice both to the members of the General Assembly and to the public of the subjects contained in proposed acts so as to prevent passage of secretive measures.” Do you agree that this is the *only* purpose of the provision?

4. Walter Dodd characterized the state constitutional title and single-subject requirements as “narrow in character but so indefinite that they do not present an objective standard by which the validity of legislation may be tested.” He concluded, therefore, that “[F]lagrant violations of this requirement may, of course, be apparent, but no test of violation is laid down by the provision itself and none has been developed by judicial action.” Walter Dodd, “The Problem of State Constitutional Construction,” *Columbia Law Review* 20 (June 1920): 639, 640.

Scudder v. Smith
331 Pa. 165, 200 A. 601 (1938)

MAXEY, Justice.

* * * * *

The facts set forth in the bills are as follows: The legislature of Pennsylvania, in its regular session in 1937 approved, what it designated, “A Joint Resolution,” which purported to create a commission to investigate the “operation of the oil industry in this

Commonwealth with special reference to the adequate, efficient and mechanical supplying of lubricating oils and materials to the people of this Commonwealth; conferring upon the commission full power to issue subpoenas, requiring the commission to make a report of its findings to the Governor together with its recommendations as to such regulating legislation . . . ; authorizing the commission to employ counsel and employees; and making an appropriation” of \$5,000. . . .

* * * * *

The gravamen of the complaint by both taxpayers is (1) that the joint resolution was legislative in

character, carrying with it an appropriation of public money, and that since it was not passed by Bill, it violated Article 3, Section 1; Article 3, Section 15; and Article 3, Section 16 of the Constitution of Pennsylvania. . . .

The defendants, denying the plaintiff's legal conclusions, contended that the joint resolution was a valid law and that the appropriation which it provided was a valid and proper exercise of legislative power.

The first question posed is: What is a legislative "Joint Resolution"? Is it a "law" within the meaning of section 1 of Article 3 of the Constitution of Pennsylvania, or is it what the legislature itself denominated it, "A Joint Resolution," a form of legislative expression recognized in section 26 of this same Article, P.S.Const. art. 3, sec. 26?

The legislative measure here is designated "A Joint Resolution." Section 1 of this legislation begins, "Be it resolved, etc." . . . The legal phraseology designating the passage of a law by *bill* uniformly has been "Be it enacted, etc.," . . . That this was intended to be a joint resolution by the Assembly we have no doubt. Here was an express declaration of the intent of the legislature to "resolve" and not to "enact."

Section 1 of Article 3 of the Constitution provides: "No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose." In the *Southwark Bank v. Commonwealth*, 26 Pa. 446, 450, this court said: "A bill is the draft or form of an act presented to the legislature, but not enacted. An 'act' is the appropriate term for it after it has been acted on by, and passed, the legislature. It is then something more than a draft or form. It has a legal existence as 'an act' of the legislative body, because it becomes a law, without further action from any other branch of the government, if the executive take no measures to prevent it." A "Bill" has been defined to be "a form or draft of a law presented to a legislature for enactment." Webster's New International Dictionary. A "Joint Resolution" has been defined by the same authority to be "A resolution adopted jointly by the two branches of a legislative body." A "resolution" by the same authority has been defined as "A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution." When the Constitu-

tion provided that "no law shall be passed except by Bill," it meant by "a form or draft of a law submitted to the legislature for enactment"; it did not recognize a mere "formal expression of opinion" as adequate to the *creation of a law*. The fact that the joint resolution went through the *mode of passage* prescribed by the Constitution for Bills, does not supply the constitutional deficiencies of its conception. The purpose of the constitutional requirements relating to the enactment of *laws* was to put the members of the Assembly and *others interested, on notice*, by the title of the measure submitted, so that they might vote on it with circumspection. What was attempted to be done by the sponsors of this challenged measure was something utterly alien to the proper subject matter of a "joint resolution." Its deceptive nomenclature is fatal to its validity as a *law*.

This "joint resolution" first purports to create a commission to investigate the oil industry in Pennsylvania. It confers certain authority upon this commission, giving it unlimited inquisitorial power by the process of subpoena *upon any person*. It subjects such person in the event of wilful neglect or refusal to testify or produce books, records, papers or documents, "to the penalties provided by the Laws of the Commonwealth in such cases." By Section 4, it contains appropriation which is to be used to pay the Commission's expenses. The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion. Fatal to the Attorney General's contention that this legislative expression is a law, is Article 3, Section 1 of our Constitution. P.S.Const. art. 3, sec. 1, which declares that "no laws shall be passed except by bill." Clearly the requirements of Section 15 of the same Article, P.S.Const. art. 3, sec. 15, that "all appropriations must be passed by Bill" cannot be construed to mean that appropriations can be passed by joint resolution as in this case. This "joint resolution" was not a bill and its adoption by the legislature and approval by the Governor did not make it a law. In *Ex parte Hague*, 1929, 105 N.J.Eq. 134, 147 A. 220, 222, Vice-Chancellor Fallon said: ". . . A joint resolution adopted by a state Legislature is not a law. It is of less solemnity than a law, and clearly distinguishable therefrom. . . ."

* * * * *

Discussion Notes

1. Would a joint resolution be required to have a title, disclosing its contents?

2. Would a joint resolution have to be presented to the governor?

C. Limitations on Special or Local Laws

Many state constitutions place severe limits on the legislature's power to enact "special or local" laws. Most of these limits were inserted in state constitutions in the second half of the nineteenth century.

The Pennsylvania Supreme Court, in discussing the ban on special and local legislation, stated:

It is certainly not forgotten that the well-nigh unanimous demand which brought the convention of 1873 into existence was prompted by the evils springing from local and special legislation. That convention, direct from the people, composed of the ablest and most experienced citizens of the commonwealth, framed this article 3 on legislation. Assuming, what was the settled law, that the general assembly had all legislative power not expressly withheld from it in the organic law, they set about embodying in that law prohibitions which should in the future effectually prevent the evils the people complained of. Article 3 is almost wholly prohibitory. It enjoins very few duties, but the "thou shalt nots" number more than 60. . . . That constitution, with this article the most prominent feature of it, was adopted by an unprecedented majority on a direct vote, indicating a settled determined purpose on part of the people to hold back from the legislature the power to enact local and special laws.

Perkins v. Philadelphia, 156 Pa. 554, 565, 27 A. 356, 360 (1893).

See William A. Russ, Jr., "The Origin of the Ban on Special Legislation in the Constitution of 1873," *Pennsylvania History* 11 (October 1944): 260.

Anderson v. Board of Com'rs of Cloud County 77 Kan. 721, 95 P. 583 (1908)

PORTER, J.

In April, 1907, the board of county commissioners of Cloud County appropriated the sum of \$8,000, for the purpose of removing and rebuilding a bridge across the Republican river, and afterwards proceeded to let the work by contract to the Western Bridge & Construction Company. The plaintiff, who is the owner of a 640-acre farm in Cloud County, brought suit to enjoin the proceedings. The court refused to grant a temporary injunction, and plaintiff brings the case here for review. . . .

It is admitted that the board are without power or authority in the premises, except as conferred upon them by chapter 72, p. 94, Laws 1907, for the reason that the expense of removing the bridge and building a new one will exceed the sum which the board are allowed to appropriate for such purposes without a vote of the people. . . .

The sole contention is that the act of the Legislature under which the board are proceeding is unconstitutional. The title of the act reads as follows: "An act to provide for the erection and maintenance of a bridge, and removal of a bridge, or bridges, across the Republican river, in the vicinity of Concordia, Cloud County, Kansas, and to authorize the board of county commissioners of said county to issue bonds to provide funds for payment of the same." . . . The ground upon which its validity is assailed is that it is a special act, and for the reason repugnant to the second clause of section 17 of article 2 of the Constitution. By its express terms the act is special, and applies to Cloud County alone. From 1859, when the Constitution was adopted, until the amendment of 1905 (Laws

1905, p. 907, c. 543), the language of section 17 of article 2 read as follows: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

In the early case of *State ex rel. v. Hitchcock*, 1 Kan. 178, 81 Am.Dec. 503, this provision was construed, and the rule declared, that it was for the Legislature to determine whether their purposes could or could not be expediently accomplished by a general law. That rule has never been departed from by the court, in construing the second clause of the foregoing provision. *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915, and cases cited. This constitutional limitation is based upon the theory that the state is a unit, to be governed, throughout its length and breadth, on all subjects of common interest, by the same laws, and that these laws should be general in their application and uniform in their operation. When it was adopted the evil effects of special legislation, enacted at the behest of private individuals or local communities, were well understood and appreciated. The makers of the Constitution were confronted with the experience of the older states, which had demonstrated that Legislatures were wholly unable to withstand the constant demands for private grants of power and special privilege. The same year that our Constitution was adopted the conditions in Illinois had reached such a stage that, in the language of the Supreme Court, the mischiefs of special legislation were "beyond recovery or remedy." In the opinion of the case of *Johnson v. Joliet & Chicago Railroad Company*, 23 Ill. 202, 207, Justice Breese said: "It is too late now to make this objection; since, by the action of the General Assembly under this clause, special acts have been so long the order of the day, and the ruling passion with every Legislature which has convened under the Constitution, until their acts of this description fill a huge and misshapen volume, and important and valuable rights [are] claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void."

From time to time, in opinions written upon the subject, members of this court have expressed their individual dissent to the doctrine that the courts were bound by the legislative determination. . . .

As early as 1854 the same question, which was presented to this court in *State ex rel. v. Hitchcock*, supra, was before the Supreme Court of Indiana, and exactly the opposite construction was placed upon their Constitution. In the opinion in *Thomas v. Board of Commissioners, etc.*, 5 Ind. 4, it was said: "It is, however, insisted that the Legislature have decided a general law to be applicable to the case under consideration, that from this decision there is no appeal,

and that therefore it is not competent for this court to decide upon the validity of the law in question. If that position be correct, the twenty-third section has no vitality, nor is there any reason why it should have a place in the Constitution. It would impose no restriction upon the action of the Legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the Legislature to enact a special or local law *ad libitum*, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction or [sic] its own powers under the Constitution. We are not prepared to sanction this doctrine. The maxim that 'Parliament is omnipotent,' has no place in American jurisprudence. Whether the Legislature have, in the case at bar, acted within the scope of their authority, is, in our opinion, a proper subject of judicial inquiry."

The Indiana court, however, receded from this position, and in 1868, the decision in the case quoted from was expressly overruled in *Gentile v. State*, 29 Ind. 409. In 1878 the Supreme Court of New Jersey, construing a similar constitutional provision, declined to adopt the construction that the determination of the Legislature, to the effect that a general law could not be made applicable, was binding upon the courts, and in the case of *Pell v. City of Newark*, 40 N.J. Law, 71, 81, 29 Am. Rep. 266, used this language: "It cannot be adopted by the courts without abandoning one of the most important branches of jurisdiction committed to them by the Constitution. That the Legislature would act in good faith must be presumed. Purity of motive and a desire to keep within the prescribed limitations must be conceded to its members at all times; but that the people should have deliberately framed and imbedded in their organic law an amendment to prohibit special legislation, where general laws might be passed, and, at the same time, should have intended to put legislative action beyond review, where there was a clear infraction of the prohibition, is a proposition to which it seems impossible to assent. The mere form in which a law is enacted cannot be conclusive of the question."

The foregoing quotations indicate some of the many reasons that might have been urged in support of the other theory of constitutional construction, if this court had seen fit to adopt that theory when the case of *State ex rel. v. Hitchcock*, supra, was before it.

More than one-half of the states of the Union have sought to curb the growing evils of special legislation by constitutional prohibitions. And the courts, in construing provisions similar in language to our section 17 as it read before the recent amendment, have almost uniformly held it to be the province solely of the Legislature to determine when a general

law can be made applicable. Whether the rule adopted in *State ex rel. v. Hitchcock* was sanctioned by the better reason, it undoubtedly was supported by the weight of authority. In many of the states the constitutional limitation is coupled with a specific enumeration of subjects with respect of which special laws are expressly forbidden. This is true of the Constitutions of all of the newer states, and the same plan has been adopted, in some of the older states, by amendment. In New York the constitution enumerates 13 subjects upon which the Legislature is forbidden to pass a private or local bill. The Constitution of the state of Washington prohibits special legislation upon 18 subjects; that of North Dakota expressly names 35, and in addition thereto, the Constitution reads: "Sec. 70. In all other cases where a general law can be made applicable, no special law shall be enacted; nor shall the Legislative assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed."

The Constitution of Missouri was amended in 1875, and enumerates 32 subjects upon which special laws are prohibited, among which are the following: "Regulating the affairs of counties, cities, townships, wards or school districts; changing the names of persons or places; changing the venue in civil or criminal cases; authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys; relating to ferries or bridges; vacating roads, town plats, streets or alleys; authorizing the adoption or legitimation of children; locating or changing county seats; incorporating cities, towns or villages, or changing their charters; granting divorces; erecting new townships, or changing townships lines, or the lines of school districts; creating offices, or prescribing the powers and duties of officers in counties, cities, townships, election or school districts; changing the law of descent or succession; regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; fixing the rate of interest; affecting the estates of minors or persons under disability; regulating labor, trade, mining or manufacturing; creating corporations, or amending, renewing, extending or explaining the charter thereof; granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track; declaring any named person of age; giving effect to informal or invalid wills or deeds; legalizing the unauthorized or invalid acts of any officer or agent of the state, or of any county or municipality thereof." In addition there is the following

general limitation: "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject."

Minnesota amended her Constitution in 1892, and special laws upon 15 subjects are prohibited, and there is also a general limitation, couched in the identical language quoted from the constitution of Missouri. The experience of those states, which have attempted thus to solve the problem, has demonstrated that it is impossible to anticipate the various subjects upon which this kind of legislation will be demanded. The fact that the people have not attempted, in our Constitution, to enumerate any of the specific subjects upon which the Legislature shall not pass special laws has the effect, necessarily, to expand rather than to limit the scope of the provision as it reads.

The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence, their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law become indifferent to its passage. It is customary, on the plea of legislative courtesy, not to interfere with the local bill of another member; and members are elected, and re-elected, on account of their proficiency in procuring for their respective districts special privileges in the way of local or special laws. The time which the legislature would otherwise devote to the consideration of measures of public importance is frittered away in the granting of special favors to private or corporate interests or to local communities. Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions, whose operation extends no further than the boundaries of the particular school district or township or county to which they were made to apply. For performing the same services the sheriff or register of deeds or probate judge of one county receives an entirely different compensation from that received by the same officer of another county. The people of one community of the state are governed, as to many subjects, by laws wholly different from those which apply to other localities. Worse still, rights and privileges, which should only result from the decree of a court of competent jurisdiction after a full hearing and notice to all parties in interest, are conferred upon individuals and private corporations by special acts of the Legislature, without any pretense of investigation as to merits, or of notice to adverse parties.

Commenting upon the evils of special legislation, Mr. Samuel P. Orth, in the *Atlantic Monthly* for January, 1906 (volume 97, p. 69), uses this language: "The Romans recognized the distinction between private bills and laws. To them special laws were *privilegia* or *constitutionis privilegia*. In England they used to say, when a public bill was passed: 'Le roi le veut'—it is the king's wish; and of a private measure: 'Soit fait comme il est desire'—let it be granted as prayed for. Here is the gist of the matter: A public law is a measure that affects the welfare of the state as a unit; a private law is one that provides an exception to the public rule. The one is an answer to a public need, the other an answer to a private prayer. When it acts upon a public bill, a Legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is transformed from a tribune of the people into a justice shop for the seeker after special privilege."

It has been estimated that fully one-half of the laws enacted by the state Legislatures in recent years have been special laws. Since 1859 the rapid growth of cities and towns has produced so many changes in social and economic conditions, and added so much to the complex necessities of local communities, that the demand upon Legislatures for this species of class legislation has increased, and the evil effects have multiplied. The Legislature of 1905, which differed in this respect but little from its predecessors, passed no less than 25 special acts relating to bridges, and 35 fixing the fees of officers in various counties and cities. Out of a total of 527 chapters more than half are special acts. This does not include appropriation laws which, from their nature, are inherently special. The first act passed by this Legislature declared a certain young woman the adopted child and heir at law of certain persons. Others changed the names of individuals. Many granted valuable rights and privileges to private corporations. Hundreds granted special favors to municipal corporations, and many others conferred special privileges upon individuals. Such were the conditions which induced the people, at the general election in 1906, to change the Constitution, by adopting the amendment to section 17 of article 2. The amendment was submitted by the legislature of 1905 (Laws 1905, p. 907, c. 543, sec. 1), and reads as follows, the amendatory part being italicized: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable no special law shall be enacted; *and whether or not a law enacted is repugnant to this provision of the Constitution shall be construed and determined by the courts of the state.*" The only change is to require the courts to determine, as a judicial question, whether in a given case this provision has been complied with by the Legislature. The

amendment adds nothing to the mandatory character of the provision. As it read originally it was mandatory, and the validity of every law, enacted by the Legislature since the adoption of the Constitution, may be said to have depended upon a strict compliance with it. Under the construction adopted by the court, however, the way was open for the Legislature to disregard both the spirit and the letter of the provision; and, as we have attempted to show, both have been honored more in the breach than in the observance. It is apparent that had this section, as originally adopted, provided that the courts should determine the question, or had a different rule of construction been adopted by the court, many laws must necessarily have been declared invalid because repugnant to the provision.

Constitutions are the work of the people, not of Legislatures or of courts. The people give, and the people take away, constitutional provisions. The adoption of the amendment must be regarded as the sober, second thought of the people upon the subject, and as an emphatic declaration of their determination to strike at the root of the evil, and to rely upon the vigilance of the courts to restrain the action of the Legislature in the future. The Legislature no longer have the power of finally determining, either that a proposed law will have uniform operation throughout the state, or that a local condition exists which requires a special law. A cursory glance through the bulky volume of the session laws of the Legislature of 1907 indicates that the adoption of the amendment has not served any good purpose, unless the action of the courts shall give to it the effect which the people intended.

As observed, the provision has not been altered, except to take from the Legislature and give to the courts the final determination of the question whether a given act of the Legislature is repugnant to its terms. It still recognizes the necessity for some special legislation. It is still a limitation, and not a prohibition. Without some special laws state governments could not exist. An appropriation law, however general in its terms is necessarily special. A law changing the boundaries of a judicial district is a special law, but one which may be required at any time, and to enact a general law upon the subject, might accomplish more evil than good. Again, conditions sometimes arise, and emergencies are created, which require the enactment of special legislation. The mere mention of the subject in the Constitution is a recognition of this necessity.

What is the attitude which the courts must take, in respect to this subject, since the amendment? In the quotations from the Missouri and Minnesota amendments, *supra*, it will be observed that they provide that the question "shall be judicially determined

without regard to any legislative assertion on that subject," but without the addition of these words the attitude of the courts, in our opinion, must be the same. It will be the duty of the courts to determine the question without reference to anything the Legislature has declared, either in the act in question or in other acts.

It is obvious that the amendment has the effect to destroy the force of some of the former decisions of this court as precedents. The general canon of statutory construction, which makes it the duty of courts to uphold the validity of a law if it is possible to do so, can have no application in the future, where an act is assailed as repugnant to this provision, however much that principle may apply to objections falling under other provisions of the Constitution.

The Constitution expressly forbids special laws where a general law can be made to apply. When a special law is passed, therefore, the Legislature necessarily determines, in the first instance, that a general law can not be made to apply. But their determination is not final. There is, of course, a presumption that public officers have discharged their duties properly, and every act of the Legislature is presumed to be valid until there is a judicial determination to the contrary. But when a special law has been enacted, and its validity is assailed in the courts, the question is to be finally determined by the courts as a judicial question, uncontrolled by the determination of the Legislature. The courts must determine the question, as other purely judicial questions are determined, by reference to the nature of the subject, not upon proof of facts or conditions, but upon the theory that judicial notice supplies the proof of what courts are bound to know, and that courts must be aware of those things which are within the common knowledge, observation, and experience of men generally.

The first clause of this section of the Constitution involves the question of classification, which it is apparent does not enter into the present case. Here there will doubtless remain in the future an ample field, upon which lawyers may contend and courts and judges differ. It may be said in passing, however, that it will be the duty of the courts, when the question arises, to apply the established tests to determine whether an attempted classification of the Legislature is a proper one, based upon some apparently natural reason, suggested by necessity and occasioned by a real difference in the situation and circumstances of the class to which it applies, or whether it is arbitrary or capricious, and excludes from its provisions some persons, localities, or things to which it would naturally apply except for its own limitations. It may be said, however, that it will not become the duty of the courts to invent reasons for upholding a law which is repugnant to either clause of this provision.

It requires no argument or discussion to demonstrate that the special act in question violates the Constitution. To enact a general law on the subject, giving to boards of commissioners in every county in the state authority to build or remove bridges, appropriate funds, and issue bonds to meet the expense thereof, under such restrictions and limitations, upon their authority in the premises as the legislature may deem wise and salutary, would not require more than ordinary skill in the science of legislation.

We are not concluded either way by the fact that a general law on the subject was in existence when a special act was passed. That fact, however, serves as an apt illustration of the adaptability of a general law upon the subject, and as an argument against the necessity for a special law. . . .

* * * * *

Discussion Notes

1. In *Anderson*, the Kansas Supreme court stated that, with respect to the constitutional ban on special laws, the presumption in favor of a statute's constitutionality should not be applied. 95 P. at 587. Why does the court make this point? Are

there other situations where it might apply?
2. In what way was the law involved in *Anderson* "special"? Are there other ways in which laws can be special? Read the next case with this in mind.

Grace v. Howlett
51 Ill. 2d 478, 283 N.E.2d 474 (1972)

SCHAEFER, Justice.

By Public Act 77-1430, which became effective January 1, 1972, the General Assembly added article

XXXV to the Illinois Insurance Code. (Ill.Rev.Stat.1971, ch. 73, pars. 1065.150 through 1065.163.) This action was instituted in the circuit court of Cook County by the plaintiff, Michael J. Grace, against Michael J. Howlett, Auditor of Public Accounts, and other State officers, to enjoin them from expending funds appropriated for the enforcement of the new article. Evidence was heard, and the court found that certain provisions of the new article

violated the constitution of the United States and the constitution of the State of Illinois. An injunction was issued and the defendants appealed directly to this court under Rule 302(a) (1). Ill.Rev.Stat. 1971, ch. 110A, par. 302(a) (1).

Article XXXV is entitled "Compensation of Automobile Accident Victims." Section 608 is a key provision of the article. In the severability clause (section 613), the General Assembly has provided that "Section 608, or any part thereof, of this Article is expressly made inseverable." Section 608 relates to the amount of damages which may be recovered in actions for accidental injuries arising out of the use of motor vehicles. In essence it provides that (except in cases of death, dismemberment, permanent disability or serious disfigurement) the amount recoverable for pain, suffering, mental anguish and inconvenience "may not exceed the total of a sum equal to 50 percent of the reasonable medical treatment expenses of the claimant if and to the extent that the total of such reasonable expenses is \$500 or less, and a sum equal to the amount of such reasonable expenses if any, in excess of \$500."

The defendants describe article XXXV as "the culmination in Illinois of a growing public demand for a change in the way society deals with the enormous legal, social and economic problems spawned by motor vehicle crashes." They say that "one of the major evils of the present system of compensating auto accident victims is the small personal injury suit," and that "[w]hile opinions may differ on solutions, those who have studied the problem generally agree that there are three major defects in the existing system of compensating victims of auto crashes: (1) it results in inequitable distribution of compensation among personal injury claimants; (2) it is excessively and needlessly expensive and inefficient; and (3) it makes excessively burdensome demands upon the limited resources of the judicial system." These are the evils that article XXXV is said to have been intended to eliminate. We have been referred by both parties to numerous statistical analyses as well as to literature concerning relationships between court congestion and litigation stemming from automobile accidents. See, e. g., *Motor Vehicle Crash Losses and Their Compensation in the United States*, a study by the United States Department of Transportation; James and Law, *Compensation for Auto Accident Victims* (1952), 26 Conn. Bar Journal 70; Morris and Paul, *The Financial Impact of Automobile Accidents* (1962), 110 U.Pa.L.Rev. 913; Conard et al. *Automobile Accident Costs and Payments—Studies in the Economics Of Injury Reparation* (1964); R. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim* (1965).

We assume that the problems described by the defendant do exist. But as has been pointed out, the fact that a problem "does exist does not permit arbitrary or unrelated means of meeting it to be adopted." (*Heimgaertner v. Benjamin Electric Manufacturing Co* (1955), 6 Ill.2d 152, 128 N.E.2d 691.) We turn therefore to a consideration of the numerous constitutional objections that have been leveled at article XXXV. Violations of due process and equal protection under both State and Federal constitutions are asserted, as well as violations of the jury trial provisions of section 13 of article I, the separation of powers provision of section 1 of article II, and the provisions of section 8 and 13 of article IV of the constitution of Illinois.

It is important to note at the outset that section 600 and 608 are both aimed at a single problem. They are part of a single act directed toward evils in the existing method of disposing of personal injury claims arising out of motor vehicle accidents. That singleness of purpose is emphasized by the severability section (section 613), the effect of which is a legislative declaration that without the limitations upon recovery established in section 608, the other provisions of article XXXV would not have been enacted.

Despite the unified purpose of the two provisions, the limitations placed by section 608 upon the amounts recoverable for pain, suffering, and the like apply to all persons who are injured by automobiles, and not just to those injured persons who are covered by a "first party" policy under section 600. In other words, article XXXV requires that only "private passenger automobiles" must be covered by the policies issued under section 600, but it prohibits the award of general damages in excess of section 608 limitations, to all persons injured by any kind of motor vehicle, whether covered by such a policy or not.

The category of private passenger vehicles, with respect to which coverage is required to be extended under section 600, is not clearly defined. The exclusion of rented cars and livery vehicles is specific, but the statutory definition also apparently excludes any 4-wheel motor vehicle which is "used primarily in the occupation, profession or business of the insured." The extent to which the automobiles of doctors, lawyers, engineers, architects and salesmen, for example, are included in the provisions of section 600 is uncertain.

The effect of the classifications created by article XXXV may be visualized if we assume that two pedestrians each suffer an identical injury when struck by a negligently operated automobile: A, who is struck by a car which is included within the first party coverage category of section 600 gets prompt payment of his medical and other expenses as provided

by section 600; B, who is struck by a car which is not included within the enumerated categories in section 600 does not receive any payment under section 600. In addition, the opportunity to recover damages in an action at law which B had prior to the enactment of article XXXV is sharply curtailed by the restrictions upon recovery which are contained in section 608. Furthermore, his right to have his case tried before a jury may be clogged by the mandatory arbitration provisions of section 609, a matter which will subsequently be discussed in detail.

Section 22 of article IV of the 1870 constitution of Illinois prohibited the enactment of a special law in many enumerated instances, and concluded: "In all other cases where a general law can be made applicable, no special law shall be enacted." The 1970 constitution includes, for the first time, an equal-protection clause in article I, section 2. The 1970 constitution also provides, in article IV, section 13: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." While these two provisions of the 1970 constitution cover much of the same terrain, they are not duplicates, as the commentary to section 13 of article IV points out: "In many cases, the protection provided by Section 13 is also provided by the equal protection clause of Article I, Section 2." (S.H.A., Const. of 1970, Art. IV, sec. 13, at 244.) Indeed, as pointed out in the consolidated cases reported as *Bridgewater v. Hotz* (1972), 51 Ill.2d 103, 281 N.E.2d 317, the new section 13 of article IV has increased judicial responsibility for determining whether a general law "is or can be made applicable."

Unless this court is to abdicate its constitutional responsibility to determine whether a general law can be made applicable, the available scope for legislative experimentation with special legislation is limited,

and this court cannot rule that the legislature is free to enact special legislation simply because "reform may take one step at a time." (See, *Williamson v. Lee Optical of Oklahoma, Inc.* (1955), 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563.) The constitutional test under section 13 of article IV is whether a general law can be made applicable, and in this case that question must receive an affirmative answer.

There are many purposes for which the obvious differences between private passenger automobiles, buses, taxicabs, trucks and other vehicles would justify different legislative treatment. But the determination of the amount to be recovered by persons injured by those vehicles and the conditions governing the recovery is not one of those purposes. What was true of the municipal tort liability statutes involved in *Harvey v. Clyde Park District* (1964), 32 Ill.2d 60, 203 N.E.2d 573, is true here: those classified are those who suffer the accidental injuries as well as those who inflict them. There we said: "Many of the activities that frequently give rise to tort liability are common to all governmental units. The operation of automobiles is an obvious example. From the perspective of the injured party, or from the point of view of ability to insure against liability for negligent operation, there is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover, and one injured by a school district truck is allowed to recover only within a prescribed limit. And to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of article IV." 32 Ill.2d at 65, 203 N.E.2d at 576. See also, *Grasse v. Dealer's Transport Co.* (1952), 412 Ill. 179, 106 N.E.2d 124.

* * * * *

Discussion Notes

1. The court in *Grace v. Howlett* notes that the special law and equal protection provisions of the state constitution "cover much of the same terrain." What is the relationship of the two provisions? Do they both reflect concerns about equality before the law? See Robert F. Williams, "Equality Guarantees in State Constitutional Law," *Texas Law Review* 63 (March/April 1985): 1209-10.

2. With respect to restrictions on special legislation, see also, *Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977).

3. For a criticism of state constitutional provisions such as the one involved in *Grace v. Howlett*,

see Thomas F. Green, Jr., "A Malapropian Provision of State Constitutions," *Washington University Law Quarterly* 24 (April 1939): 359.

As to legislation which applies in "classes" of localities, see John M. Winters, "Classification of Municipalities," *Northwestern University Law Review* 57 (July-August 1962): 279; *Farrington v. Pinckney*, 1 N.Y.2d 74, 133 N.E.2d 817 (1956).

4. See also Frank E. Horack, "Special Legislation: Another Twilight Zone," *Indiana Law Journal* 12 (December 1936): 109, 183; Note, "General and Special Laws in Texas," *Texas Tech Law Review* 2 (Spring 1971): 336; W.T. Mallison, Jr., "General Versus Special Statutes in Ohio," *Ohio State Law Journal* 11 (Autumn 1950): 462.

**Housing Authority of the
City of St. Petersburg v.
City of St. Petersburg
287 So.2d 307 (Fla. 1973)**

BOYD, Justice.

This cause is before us on appeal from the Circuit Court, Pinellas County. The trial court, in its final judgment, passed upon the validity of Chapters 63-557 and 72-270, Laws of Florida, giving this Court jurisdiction of the direct appeal under sec. 3 of Article V of the Constitution of the State of Florida, F.S.A.

The facts of the case are as follows:

In 1937, the legislature enacted Chapter 421 of the Florida Statutes, F.S.A., creating housing authorities in all municipalities having a population in excess of five thousand people. In 1941, this statute was amended by reducing the population requirement to 2,500. Also, in 1941, similar housing authorities were created in all counties in the state. These housing authorities were given the power to "prepare, carry out, acquire, lease and operate housing projects to provide for the construction or re-construction, improvement, alteration, or repair of any housing project or part thereof." The 1937 Act, as amended, provided that the housing authority could not transact any business or exercise any of its powers until or unless the governing body of the respective city, by proper resolution, declared that there was a need for such an authority to function in said city. In November of 1937, the St. Petersburg City Council issued such a resolution.

The Florida Legislature enacted Chapter 63-557 and 72-270 Laws of Florida, both of which acts, by their language, were applicable only to Pinellas County, and restricted the operation of the 1937 law, as amended, by providing that the housing authority within Pinellas County could construct or contract to construct housing projects only upon the *approval of a majority vote in a referendum election* to be held in the area for which the housing authority is created. It was stipulated that notice of intention to enact Chapter 63-557 was not published, and that notice of intention to enact Chapter 72-270 was also not published.⁷

⁷In addition, the following certification by the Secretary of State appears in the Record:

I, RICHARD (DICK) STONE, Secretary of State of the State of Florida, do hereby certify that there are no Proofs of Publication or Affidavits attached to the following original laws on file in this office:

"Chapter 63-557 (Senate Bill No. 1401), Acts of 1963, and Chapter 72-270 (Senate Bill No. 1099), Acts of 1972.

Appellant contends that if this Court finds, as it urges, that these two laws were special laws, such notice of intention to enact and subsequent publication was required by Article III, Section 21, of the Constitution of 1885,⁸ and Article III, Section 10, of the Constitution of 1968,⁹ respectively.

Appellant alleges that it desired to construct public housing in St. Petersburg, pursuant to powers granted to it by the 1937 law, but was unable to secure the necessary financing to acquire land, and the financing necessary to construct such public housing, until such time as the referendum concerning the same had been successfully held. The Appellee has failed to hold a referendum on any proposed construction of public housing in the City of St. Petersburg, and Appellant contends that if the Appellee had called such a referendum, it would be incumbent upon the Appellant to bring an action to enjoin the same; or, in the event a referendum was held and the proposed housing defeated, to bring an action to have the referendum declared null and void.

As a result of the foregoing, Appellant alleges that it has been, and will be, completely frustrated in carrying out and performing the duties and responsibilities imposed upon it by the 1937 Law until there is an adjudication as to the constitutionality of Chapter 63-557 and 72-270.

The position of the Appellee, succinctly stated, is that Chapter 63-557 and 72-270 are general laws

⁸"... [N]o local or special bill shall be passed, nor shall any local or special law establishing or abolishing municipalities, or providing for their government, jurisdiction and powers, or altering or amending the same, be passed, unless notice of intention to apply therefor shall have been published in the manner provided by law where the matter or thing to be affected may be situated, which notice shall be published in the manner provided by law at least thirty days prior to introduction into the Legislature of any such bill. The evidence that such notice has been published shall be established in the Legislature before such bill shall be passed, and such evidence shall be filed or preserved with the bill in the office of the Secretary of State in such manner as the Legislature shall provide, and the fact that such notice was established in the Legislature shall in every case be recited upon the Journals of the Senate and of the House of Representatives: Provided, however, no publication of any such law shall be required hereunder when such law contains a provision to the effect that the same shall not become operative or effective until ratified or approved at a referendum election to be called and held in the territory affected in accordance with a provision therefor contained in such bill, or provided by general law."

⁹"No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected."

which were properly enacted by the Legislature. While the Appellee admits that notice of intention to enact was not published for either statute, the Appellee contends that since these were general laws, such was not required, and that, therefore, the laws are constitutional.

* * * * *

The sole question on this appeal is whether these two Acts are special acts falling within the purview of the constitutional restrictions requiring publication of notice of intent to seek enactment.

Neither the Constitution nor general law defines the term "special laws" as used in the Constitution and general law. This Court has, in the past, stated the basic reasons for the constitutional restriction, and has defined the type of law subject thereto. In *Milner v. Hatton*,¹¹ we set out the purpose of the constitutional restriction as follows:

. . . It therefore fails to comply with the requirements of either the Constitution or the statute, one of the purposes of both of which was to draw certain safeguards around the passage of local and special legislation by which the people of the locality to be affected would be given fair notice of the intention to get such legislation adopted, and of the substance thereof, and that the legislative journals should affirmatively show that such fair notice had been given as to the particular bill. In order to make this amendment to the constitution effective for the beneficent purpose for which it was evidently adopted by the people of this state, the constitutional requirements must be carefully complied with by the legislative body and fairly and thoroughly enforced by the courts.¹²

In *Carter v. Norman*,¹³ we defined local and special laws as:

. . . A statute relating to particular subdivisions or portions of the state, or to particular places of classified locality is a local law. A statute relating to particular persons or things or other particular subjects of a class is a special law.¹⁴

There are numerous other cases holding specific acts subject to the constitutional restrictions on pas-

sage of special laws. The great bulk of these cases involved so-called population acts applicable to a single county which was not described by name, but instead by population bracket into which it alone fell. This Court has uniformly held these acts invalid where there obviously is no reasonable basis for the classification.

When Chapters 63-557 and 72-270 are considered in the light of the purpose of the constitutional restriction and the definitions of special or local laws as determined by this Court, it is apparent that they are special laws falling within the constitutional restrictions and requiring publication of notice of intent to enact. They restrict, in Pinellas County only, the powers granted housing authorities throughout the entire state, thereby creating in Pinellas County housing authorities with powers different from all others. The people of Pinellas County were afforded no notice of the intent to enact these restrictions on housing authorities located within their county only.

It makes no difference that said laws were purportedly enacted under the guise of being general laws. This was not a novel procedure by the legislature, but had been attempted on numerous other occasions, all of which ultimately failed when subjected to judicial scrutiny. In *State ex rel. Baldwin v. Coleman*,¹⁵ we admonished:

But even though a bill is introduced and treated by the Legislature as a general law, if the bill in truth and in fact is clearly operative as a local or special act and the court can so determine from its obvious purpose or legal effect as gathered from its language or its context, this court will so regard it and deal with it as a local or special act in passing on its validity, regardless of the guise in which it may have been framed and regardless of whether the particular county or locality intended to be affected by it is in terms named or identified in the act or not.¹⁶

It is apparent that if Chapters 63-557 and 72-270 are special laws and were purportedly enacted in a manner prohibited by the Constitution of Florida, they are a nullity. We have summarily so held in numerous cases.

Therefore, Chapters 63-557 and 72-270, without any notice of intention to apply therefor having been published as required by the Constitution, and not containing a referendum, these Acts are nullities.

* * * * *

¹¹100 Fla. 210, 129 So. 593 (1930).

¹²129 So. at 596.

¹³38 So.2d 30 (Fla.1948).

¹⁴Id. at 32.

¹⁵148 Fla. 155, 3 So.2d 802 (1941).

¹⁶3 So.2d at 803. See also *Carter v. Norman*, *supra*, note 13.

Discussion Notes

1. Compare the outcome of the principal case, and its legal basis, with *James v. Valtierra*, 402 U.S. 137 (1971). See also, *State ex rel. City of Pompano*

Beach v. Lewis, 368 So.2d 1298 (Fla. 1979).

2. Are the concerns about “local” and “special” laws the same?

D. Direct Legislation

The initiative and referendum movement around the turn of the century was another indication of public dissatisfaction with state legislatures. Initiatives enabled the public to bypass unresponsive state legislatures, and referendums provided a check on the effect of unpopular statutes. These devices are more sophisticated than the earlier procedural restrictions, most of which also reflected disapproval of legislative actions. The initiative allowed the people to take direct action when the legislature refused to act. The referendum enabled the people to target specific enactments rather than depend on the indirect deterrence of procedural restrictions.

The people of South Dakota began the process of taking back, or reserving to themselves, a measure of legislative power in a constitutional amendment approved in 1898. During the next twenty years, about a dozen states followed the lead. See generally Jefferson B. Fordham and J. Russell Leach, "The Initiative and Referendum in Ohio," *Ohio State Law Journal* 11 (Autumn 1950): 496; Barbara F. Grossmand, "The Initiative and Referendum Process: The Michigan Experience," *Wayne Law Review* 28 (Fall 1981): 79. One observer during this era predicted that: The more direct legislation you have . . . the greater the body of judge-made law. George Lefcoe and Barney Allison, "The Legal Aspects of Proposition 13: The *Amador Valley* Case," *Southern California Law Review* 53 (November 1979): 173.

Do you agree with the above statement?

Compare the process of enactment of direct legislation with the legislative process.

Luker v. Curtis 136 P.2d 978 (Idaho 1943)

AILSHIE, Justice.

This is an original proceeding for a writ of prohibition, restraining defendant, as Secretary of State,

from publishing in the session laws of the twenty-seventh legislative session, H.B. No. 74, passed by the twenty-seventh legislative session, which act purports to repeal the "Senior Citizens' Grants Act," initiated by the people and approved and passed by vote of the people at the general election of November, 1942. . . .

Now, passing to the question as to the power of the legislature to repeal an initiative act adopted by popular vote, we must examine the provisions of the constitution, sec. 1, art. III, which provides as follows:

Sec. 1. *Legislative power—Enacting clause—Referendum—Initiative.*—The legislative power of the state shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as follows: 'Be it enacted by the Legislature of the State of Idaho.'

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection pro-

vided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted.

The italicized portion of the foregoing, being the initiative clause, was adopted in 1912 (1913 Sess.Laws, Amendment No. 16, p. 675). Acting under procedure prescribed by the legislature (1933 Sess.Laws, chap. 210, p. 431), the requisite number of electors initiated an act designated and known as the "Senior Citizens' Grants Act," which was submitted to and adopted by the voters at the November, 1942, election. The act was certified as passed and, by the Governor, declared in force November 23, 1942. The legislature, which convened in January, 1943, by H.B. No. 74, repealed the "Senior Citizens' Grants Act."

In the first place, let it be noted, the initiative provision of the constitution places no limitation whatever on the power of *amendment or repeal* of an initiative act.

This power of legislation, reclaimed by the people through the medium of the amendment to the constitution, did not give any more force or effect to initiative legislation than to legislative acts but placed them on an equal footing. The power to thus legislate is derived from the same source and, when exercised through one method of legislation, it is asserted, is just as binding and efficient as if accomplished by the other method; that the legislative will and result is as validly consummated the one way as the other.

It is contended, however, that the legislature has no power or authority to amend or repeal an *initiative act*, for the alleged reason that an initiative act comes directly from the people. That may very well be answered by the fact, that the legislators, who convene on the first Monday of January, following adoption of initiative measures, also come direct from the people, having been elected at the same time and by the same electors who adopted the initiative measure. If the legislature repeals or amends an initiative act, the people have at least two remedies, both of which they may exercise at the same time, to redress their grievance, if indeed they have a grievance, over the act of the legislature: First, they may reenact the measure by another initiative and, second, at the same time and at the same election, may elect other members of the legislature who will, or may, better heed their wishes.

The enactment of law by the legislature takes a very different course from enactment by initiative. In the legislature, a Bill must be introduced, printed, read on three several days; and the members thereby have an opportunity of debating the act and offering and making amendments so that the law, if on a con-

troversial subject, is ordinarily much discussed and analyzed. On the other hand, an initiative measure is drafted by a single person, or group of persons (Wallace v. Zinman. 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341, 1345), and after it is circulated and filed, there is no opportunity for amendment or change until after it is voted upon. Indeed, the public, except the signers of the initiative petition, have no ready opportunity of seeing or reading an initiative measure until the Secretary of State mails copies out to the auditors of the several counties for distribution, preceding the general election. . . .

It may have been, and is, altogether probable, that the framers of the initiative amendment to the constitution had these considerations in mind, when they drafted the amendment, and therefore refrained from inserting any prohibition against the legislature amending an initiative act; but rather preferred to leave that entire legislative field of deliberation to the people and their chosen legislators. It is not unreasonable to infer, that the people themselves realized that emergencies might arise requiring amendment, alteration or repeal of initiative laws, as well as legislative acts, that could not, with safety to the public welfare, be deferred for two years or until the next general elections. That, however, is a political question involving governmental authority and policy, over which the courts have no jurisdiction to consider or pass upon.

The people adopted a constitution which divides the powers of state government into three distinct branches, Const., art. II, sec. 1, the first and foremost of which is the legislative power, Const.Art. III, sec. 1, "vested in a senate and house of representatives." Then, as an afterthought and by way of amendment (in 1912), they reclaimed certain specified powers, one of which was "the power to propose laws, and enact the same at the polls independent of the legislature." This created an alternative method for passage of a law and, by the very terms of the reservation, the alternative method can only be exercised "under such conditions and in such manner as may be provided by acts of the legislature." The initiative and referendum provision of the amendment to the constitution lay dormant for more than twenty years until the legislature by chap. 210 of the 1933 session enacted the provisions of that chapter, prescribing the manner and method of exercising the initiative and referendum privileges. Johnson v. Diefendorf, 56 Idaho 620, at 634-637, 57 P.2d 1068.

So it can readily be seen that the people, in reclaiming and retaining the initiative legislative power, were nevertheless content to leave the *manner and conditions* of its exercise to their chosen senators and representatives; and in no form or manner limited the power of the legislature in time, manner

or method of legislating on any subject upon which the lawmaking power can operate.

We are not without judicial authority concerning the adoption and operation of the principles of initiative legislation. The subject received attention by the people of Wisconsin and the court of that state as early as 1860. *State ex rel. Bank v. Hastings*, 12 Wis. 47, 52; *Van Steenwyck v. Sackett*, 17 Wis. 665 (*645), 675 (*654). In that state the constitution of 1848 reserved to the people the right to legislate by initiative and referendum on the subject of *banks and banking*. Sections 4 and 5, art. XI, Wis. Const. The same principle, as related to municipal government, was recognized in Indiana by the constitution of 1816. See *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N.E. 252, 4 L.R.A. 79, 83.

About half a century ago (in the '90s), a number of new theories of legislation and political policies came into vogue and resulted in the formation of various political and civic organizations, advancing new theories of popular government. It is generally considered, however, that the first *initiative and referendum amendment* to an American constitution (12 Encyc. Brit., p. 358) was adopted by the people of South Dakota in 1898. Const. sec. 1, art. 3; *State ex rel. Richards v. Whisman*, 36 S.D. 260, 154 N.W. 707, 709, L.R.A. 1917B, 1. That amendment, while differently phrased, was in substance and effect the same as the Idaho initiative and referendum amendment, *supra*. The scope and effect of the amendment came under review of the supreme court of South Dakota in *State ex rel. Richards v. Whisman*, *supra*; and the court, among other things, said:

As we view this constitutional amendment, there is nothing therein contained which, either expressly or impliedly, in any degree, conflicts with, inhibits, limits, abridges, or prohibits any part of the legislative power originally granted to it to enact, amend, or repeal any law which it might have enacted before the adoption of this amendment. The fact that the people themselves may propose or enact laws in connection with the Legislature in no manner conflicts with or prohibits the Legislature from itself also enacting the same law that might be desired by the people. If the Legislature of its own volition should enact the same law desired by the people, the initiative would then become unnecessary and useless as to such law. The evident purpose of this constitutional amendment was not to curtail or limit the powers of the Legislature to enact laws, but the purpose was to compel enactment by the Legislature of measures desired by the

people, and, if the Legislature neglected to act as so desired by the people, that then the people, by means of the initiative might enact such measures into laws themselves. And, recognizing the right of the Legislature to enact laws as it pleased, within all its constitutional powers, the referendum was designed as a check upon all legislative enactments not favored by the people. The only prohibition or inhibition or limitation in relation to legislative power appearing in the initiative portion of the amendment is that which relates to the veto power, and which reads: "The veto power of the executive shall not be exercised as to measures referred to a vote of the people."

If the framers of this constitutional amendment had placed therein language something like the following: "No Legislature shall have power to repeal any initiative measure referred to a vote of the people," then the Constitution would have expressly prohibited the Legislature from amending or repealing initiated laws; or, if they had placed something like this in the constitutional amendment: "Initiated laws can be amended or repealed only by a vote of the people"—then this constitutional amendment would, by necessary implication, have prohibited the Legislature from repealing initiated laws. But no such limitation of the legislative power appears in such amendment or elsewhere in the Constitution. Appellants are, in effect, now asking this court to read into the Constitution something that is not, either expressly or by implication therein.

Soon after the South Dakota experiment was launched, and in 1902, the Oregon constitution was amended, art. 4, sec. 1, reserving to the people the right to initiate and adopt legislation in substantially the same language and to the same effect as our amendment. The scope and purpose of the reservation by the people, of the power to initiate legislation, has been several times before the Oregon court and considered at great length. Soon after adoption of the amendment, and in 1903, the court, speaking through Mr. Justice Bean, gave the question a very thorough consideration and review, in *Kadderly v. City of Portland*, 44 Or. 118, 74 P. 710, 720, 75 P. 222, and, among other things, said:

The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substi-

tuted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.

The Kadderly case has been uniformly approved and followed by the Oregon court. . . .

Oklahoma incorporated the initiative and referendum in its constitution at the time of its admission to the Union; and that provision is similar to and substantially the same as the Oregon initiative. Ex parte Wagner, 21 Okl. 33, 95 P. 435, 18 Ann.Cas. 197. As recently as 1935, in the case of Granger v. City of Tulsa, 174 Okl. 565, 51 P.2d 567, 568, 569, the Oklahoma court had occasion to consider the effect of the initiative provision of their constitution and said:

There is no express provision in the State Constitution prohibiting the Legislature or a municipal legislative body from repealing or amending the measures initiated by the people of the state or the municipality, respectively. . . .

* * * * *

The initiative principle of legislating has been attacked in the courts from time to time, on the theory that it was contrary to and destructive of a *representative* form of government and therefore in violation of the Federal constitution. That contention was finally set at rest by the supreme court of the United States in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377, wherein the court, speaking through Chief Justice White, held that the manner, method and instrumentalities, through which the people of a state determine to *legislate*, are *political* (28 AmJur., 153) and *not judicial* questions; and that the courts can not consider the wisdom or unwisdom of the methods or instrumentalities by which the people of a state determine to accomplish legislation. See Johnson v. Diefendorf, supra.

The authority of the legislature is limited only by the Constitution itself, and it is axiomatic that any such body may alter, limit, or repeal, in whole or in part, any statute passed by a preceding one, unless there is some constitutional inhibition to the contrary.

Higgins' Estate v. Hubbs, 31 Ariz. 252, 252 P. 515, 519.

We conclude and hold that the legislature had the constitutional power to enact the repealing statute. We express no opinion as to the wisdom or unwisdom of the act.

* * * * *

HOLDEN, Chief Justice (dissenting).

Whether the "Senior Citizens' Grants Act" was, or is, wise or unwise and whether, for instance, a pension of \$20.00 per month is too little or a pension of \$100.00 per month too much, are *social* questions, and not *judicial* questions; also whether the initiative principle of legislation as provided by Section 1, Article III of our State Constitution, was, or is, wise or unwise, is a *political* and not a *judicial* question. With the determination of such questions this court has nothing whatsoever to do. So that the sole question presented to this court for determination is: Has the legislature power to repeal an initiative act adopted by popular vote under and pursuant to Section 1, Article III of the Constitution of the State of Idaho?

It is therein provided that: "The people reserve to themselves the power to propose laws, and enact the same at the polls *independent of the legislature.*" (Emphasis mine.) In other words, it is expressly provided, without any qualification or exception whatever, that all legislation initiated and enacted by the people, shall be "independent of the legislature." To hold, as the majority does, the legislature has power to repeal legislation enacted by the people under and pursuant to this provision of the Constitution, at once makes such legislation absolutely *dependent* upon the will of the legislature, not "*independent* of the legislature, as our Constitution so clearly provides. Not only can no hint be found giving the legislature power to repeal initiative legislation, but, on the contrary, the above quoted language of the Constitution, expressly negatives any such power. Furthermore, if the legislature has the power to repeal, as the majority holds, then, it could repeal, any and all legislation enacted by the people, as often as enacted, thus not only annulling this provision of the Constitution, but at the same time rendering it useless, absurd and ridiculous.

It will be conceded, I am sure, the legislature has no power whatever to directly annul any provision of our Constitution. Can the legislature, then, do *indi-*

rectly, by repeal, what it cannot do *directly*? It is the universally recognized rule that a thing cannot be done *indirectly*, which cannot be done *directly*. Hence, the answer must be "no." But the legislature is, nevertheless, given the power by the majority of this court to *indirectly*, by repeal, wholly annul and destroy a clear, plain, express provision of our Constitution granting the right to our citizens to initiate and enact legislation "independent of [not dependent upon] the legislature." The effect of the holding of the majority of this court is, of course, to render Section 1, of Article III, *supra*, a mere worthless "scrap of paper."

But the majority say that if the legislature repeals an initiative act, "The people have at least two remedies, both of which they may exercise at the same time, to redress their grievance, if indeed they have a grievance, over the act of the legislature: First, they may reenact the measure by another initiative and,

second, at the same time and at the same election, may elect other members of the legislature who will, or may, better heed their wishes."

The first above mentioned remedy would, of course, be worthless, in that, as above pointed out, the legislature could repeal initiative legislation as often as the people enacted it. As to the second remedy: The election of a majority to the legislature pledged to the enactment of a "Senior Citizens' Grant Act" would make the adoption of the act by the people wholly unnecessary. I submit the preservation of a provision of the Constitution, complete and effective (not partial, ineffective and useless), so that the thing intended to be accomplished thereby can be fully and effectually accomplished, should not depend upon either the election or the views of a majority of the legislature.

For the reasons above stated I, dissent from the majority opinion.

Discussion Notes

1. Was this an issue about implied powers or implied limitations?

2. The principal case relied on *Kadderly v. Oregon*, 44 Ore. 118, 74 P. 710 (1903). For a critical discussion of the early experience with the Oregon provisions, see Platt, *Some Experiments in Direct Legislation*, *Yale Law Journal* 18 (1908): 47-48:

Against the theoretical view of direct legislation little can be said. If communities were small and intelligent, and newspapers fair and intelligent, direct legislation ought to be a success. As to whether the great mass of voters in a big commonwealth will advise themselves sufficiently, and will so act, is one of the great questions connected with this form of legislation.

3. See generally Note, "The Power of the Legislature to Amend or Repeal Direct Legislation," *Washington University Law Quarterly* 27 (April 1942): 439. Article II, section 10 (c) of the California Constitution provides:

The Legislature may . . . amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

4. For a survey of current provisions on direct lawmaking, see, Note, "Initiative and Referendum—Do They Encourage or Impair Better State Government?" *Florida State University Law Review*

5 (Fall 1977): 925; (1977); Note, "The California Initiative Process: A Suggestion for Reform," *Southern California Law Review* 48 (March 1975): 92. See also, Note, "The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced its Future?" *UCLA Law Review* 27 (December 1979): 433. See generally, Max Radin, "Popular Legislation in California: 1936-1946," *California Law Review* 35 (June 1947): 171; Peter G. Glenn, "State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments," *Southern California Law Review* 51 (January 1978): 265.

5. Does the governor's veto power apply with respect to direct legislation? See, *State ex rel. Lofgren v. Kramer*, 417 P.2d 837 (Wash. 1966). What about the single-subject and title restrictions? See, Comment, "Constitutional Restraints on Initiative and Referendum," *Vanderbilt Law Review* 32 (October 1979): 1143.

6. Derrick A. Bell provides an important view of minorities with respect to the majority-rule initiative process in "The Referendum: Democracy's Barrier to Racial Equality," *Washington Law Review* 54 (December 1978): 1.

7. The initiative for use in enacting state statutes must be distinguished from the initiative which may be used to amend the state constitution. See Chapter 13, Section C.

8. See generally David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore: Johns Hopkins University Press, 1984); Richard Briffault, "Distrust of Democracy," *Texas Law Review* 63 (March/April 1985): 1347 (reviewing Magleby, *Direct Legislation*).

E. "Legislative Veto" of Administration Rules

State ex rel. Barker v. Manchin 279 S.E.2d 622 (W. Va. 1981)

McGRAW, Justice:

The relator, Naaman Jackson Barker, a resident and citizen of West Virginia employed as a surface miner in or near Logan County, West Virginia, seeks a writ of mandamus under the original jurisdiction of the Court to compel the respondent, A. James Manchin, Secretary of State of West Virginia, to file in the permanent register of rules certain rules and regulations promulgated by the Director of the Department of Mines governing the safety of persons employed in and around surface mines operated within the state so that they will be in force and effect and can be enforced as contemplated and required by law. The relator contends that the provisions of the West Virginia Administrative Procedures Act, particularly W.Va.Code Secs. 29A-3-11 and 29A-3-12 (1980 Replacement Vol.), pursuant to which the rules in question were disapproved by the Legislative Rule-Making Review Committee, are unconstitutional and void and that the respondent, therefore, has a nondiscretionary duty to file the rules and regulations in the permanent register. We conclude that the relator's arguments are meritorious, and we award the writ.

The facts of the case are not in dispute. In 1967 the legislature, in enacting surface mining and reclamation legislation, provided that the Director of the Department of Mines "shall promulgate reasonable rules and regulations, in accordance with provisions of chapter 29A . . . of said Code, to protect the safety of those employed in and around surface mines, and the enforcement of all laws, and rules and regulations relating to the safety of those employed in an around surface mines is hereby vested in the department of mines." W.Va.Code sec. 20-6-20 [1967]. In 1979, be-

fore this litigation was commenced, the legislature amended chapter 20, article 6 of the Code, manifesting the intent that the Department of Natural Resources and the Department of Mines were to cooperate in the promulgation of rules and regulations relating to the mining industry. W.Va.Code sec. 20-6-1 [1979]. In 1980, after the commencement of these proceedings, the legislature amended the state's surface mining and reclamation laws to reflect its intention that safety in and around surface mining operations be the responsibility of the Department of Mines. . . .¹

The Legislature also charged the Department of Mines with certification and training of persons responsible for blasting or the use of explosives in surface mining, W.Va.Code sec. 20-6-34 (1980 Cum.Supp.), and with promulgating rules and regulations concerning the certification of surface mine foremen. W.Va.Code sec. 20-6-36 (1980 Cum.Supp.). This brief summary of legislation, before and after the commencement of the pending mandamus proceeding, clearly affirms the position of the relator that the Department of Mines is required by law to promulgate rules and regulations relating to personnel safety in and around surface mining operations.

During this period, the Legislature revised the West Virginia Administrative Procedures Act, Chap-

¹The 1980 amendments to the surface mining and reclamation laws were passed with the proviso that they would become effective upon a proclamation of the governor finding that the approval of the West Virginia state program under sec. 503 of the Surface Mine Control and Reclamation Act of 1977, 30 U.S.C.A. sec. 1201 *et seq.*, has been given by the Secretary of the United States Department of Interior. That proclamation was issued on January 15, 1981, and became effective on January 19, 1981. Executive Order No. 1-81 (January 15, 1981). Until that date, the 1979 amendments remained in effect.

ter 29A of the West Virginia Code in an attempt to maximize public participation in administrative rule-making. 1976 W.Va. Acts, ch. 117. See generally Neely, *Rights and Responsibilities in Administrative Rule-Making in West Virginia*, 79 W.Va.L.Rev. 513 (1977) [herein-after cited as Neely]. The 1976 amendments did not alter the portion of the Act which provides that lawfully adopted rules and regulations of administrative agencies of the State shall be of no legal force and effect unless they are filed in the permanent register in the office of the Secretary of State, who is responsible under the law for the maintenance of the register and for the reception and official filing of rules and regulations therein. W.Va.Code sec. 29A-2-1 (1980 Replacement Vol.) As part of the revision, however, a new legislative body was created, the Legislative Rule-Making Review Committee, the constitutional validity of which is at issue here. W.Va.Code sec. 29A-3-11 (1980 Replacement Vol.).

Briefly, section 11 of the Administrative Procedures Act provides that no agency rule or regulation shall become effective until it has been presented to and approved by the Committee. The Committee is composed of six members of the Senate and six members of the House of Delegates, appointed by the President of the Senate and the Speaker of the House of Delegates, respectively, who also act as ex officio nonvoting members. The Committee has six months after the presentation of the proposed rule or regulation within which to approve or disapprove, in whole or in part, the proposed agency action. If the Committee fails to act on proposed rules and regulations within that time period, it is deemed to have approved all of the proposed regulation. Barring action by the legislature as a whole, approved regulations become effective after thirty days. Disapproved regulations are invalid and may not be implemented by the agency unless the full Legislature reverses the Committee disapproval.

Under the provisions of W.Va.Code sec. 29A-3-12 (1980 Replacement Vol.), the Committee is required to submit to the Legislature copies of the rules and regulations it has considered at least thirty days before the end of each regular session. The rules and regulations are referred to the appropriate committees of the legislature for study. Committee hearings are required to be held on rules and regulations disapproved in whole or in part by the legislative Rule-Making Review Committee.

[T]he legislature may by concurrent resolution either sustain or reverse, in whole or in part, the action of the legislative rule-making review committee under the provisions

of section eleven, except that *if the legislature fails during its regular session to sustain by resolution the disapproval of a rule or regulation proposed for the purpose of implementing a federally subsidized or assisted program, such disapproval shall be deemed reversed* for purposes of this section and the proposed rule or regulation shall become effective . . . (emphasis added).

W.Va.Code sec. 29A-3-12.

The language of this statute implies that the action of the Committee is a recommendation to the Legislature. Theoretically, the Committee's action is only a starting point for review by the full Legislature. However, while the statute contemplates such review, it clearly does not require it. While the Legislature "may" approve or disapprove the Committee recommendation, it is not required to. In only one instance is formal action by the Legislature required in order to validate the Committee action. If the Committee disapproves a rule designed to implement "a federally subsidized or assisted program," then such disapproval must be formally sustained. W.Va.Code sec. 29A-3-11. In this instance alone, inaction by the full Legislature is "deemed" to reverse the Committee. W.Va.Code sec. 29A-3-12. Presumably, in all other cases, inaction by the Legislature constitutes tacit approval of the Committee action. Thus, in all areas except federal aid programs, there is no formal requirement for review of the Committee's action. Its decisions stand on their own and serve as a final "veto" of any disapproved rule.

The surface mine safety rules and regulations here in issue were adopted by the Department of Mines and transmitted to the Secretary of State in January of 1979. Notice of opportunity for interested persons to submit data and proposed amendments to the rules and regulations was given and a date for a public hearing was set in compliance with W.Va.Code secs. 29A-3-8 and 9 (1980 Replacement Vol.). When finally adopted with amendments, the rules and regulations were transmitted to the Secretary of State and to the Legislative Rule-Making Review Committee on April 23, 1979. At the Committee's meeting on June 25, 1979, the proposed surface mine safety rules and regulations were considered and, after discussion, were disapproved. The relator, a citizen of West Virginia and a surface miner, brought this action in mandamus to compel the respondent to file the proposed surface mine safety rules in the state register as final rules having full force and effect of law, contending that the Legislative Rule-Making Committee and the Legislature,

acting pursuant to the provisions of W.Va.Code secs. 29A-3-11 and 12, have unconstitutionally prevented the Department of Mines from promulgating and implementing valid surface mine safety regulations as required by law.

* * * * *

Having disposed of the preliminary issues and defenses raised in the case, we turn our attention to resolution of the major issue presented for our determination: Whether W.Va.Code secs. 29A-3-11 and 12, which provide for the review and disapproval of otherwise validly promulgated administrative rules and regulations by the Legislature through its Legislative Rule-Making Review Committee are unconstitutional as violative of the separation of powers doctrine embodied in article V, section 1 of the Constitution of West Virginia.

* * * * *

This constitutional provision which prohibits any one department of our state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. . . . Where one branch of our state government seeks to exercise or to impinge upon the powers conferred upon another branch, we are compelled by this mandate to restrain such action, absent a specific constitutional provision permitting such interference.³

³There are some examples of constitutionally approved intrusions into the legislative sphere by the executive which are worth noting here. The governor, the chief executive of the State, is required to prepare and submit to the legislature a budget, W.V.Const. art. VI, sec. 51, and is empowered to convene the Legislature, W.Va.Const.art. VI, sec. 19, to call extraordinary sessions, W.Va.Const.art. VII, sec. 7, and to veto bills, W.Va.Const.art. VII, secs. 14, 15.

A particularly interesting, even intriguing, constitutional intrusion by the executive on the legislative power is the Citizens Legislative Compensation Commission, established by W.Va.Const. art. VI, sec. 33. It is designed to breathe due process into the establishment of fair and proper legislative salaries. The Commission, whose members are appointed by the governor, is required to submit to the legislature a resolution, delineating the compensation and expense allowances to which the Commission has determined the members of the Legislature are entitled in the performance of their duties. The Commission must hear evidence of proper standards of pay for comparable constitutional officers in this and other jurisdictions, must make findings of fact with respect to the salaries of these constitutional officers and must recommend, based upon these findings, a proper level of compensation for legislative service in West Virginia. Failure by the Commission to fulfill its constitutional responsibilities would subject it to judicial review and mandate.

The powers and duties of each of our three branches of government are set forth in the constitution. Powers and responsibilities of the Legislature are detailed in article VI. Article VII relates to the powers and duties of the Executive Department and article VIII defines the powers and responsibilities of the Judicial Department. Generally speaking, the Legislature enacts the law, the Governor and the various agencies of a the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder. W.V.Const. art. VI, sec. 1; art. VII sec. 5; art. VIII, sec. 1. The relator here contends that the Code provisions relating to the authority of the Legislative Rule-Making Review Committee to disapprove proposed agency rules and regulations and of the entire Legislature to do so by concurrent resolution offends the doctrine of separation of powers by permitting the Legislature to exercise power properly belonging to the Executive Department.

* * * * *

When the legislature delegates its rule-making power to an agency of the Executive Department, as it did here by requiring the Director of the Department of Mines to promulgate surface mine safety rules and regulations, it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations. Once the executive officer or agency has made and adopted valid rules and regulations pursuant to the grant of the legislative powers, they take on the force of statutory law. See 2 Am.Jur.2d, *Administrative Law* secs. 292-295 (1964). Under the provisions of the 1976 revision of article 3 of the Administrative Procedures Act, however, rules and regulations of administrative agencies become effective only upon compliance with the provisions of the Act, including sec. 29A-3-11, creating and granting authority to disapprove regulations to the Legislative Rule-Making Review Committee, and sec. 29A-3-12, relating to the action of the entire Legislature on the Committee's report. W.Va.Code sec. 29A-3-3 (1980 Replacement Vol.). Thus, even though an executive officer or agency has fulfilled its duty by drafting and approving otherwise valid regulations pursuant to a delegation of the legislative rule-making power, the statute precludes the regulations from taking effect and prevents such officer or agency from implementing those measures until they are approved by the Legislature or a portion of its membership. No standards are provided for the review of rules and regulations by the Legislature. A twelve-member committee may, in its discretion, ap-

prove or disapprove, in whole or in part, any proposed administrative rules and regulations. The Committee may in fact attempt to influence or dictate the content of the rules and regulations of an executive agency, separate and distinct from the Legislative Department.⁵ The entire Legislature may, at some later date, sustain or reverse the action of the Committee by concurrent resolution. Inaction by the Legislature validates the Committee's disapproval of rules and regulations and precludes their implementation by the Executive Department. The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, as head of the Executive Department, by W.Va.Const. art. VII, sec. 14, and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.

As we noted before, our constitution places strict procedural and substantive limitation upon the power of the Legislature to enact law. The constitution outlines the procedure for exercising legislative power. This language is a self-contained standard to which all enactments must conform. If the passage of a purported law has not strictly conformed with the standards, it is void. The magic gantlet [sic] is spelled out in article VI and VII of the constitution.

Article VI, section 1, vests the Senate and the House of Delegates with the legislative power and requires enactments to be styled, "Be it enacted by the Legislature of West Virginia." "Bills and resolutions may originate in either house, but may be passed, amended or rejected by the other." W.Va.Const. art. VI, sec. 28. Section 29 of article VI prohibits a bill from becoming law "until it has been fully and distinctly read, on three different days, in each house . . .," except in cases of urgency. No act of the Legislature may embrace more than one object,

⁵See, Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J.Pub.Law 134, 157-158 (1958):

It would doubtless be unrealistic to assume that a group of state legislators would be content to make judgments about the legal power of administrative agencies, and ignore the political implications of administrative policies as these are revealed in actual application in specific instances. Legislative review of administrative rule-making is almost certain, in the United States, to be political review. (Emphasis added.)

which must be expressed in the title of the act, nor may any law be revised or amended by reference only to its title. W.Va.Const. art. VI, sec. 30. Article VI, sec. 31 provides for the passage of amended bills or resolutions upon the affirmative vote of a majority of the house in which the bill or resolution was originally passed. Additional procedures for the passage of budgetary items and appropriations bills are set out at length in article VI, sec. 51 and its subsections. Before any bill passed by the Legislature can become law, it must be submitted to the Governor for his approval. If the Governor disapproves the bill, it is returned first to the house in which it originated and then to the other house. The Governor's veto may be overridden by a majority vote of the members of both houses. W.Va.Const. art. 7, sec. 14. Detailed procedures for the Governor's veto or approval of appropriations bills are set forth in article VI, section 7 and article VII, section 15.⁶

These constitutional provisions clearly limit the power of the legislature to give the binding effect of law to its actions. It may create law only by following the formal enactment process. Where it seeks to give legal force to informal actions, the Legislature exceeds the limits of its constitutional authority. Thus, it has been held from the earliest days of our statehood that the legislature cannot give a matter the force and effect of law by joint resolution when such matter is properly the subject of the enactment process. *Boyers v. Crane*, 1 W.Va. 176 (1865). Joint or concurrent resolutions, while they may bind the members of the legislative body, are not statutes and do not have the force and effect of law. . . .

Of course, when an administrative agency promulgates rules and regulations pursuant to a grant of power by the Legislature, it is not limited by the constitutional restraints on legislative action. The constitutional limitations outlined above apply only to the legislative branch of our government. Moreover, since the executive cannot be delegated pinary rule-making power but must adhere to legislative guidelines in promulgating regulations, such restraints are less critical to control the exercise of that power by the executive. Thus, so long as it acts within the limits of the legislative grant of rule-making power, the ex-

⁶Other constitutional limitations on the Legislature's power may be found in article VI, section 39 (no special or local laws), article VI, section 39(a) (no special law incorporating cities, towns or villages or amending their charters), article VI, section 40 (Legislature may not confer power of appointment upon court or judge), and article VI, section 42 (appropriations bills for legislators' salaries shall contain no provision on any other subject).

ecutive may properly make rules having the force and effect of law without following the constitutional enactment procedures required of the Legislature when it exercises its law-making power.

What the Legislature has attempted to do here is to invest itself with the power to promulgate rules having the force and effect of law outside the constitutional limitations imposed upon the legislative branch in the exercise of that power. In effect, the Legislature abdicates in favor of the executive its power to make rules and then asserts that because the rule-making power so delegated is legislative in nature, it may step into the role of the executive and disapprove or amend administrative regulations free from the constitutional restraints on its power to legislate. The statutory scheme brings to mind the Old Testament quotation from Job I: 21, "The Lord gave, and the Lord hath taken away." The Legislature at one time created and delegated powers and responsibilities to the Department of Mines and at a later time attempted to take away some of those important powers and responsibilities and to lodge them in the hands of the Legislature and its personnel. Such a mechanism for legislative review of executive action may properly be called an "extra-legislative control device" for it permits the Legislature to act as something other than a legislative body to control the actions of the other branches. This is in direct conflict with our constitutional requirement of separation of powers. The power of the Legislature in checking the other branches of government is to legislate. *State v. Harden*, 62 W. Va., 313, 58 S.E. 715 (1907). While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a legislature through its collective wisdom and will, within the confines of the enactment procedures mandated by our constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements.

Other jurisdictions have reasoned in a similar manner to reach the conclusion that a legislature may not act informally to check the activities of the other branches of government. Most recently, the Supreme Court of Alaska, in *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980), reviewed the provisions of the Alaska Constitution setting out the procedural requirements for formal legislative action. Recognizing the legal force of rules and regulations, the court reasoned that the only proper check on the executive was by way of statutory enactment through the formal process of passing a bill.

* * * * *

This is not to say that we believe all legislative review of rule-making to be void. Legislative rule-making review has purpose and merit and may be beneficially exercised and employed when contained within its proper and constitutional sphere. The respondent asserts that the purpose of creating the Legislative Rule-Making Review Committee and the present statutory scheme was to correct abuses of authority by administrative agencies and officials in exercising the rule-making power.⁸ We do not question that some procedure for review of agency rules and regulations may well be warranted, but we must require that it be done within the limits of the separation of powers doctrine and according to the system of checks and balances in our governmental frame-

⁸Many scholars point to the burgeoning bureaucracy in government today and tout the practicality of legislative rule-making review as a solution to the problem of insuring executive compliance with the legislative will in the face of increasing administrative regulation. See generally Bosivert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 638 (1957); Cooper and Cooper, *The Legislative Veto and the Constitution*, 30 Geo.Wash.L.Rev. 467 (1962); Melville, *Legislative Control Over Administrative Rule Making*, 32 U.Cinn.L.Rev. 33 (1963); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience* 30 N.Y.U.L.Rev. 1031 (1955); and Stewart, *Constitutionality of the Legislative Veto*, 13 Harv.J.Legis. 593 (1976). See also *Investigating Committee*, 33 Col.L.J. 1 (1933). They cite with approval the British system of "laying" rules before Parliament for its approval and applaud the system as an efficient means of insuring faithful execution of the laws. While we commiserate with the Legislature in its attempts to diminish the negative effects of the current plague of "red tape" and "over-regulation," we think the respondent's argument misses the point.

Regardless of its inherent efficiency, informal coercive review of executive rule making is not permissible in the presence of a constitutional mandate that the powers of government be maintained in separate and distinct branches. In a parliamentary system, the executive branch is merely an arm of the legislative body. In a tripartite republic, the two branches are independent. The matter was summed up quite well by Chief Judge Crane in the case of *People v. Tremaine*, 281 N.Y. 1, 12, 21 N.E.2d 891, 896 (1939), where he stated in part:

We are not a parliamentary government where the Executive branch is also part of the Legislative. . . . We start with a Constitution which is our province to interpret as it is written, and not as we think it might have been written.

The same point was stated less subtly by Justice Matthews in *State v. A.L.I.V.E. Voluntary*, *supra*.

[T]he question of whether the legislature might perform a task more efficiently if it did not have to follow [the constitution] is essentially irrelevant. Since [the constitution] applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. 606 P.2d at 778-779.

work. Alternatives to the present system may be found in the substantial literature relating to the problem.⁹

One of the most impressive pieces of literature on this subject which we have encountered is provided by H. Lee Watson in his article, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975) [hereinafter cited as *Watson*]. Specifically analyzing the use of what he calls "extra-legislative control devices" (means for direct legislative review of executive action without the safeguards of the enactment process), Mr. Watson, using a test made up of four specific criteria,¹⁰ concludes that such devices result in an unconstitutional framework; "the creation of power to be wielded by the hand creating it." *Watson, supra*, pp. 990-991. Interestingly, Watson saves his most intense criticism for the sort of framework presented in this case.

Watson concludes that the legislative committee veto is the most clearly constitutionally invalid of the legislative control devices, rendered invalid per se by virtue of its impact on the process. By placing the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates, the committee veto avoids the concept of "constitutional averaging" foreseen by the framers of the constitution as a means of balancing the dual role given legislators. While Watson views this consequence to our system of government as the most significant constitutional deficiency of the committee veto, he also considers it infirm in that it gives a small portion of the legislative membership a con-

⁹See, e.g. Note, *Congressional Veto of Administrative Action*, 1976 Duke L.J. 285; Newman and Keaton, *Should Legislators Supervise Administrators*, 41 Cal.L.Rev. 565 (1953); Ginnane, *Control of Federal Administrators by Resolutions and Committees*, 66 Harv.L.Rev. 569 (1952); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975); see also Neely, *supra*, 79 W.Va.L.Rev. 513.

¹⁰The four criteria are as follows:

(1) whether the measure under examination forces legislators to choose between their constituency and the national interest;

(2) whether the measure encourages the exercise of self-interest independent of any preexisting or co-existing local orientation of the power-wielding body;

(3) whether the statute tends toward legislative dominance of the government; and

(4) whether the statute fosters increase of overall federal power. [Not applicable to the discussion herein].

tinuing role in governmental decision-making once the formal law-making processes have been completed. The legislature vests the members of the committee with a post-legislative discretionary power, the exercise of which impermissibly fosters legislative dominance and expansion of power in several ways. First, by providing that the executive exercises discretion only at the pleasure of the reviewing committee, the legislature usurps the traditional role of the executive to fill in the interstices left by flexible statutory standards by exercising legislatively delegated discretionary power. In effect the executive exercise of discretion is replaced by committee exercise of discretion, increasing the role of the legislature at the expense of the executive.

Secondly, as the power of the executive to execute the laws is determined by the amount of discretion given it by the legislature, the more broadly a statute is drawn, the more power will be abdicated to the executive. Ordinarily the legislature attempts to prepare specific and narrowly drawn legislation in order to limit or to control the exercise of discretion by the executive. Where, however, the legislature retains jurisdiction over the discretionary power it vests in the executive, it no longer has the incentive to limit that power. The element of balance between the two branches no longer exists. Finally, Watson decries the creation of discretionary power to be wielded by the same hand. "Where the effectiveness of discretionary power is maximized by delegating the authority to a group of manageable size, a committee or even an individual, the danger of self-interest is also maximized." *Watson, supra*, p. 1056. These guidelines should prove useful in helping to avoid the infirmities which render void the statutory rule-making review scheme embodied in our Administrative Procedures Act.

* * * * *

For the reasons stated herein, the petitioner's prayer is granted and a writ of mandamus will promptly issue directing and requiring the respondent, A. James Manchin, Secretary of State of West Virginia, to receive, file, and place in force and effect the validly promulgated rules and regulations governing the safety of those employed in and around surface mines in West Virginia of the Department of Mines, as transmitted to him, on or about April 23, 1979, by Walter L. Miller, Director of the Department of Mines, all in accordance with and as provided by article 3 of chapter 29A of the West Virginia Code.

Writ awarded.

Discussion Notes

1. A number of state courts, like West Virginia, had declared legislative-veto provisions unconstitutional before the United States Supreme Court invalidated the practice at the federal level in *Immigration and Naturalization Service v. Chada*, 462 U.S. 919 (1983). See generally L. Harold Levinson, "The Decline of the Legislative Veto: Federal/State Comparisons and Interactions," *Publius: The Journal of Federalism* 17 (Winter 1987): 115.

2. Would the decision of the United States Supreme Court in *Chada*, that Congress could not validly include legislative veto provisions in its statutes, apply to the interpretation of state constitutions?

3. The validity of the legislative veto in Virginia was resolved without litigation, after an opin-

ion of the Attorney General concluded that the practice violated the state constitution. See Thomas R. Morris, "State Attorneys General As Interpreters of State Constitutions," *Publius: The Journal of Federalism* 17 (Winter 1987): 149-50.

4. Reread the *Barker* decision, this time considering the technique by which this case was presented to the West Virginia Supreme Court of Appeals. Would state constitutions influence this kind of exercise of the *judicial* power?

5. In *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982) the New Jersey Supreme Court invalidated a legislative veto mechanism for much the same reasons as given by the West Virginia Supreme Court of Appeals. On the same day it decided *Byrne*, the New Jersey Court handed down the following opinion. Can the two be reconciled?

**Enourato v.
New Jersey Building Authority
90 N.J. 396, 448 A.2d 449 (1982)**

PASHMAN, J.

* * * * *

I

The Legislature established the New Jersey Building Authority ("Authority") to build and operate office facilities for state agencies. L. 1981, c. 120, N.J.S.A. 52: 18A-78.1 to .32. The Act authorizes the Authority to issue bonds and notes in an amount not to exceed \$250,000,000 to be used to build those facilities. N.J.S.A. 52: 18-A-78.-14(a). The bonds and notes are entirely the debt of the Authority, not the State. They must state on their face that they shall not create any indebtedness, liability or obligation of the State or any political subdivision. N.J.S.A. 52: 18A-78.14(f).

All actions taken by the Authority must receive the Governor's approval. No action taken at any Authority meeting has any legal effect if the Governor vetoes the action within 15 days of the meeting. N.J.S.A 52: 18A-78.4(i).

The Act also contains two provisions that allow the Legislature to veto Authority actions. First, to commence any project whose estimated cost exceeds \$100,000, the Authority must obtain a concurrent resolution of both houses of the Legislature within 45 days of the submission of the project to the Legisla-

ture for approval. N.J.S.A. 52: 18A-78.6,-78.8(b). Second, every lease agreement between the Authority and a state agency must be approved by the presiding officer of each house of the Legislature. N.J.S.A. 52: 18A-78.9.

* * * * *

II

Constitutionality of the Legislative Veto Provisions of the New Jersey Building Authority Act

In *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982), decided today, the Court holds that the Legislative Oversight Act, L.1981, c. 27, is unconstitutional. By empowering the Legislature to revoke virtually all proposed executive agency rules, the Act intruded excessively upon the Executive's law enforcement authority in violation of the separation of powers. The Act also allowed the legislative branch to effectively amend and repeal existing laws without the participation of the Governor. This violated the separation of powers, *N.J.Const.* (1947), Art. III, para. 1, and the Presentment Clause requirement that "[e]very bill which shall have passed both houses shall be presented to the Governor" for approval or veto. *N.J.Const.* (1947), Art. V, sec. 1, para. 14.

However, the Court in *General Assembly* made clear that the separation of powers leaves room for some legislative oversight and participation in executive action. Not every legislative input into law enforcement impermissibly interferes with the Executive's law enforcement power. Likewise, not every action by the Legislature constitutes law making that requires a majority vote of both houses and presentment to the Governor.

Where legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster.

[*General Assembly* (at 395, 448 A.2d 448)]

The Court finds that the legislative veto provisions in the New Jersey Building Authority Act, L. 1981, c. 120, N.J.S.A. 52: 18A 78.1 to .32, fall within the proper scope of legislative oversight of executive action. The Act's veto power is limited to approval or rejection of proposed building projects and leases that require continuing budget appropriations by the Legislature. Legislative oversight therefore plays a

necessary role in ensuring continuing legislative support for these projects.

At the same time, the veto provisions in the Act are limited in scope and do not empower the Legislature to "revoke at will portions of coherent regulatory schemes." *General Assembly*, 90 N.J. at 378, 448 A.2d 439. The veto therefore cannot substantially disrupt exclusive executive branch functions. Indeed, the Governor has full control over Authority decision making. Further, even repeated use of the veto has little potential to alter the underlying legislative policy of providing capital facilities to meet internal governmental needs. Nor can it subvert the Governor's role in enforcing the law. The oversight provisions in L. 1981, c. 120, therefore violate neither the Presentment Clause nor the separation of powers.

* * * * *

Discussion Notes

1. The court in *Enourato* went on to distinguish, in detail, the specific legislative veto mechanism from the generic provision it invalidated in *Byrne*.

2. Professor Levinson refers to *Enourato* as the "most significant case upholding a specific legislative veto system. . . ." "The Decline of the Item Veto," 121 n. 31.

Local Government and State Constitutions

Local governments have a wide range of powers and responsibilities in the American governmental system. They are the units of government with which citizens are most likely to have contact.

In this chapter we will address, briefly, questions such as where local governments get their powers, and how such powers are limited. What is the relationship of local government to state government? What role does the state constitution play?

A. Background

**Michael E. Libonati,
“Intergovernmental Relations in
State Constitutional Law:
A Historical Overview”**

**Annals of the American Academy of
Political and Social Science
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After 1787, the United States had national, state, and local government. Only national and state government, however, enjoyed “constitutional legitimacy.”¹ The failure of the framers of either the U.S. Constitution or the state constitutions to include provisions “separating powers vertically (state-local) as well as horizontally (executive-legislative-judicial)”² had pervasive consequences for local government. An intellectual milieu quickly developed in which policy questions about intergovernmental structure and functions were forestalled and engrossed by debates concerning the constitutional legitimacy and autonomy of local government. The purpose of this article is to identify and appraise four competing constitutional models of local government—conceptions that were already at hand during the intellectual ferment attending the American Revolution—to sketch their evolution and transformation during the nineteenth century, and to depict briefly their contempo-

¹James E. Herget, “The Missing Power of Local Government: A Divergence between Text and Practice in Our Early State Constitution,” *Virginia Law Review*, 62(5): 999, 1001 (June 1976).

²*Ibid.*

rary impact. These models are custom and practice, community autonomy, corporate status, and subordination to the sovereign.

Custom and Practice

Claims to local rights emerging out of custom ought to be congenial to the common-law mind, even in the field of public law.³ Towns in Massachusetts, for example, exercised a variety of regulatory and entrepreneurial functions during the colonial period without any firmer warrant than custom and practice.⁴ Demophilus, a revolutionary pamphleteer, invoked the usage of free Saxon communities when urging the framers of Pennsylvania’s constitution to purge a reconstituted commonwealth of the pernicious accretions of Norman centralization in the allocation of power.⁵ Judge Thomas M. Cooley’s assertion of an inherent right to local self-government is grounded on the notion that there are “powers which from time immemorial have been locally possessed and exercised.”⁶

The arguments furnished by Demophilus and by Cooley are, however, skewed by the pervasive ideology of constitutionalism. Neither was interested in fashioning the kind of ingenious gloss on custom that allowed medieval jurists to reconcile state sovereignty with the de facto independence or autonomy

³J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (New York: Norton, 1967), pp. 30-55.

⁴Oscar Handlin and Mary F. Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*, rev. ed. (Cambridge, MA: Harvard University Press, Belknap Press, 1969), pp. 87-88.

⁵Demophilus, *The Genuine Principles of the Ancient Saxon or English Constitution* (Philadelphia: Robert Bell, 1776). See generally H. Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1965).

⁶*People v. Hurlbut*, 24 Mich. 44, 109 (1871).

of cities.⁷ Demophilus called for the incorporation of the details of a mythicized Saxon public customary law into a written constitutional text. But what if the state constitution is silent? Cooley argued that the custom and practice of local government is so pervasive that local autonomy from state legislative interference must be read into a state constitutional document even when it does not expressly speak to the issue. A subsequent state court decision, however, summarized and disposed of Cooley's contentions in the following language:

The principal circumstances from which the court there found in the constitution of that state implied restrictions upon the power of the legislature, as regards local government, were, first, that the constitution was adopted in view of a well-understood and tolerably uniform system of local government existing from the earliest settlement of the country, and secondly, that the liberties of the people were generally supposed to spring from and to depend upon that system.

With respect to the second point, whatever may be the historical origin of the liberties of the people, they seem to be dependent at the present day upon the right of the people to participate by suffrage and by representation in the government which they themselves have established under the guaranties of a written constitution. The absence from such written constitution of any guaranty of local self-government is a cogent argument against its existence as a right.

With respect to the first point, the constitution of this state was not adopted in view of any uniform system of local governments, for we have had none such; certainly no uniform recognition of the right of local self-government that is here contended for.⁸

Although Cooley's formulation is no longer taken seriously in the field of state constitutional law,⁹ it may linger, like the smile of the Cheshire cat, in a mood or predisposition in favor of local autonomy, such as that sketched by Richard Briffault.¹⁰

⁷Joseph Canning, *The Political Thought of Baldus de Ubaldis* (New York: Cambridge University Press, 1987), pp. 64-65, 67-68, 93-158.

⁸*Attorney General ex. rel. Booth v. McGuinness*, 78 N.J.L. 346, 355 (1909).

⁹C. Dallas Sands and Michael E. Libonati, *Local Government Law* (Wilmette, IL: Callaghan, 1981), chap. 3.

¹⁰Richard Briffault, "Localism in State Constitutional Law," this issue of *The Annals of the American Academy of Political and Social Science*.

Community Autonomy

A robust practice of civic republicanism¹¹ based on the dispositive powers of local juries and on local militia flourished during the Revolutionary War. Thus a Connecticut town was deemed empowered to pay an enlistment bonus to those who had served in the Continental Army.¹² In 1814, a coastal town unanimously voted to levy a tax to defray expenditures for its defense during a British invasion. A taxpayer challenging the legality of the tax contended that

... the practice of towns during the revolutionary war may perhaps be cited in support of the act of the town . . . [b]ut that was a period of confusion and anarchy, from which precedents cannot be drawn in times of settled government. Towns then at one time or another, exercised almost all the powers of sovereignty. By the constitution of the United States, the power of raising and supporting armies, and all necessary concomitant powers, are vested exclusively in Congress. The common defense is committed to that body, and all necessary means for that object. It can, then, make no portion of the necessary expenses of our towns.¹³

In ruling in the challenger's favor, Chief Justice Isaac Parker rejected the communitarian notion that the town could assume a duty to defend itself against the incursions of an enemy in time of war, as towns are "creatures of legislation . . . enjoying only the powers which are expressly granted them."¹⁴ Thus a thick, rich, and complex practice of civic community was rejected and replaced by an abstract juridical entity—a municipality whose powers are derived from and subject to the sovereign state legislature.

In the last quarter of the nineteenth century, the idea of community re-engaged leading academic thinkers.¹⁵ Similarly, under the aegis of the home-rule movement, state constitutional provisions according local governments meaningful autonomy were enacted. The Ohio Constitution conferred on municipalities "all powers of local self-

¹¹J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (Princeton, NJ: Princeton University Press, 1975); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), pp. 71-72, 289-91.

¹²*Hitchcock v. Town of Litchfield*, 1 Root 206 (1790).

¹³*Stetson v. Kempton*, 13 Mass. 272, 274 (1816).

¹⁴*Ibid.*, p. 284.

¹⁵R. Jackson Wilson, *In Quest of Community: Social Philosophy in the United States, 1860-1920* (New York: John Wiley, 1968), pp. 26-31.

government,”¹⁶ that is, the capacity to initiate actions over a wide range of issues in terms of the municipality’s own goals.¹⁷ The California Constitution conferred not only policymaking initiative but also immunity from state legislative interference in “municipal affairs.”¹⁸

In retrospect, it is apparent that the resurgent communitarian commitment of the home-rule movement recapitulated a characteristic vice of American thinking about government—the ideology of constitutionalism. Home rule on the Ohio and California model sought to legitimate local autonomy by constitutionalizing a rigid formula allocating power within the polity. The constitutionalization of local rights had the effect of turning policy debates about the scope of local initiative and the allocation of powers between state and local decision makers into constitutional questions resolvable only by the state judiciary. The dream of local autonomy realized itself in a regimen of “judicial home rule” in which state courts demonstrated their inability to draw sensible boundaries between state and local functions.¹⁹ Most modern state constitutional provisions on home rule reject the *imperium in imperio* model. Instead, the formulation of the American Municipal Association and the National League of Cities, under which the state legislature retains full control over the scope of local powers, predominates.

* * * * *

Corporate Status

A third vision for legitimating local government rights derives from the ambiguous status of local government as a corporate entity that performs governmental and proprietary functions. Prior to the Revolution, most corporations were entities such as towns, parishes, and common fields, “created in order to enable individuals to pool their wealth for community purposes.”²¹ Chartered municipal corporations were instruments for stimulating commercial development and promoting trade. Their aims were narrow: preserving monopolies in the hands of licensed tradesmen and artisans; regulating markets;

price fixing; and setting standards of quality, weight, and measure for commodities authorized to be sold in the city.²² The corporation was self-supporting, raising revenues by collecting import or sales duties, licensing fees, and rents from the commercial facilities that it owned and operated. Holding fast to the doctrine of the inviolability of the corporate charter then prevalent in England, the municipal corporation of Philadelphia, for example, refused to accept new responsibilities in the areas of public health, safety, and welfare.²³

Had the doctrine of charter inviolability, which frustrated the attempt of the New Hampshire legislature to assert control over the corporation of Dartmouth College,²⁴ been extended to municipal corporations, qualifying municipalities would have possessed enforceable autonomy rights against the state. At minimum, a municipal corporation acting in a proprietary capacity would have received the same protections under the U.S. Constitution as that vouchsafed to their private sector brethren. This approach was decisively rejected by the United States Supreme Court when it sanctioned the New Jersey legislature’s policy of expropriating municipally owned water-diversion rights without compensation while paying for identical rights in private ownership.²⁵

At the state level, Hendrik A. Hartog’s masterful monograph on the evolution of New York’s law of municipal corporations demonstrates that the city of New York was transformed from a protagonist with significant powers of initiative and immunity into a dependent Caliban under the tutelage of the state legislature.²⁶ Even less protection against state legislative intervention was afforded by other state courts. For example, the Pennsylvania Supreme Court vigorously rejected the city of Philadelphia’s claims that a state statute impermissibly stripped it of powers or franchises held in its proprietary capacity. The court held that the city charter was “in no sense a contract with the state—and therefore fully subject to the control of the legislature.”²⁷

¹⁶Ohio Const. art. XVIII, Sections 3 and 7.

¹⁷Gordon L. Clark, *Judges and the Cities* (Chicago: University of Chicago Press, 1985), p. 6.

¹⁸California Const. art. XI, Section 5(a).

¹⁹Jefferson B. Fordham and Joe F. Asher, “Home Rule Powers in Theory and Practice,” *Ohio State Law Journal*, 9(1): 18 (1948); Sho Sato, “‘Municipal Affairs’ in California,” *California Law Review*, 60(4): 1055 (June 1972).

²¹William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, MA: Harvard University Press, 1975), p. 6.

²²Jon C. Teaford, *The Municipal Revolution in America* (Chicago: University of Chicago Press, 1975), pp. 16-34.

²³Judith M. Diamondstone, “Philadelphia’s Municipal Corporation, 1701-1776,” *Pennsylvania Magazine of History and Biography*, 90: 183 (Apr. 1966).

²⁴*Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 4 L.Ed. 629 (1819).

²⁵*Trenton v. State of New Jersey*, 262 U.S. 182 (1923).

²⁶Hendrik A. Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983).

²⁷*Philadelphia v. Fox*, 64 Pa. 169, 180-81 (1870).

What the Pennsylvania Supreme Court sustained was an early example of what came to be known as ripper legislation—state statutes that divested a city of its power to administer its parks or police force or personnel matters. Such legislation typically sought to remove as many areas of decision making as possible from local political control by vesting power over municipal functions in state appointees carrying out a state-formulated agenda.²⁸

These developments have most clearly affected local government not through constitutional discourse but through the application what Peter J. Steinberger calls the “ideology of managerialism.”²⁹

Our legacy from managerialism is significant. It has yielded a harvest of innovations. To the managerial approach we owe these structural forms: the council-manager form of government, the independent board, and metropolitan government. On the procedural front, civil service, the merit system, and the creation of a rationalized and professional local administrative system are products of managerialism. Substantively, managerialism stands for rational planning and social engineering. At its best, managerialism represents a skilled and committed elite of experts in service to a broadened vision of community. At its worst, managerialism squeezes the citizenry out of the public space in which decisions are made. The commitment to expertise and professionalism on the part of the managers also breeds careerism, job hopping, and a failure to commit to the community for the long, slow process of implementing any innovation. The triumph of managerialism imports a transformation of local law into a subordinate topic within the field of hyperextended administrative law stretching from the federal government to the smallest local government. As Steinberger observes, managerial principles, such as centralization, hierarchy, and formal coordination, are inimical to claims for an autonomous city government.³⁰

Subordination to the Sovereign

The most influential patrimony shaping dominant American conceptions about the allocation of powers in society crystallized at the close of the eighteenth century. The natural-rights approach stemmed from an earlier intellectual and political movement in Europe in which the sovereign state and the sovereign individual allied themselves against the corporation.³¹ No room was left for intermediate bodies in

the amalgam of individualism, natural law, and statism that prevailed during the Enlightenment.³² As Otto Gierke pointed out in his magisterial summation of the natural-rights tradition as of 1650, local polities were regarded as “no more than administrative institutions” that “the sovereign could create, transform or abolish in light of his own free judgment of their utility.”³³

Two centuries later, Judge John F. Dillon identified the state legislature as the sovereign and reiterated the natural-rights orthodoxy concerning the subordinate status of local government in the following words: “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.”³⁴ The message of this text is blunt: the state legislature is the boss; the state legislature commands, localities obey. There is no room for disharmony or plurality of governmental interests within the structure of state government. The judiciary acknowledges, supports, and legitimizes the intellectual construct of a unitary, centralized sovereign endowed with the arbitrary and despotic power of Uranus over his children.

The normative effects of Dillon’s approach go beyond the rejection of local government claims to immunity from state legislative control. First, the unitary theory of sovereignty entails a positive stance toward claims of local initiative. That is, the scope of local structural and programmatic initiatives must be confined to that which is granted by state enabling legislation. Second, statutes empowering local government units are in derogation of sovereignty and hence must be construed narrowly. Thus Dillon’s rule of interpretation flows from his concept of sovereignty.³⁵ Third, because local governments are subordinate and the state is dominant, any jurisdictional conflict must be resolved in favor of the hierarchically superior governmental unit. Because courts serve as the lions under the sovereign’s throne, they undertake to safeguard the primacy of the state not only when a statute directly ousts local jurisdiction but also when a local exercise of power conflicts with a state statute. Thus courts have fashioned and applied a doctrine of implied preemption that quashes, in the

²⁸Martin J. Schiesl, *The Politics of Efficiency* (Berkeley: University of California Press, 1977).

²⁹Peter J. Steinberger, *Ideology and the Urban Crisis* (Albany: State University of New York Press, 1985), pp. 28-36.

³⁰*Ibid.*, p. 133.

³¹Otto Gierke, *Associations and the Law* (Buffalo, NY: University of Toronto Press, 1977), pp. 43-44.

³²*Ibid.*, p. 5.

³³Otto Gierke, *Natural Law and the Theory of Society 1500 to 1800* (Boston: Beacon, 1960), p. 67.

³⁴*Clinton v. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455 (1868).

³⁵*State v. Thompson*, 149 Wis. 488, 505, 137 N.W. 20 (1912); Sands and Libonati, *Local Government Law*, sec. 13.05.

interest of the sovereign, local initiatives sanctioned by enabling legislation deemed discordant with other state statutes.³⁶ Fourth, because the state constitution confers no rights upon a local government unit against the state sovereign, a local government unit has no capacity to assert state constitutional claims against the state sovereign.

Each of these four effects of the natural-rights theory of sovereignty has left its mark on state constitutional law. In Georgia, a legislative attempt to confer home-rule powers on the city of Atlanta was struck down as an unconstitutional delegation of sovereign legislative powers, thus necessitating an amendment to the state constitution in order to permit home rule. The Iowa Constitution had to be amended to overturn Dillon's rule of strict and niggardly interpretation of legislative grants of power to municipalities.³⁷ The home-rule provision of the Illinois Constitution contains an elaborate set of rules addressing the question of preemption,³⁸ as well as a provision mandating that the "powers and functions of home rule units shall be construed liberally."³⁹

Local Government's Capacity to Sue

I should like to close this article with an extended discussion of emerging trends in state court decisions on the problem of local government's capacity to sue, because these decisions and their ramifications bode well for a resurgent commitment to local self-government.

The laurel for the most sensible approach in reported cases goes to the Utah Supreme Court.⁴⁰ A county sought to challenge the constitutionality of a state assessment of mining properties because the assessment level did not reflect the full cash-value standard embedded in the state constitution. The Utah Supreme Court enunciated two criteria, one aimed at the objective of assuring a full and vigorous adversarial presentation of the claim and another designed to vindicate the public interest in assuring the rule of law. The county was held to have capacity to sue on

the basis of traditional standing criteria: that the interests of the parties be adverse, and that the challenging party have a legally protectable interest in the controversy. The Utah court did not succumb to the blandishments of the notion that the county, as a creature of the state, was irrebuttably presumed to exist in happy harmony with the state. The court held that the assessment determinations of the state tax commission directly and adversely affect county budget and taxing functions to the extent that mining properties are underassessed.

The court also delineated a second, separate standing test, which is germane to the creation of a sound public-law doctrine. According to that criterion, a local government unit is afforded standing to raise issues of great public importance that are susceptible to judicial resolution. Under this criterion, the county can sue because, otherwise, underassessments could be effectively insulated from challenges that would not likely be brought by a property owner benefiting from underassessment, the state agency making the underassessment, or a county taxpayer. That is, county standing is recognized on the pragmatic footing that only the local government unit has the will and resources to check constitutional misconduct in state administration of the assessing function.

The Utah test recognizes that localities have interests different from those of the state. It further recognizes that localities are not servants of the state but potential protagonists in the ongoing process by which power is shaped and shared. Note the tack the Utah court could have taken. The state lawmaking process is the exclusive forum for working out controversies between centralization and localism. Because citizens are the only bearers of participatory rights, and they are fully represented in the legislature, there can be no judicially cognizable conflict between the generalized interest represented by the state and the parochial interests asserted by local governments. If localities are aggrieved, their grievances are resolvable exclusively by the centralized decision-making apparatus known as the state legislature. The structure of this argument mirrors the U.S. Supreme Court's reasoning in *Garcia*.⁴¹ Just as states have no claims against the national government because their interests are fully represented in the national legislature, so localities cannot be heard to complain of actions by the states.

* * * * *

A fascinating set of cases traces the implementation of state constitutional provisions in Michigan and Missouri, which prohibit the state both from

³⁶The fallacious reasoning underpinning the doctrine of implied preemption as conventionally formulated is discussed in *Commonwealth of Pennsylvania, Department of General Services v. Ogontz Area Neighbors Association*, 505 Pa. 614, 483 A.2d 448 (1984).

³⁷Iowa Const. art III, sec. 40. The state constitutions of Alaska, New Jersey, Michigan, and Montana contain similar provisions that require local government powers to be liberally interpreted. Sands and Libonati, *Local Government Law*, sec. 13.05, n. 23.

³⁸Ill. Const. art. VII, sec. 6(g), (h), (i).

³⁹*Ibid.*, sec. 6(m).

⁴⁰*Kennecot Corporation v. Salt Lake County*, 702 P.2d 451 (1985).

⁴¹*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

mandating new or expanded activities by local governments without full state financing of the additional costs and from reducing the state financing proportion of the costs of existing mandates.⁴³ Accordingly, a state statute imposing new duties on localities with respect to solid-waste management resulting in increased costs was unconstitutional. A state statute increasing the salaries of county employees was held to violate the Missouri version of this significant new guarantor of local fiscal autonomy.

Conclusion

The recognition of procedural, dignitary, and autonomy interests of local governments has significant implications for state-local relations. In the first

⁴³Mich. Const. art. 9, Sec. 26; Mo. Const. art. X, Sections 16-24.

place, state courts have begun to undo the unitary theory of sovereignty whereby localities are presumed not to have interests adverse to those of the state that created them. Second, local governments are viewed not as mere servants of the state but as potential protagonists in the ongoing process by which state legislative claims to omnipotence are checked and balanced by judicial review. Third, a significant new class of potential plaintiffs is now empowered to vindicate the rule of law in a variety of public-law areas hitherto unscrutinized by the state judiciary. Fourth, state courts have indicated an increased willingness to resolve conflicts that inevitably arise between the general interests represented by the state and the particular interests represented by local governments within the overriding framework of the state constitution.

* * * * *

Discussion Notes

1. An article referred to by Professor Libonati, James E. Herget, "The Missing Power of Local Government: A Divergence Between Text and Practice in Our Early State Constitutions," *Virginia Law Review* 62 (June 1976): 999, provides an exhaustive treatment of the early state constitutional silence with respect to local government, and the evolution of the powers of local government.

2. See also, Howard Lee McBain, "The Doctrine of An Inherent Right of Local Self-Government," *Columbia Law Review* 16 (March, April

1916): 190, 299; Amasa M. Eaton, "The Right to Local Self-Government," *Harvard Law Review* 13 (1900): 441, 570, 638; 14 (1901): 20, 116.

3. See, Richard Briffault, "Localism in State Constitutional Law," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 117.

4. Professor Libonati mentions the recent state constitutional amendments requiring states to fund increased mandated services by local governments. What are the ramifications of such provisions? Read the following case with this in mind.

Durant v. State Board of Education 424 Mich. 364, 381 N.W. 2d 622 (1985)

BOYLE, Justice.

We granted leave in these two cases to consider the proper interpretation of specific provisions of the "Headlee Amendment," Const. 1963, art. 9, Sections 29, 30, and 32.

* * * * *

I

Facts

The issues in this case arise from: A) the fact that the amount of state funding for K-12 education, taken as a whole, has declined since 1978-79, and B) from the further fact that the result of application of two distinct formulae for financing has, as applied,

resulted in a reduction of the state-financed proportion of individual school districts' budgets. These two formulae are used to determine the amount of state aid which will be available to school districts during each school year.

* * * * *

II

Does the Headlee Amendment Require that Funding to Each School District Be Maintained at 1978-79 Levels?

The first contention of plaintiffs in both *Durant* and *Waterford* is that the state is required by Const. 1963, art. 9, Sec. 29. (hereafter Sec. 29) to contribute the same percentage of the school operating budget as it did in 1978-79. Section 29 provides:

The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by

state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

Plaintiffs argue that this provision was intended to cover the constitutional obligation of a free education mandated by Const. 1963, art. 8, Sec. 2. If we accept plaintiffs' contention, a school district which received fifty percent of its total operating budget in the form of state aid in 1978-79 would be constitutionally entitled to that percentage of their budget in all succeeding years.

The defendants, on the other hand, argue that Sec. 29 applies only to specific requirements imposed on the school districts by state statutes and state agencies. Defendants further argue that this would mean that the state could constitutionally reduce the amount of state aid given to individual school districts below the proportion of the total school budget in 1978-79.

A. Is the Mandate of a Free Public Education in Const. 1963, art. 8, Sec. 2 an "Activity or Service Required . . . by State Law" As Set Forth in Sec. 29 of the Headlee Amendment?

The issue here involves the proper interpretation of the term "state law" as it appears in Sec. 29. Plaintiffs claim that the voters intended the term "state law" in Sec. 29 to include constitutional provisions, such as the mandate of a free education in article 8, while the defendants argue that it was intended only to refer to state statutes and state agency rules.

Article 9, Sections 25-34 was presented to the voters under the popular term "Headlee Amendment," named after its original proponent, Richard Headlee. It was proposed as part of a nationwide "taxpayer revolt" in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level.

For the reasons which follow, we hold that it was not the intent of the voters to include in Sec. 29 any obligations that may be imposed upon local governmental units by Const. 1963, art. 8, Sec. 2 and that unrestricted state aid is not funding for an "existing

activity or service required of units of Local Government by state law."

1. The Language of the Constitution.

In order to determine the proper interpretation of the term "state law" in Sec. 29, we must ascertain the intent of the voters who passed the Headlee Amendment. We begin by looking to the language of the Constitution itself.

First, a proper reading of the first two sentences of Sec. 29, in combination with each other, evidences that the correct interpretation of the term "state law" in the section is that asserted by the defendants, i.e., state statutes and state agency rules. The first sentence of Sec. 29 states:

The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law.

The second sentence adds:

A new activity of service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

The first sentence, the one at issue in this case, is aimed at existing services or activities already required of local government. The second sentence addresses future services or activities. Both sentences clearly reflect an effort on the part of the voters to forestall any attempt by the Legislature to shift responsibility for services to the local government, once its revenues were limited by the Headlee Amendment, in order to save the money it would have had to use to provide the services itself.

Because they were aimed at alleviation of two possible manifestations of the same voter concern, we conclude that the language "required by the legislature or any state agency" in the second sentence of Sec. 29 must be read together with the phrase "state law" in the first sentence. This interpretation is consistent with the voters' intent that any service or activity required by the Legislature or a state agency, whether now or in the future, be funded at an adequate level by the state and not by local taxpayers.

* * * * *

Discussion Notes

1. Missouri adopted a provision much like Michigan's, also as part of an amendment proposed by a "tax revolt" initiative. See Edward D. Robertson, Jr. and Duncan E. Kincheloe, III, "Missouri's Tax Limitation Amendment," *University of Missouri at Kansas City Law Review* 52 (1983): 1; *Boone County Court v. State*, 631 S.W.2d 321 (Mo. 1982).

2. Would a limitation such as Michigan's or Missouri's apply where a *judicial interpretation* of a statute resulted in a new requirement of local governments? See *University Emergency Service v. City of Detroit*, 141 Mich. App. 512, 367 N.W.2d 344, 348 (1984).

3. What would be the proper remedy for courts to grant for violations of these kinds of provisions?

B. Municipal Home Rule under State Constitutions

In 1955 Jefferson B. Fordham noted:

In the state orientation there is a very important choice between use of the state constitution as the direct instrument for allocating governmental powers and reliance upon the legislature as a continuing power-distribution organ in the state. As between the three branches of the state government the primary allocation is, of course, made by the constitution. More or less discretion may be left to the state legislature even at this level. The devolution of authority to local units has traditionally been a function of the state legislature under the strongly prevailing doctrine of legislative supremacy over local government. It is here that the basic choice of political method presents great difficulty. What factors militate in favor of modifying legislative supremacy by constitutional amendment?

Jefferson B. Fordham, "Foreword: Local Government in the Larger Scheme of Things," *Vanderbilt Law Review* 8 (June 1955): 668.

He continued:

The prospect of adequate legislative recognition of local problems and needs is considered so slight by the proponents of constitutional home rule that they regard constitutional amendment as the only practical recourse. They say, in effect, that life is too short; local government cannot afford to wait on the vague prospect that the legislative institution will undergo the desired improvement. It is a familiar theme. Let's by-pass the legislature and provide for this or that problem by modifying the organic law. *Ibid.*, 671.

Read the following materials with these issues in mind.

City of Miami Beach v. Fleetwood Hotel, Inc. 261 So.2d 801 (Fla. 1972)

ROBERTS, Chief Justice.

We here review by direct appeal a decision of the Circuit Court, Dade County, holding unconstitutional an Ordinance of the City of Miami Beach purporting to regulate rents. . . . Ordinance No. 1791, entitled "Housing and Rent Control Regulations," provides for regulation of rents in all housing with four or more rental units except for hospitals, nursing homes, retirement homes, asylums or public institutions, college or school dormitories or any charitable or educational or non-profit institutions, hotels, motels, public housing, condominiums and cooperative apartments, and any housing accommodations completed after December 1, 1969.

The City Council enacted the Ordinance in October, 1969 after making a determination that an inflationary spiral and a housing shortage existed in the City which required the control and regulation of rents. The City contends that it acted with the intent and purpose of protecting its residents from exorbitant rents.

* * * * *

The trial court declared the Ordinance invalid after determining that the City of Miami Beach does not have the power to enact a rent control ordinance. . . and that the Ordinance conflicted with state law, specifically Sections 83.03, 83.04 and 83.20, Florida Statutes, F.S.A.

The legal issues involved in this case are as follows:

(1) Whether or not the City of Miami Beach has the power to enact this rent control ordinance?

* * * * *

(3) Whether or not the rent control ordinance conflicts with state law?

The first issue must be answered in the negative. The City of Miami Beach does not have the power to enact the ordinance in question. This Court recognizes that the language in the Florida Constitution which governs the powers exercisable by municipalities has been changed by Article VIII, Section 2(b), 1968 Florida Constitution.

Article VIII, Section 8 of the Constitution of 1885 reads,

The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. . . .

Section 2, Article VIII of our new 1968 Constitution provides,

(a) Establishment. Municipalities may be established or abolished and their charters amended pursuant to general or special law. . . .

(b) Powers. Municipalities 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. (Emphasis supplied.)

Although this new provision does change the old rule of the 1885 Constitution respecting delegated powers of municipalities, it still limits municipal powers to the performance of municipal functions.

That the paramount law of a municipality is its charter, (just as the State Constitution is the charter of the State of Florida,) and gives the municipality all the powers it possesses, unless other statutes are applicable thereto, has not been altered or changed. . . . The powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt will be resolved against the city.

Liberis v. Harper (Fla. 1925) 89 Fla. 477, 104 So. 853. "Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes." *Hoskins v. City of Orlando, Florida* (5th Cir., 1931) 51 F.2d 901. The aforesaid holding of the United States Fifth Circuit Court is entirely consistent with the 1968 change in our Constitution.

The Charter of the City of Miami Beach does not authorize the City of Miami Beach the power to enact a rent control ordinance. Section 6 of the Code contains no mention of such a power. The only possible source of such a power is Section 6 (x) which permits the City "to adopt all ordinances or do all things deemed necessary or expedient for promoting or maintaining the general welfare, comfort, education, morals, peace, health and convenience of said city, or its inhabitants and to exercise all of the powers and privileges conferred upon cities or towns by the General Law of Florida when not inconsistent herewith."

The weight of authority is that without specific authorization from the state, the cities cannot enact a rent control ordinance either incident to its specific municipal powers or under its General Welfare provisions. *Warren v. City of Philadelphia*, (1956) 387 Pa. 362, 127 A.2d 703, *Heubeck v. City of Baltimore*, (1954) 205 Md. 203, 107 A.2d 99, *Grofo Realty Co. v. Bayonne*, (1957) 24 N.J. 482, 132 A.2d 802, *Wagner v. Mayor and Municipal Council of City of Newark*, (1957) 24 N.J. 467, 132 A.2d 794.

Local governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Florida Constitution. "Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates . . . and many other matters of general and statewide significance, are not proper subjects for local treatment. . . ." *Wagner v. Mayor and Municipal Council of Newark*, supra, at 800. Mr. Justice Cardozo, in *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705, 713 (Ct.App. 1929) made the following statement which is in support of the above stated proposition,

There are other affairs exclusively those of the state. . . . None of these things can be said to touch the affairs that a city is organized to regulate, whether we have reference to history or to tradition or to the existing forms of charters.

* * * * *

The State of Florida through legislative action has enacted statutory provisions to regulate the landlord tenant relationship. Chapter 83, Fla.Stat.F.S.A. Absent a legislative enactment authorizing the exer-

cise of such a power by a municipality, a municipality has no power to enact a rent control ordinance.

* * * * *

ERVIN, Justice (dissenting):

I cannot agree with the majority's conclusions.

The majority holds, first, that the City of Miami Beach does not have the power to enact a rent control ordinance absent specific authorization from the Legislature of the State of Florida. Although such a conclusion would have been correct under the 1885 Constitution, it is not proper under Article VIII, Section 2(b) of the 1968 Constitution and Section 167.005, Florida Statutes, F.S.A., which statutorily implements that constitutional provision. The majority has totally ignored the intent and plain meaning of these new sections. Its holding on this point will return to this state the plethora of local bills, which evil was supposedly obviated by Article VIII, Section 2(b). That section provides:

Municipalities 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. Each municipal legislative body shall be elective. Art. VIII, Sec 2(b), Fla. Const. (Emphasis supplied.)

The comparable provision in the 1885 Constitution, Article VIII, Section 8, was as follows:

The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors. (Emphasis supplied).

The difference in the two provisions is obvious. Under the earlier constitution, municipalities had only such powers as were specifically granted them by

the Legislature. "Legislative control over cities . . . [was] absolute, subject only to the restriction that it shall not contravene some provision of the Constitution." *Cobo v. O'Bryant*, Fla.1959, 116 So.2d 233, 236. The converse is now true. The 1968 revision to the Florida Constitution has given municipalities governmental, corporate, and proprietary powers to enact municipal legislation unless otherwise provided by law. Commentary to Art. VIII, Sec. 2(b), 26A F.S.A., pp. 291, 292.

Under the pertinent section of Florida's Constitution, therefore, a municipality may enact a rent control ordinance without receiving specific authorization from the State Legislature if (1) rent control is a municipal function and (2) there is no contrary or superseding legislation. Article VIII, Section 2(b), places no other limitations on a municipality's power to enact ordinances.

It seems clear to me that rent control can be a municipal function. *Accord, Warren v. City of Philadelphia*, 1955, 382 Pa. 380, 115 A.2d 218; *Heubeck v. City of Baltimore*, Md.App.1954, 205 Md. 203, 107 A.2d 99. The housing problems of a community are unquestionably the concern and responsibility of the government of that city. Without adequate, decent housing a city cannot function as a modern peaceful community. Unchecked spiraling rents can destroy it. Certainly those closest to the problem, the people of the affected municipality, are the ones most able to recognize and attempt to cure an untoward condition.

It is equally clear that there is no contrary or superseding legislation preventing the City of Miami Beach from enacting this rent control ordinance. The majority, as its third point, holds the ordinance is superseded by Chapter 83, Florida Statutes. Such a position is totally untenable. The chapter deals with the duration and termination of nonfreehold estates, rent, removal of tenants, and deposit money. Nowhere does the chapter mention rent control. Rent control has to do with rents to be paid—nothing else. Chapter 83 does not relate to the amount of rents to be paid.

* * * * *

Discussion Notes

1. After the court's decision in *Fleetwood Hotel*, the legislature enacted a municipal home rule statute apparently intended to permit cities to adopt rent control ordinances. This statute was upheld by the Florida Supreme Court, but the Miami Beach ordinance was once again invalidated on the ground that it was a delegation of power without proper guidelines or standards. *City of Miami Beach v. Forte Towers, Inc.*, 305 So.2d 764 (Fla. 1974).

2. Compare the concern with "local bills" expressed in Justice Ervin's dissent, with that expressed in *Anderson v. Bd. of Com'rs of Cloud County*, in Chapter 9, Section C.

3. How can both the majority and dissenting opinions rely on the same cases for support?

4. Can governmental powers really be classified as either local or statewide? See Fordham, "Foreword: Local Government," 675.

Jefferson v. State
527 P.2d 37 (Alaska 1974)

* * * * *

This court has dealt with conflicts between state law and a municipal home rule charter or ordinance in several cases.²⁴ The starting point for an analysis of this issue must be found in the Alaska Constitution, Art. X, Sec. 11:

A home rule borough or city may exercise all legislative powers not prohibited by law or charter.

The authors of this provision hoped that its simple language and sweeping grant of power would enable home rule municipalities to meet a multitude of legislative needs without depending on specific grants of power from a state legislature.²⁵ They were aware of the difficulties encountered in other jurisdictions where delegations of power to local government units were conferred in terms, such as "matters of local concern" or "of local affairs," which were intended to create an exclusive sphere of municipal action free from any intrusion by the state legislature.²⁶ Attempts by the courts in those jurisdictions to re-

²⁴It has been claimed our approach has not always been entirely consistent. See Sharp, *Home Rule in Alaska: A Clash Between the Constitution and the Court*, 3 U.C.L.A.-Alaska L.R. 1 (1973).

²⁵Art. X, section 1, the introductory section on home rule in the Alaska Constitution reads:

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdiction. A liberal construction shall be given to the powers of local government units.

²⁶See Sharp, *supra*, note 24 at 3. Most courts fail to distinguish between the types of home rule provisions. The provisions of other jurisdictions described in the text are sometimes designated as "shield" or "protection" provisions and usually require a court's determination of whether an exercise of municipal power is statewide or local in nature, when such exercise of power conflicts with a state statute. Alaska's home rule provision is a "grant" or "sword" of legislative power given to the municipality to be exercised as long as it is not prohibited by law. Art. X, Sec. 11.

This difference between "shield" and "sword" provisions was implicitly recognized in *Rubey v. City of Fairbanks*, 456 P.2d 470, 475 (Alaska 1969) where the court declined to follow California's preemption-by-state-occupation-of-the-field doctrine because of the difference between California's and Alaska's home rule provisions. California's provision is a combination "shield" and "sword," while Alaska's is solely a "sword." See Duvall, *Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning*, 8 Alaska L.J. 232, 233-35 (Oct. 1970); Sato & Van Alstyne, *State and Local Government Law* 216-218 (1970).

solve conflicts between local enactments under such limited delegations of authority and state statutes relating generally to the same subject have often led to confusion and inconsistencies. Then too, some commentators have suggested that constitutional or statutory home rule provisions had been rendered ineffective in other states because of restrictive court decisions.²⁸ With this all before them the constitutional delegates undertook to give Alaska home rule municipalities a wide range of powers to meet the differing needs of the varied and scattered communities of this state. It was hoped that the constitutional delegation of authority to local government units under the terms of Art. X, Sec. 11 would lead the courts of this jurisdiction to take a new and independent approach when conflicts inevitably arose between the municipalities and the state.²⁹ The foundation for this new approach has been laid in the past decisions of this court which have favored the exercise of legislative powers by local government units.³⁰

However, to say that home rule powers are intended to be broadly applied in Alaska is not to say that they are intended to be pre-eminent. The constitution's authors did not intend to create "city states with mini-legislature."³¹ They wrote into Art. X, Sec. 11 the limitation of municipal authority "not prohibited by law or charter." The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern.³² A municipal ordinance is not

²⁸See Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 Ohio St.L.J. 18 (1948); Richland, *Courts Nullify Home Rule*, 44 National Mun. Rev. 565-70 (1955); Sato, "Municipal Affairs" in California, 60 Cal. L. Rev. 1055 (1972). *But see also* Sandalow, *The Limits of Municipal Powers Under Home Rule: A Role for the Courts*, 48 Minn. L.R. 643 (1963-64).

²⁹See Sharp, *Home Rule in Alaska, supra*, note 24, at 22-27.

³⁰See *Lien v. City of Ketchikan*, 383 P.2d 721-23 (Alaska 1963); *City of Juneau v. Hixon*, 373 P.2d 743 (Alaska 1962); *Rubey v. City of Fairbanks*, 456 P.2d 470-475 (Alaska 1969).

³¹Duvall, *Delineation of the Powers of the Alaska Home Rule City: The Need for a Beginning*, 8 Alaska L.J. 232, 240 (Oct. 1970).

³²See Sharp, *supra* note 24, at 30-31; Duvall, *supra* note 31 at 235, 237-239. In *Rubey v. City of Fairbanks*, 456 P.2d 470, 475 (Alaska 1969) this court recognized a prohibition test for conflict resolution between state and local legislation:

Article X, section 11 of the Alaska constitution provides that a home rule city, such as Fairbanks, 'may exercise all legislative powers not prohibited by law or by charter.' There is no legislative enactment in Alaska that expressly prohibits a home rule city from making assignation a criminal offense. We do not find such prohibition from the fact that the Alaska legislature has extensively covered the field of sexual offenses. We believe there would have to be some additional factor from which the intent of the legislature to prohibit local regulation in the area could be reasonably inferred. We are not aware of any such factor in this case.

necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.³³

³³We affirm our rejection of the doctrine of state preemption by "occupying the field." We will not read into a scheme of statutory provisions any intention to prohibit the exercise of home rule authority in that area of the law. If the legislature wishes to "preempt" an entire field, they must so state. See *Rubey v. City of Fairbanks*, 456 P.2d 470 (Alaska 1969).

We note that the legislature has done this in its new Title 29, Municipal Code. AS 29.13.100 provides in part:

Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided.

Discussion Notes

1. What does the Alaska court mean by "shield" and "sword" home rule provisions?

2. How do the Florida and Alaska approaches to home rule differ?

3. Did the Florida court's approach in *Fleetwood Hotel* resemble any of those described by the Alaska Court?

4. The case of *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, 470 N.E. 2d 266 (1984), which was considered in Chapter 5 with respect to the use of constitutional history to interpret a state constitutional right to bear arms provision, also confronted a major home rule issue. The majority opinion upheld a municipal ban on the possession of operable handguns, stating:

Article VII, section 6, of our constitution provides in relevant part:

(a) . . . Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; . . .

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive. (Ill. Const. 1970, art. VII, sec. 6.)

The limitation "pertaining to its government and affairs" has been interpreted to mean that ". . . the powers of home rule units relate to their own problems, not to those of the state or the nation." *City of Des Plaines v. Chicago & North Western Ry.*

Co. (1976), 65 Ill.2d 1, 5, 2 Ill.Dec. 266, 357 N.E.2d 433.

Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the problem, the units of government which have the most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it. . . .

* * * * *

The Plaintiffs seek to apply a free-wheeling preemption rule to the exercise of home rule power. They argue in effect that a subject is preempted whenever it is of significant concern to the State or whenever a uniform statewide solution to the problems it entails might arguably be more manageable than individual control by local units of government. Home rule, however, is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.

103 Ill.2d at 502, 470 N.E.2d at 274.

Does the Illinois court's description of the relationship between states and local governments bear any analogy to the relationship between states and the federal government? What about the notion of "experimentation"?

5. In 1968, Pennsylvania amended its constitution to provide:

Discussion Notes (cont.)

Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

Pennsylvania Constitution, Art. IX, section 2.

Interestingly, Article IX, section 14 defines "municipality" to cover "a county."

Jefferson B. Fordham described the Pennsylvania provision in the following terms:

Plainly the direct constitutional grant of power is self-executing. The section embraces the writer's home rule theory. Neither enabling nor implementing legislation is required. There is reserved to the legislature power to deny to a home rule charter unit authority to exercise a power or function, but there is no express reservation of that sort as to governmental structure and administration. Thus, home rule power as to the latter appears to be plenary.

"Judicial Nullification of a Democratic Political Process—The Rizzo Recall Case," *University of Pennsylvania Law Review* 126 (November 1977): 17. Fordham was criticizing a decision of the Pennsylvania Supreme Court which held that Philadelphia did not have the power, under the provision quoted above, to provide for recall in its home rule charter. See *Citizens Committee to Recall Rizzo v. Board of Elections*, 470 Pa. 1, 367 A.2d 232 (1976).

6. The most recent home rule recommendations, however, suggest "a direct constitutional devolution of substantive home rule powers dependent only upon the adoption of a home rule

charter. It does not place any substantive power or function beyond legislative control by general law. Under this approach a home rule charter is an instrument of limitation and not of grant." Fordham, "Judicial Nullification," 13.

The recommendations are contained in Fordham, *Model Constitutional Provisions for Municipal Home Rule* (1953), reprinted in J. Fordham, *Local Government Law* 76-84 (rev. ed. 1975). See generally Kenneth Vanlandingham, "Constitutional Municipal Home Rule Since the AMA (NLC) Model," *William and Mary Law Review* 17 (Fall 1975): 1.

7. On municipal home rule generally, see Harvey Walker, "Toward a New Theory of Municipal Home Rule," *Northwestern University Law Review* 50 (November-December 1955): 571; Note, "Home Rule and the New York Constitution," *Columbia Law Review* 66 (June 1966): 1145; Note, "Constitutional Home Rule for Idaho Cities," *Idaho Law Review* 8 (Spring 1972): 355; Sho Sato, "Municipal Affairs in California," *California Law Review* 60 (June 1972): 1055; Leon Thomas David, "California Cities and the Constitution of 1879: General Laws and Municipal Affairs," *Hastings Constitutional Law Quarterly* 7 (Spring 1980): 643; Robert Kratovil and John T. Ziegweid, "Illinois Municipal Home Rule and Urban Land: A Test Run for the New Constitution," *DePaul Law Review* 22 (Winter 1972): 359.

For a provocative evaluation of the development of city powers, see Gerald L. Frug, "The City as a Legal Concept," *Harvard Law Review* 93 (April 1980): 1057.

See also, Jon C. Teaford, "Special Legislation and the Cities, 1865-1900," *American Journal of Legal History* 23 (July 1979): 189; Robert A. Dahl, "The City in the Future of Democracy," *American Political Science Review* 61 (December 1967): 953.

8. Regarding county home rule, see Charles M. Kneier, "The Legal Nature and Status of the American County," *Minnesota Law Review* 14 (January 1930): 141; S. Gayle Lowrie, "Interpretation of the County Home Rule Amendment by the Ohio Supreme Court," *University of Cincinnati Law Review* 46 (November 1936): 454; Orval Etter, "County Home Rule in Oregon," *Oregon Law Review* 46 (April 1967): 251.

See also, Jerome G. Rose, "Conflict Between Regionalism and Home Rule," *Rutgers Law Review* 31 (May 1978): 1; Note, "Intergovernmental Cooperation: Does the 1970 Illinois Constitution Give Units of Local Government the Green Light?" *John Marshall Journal of Practice and Procedure* 8 (Winter 1974-1975): 295.

C. Representation in Local Governmental Units

Foster v. Sunnyside Valley Irrigation District 102 Wash.2d 395, 687 P.2d 841 (1984)

UTTER, Justice.

Two issues are raised by this appeal from the trial court's grant of defendant/respondent's motion for summary judgment. . . . Second, does RCW 87.03.045 and RCW 87.03.050, relating to a voting scheme for the irrigation district, violate Const. art. 1, Sec. 19 by infringing on the right of suffrage? We conclude that . . . RCW 87.03.045 and .050 unconstitutionally infringe upon appellants' right to vote under Const. art. 1, Sec. 19.

The facts are basically undisputed. In 1915, appellants' predecessor, R.E. Wise, contracted with the United States government, on behalf of his "heirs, executors, administrators and assigns" for water rights for a 24.36 acre tract he owned in Benton County. The contract was made pursuant to the federal Reclamation Act "and acts amendatory thereof." He agreed to pay annual installments of \$52 per acre of irrigable land for construction costs and additional operation and maintenance charges as prescribed by the act.

In 1945, the Sunnyside Valley Irrigation District (SVID) purchased the Sunnyside Canal and its appurtenant works from the United States and assumed its contractual obligations. . . . Under its agreement with the United States, SVID assumed the obligation to operate and maintain all Reclamation Act irrigation works which extend from the Yakima River to delivery boxes (weirs) within the district. There is one weir available for every 40 acres of irrigable land within the district.

Pursuant to its authority under RCW 87.03.240, SVID assesses landowners within the district for this service based on the availability of irrigation water to

each acre multiplied by the number of acres owned plus administration costs. Parcels which are one acre or less are assessed a minimum charge based on the "benefit of water available." A weir was located appurtenant to Wise's property.

In 1972, Wise's farmland was subdivided and sold as residential lots. The plat for the subdivision failed to provide for irrigation water rights of way or pipelines to the lots from the weir (which was later required by RCW 58.17.310); consequently, the lots do not have access to the water. Nevertheless they have been, and continue to be, assessed for irrigation.

Appellants purchased property from within that subdivision and petitioned the board of directors of SVID for exclusion of their property from the district. This request has been denied. Appellants are not eligible to vote for members of the board because in 1966 the district adopted a resolution pursuant to RCW 87.03.045 and .050 which provides that holders of title to land platted or subdivided into residential or business lots not being used for agricultural purposes cannot vote in SVID elections.

* * * * *

II

Appellants challenge the constitutionality of the district's voting scheme, and of the enabling statute, RCW 87.03.045. They maintain that the scheme violates the equal protection clause of U.S. Const. amend. 14, Const. art. 1, Sec. 12, and Const. art. 1, Sec. 19, by denying them the right to vote in district elections.

* * * * *

Under the statute only those landowners whose property is used for agricultural or horticultural purposes may vote, no single landowner can have in excess of two votes (one vote for 1 to 10 acres and an

additional vote for all remaining property). Appellants fall within the exception to the statute and are not permitted to cast even a fractional vote for SVID board members.

The right to vote is fundamental under both the United States and Washington constitutions. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.E.2d 506 (1964); *Malim v. Benthien*, 114 Wash. 533, 196 P. 7 (1921). The Washington Constitution, unlike the federal constitution, specifically confers upon its citizens the right to “free and equal” elections. Const. art. 1, Sec. 19. Because we find that the Washington constitution goes further to safeguard this right than does the federal constitution, we base our decision here upon the Washington constitution.

Const. art. 1, Sec. 19 provides: “All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” The Washington Constitution defines qualified electors as:

All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections.

Const. art. 6, Sec. 1 (amend. 63).

All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise.

Const. art. 6, Sec. 3.¹

The meaning of the guaranty to “free and equal” elections can be ascertained, in some measure, by looking to the records of the constitutional convention, and the few cases which have discussed Const. art. 1, Sec. 19.

The guaranty that “all Elections shall be free and equal” was adopted from the Oregon constitution, which was, in turn, adopted from the Indiana constitution. *The Journal of the Washington State Constitutional Convention*, 1889, at 508 n.31 (B. Rosenow ed.

¹Originally, the franchise included males 21 years or over and excluded Indians not taxed. Const. art. 6, Sec. 1. In 1896, the constitution was amended to require further that all electors be able to read and speak English. Const. art. 6, Sec. 1 (amend. 2). In 1910, the franchise was expanded to include women. Const. art. 6, Sec. 1 (amend. 5). Finally, in 1974, the minimum voting age was reduced to 18 years or over and both the exclusion of “Indians not taxed” and the requirement that electors be able to read and speak English were deleted.

1962). The framers of the Washington Constitution added to this phrase the additional guaranty that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” At the convention, there were two motions to replace the word “equal” with an alternative word. Mr. Dyer moved to substitute “open” for “equal.” Mr. Reed moved to substitute “impartial” for “equal.” Mr. Lindsley moved to strike the entire section. Each of these motions failed. At least one delegate, Mr. Moore, believed that “equal” meant the same thing as “free.” *Journal, supra* at 508.

The earliest case to consider Const. art. 1, Sec. 19 was *Malim v. Benthien, supra*. There the issue was whether the diking and drainage act of 1913, Rem. Code section 4107, unconstitutionally denied persons living outside a water district, but subject to district assessments, the right to vote. The court determined that the only difference between those persons entitled to vote and those not so entitled was that the former group lived within the district’s boundaries while the latter lived outside. This distinction lacked sufficient merit to deprive those outside the district of the right to an equal vote under the privileges and immunities clause of Const. art. 1, section 12 and Const. art. 1, section 19. *Cf. King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wash.2d 536, 554 P.2d 1060 (1976) (where a voting scheme limiting the right to vote in general municipal elections to city residents under Const. art. 1, section 12 was found constitutional, although the municipality managed a water district affecting those outside city boundaries, because adequate safeguards existed to protect those outside the city and “city residents [were] substantially affected by all city actions, not just its management of the water system”).

* * * * *

One of the latest cases to apply Const. art. 1, section 19 is *Carstens v. Public Util. Dist. 1*, 8 Wash.2d 136, 111 P.2d 583 (1941). There, the Lincoln County public utility district sought to take, by eminent domain, property owned by a private utility company. Plaintiffs owned property in Spokane and Grant Counties which defendant sought to condemn. They claimed, in part, that permitting the district to condemn transmission lines in Spokane and Grant Counties violated Const. art. 1, section 19 because persons in those counties were not able to vote on this issue. The court rejected this contention on grounds that persons in these counties had no property or other real interest in the existing service. “The minute losses which the individual customers might suffer as a result of the removal of the property from the tax rolls would probably be counteracted by savings realized in power rates.” *Carstens*, at 152. 111 P.2d 583.

Accord, *Orchard Grove Water Ass'n v. King Cy. Boundary Review Bd.*, 24 Wash.App. 116, 120, 600 P.2d 616 (1979) (Const. art. 1, section 19 "is violated only when the property rights of persons are affected in more than an incidental way by a municipal corporation in which they have no right to vote").

This history offers several principles applicable here. The right of all constitutionally qualified citizens to vote is fundamental to our representative form of government. In most instances any legislative act which qualifies this right must, under federal law, be based upon a compelling state interest and the state must demonstrate that no less restrictive measures are available to achieve this interest. *Reynolds v. Sims, supra*. The language of Const. art. 1, section 19 is not to be interpreted literally: "elections and voters may . . . be regulated and property controlled"; in certain limited situations, the right to vote on an issue or for a representative may be confined to those persons directly affected by the issue or representative body. *State v. Wilson, supra*, 137 Wash. at 132-33, 241 P. 970.

The United States Supreme Court has departed from the strict one-person, one-vote rule of *Reynolds v. Sims, supra*, where the election of representatives in special purpose municipal districts is concerned. See *Salyer Land Co. v. Tulare Lk. Basin Water Storage Dist.*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981). This is due to the limited governmental powers possessed and exercised by these districts and the disproportionate impact such districts frequently have upon a definable class living within their boundaries.

The Supremacy clause, U.S. Const. art. 6, see also Const. art. 1, Sec. 2, requires that we satisfy the Supreme Court's test for departure from the strict rule of *Reynolds v. Sims, supra*. It is useful, therefore, to set forth the federal analysis to calm any fears that we might be subverting the federal guaranty under the guise of interpreting our own constitution; rather than going beyond the confines of the federal constitution on state constitutional grounds.

In *Salyer* and *Ball*, the Supreme Court set forth the test for determining when statutes governing the election of representatives in special purpose municipal districts are exempt from the strict scrutiny to which the regulation of voting rights is normally subjected. In each case, the Court looked to whether the type of authority exercised by the limited purpose district was governmental in nature. Factors considered were the district's ability to impose taxes, enact laws governing the conduct of citizens or "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services." *Ball*, 451 U.S. at 366, 101

S.Ct. at 1818. Once the court was satisfied that the district's authority was limited to facilitating a non-governmental purpose, it inquired only whether the voting scheme at issue was reasonable.

In *Salyer*, the Court upheld a statute which gave greater influence in water district elections to those voters most affected by the district's operations. Specifically, the statute permitted only landowners to vote in general district elections and apportioned these votes according to the assessed valuation of the land. The cost of the district's projects were assessed against the land according to the benefits received. The Court reasoned that, because the district exercised little governmental authority, the requirements of *Reynolds v. Sims, supra*, were inapplicable. It then found the legislature's apportionment scheme reasonable because the burden of assessments generally impacted landowners unequally, according to the size of their land holdings.

In *Ball*, the Court considered the nongovernmental activities of the water district and the primary purpose originally served by the district's organization. Once it had characterized the district's primary purpose the Court looked to the persons most significantly impacted by this purpose. The Court held that the federal constitution would permit a franchise limited to those most affected. It then found reasonable and upheld a voting scheme which limited the right to vote in water district elections to landowners and apportioned voting power according to the number of acres owned.

We find the *Ball* court's analysis inconsistent with Const. art. 1, Sec. 19 as interpreted by *Malim* and *Carstens*. The *Ball* Court's narrow focus upon the original irrigation purpose of the district caused it to recognize only the interests of landowners. Yet the district also generated and supplied electricity to approximately 240,000 consumers and derived 98 percent of its total operating revenue from this activity. Thus, nonlandowners, too, were significantly affected by the district's policies. The cost of the district's "primary function" of providing irrigation water for agriculture was borne by many who had no voice whatever in district policy. *Ball*, at 381-85, 101 S.Ct at 1826-28 (White, J., dissenting).

While it is consistent with Const. art. 1, Sec. 19 to permit limited electoral qualifications in special purpose districts where their activities are largely non-governmental in nature, and where the issue being voted upon disproportionately affects a definable class, *State v. Wilson, supra*, it demands that those constitutionally qualified electors who are significantly affected by district decisions be given an opportunity to vote for the representative of their choice in district elections. *Malim v. Benthien, supra*.

Whether the right to vote is in fact so apportioned is subject to strict judicial scrutiny.

We find that SVID does not possess the general governmental powers which require imposition of the one-person, one-vote rule of *Reynolds v. Sims*, *supra*. Although the district has broad authority to develop and maintain a system for delivery of irrigation water and generation of electricity, RCW 87.03.015, it is not empowered to impose ad valorem property or sales taxes, enact laws governing the conduct of citizens or administer the normal functions of government.

While the record before us is inadequate to permit a determination of the district's actual impact upon its residents, we note that its statutory authority is broad and its potential impact is great. Appellant residential landowners living within the Wise subdivision are directly and significantly affected by the district's operation. The district's voting scheme has denied them their right to vote in violation of Const. art. 1, Sec. 19 and Const. art. 6, Sec. 1 (amend. 63). Accordingly, the district must hereinafter permit those citizens living within the Wise residential subdivision to vote in district elections. It must also repay appellants the monies assessed on their property for

the period during which they were denied this right.

Can the district constitutionally accord greater weight to votes cast by some members of the class directly affected by district operations than it does to other members of this class? We find the federal rationale for upholding such voting scheme consistent with Const. art. 1, Sec. 19. Such schemes are based upon the allocation of burden upon residents within the district. Those residents receiving more of the burden are entitled to a greater say in the district's operation. *See, e.g., Salyer Land Co. v. Tulare Lk. Basin Water Storage Dist., supra*. The allocation reflected in the legislative scheme here is inadequate, however, under Const. art. 1, Sec. 19, because it does not account for a class of persons significantly affected by the district's operations. It gives them no voice. Once the Legislature has determined the district's relative impact upon definable classes within its boundaries, it may apportion votes according to this impact.

We hold, therefore, that RCW 87.03.045 violates the Washington constitutional guaranty of free and equal suffrage. The judgment is reversed in part and respondent is ordered to remit to appellants all assessments taken while they were denied the right to vote in district elections.

Discussion Notes

1. What sort of "local government" was the Sunnyside Valley Irrigation District?

2. Consider Justice Utter's approach to the state and federal constitutional issues in this opinion in light of his expressed views in the excerpts from his article on page 108.

Taxing, Borrowing and Spending under State Constitutions

State constitutions contain many detailed provisions concerning the power of state and local governments to levy taxes, grant tax exemptions, borrow money (primarily through the sale of bonds), and spend the money raised by taxing and borrowing. These provisions, of course, limit and supplant state or local legislative authority.

State constitutions did not always contain this degree of detail on finance matters. Provisions were added in response to governmental abuses of the taxing, borrowing and spending powers. Then, as time went by, other provisions had to be added specifically to authorize governmental involvement in the financing of projects considered to be within the proper sphere of modern state and local government.

A. State Constitutional Uniformity Requirements for Taxation

The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government. In republics it is vested in the legislature, and in the absence of any constitutional restrictions, may be exercised by them, both as to objects and modes, to any extent which they may deem

proper.
Knowlton v. Supervisors of Rock County, 9 Wis. 378, 387 (1859).

If the power of taxation is within the plenary power of state legislatures, what are the limitations on this power and why have such limitations been included in state constitutions?

1. Uniformity in Property Tax

**Robert F. Williams,
“The Tax Injunction Act and
Judicial Restraint:
Property Tax Litigation in
Federal Courts”**

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I. Introduction

Problems in real property taxation have attracted increasing national attention in recent years.¹ Inequality in the assessment, or valuation, of real estate for the purpose of imposing *ad valorem* taxes has caused the most difficulty. The taxing unit must officially assign a value to a piece of property before it applies its tax rate to calculate the taxpayer's bill. Assigning value is a difficult and complex matter.

It calls for a “value judgment” that is discretionary, subjective and of low visibility.

Inevitably, some taxpayers will disagree with such governmental decisions affecting their pocket-books. Almost all real estate is assessed for tax purposes below its market value (fractional or differential assessment), so the taxpayer rarely argues the property was assessed at more than its true value. Rather, the dispute arises when a taxpayer believes his property is assessed at a higher *percentage* of

¹See generally, G. Benson, S. Benson, H. McClelland & P. Thompson, *The American Property Tax: Its History, Administration and Economic Impact* (1965); A. Lynn, *The Property Tax and Its Administration* (1969); Farr, *The Property Tax As an Instrument for Economic and Social Change*, 9 Urb. Law. 447 (1977); Hammond, *Real Property Tax Assessment: A Look At Its Administration, Practice and Procedures*, 38 Alb. L. Rev. 498 (1974); Note, *Inequality in Property Tax Assessments: New Cures for an Old Ill*, 75 Harv. L. Rev. 1374 (1962) [hereinafter cited as Note, *Inequality*]; Note, *Tax Assessment of Real Property: A Proposal for Legislative Reform*, 68 Yale L.J. 335 (1958); Note, *The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*, 124 U. Pa. L. Rev. 1418 (1976) [hereinafter cited as Note, *Uniformity*].

its value (assessment to market value ratio) than are other properties in the taxing unit. When everyone is receiving the “break” of underassessment, however, it can be very difficult for people to detect inequality by comparing their tax assessments with others.⁶ The practice of fractional assessment continues for a number of intentional and unintentional reasons.⁷

A disturbing and persistent inequity arises when properties in certain neighborhoods are assessed at a higher percentage of their value than those in other neighborhoods within the taxing unit. The assessment-to-market-value ratio of properties in one neighborhood can be higher than in others and, therefore, upon application of a uniform tax rate these taxpayers pay a disproportionate share of the tax burden. They have a higher *effective* tax rate. Numerous convincing studies have documented this form of discriminatory taxation in declining, low-

⁶Hellerstein, *Judicial Review of Property Tax Assessments*, 14 Tax. L. Rev. 327, 340 (1959); Note, Uniformity, *supra* note 1, at 1426-28. For a discussion of Florida's recent legislative developments in this area, see Pajic, Weber & Francis, *Truth or Consequences: Florida Opts for Truth in Millage in Response to the Proposition 13 Syndrome*, 8 Fla. St. U. L. Rev. 593 (1980).

⁷Inequalities in tax burden occur because no local government assesses all property at the same fraction of full market value. Of uncertain origin, the practice of differential assessment may be explained by several factors. Local governments never have had enough assessors or an information system capable of keeping assessments current with changing market values. Properties are usually valued or revalued when buildings are constructed or substantially altered; newly constructed or rehabilitated properties tend to be assessed at higher percentages of market value than are older, unaltered properties. Properties are frequently revalued when they are bought and sold, while properties which do not turn over are revalued only at long intervals. Properties in stable or declining neighborhoods are also likely to have higher assessment to market value ratios (assessment/market ratios) than properties located in more attractive neighborhoods where market values are stable or rising.

Farr, *supra* note 1, at 452. See also K. Case, *Property Taxation: The Need for Reform 17-32* (1978); H. Aaron, *Who Pays the Property Tax?* 59-64 (1975). Over-assessment of low-income neighborhoods is not, however, universal. See D. Paul, *supra* note 5, at 130.

In *Gibraltar Corrugated Paper Co. v. North Bergen Twp.*, 20 N.J. 213, 219, 119 A.2d 135, 137 (1955), the New Jersey Supreme Court said with respect to the unequal assessment problem: “The failure to reach a uniform state of equality at true value is probably due to the frailties of human nature.” Justice Brennan responded in his concurring opinion: “Whether the failure to make assessments at true value is ‘due to the frailties of human nature’ or other reasons, the day has certainly arrived when officials at all levels of the administrative process are utterly without a defense to continue the practice.” *Id.* at 223, 119 A.2d at 140.

income neighborhoods often inhabited by minorities.⁹

Lacking the power and cohesion to obtain equitable treatment through concerted political action, taxpayers in such areas could be expected to turn to the courts for remedies.

Federal courts and federal law do not provide the types of remedies one might expect. The limited role of federal law, usually a dominant force in “discrimination” cases, is attributable to two factors. First, substantive federal law provides scant relief. There is virtually no federal statutory protection and the United States Supreme Court’s interpretation of the Equal Protection Clause in cases concerning unequal property tax assessment has been very restricted. States may separate real estate into classifications, such as commercial, industrial, single-family residential and multi-family residential, and apply different rates of taxation or levels of assessment to them.¹² Even within a single classification, unequal assessments¹³ do not violate the Equal Protection Clause unless intent or systematic discrimination is shown.¹⁴

⁹For a complete treatment of the causes and effects of this type of discrimination, including case studies, see Baar, *Property Tax Assessment Discrimination Against Low-Income Neighborhoods*, 13 Urb. Law. 333 (1981). See also D. Paul, *supra* note 5, at 32-35.

Evidence also indicates a generally higher assessment level for commercial and industrial property, when compared to residential property. *Id.* at 25 *passim*. But see *Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations on the Impact and Administration of the Property Tax*, 92d Cong., 2d Sess. 57-60 (1972) [hereinafter cited as *Hearings*]; Pomp, *What is Happening to the Property Tax?* Proceedings of the Seventy-Second Annual Conference, National Tax Assoc. 10 (1970), reprinted in 10 *Assessors J.* 107 (1980) (movement toward greater burden on residential property).

¹²*Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 368 (1940): “That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others . . . —these are among the commonplaces of taxation and of constitutional law.” See also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526. (1959) (“that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.”); Note, *supra* note 6, at 1421.

¹³Unequal assessments within a single classification result from properties being assessed at different percentages of their values.

¹⁴Clement, *Discrimination in Real Property Tax Assessment: A Litigation Strategy for Pennsylvania*, 36 U. Pitt. L. Rev. 285, 314 (1974); Note, *Inequality*, *supra* note 1, at 1375-76; Note, *Uniformity*, *supra* note 1, at 1420 n.25.

In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), the Court stated that “[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.” *Id.* at 359.

* * * * *

Cases alleging discrimination on the basis of race, however, are among those most likely to prevail under this equal protection analysis.¹⁵

The limited federal substantive law . . . compelled taxpayers to seek relief from unequal assessment under state law, particularly state constitutional and statutory requirements for “uniform,” “full value” or “equal” assessment.²⁴ Despite major advances, recourse to these state guarantees has not been fully effective, particularly as to discriminatory assessment of low-income, minority neighborhoods.²⁵

¹⁵Berry, *A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment*, 65 Cal. L. Rev. 828, 829 n.2 (1977); Clement, *supra* note 14, at 314.

²⁴The Supreme Court, in *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362 (1940) specifically declined to read the Equal Protection Clause as equivalent to state constitutional uniformity provisions:

This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure.

Id. at 368.

Regarding the “narrow and sometimes cramping” effects of state uniformity in taxation provisions, see Myers, *Open Space Taxation and State Constitutions*, 33 Vand. L. Rev. 837 (1980).

²⁵See Berry, *supra* note 15, at 829.

**Bettigole v.
Assessors of Springfield
343 Mass. 223, 178 N.E.2d 10 (1961)**

CUTTER, Justice.

These two bills in equity present questions about the validity of the proposed 1961 assessment of property taxes in Springfield. They have been argued together.

The Bettigole case is brought by individual, fiduciary, and corporate owners of multi-family dwellings, commercial real estate, and other property in Springfield which it is alleged “will be in 1961 and subsequent years . . . deliberately . . . over-valued and over-assessed both in relation to other classes of taxable real estate for which assessed valuations have been established at lower percentages of fair cash value and in relation to the general average or ratio of valuations to fair cash value of taxable real estate in” Springfield. It is alleged that (the board) has for many years established assessed valuations for different

classes of real estate in the city at widely differing percentages of the full fair cash value of such real estate and plans to do so for 1961. The bill seeks a declaration as to the “lawfulness under the Constitution and laws of [t]he Commonwealth of the policy and practice” just described, and also injunctive relief (a) against continuance of this assessment practice by the assessors, and (b) against action to send out bills for, and to collect, the taxes so assessed. The Attorney General has been notified of the proceeding and afforded an opportunity to be heard.

* * * * *

By August 1, 1961, the board “had determined the sound value [a term used by the board as equivalent to fair cash value] of each parcel of taxable real estate in the [c]ity as of January 1, 1961, and the fair cash value of the personal property owned by each [taxable] person.” The board had also classified all parcels of real estate into six categories, . . . and a majority had voted on September 8 and 15, 1961, “to establish . . . [1961] assessed valuations of all taxable property in the [c]ity by applying the following . . . percentages to the sound value determined by the . . . [board] for the following classes of property,” respectively, viz., (1) single family residences-50%; (2) two family residences-60%; (3) three family residences-65%; (4) four or more family residences-70%; (5) property of public utilities and commercial and industrial properties-85%; (6) farms, vacant land, and other real estate-70%. Personal property subject to local taxation was to be assessed at 85% of the fair cash value thereof previously determined by the board.

“The [b]oard determined assessed valuations for 1960 in substantially the same manner as it intends to use in 1961 and 1962” and the board’s “practice of applying varying percentages of sound or fair cash value of different classes of property in arriving at assessed valuations was deliberate and intentional.” A table (Annex A), made a part of each statement of agreed facts . . . shows, for example, that the fair cash (sound) value of 22,005 parcels of single family residence property was \$266,285,568 (col. 3), but that these parcels were assessed at an aggregate of \$133,142,792 (col. 5) for only 50% (col. 4) of their fair cash (sound) value. The table indicates that, if all taxable property in the city had been assessed at 100% of fair cash value, these 22,005 parcels would have been subjected to aggregate taxes of \$11,223,937 (col. 7) at a tax rate of \$42.15 per \$1,000 of valuation, whereas they were in fact taxed only \$8,601,024 (col. 6) under a tax rate of \$64.60. The table also shows that 2,521 parcels of public utility, commercial and industrial properties, assessed at 85% of fair cash value (col. 4), were in fact taxed \$9,602,217 (col. 6), whereas, if all taxable property in the city had been assessed at 100% of fair cash value, the aggregate tax on these

2,521 parcels would have been only \$7,370,792 (col. 7). This is the most striking comparison revealed by Annex A, and (although this is not done in the statements of agreed facts) its effect can be shown in tabular form (by a single mathematical calculation from Annex A) as follows:

	(A) Approximate percentage of total fair cash value of all taxable property	(B) Approximate percentage of all property taxes assessed on <i>non-uniform</i> basis
22,005 single family residence parcels	43%	33%
2,521 public utility, commercial and industrial parcels	28%	37%

It thus appears that 43% of the total fair cash value of taxable property in Springfield is paying only 33% of the property taxes, whereas 28% of the total is paying 37% of the property taxes. The somewhat lesser disparity, produced by the board's assessment method, among various other classes of property is equally susceptible of mathematical demonstration.

* * * * *

The plaintiffs are owners of properties within the classes of four and more family residences, commercial and industrial properties, and farms, vacant land and other real estate, listed in detail in annexes to the bills. Because "they own such property . . . [each of the plaintiffs will] pay substantially more in taxes for 1961 if the [board's assessing] practice described . . . [earlier in this opinion] is followed than if the assessed valuations of all taxable property in . . . Springfield were the fair cash value of such property."

The plaintiffs "insist that, in accordance with the [C]onstitution and laws of the Commonwealth, the assessed valuations of all taxable property in . . . Springfield should be the fair cash value of such property." A majority of the board insists "upon following . . . [the above described] practice . . . and have refused to establish assessed valuations . . . at the fair cash value of . . . property."

* * * * *

1. These cases continue property tax controversies which have existed in Springfield in recent years. . . . The bills present for consideration, upon very complete, precise statements of agreed facts, the question whether the whole 1961 property tax assessment scheme violates the Constitution of the Commonwealth (Part II, c. 1, Sec. 1, art. 4) which empowers the General Court "to impose and levy

proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth. . . ." (emphasis supplied). See also art. 10 of the Declaration of Rights, which reads, "Each individual . . . has a right to be protected . . . in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection. . . ." (emphasis supplied). It is well settled that the words "his share" in art. 10 of the Declaration of Rights "forbid the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers." See Opinion of the Justices, 332 Mass. 769, 777, 126 N.E.2d 795, 800. Similarly, "the expression 'proportional and reasonable' [in Part II, c. 1, Sec. 1, art. 4] forbids the imposition of taxes upon one class of persons or property at a different rate from that which is applied to other classes." See Opinion of the Justices, 341 Mass. 738, 167 N.E.2d 745, 752. This interpretation of these constitutional provisions has been unvarying "from the early days of the Commonwealth to the present time." See Opinion of the Justices, 332 Mass. 769, 778-779, 126 N.E.2d 795, where the earlier decisions are collected; Carr v. Assessors of Springfield, 339 Mass. 89, 91-93, 157 N.E.2d 880; Stone v. Springfield, 341 Mass. 246, 248, 168 N.E.2d 76, 78 (where it was said, "An intentionally made, widely disproportionate assessment would constitute a gross violation of 'a fundamental constitutional limitation upon the power . . . to impose property taxes'"). . . .

In *Cheshire v. County Commrs. of Berkshire*, 118 Mass. 386, 389, this court said that the constitutional provision for "proportional and reasonable" taxes "forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation." The court there recognized that "[p]ractically it is impossible to secure exact equality or proportion in the imposition of taxes" but it pointed out that the statutory "aim [should] be towards that result, by approximation at least." The statements of agreed facts negate any suggestion of "equality or proportion" in the 1961 Springfield assessments, for it is established that disproportion, rising to a maximum of the difference between 50% and 85% of fair cash value, "was deliberate and intentional" and that personal property and one class of real estate was thus to be assessed 170% (85/50) of the level of assessment of another class of real estate. This is not even equality by "approximation," which, at the least, requires attempted equality of assessment in absolute good faith and to the best of the abilities of the public officers charged with making valuations.

* * * * *

Discussion Notes

1. The *Bettigole* case is discussed in Note, "Inequality in Property Tax Assessments: New Cures for an Old Ill," *Harvard Law Review* 75 (May 1962): 1374.

2. For a case reaching a different result, see *City of Sacramento v. Hickman*, 428 P.2d 593 (Cal. 1967).

3. For an economic analysis of litigation seeking uniform assessment, see Robert P. Inman and Daniel L. Rubinfeld, "The Judicial Pursuit of Local Fiscal Equity," *Harvard Law Review* 92 (June 1979): 1662.

4. *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 446 (1923):

The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 percent of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the equal protection clause of the Fourteenth Amend-

ment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of *Taylor v. Louisville & Nashville R.R. Co.*, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this Court in *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 499, 516, 517, 518. The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

Gottlieb v. City of Milwaukee
33 Wis.2d 408, 147 N.W.2d 633

* * * * *

The Urban Redevelopment Law was enacted initially by ch. 333 of the Laws of Wisconsin of 1943. Although it has been modified to some degree, in substance the law authorizes local governing bodies of Wisconsin cities to enter into contracts with persons who have formed what is referred to as a redevelopment corporation. These contracts require the erection of buildings or improvements according to an approved plan in an area of the city found to be substandard or insanitary in exchange for the privilege of partial tax freeze.

Sec. 66.409 provides that the local governing body may by ordinance exempt real property held by a redevelopment corporation for a maximum exemp-

tion period of not more than thirty years from that portion of every local tax that is in excess of the "maximum local tax." The "maximum local tax" is defined in Sec. 66.405(3) (j) and (m) as the tax that would have been payable if computed on the last assessed valuation of the parcel of real estate prior to the transfer of the property to the redevelopment corporation.

The plaintiffs herein allege that the law violates the rule of uniformity laid down by Art. VIII, Sec. 1, of the Wisconsin constitution in that it requires the assessor to ignore for the period of the "freeze" the value of the particular improvements which in other locations or under other ownership would be assessable and taxable and the consequence of this is to cause the effective rates on taxable real estate to be unequal.

* * * * *

HEFFERNAN, Justice.

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**Standards of tax uniformity required by
Art. VIII, Sec. 1, of the
Wisconsin Constitution**

The language of the constitution relevant to this question is simple:

The rule of taxation shall be uniform. . . .
Taxes shall be levied upon such property . . .
as the legislature shall prescribe.

Nonetheless, this provision of the constitution has been the subject of litigation for well over one hundred years. The Wisconsin Reports show that more than 40 cases have been concerned with the interpretation of this portion of Art. VIII. In 1906 Mr. Justice Marshall in *Chicago & N.W. R. Co. v. State*, 128 Wis. 553, 587, 108 N.W. 557, 561, sought to dispel for all time any doubts as to its meaning. He stated:

It seems quite unaccountable that, after the lapse of nearly 60 years since the constitution was framed, and half a century since that feature of the article in question was first considered by this court, notwithstanding the seemingly clear decision then made on the point at that time primarily involved, followed soon thereafter by a second decision covering the precise matter now in hand, that we should find ourselves at this late day face to face with a controversy as to the precise meaning of the words of our organic law: "The rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe." That language seems plain, this court, as we shall see, early said it was very plain, and yet it has been treated time and again as ambiguous, and still seems to be so regarded, notwithstanding all that this court has in fifty years said on the subject. And so it must be regarded, especially since men of the highest attainments, lawyers, jurists, and learned laymen, have read different meanings out of it, having regard, as it has been thought, to the object of state constitutions and the broad powers possessed by the people, unrestrained by a charter on the subject. No better object lesson, perhaps, could well be presented to illustrate the rule that ambiguity requiring judicial construction may as well arise through the apparent consequences of applying words in their literal sense to the subject with which they deal as from uncertainty of sense in the words them-

selves, than by the matter in hand. By such application, especially in the light of the varying views entertained of what this court has decided, the words of the Constitution speak one way, seemingly, to some and another way to others. It is to be hoped that by the treatment of the subject in the three cases now before us all obscurities may be cleared up.

In view of the approximately 20 cases on the same subject that have come before the court since Mr. Justice Marshall wrote, it is apparent that his hopes have not been realized. In view of past experience, this court does not have the temerity to assume that this case will lay to rest all future uncertainties concerning the meaning of Art. VIII, Sec. 1, of the constitution. We do hope, however, to restate what we deem to be the uniform holding of this court almost from its very inception, and in so doing determine the question presently before us.

We adhere to the rule of *Knowlton v. Board of Supervisors of Rock County* (1859), 9 Wis. 378 (*410). This case is over one hundred years old and is, for all practical purposes, the seminal case interpreting that portion of the constitution. Its current viability is shown by the fact that we have found it applicable and quoted it with approval in cases decided within the last two terms of court. . . .

The *Knowlton* case involved a statute which provided that rural property within the limits of the city of Janesville was not to be subject to an annual city tax exceeding one-half that levied upon other property in the city. The court held that this tax differential violated the uniformity clause of the Constitution and held that the 50 percent exemption was invalid. The supreme court therein rejected the theory that partial exemptions were permissible, and dismissed as untenable the contention that the legislature could classify property to be taxed at different rates so long as there was uniformity within the class. In *Knowlton* the court held that once property is selected for taxation it must be taxed in its entirety and the same rate must be applied to it as to all property in the tax district.

The court stated therein, 9 Wis. at page 388 (*420):

. . . when property is the object of taxation, it should all alike, in proportion to its value, contribute towards paying the expense of such benefits and protection. These are plain and obvious propositions of equity and justice, sustained as we believe by the very letter and spirit of the constitution. Its mandate, it is true, is very brief, but long enough for all practical purposes; long enough to

embrace within it clearly and concisely the doctrine which the framers intended to establish, viz: that of equality, "The rule of taxation shall be uniform," that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform; it shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing to its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity in such a proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised.

In *Knowlton* the court was confronted with the argument that the uniformity requirement would be satisfied if there were uniformity within a proper class and that, since all rural property was taxed at one-half and all other property (in a proper and different class) at the full rate, there was uniformity. The court said, *supra*, 9 Wis. page 390 (*421):

The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, whilst the constitution established but one fixed, unbending, uniform rule upon the subject.

It was conceded in *Knowlton*, and the proposition has never been seriously challenged, that the phrase, "as the legislature shall prescribe," confers upon the legislature the right to select some property for taxation and to totally omit or exempt others. From this it was argued, *Knowlton*, *supra*, 9 Wis. page 391 (*423), that:

. . . if they have the right to wholly exempt, they can do so partially by saying that it shall pay a certain portion of the taxes, or that it shall be taxed at a certain rate lower than other taxable property. . . .

To that, the court in *Knowlton*, *supra*, 9 Wis. page 392 (*424), stated:

. . . we think this argument must fail; for the very moment that the legislature say that a specific article or kind of property shall be taxed, or shall contribute at all towards the

expense of government, from that very moment the first clause of the section takes effect, and it must be taxed by the uniform rule. The legislature can only 'prescribe,' and when they have done that, the first clause of the section governs the residue of the proceeding. There cannot be any medium ground between absolute exemption and uniform taxation.

The pronouncements of this court in *Knowlton* have been followed undeviatingly by this court since 1859 in all cases involving the general property tax.

* * * * *

Mr. Justice Marshall in *Chicago & N. W. R. Co. v. State* (1906), 128 Wis. 553, 108 N.W. 557, discussed the cases that had been decided under Art. VIII, Sec. 1, of the constitution. From his exposition of the subject, the following principles, to which we subscribe, may be derived:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

We conclude that these principles, distilled from the opinion of Mr. Justice Marshall, correctly state the present law. They have without equivocation governed the decisions of this court since the date of that opinion.

* * * * *

In 1966, in *State ex rel. Harvey v. Morgan*, 30 Wis.2d 1, 139 N.W.2d 585, we pointed out that a rebate of income taxes, or a payment from the general fund as a relief measure for the assistance of the needy aged, did not violate the uniformity rule, since the scheme was in no way hinged upon the ownership or taxation of property. The clear implication of the case is that a payment that would constitute a rebate

of property taxes would be a partial exemption and therefore void.

The viability of the uniformity clause is attested to by the series of constitutional amendments that have been necessary to avoid its proscriptions. In 1908, Art. VIII, Sec. 1, was amended to permit income, privilege, and occupational taxes without regard to the uniformity clause. In 1927, it was amended to make possible the separate taxation of forests and minerals. In 1941, came an amendment that permitted municipalities to collect and return taxes on real estate by optional methods, and, in 1961, the inequality of taxing merchants' stock in trade and certain other personal property uniformly with general property was recognized, and the requirements of the section were lifted in respect to the types of property specified. Without question these amendments resulted from the recognition by the legislature and the people of the onerous strictures of the constitutional requirement of uniformity.

The rigors of the uniformity clause have on occasion prevented the passage of socially desirable legislation; and to accomplish the ends sought, constitutional amendments permitting limited and defined exceptions to the rule have been enacted and ratified. Its purpose, however, is as worthy as it is necessary. It is "to protect the citizen against unequal, and consequently unjust taxation." *Weeks v. City of Milwaukee* (1860), 10 Wis. 186, 201 (*242, *247).

Do the tax freeze provisions of the Urban Redevelopment Law violate the constitutional requirement of uniformity.

It was argued in the trial court that all that is required by the constitutional uniformity clause is that there be a proper classification based upon substantial distinctions and that there only need be equality or uniformity within the class. This is an assumption that cannot be supported in light of this court's consistent interpretation of the uniformity provision. As we have recently said in *State ex rel. Baker Mfg. Co. v. City of Evansville* (1952), 261 Wis. 599, 609, 53 N.W.2d 795, 800:

... it contends ... that the requirement of uniformity is satisfied so long as there is uniformity within the class. We do not consider this to be the law.

We have also said that there can be but one class of property subject to tax, and that all others must be completely exempt. However, were this not a property tax, the classification approved by the trial court on the basis of reasonableness would be sufficient. . . .

It is apparent from the face of the statute that in Sec. 66.409, Stats., we are dealing with a direct property tax and not some other kind of exaction, license, or imposition. Sec. 66.409(1) by its very terms:

... exempt[s] real property ... from any increase in any local tax over the maximum local tax.

* * * * *

A perusal of the statutes reveals that during the period of the freeze, which cannot exceed thirty years, the tax on the property will be computed on a valuation that is determined by the assessed value just prior to its acquisition by the redevelopment corporation. For that length of time the owners are relieved of any tax based on an increment in value that might be attributable to the real estate itself and they are relieved of any tax that would result by virtue of an increase in value as the result of improvements or building on the property. Taxes are determined by valuation at the start of, or just prior to, the freeze period instead of by the application of the current assessed value each year as is required in respect to all other property. It is apparent that the property of the redevelopment corporation is subject to a portion of the property tax, but by a statutory concession it is not subject to all of the tax that would fall on other property of equal current value. It is partially exempt.

For reasons that the legislature considered sufficient, the property of the redevelopment corporation is given preferential treatment and bears less of its tax burden on the true ad valorem basis than does other property. This law accomplishes its intended, but constitutionally prohibited, purpose—the unequal taxation of property. Property taxes where such a freeze is in force are not uniform in their impact on property owners. Such lack of uniformity is accomplished by a prohibited partial exemption from taxation. While it may be conceded, as contended by respondent, that, if the law accomplishes its purpose, new building may be stimulated and the tax base broadened to the extent that at some time in the future other taxpayers not covered by the freeze might be benefited, nevertheless, the fact remains undisputed and undisputable that, if redevelopment corporations are assessed at a figure less than that which would be assigned to other taxpayers holding equally valuable property, other taxpayers will be paying a disproportionately higher share of local property taxes. This is not uniformity.

* * * * *

Under the terms of Art. VIII, Sec. 1, of our constitution as it now exists and as it has been interpreted with consistency by this court, partial exemptions from taxation cannot be granted to urban redevelopment corporations.

* * * * *

Discussion Notes

1. The *Gottlieb* case, as well as the whole question of differential property taxation to encourage certain activities, is ably discussed in David A. Myers, "Open Space Taxation and State Constitutions," *Vanderbilt Law Review* 33 (May 1980): 837.

2. What would be the obvious solution for those supporting the Urban Redevelopment plan in Wisconsin?

The rigid uniformity provisions were originally designed to prevent legislative abuses of the taxing power. . . . The open space amendments carve out certain exceptions to these rules. At the same time, however, the amendments confirm the continuing viability of the concept of uniformity by allowing specific deviations from operation of the rules.

Myers, "Open Space Taxation," 838.

3. See generally Wade J. Newhouse, *Constitutional Uniformity and Equality in State Taxation* (Buffalo: William S. Hein and Co., 2d Ed. 1984), 2 vols.; Michael M. Bernard, *Constitutions, Taxation and Land Policy* (Lexington, Mass.: D.C. Heath,

Lexington Books, 1979, 1980) 2 vols; William L. Matthews, Jr., "The Function of Constitutional Provisions Requiring Uniformity in Taxation," *Kentucky Law Review* 38 (1949-1950): 31, 187, 377.

4. State constitutions may hinder attempts to remedy taxation schemes that violate other provisions of the constitution. In *Buse v. Smith*, 74 Wis.2d 550, 247 N.W.2d 141 (1976), the Wisconsin Supreme Court held that reforms in the system of funding public schools from property tax revenues violated a constitutional requirement that local taxes be spent in the locality where they are collected. See generally Comment, "State Constitutional Restrictions on School Finance Reform: *Buse v. Smith*," *Harvard Law Review* 90 (May 1977): 1528.

5. For treatment of specific areas of concern, see Jacqueline P. Hand, "Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland," *University of Pittsburgh Law Review* 45 (Winter 1984): 289; Dean T. Massey and Margaret T. Silver, "Property Tax Incentives for Implementing Soil Conservation Programs Under Constitutional Taxing Limitations," *Denver Law Journal* 59 (No. 3, 1982): 485.

2. Property Tax Exemptions

Lutheran Home, Inc. v. Board of County Commissioners of Dickinson County 211 Kan. 270, 505 P.2d 1118 (1973)

PRAGER, Justice:

This is an action brought by Lutheran Home, Inc. pursuant to K.S.A. 79-2005 to recover ad valorem real property taxes paid under protest. The basis of the claim is that plaintiff's property is used exclusively for charitable and benevolent purposes and therefore is exempt from taxation. Plaintiff's property consists of a tract of land on which is situated a nursing home owned and operated by the plaintiff corporation. . . .

The facts in this case are not in dispute. Lutheran Home is a nonprofit corporation, organized and chartered under the laws of Kansas. Although its name may indicate otherwise, Lutheran Home is not affili-

ated with nor supported nor regulated by any religious body. . . .

In 1964 when the nursing home opened it was owned and operated by another corporation, Lutheran United Home for the Aged, Inc. . . . The stated purpose of the new corporation Lutheran Home, Inc. was principally to own, lease, operate, maintain and administer nursing homes on a nonsectarian basis and to provide elderly persons on a nonprofit basis with housing facilities and services specially designed to meet the physical, social and psychological needs of the aged, and contribute to their health, security, happiness and usefulness in longer living. . . .

The articles of incorporation of Lutheran Home, Inc. provide that on dissolution of the corporation after the payment of all bills and accounts the remainder of the property shall be converted to cash which shall be paid over to such charitable and educational organizations as shall be designated by a vote of the trustees. The articles provide that they may be amended by a 2/3 vote of the trustees at any annual or special meeting. The articles further provide for the adoption of bylaws by the trustees who may change

them at their pleasure so long as they do not conflict with the articles. Article XII declares that no part of the net earnings of this corporation shall inure to the benefit of any private individual. Article XII of the corporation bylaws provides as follows:

It is the intent and purpose of this corporation and its Trustees that all services rendered and functions performed by the corporation except those rendered and performed for the United States or for any of its agencies, shall, at all times be handled on a cost of doing basis and without income or profit to the corporation or to its members as such, in order that any and all amounts received by the corporation from or in connection with, such services or functions, over and above the cost thereof to the corporation, shall at all times, belong to and be the exclusive property of the corporation.

* * * * *

During 1969 and 1970 the corporation charged a monthly rate of \$230 for each ambulatory resident; non-ambulatory residents were assessed an additional \$30 per month. At the time of the trial in March 1971 there had been an increase in the monthly rate to \$260 per month for ambulatory residents and \$290 per month for non-ambulatory residents. Residents who are on welfare are charged \$300 per month which is paid by welfare funds. All residents of the facility are required to pay the monthly charge for services which is paid either from their own or family funds or by welfare. About half of the residents pay their own way and the other half receive welfare assistance. At the trial Mrs. Kandt testified that no patient had been evicted or asked to leave because he could not pay the monthly charge. She testified that there had been instances in the past where certain patients had not been able to pay and that debit is still on the books. There is nothing in the record to show that any resident has been admitted to the nursing home under an agreement to pay less than the going rate. There is nothing in the evidence to show that the lesser monthly charge is made by the Lutheran Home, Inc. than is made by other nursing facilities in the county. Residents are not required to pay an entrance fee to enter the home.

* * * * *

Since the facts are undisputed, the case presents a pure question of law as to whether or not Lutheran Home is entitled to an exemption on the nursing home property under Article 11, Section 1, of the Kansas Constitution and K.S.A. 79-201. Under both

the constitutional provision and the statutory provision in order to be entitled to an exemption, Lutheran Home, Inc. has the burden to prove that the nursing home is used exclusively for benevolent or charitable purposes. The parties in this case rely on many decisions of this court pertaining to tax exemption for charitable and benevolent purposes. . . . We have considered all of those cases along with the many Kansas cases cited therein and the more recent case of Sigma Alpha Epsilon Fraternal Ass'n v. Board of County Comm'rs, 207 Kan. 514, 485, P.2d 1297. All of these decisions recognize certain basic principles of law which are applied in cases of claimed exemption from taxation because of charitable use. These principles may be summarized as follows:

(1) Constitutional and statutory provisions exempting property from taxation are to be strictly construed.

(2) The burden of establishing exemption from taxation is on the one claiming it.

(3) The exemption from taxation depends solely upon the exclusive use made of the property and not upon the ownership or the character, charitable or otherwise, of the owner.

(4) The test of whether an enterprise is charitable for ad valorem tax purposes is whether its property is used exclusively to carry out a purpose recognized in law as charitable.

(5) The question is not whether the property is used partly or even largely for the purposes stated in the exemption provisions, but whether it is used exclusively for those purposes. (Clements v. Ljungdahl, 161 Kan. 274, 278, 167 P.2d 603; State, ex rel., v. Security Benefit Ass'n, 149 Kan. 384, 87 P.2d 560.)

(6) The phrase "used exclusively" as contained in Section 1, Article 11, of the Kansas Constitution, was intended by the framers in the sense that the use made of property sought to be exempt from taxation, must be only, solely, and purely for the purposes stated in the Constitution, and without admission to participation in any other use. (Sigma Alpha Epsilon Fraternal Ass'n v. Board of County Comm'rs, supra.)

The principles of law set forth above have generally been accepted and followed in all of our decisions. The major problem presented in this case and in other cases of claimed exemption is whether or not a particular use of property falls within the definition of a use for charitable or benevolent purposes. In Mason v. Zimmerman, supra, we held that the term "benevolent" as used in the constitutional and statutory provisions, is entirely synonymous with "charitable." The trouble is that there has been and is a wide disagreement as to what constitutes a "charitable" use.

The strict constructionist construes the word "charity" from the concept of the taxpayer citizen.

Typical of this approach is the opinion in *Washburn College v. Comm'rs of Shawnee Co.*, supra, decided in 1871. In that opinion Mr. Justice Brewer stated as follows:

All property receives protection from the State. Every man is secured in the enjoyments of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the State from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms. . . . (pp. 348-349.)

The more liberal approach to the problem is exemplified in our recent decisions in *Topeka Presbyterian Manor v. Board of County Commissioners*, supra, and *Evangelical Village & Bible Conference, Inc. v. Board of County Commrs.*, supra. The rationale of this approach is that the word "charity" should be given a broad rather than a strict meaning. For example, charity is defined as a gift for some general public use or the accomplishment of some social interest or whatever proceeds from a sense of moral duty or feeling of kindness or humanity for the relief or comfort of another.

The term "charity" in a legal sense is really a matter of description rather than of precise definition and therefore a case involving a determination of that which is charitable must be decided upon its own particular facts or circumstances. (*Topeka Presbyterian Manor v. Board of County Commissioners*, supra.) In recent years the principles of charitable exemption from taxation have been given close scrutiny and serious consideration by both federal and state courts throughout this country. There has been an increasing trend toward the tightening of exemptions and a return to the more strict view. . . .

We have reconsidered all of the Kansas decisions along with cases from other jurisdictions. We have concluded that the concept of "charity" as set forth in *Mason v. Zimmerman*, supra, should be applied in this case and in future litigation in this state. In *Mason* we said that "charity" is a gift to promote the wel-

fare of others in need, and "charitable," as used in the constitutional and statutory provisions, means intended for charity. In this sense charity involves the doing of something generous for other human beings who are unable to provide for themselves. To have charity there must be a gift from one who has, to one who has not. Unless there is a gift, there can be no charity.

As pointed out above "charity" is sometimes used interchangeably with "benevolence" and "beneficence" in describing good-will, or a helpful attitude or kindly acts, but "charity" is commonly understood more objectively as denoting gifts to the poor or positive steps taken to relieve distress and suffering of those unable to help themselves. It is the latter concept of "charity" and not the former, which is more consistent with our established rule that constitutional and statutory provisions which exempt property from taxation are to be strictly construed.

We also are convinced that "benevolent" as used in the constitutional and statutory provisions has the same meaning as "charitable" used in its objective sense of providing relief to those unable to help themselves. Under this definition of the word "charity" the characteristics of an organized charity are that whatever it does for others it does free of charge, or, at least, so nearly free of charge as to make the charges nominal or negligible, and that those to whom it renders help or services are those who are unable to provide themselves with what the institution provides for them, that is, they are legitimate subjects of charity.

We recognize that this construction of the word "charity" is more restrictive than the liberal construction given the term in *Topeka Presbyterian Manor v. Board of County Commissioners*, supra, and *Evangelical Village and Bible Conference, Inc. v. Board of County Commissioners*, supra. We believe, however, that such an interpretation is more fully in accord with the intent of the framers of the Kansas Constitution as expressed in Article 11, Section 1 and the intent of the legislature as set forth in K.S.A. 79-201. In view of the strict construction adopted here we, of necessity, overrule *Topeka Presbyterian Manor v. Board of County Commissioners*, supra; *Evangelical Village and Bible Conference, Inc. v. Board of County Commrs.*, supra, and other decisions of this court contrary to our holding here.

When we turn to the factual circumstances shown in this case we have no hesitancy in holding that the Lutheran Home is not entitled to an exemption from taxation under the charitable exemption provisions of the Kansas Constitution and K.S.A. 79-201. . . .

* * * * *

Discussion Notes

1. Could the Kansas legislature provide for a different result by statute? See *Jasper v. Mease Manor, Inc.*, 208 So.2d 821 (Fla. 1968); Note, "Property Tax Exemptions Under Article VII, Section 3(a) of the Florida Constitution of 1968," *University of Florida Law Review* 21 (Spring 1969): 649-50. Review the materials in Chapter 5, Section I.

2. See generally, Peter Swords, *Charitable Real Property Tax Exemptions in New York State: Menace or Measure of Social Progress?* (New York: Association of the Bar of the City of New York, 1981); William R. Ginsberg, "The Real Property Tax Exemption of Nonprofit Organizations: A Perspective," *Temple Law Quarterly* 53 (No. 2, 1980): 291; Walter G. Farr, Jr., "The Property Tax As an Instrument for Economic and Social Change," *The Urban Lawyer* 9 (Summer 1977): 447; Note, "State and Local Industrial Location Incentives: A Well-Stocked Candy Store," *The Journal of Corporation Law* (Spring 1980): 517.

3. Uniformity in Nonproperty Tax Matters

Amidon v. Kane **444 Pa. 38, 279 A. 2d 53 (1971)**

ROBERTS, Justice

In this consolidated appeal, we are asked to review a May 20, 1971 decree of the Commonwealth Court dismissing three separate complaints in equity challenging the constitutionality of the recently enacted Personal Income Tax provided by Article III of the Tax Reform Code of 1971, adopted March 4, 1971, Act No. 2, 72 P.S. Sec. 7101 et seq.

The various plaintiff-appellants advance four arguments in support of their claims that the Personal Income Tax is repugnant to the Pennsylvania Constitution. . . . And finally, it is argued that the tax ignores the mandate of Article VIII, Section 1 that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, . . ."

After careful and considerable study, we conclude that the tax in question offends the constitutional requirement of uniformity and that it is for this reason invalid.

Preliminarily, it is noted that we are not unmindful of the fiscal problems and difficulties besetting the Commonwealth. We must at the same time, however, emphasize that our awareness and full appreciation of these problems cannot in any way enlarge or otherwise affect our limited constitutional role in this adjudication.

The selection of subjects for taxation, their classification, and the method of collection are legislative matters. *Jones and Laughlin Tax Assessment Case*, 405 Pa. 421, 175 A.2d 856 (1961). Thus, this Court

may not consider the wisdom of a challenged tax or the purpose of its enactment. *Blauner's, Inc. v. Philadelphia*, 330 Pa. 342, 198 A. 889 (1938). So long as a statute is constitutional, the Legislature is the sole judge of its necessity or expediency and a court cannot refuse to enforce it on any ground that it is unjust, unwise, inexpedient, obsolete or contrary to any supposed policy or custom. . . .

Conversely, however, we cannot deem a legislative enactment constitutional merely because it may seem in our view to be just, expedient, necessary or wise, or because it enjoys unanimous popular support. The Constitution is in matters of state law the supreme law of this Commonwealth to which all acts of the Legislature and of any governmental agency are subordinate . . . and it is our duty and responsibility to consider only whether the legislation meets or violates constitutional requirements. *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969). Accordingly, quite aside from the instant tax's possible social, economic or other merit, we must determine whether it satisfies the constitutionally mandated standard of uniformity.

The Personal Income Tax contained in Article III of the Tax Reform Code of 1971 operates as follows:

Section 305 of the Code purports to impose a tax "[f]or the privilege of receiving, earning or otherwise acquiring income from any source whatsoever. . . ." However, the annual tax of 3.5% is levied not upon all income "from any source whatsoever" but rather only upon "the taxable income of the taxpayer." "Taxable income" is defined in Section 302(q) to mean with a few specific variations "the same as 'taxable income' as defined in the Internal Revenue Code. . . ."

The concept of taxable income in the Internal Revenue Code is of course an artificial construct, in many ways far removed from the common and ordinary meaning of the term income. For example, income derived from gifts and inheritances, interest on the obligations of a state or political subdivision, contributions by employers to employee health and accident plans, and the first one hundred dollars received by a taxpayer as dividends from domestic corporations is all specifically excludable from taxable income. In addition, the Internal Revenue Code permits the deduction of myriad items from actual or gross income in order to compute taxable income. Some of the more common and well known examples of such deductions are real estate taxes, interest on real estate mortgages and other personal financing, alimony payments, and various other state and local taxes.⁵

* * * * *

After defining taxable income in terms of the federal tax base, the Tax Reform Code of 1971 provides four types of tax credits. Section 316 allows a credit for income taxes imposed by another state, Section 317 provides a similar credit for 30% of certain local taxes, and Section 318 deals with a credit for taxes paid by a trust on accumulated income. Finally, Section 319 sets out a variable schedule of “vanishing tax credits” for the benefit of individuals whose state taxable income does not exceed \$9,900.

Does then the foregoing scheme of taxation conform to the requirements of the Uniformity Clause?

The constitutional imperative of uniformity in the imposition of taxes has remained unchanged since its first adoption in the Pennsylvania Constitution of 1874.⁸ Article XI, Section 1 of that constitution directed without qualification that:

All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Legislative proposals to amend the Uniformity Clause were rejected by the electorate in 1913 and

⁵Many of the deductions and exemptions allowed by federal tax law are unrelated to considerations of revenue raising or equalization of the tax burden; they pertain instead to the furtherance of various national non-tax policies. . . .

⁸Prior to 1874 there had been no express state constitutional provision on the power to tax other than the Bill of Rights with its implication “against all unjust, unreasonable and palpably unequal exactions under any name or pretext.” Washington Avenue, 69 Pa. 352, 363 (1871); Hammett v. Philadelphia, 65 Pa. 146 (1869); see Note, The Pennsylvania Constitutional Requirement of Uniformity in Taxation, 87 U.Pa.L.Rev. 219 (1938).

1928,⁹ and the May, 1967 referendum submitted to the people of Pennsylvania concerning whether a constitutional convention would be called specifically provided that the convention would not revise that portion of the constitution. Likewise, the constitutional convention enabling act stated in no uncertain terms that “. . . nor shall that part of Article IX, Section 1 of the Constitution providing that: ‘All taxes shall be uniform . . .’ be *modified, altered or changed in any respect whatsoever.*” Act of March 16, 1967, P.L.2, Sec. 7, [1967] Pa. Laws 7. (Emphasis added.)

In addition to its unbroken historical continuity, the constitutional standard of uniformity also possesses widespread and far reaching application. While some other jurisdictions adhere to the view that uniformity applies only to property taxes,¹⁰ our particular constitutional mandate that “[a]ll taxes shall be uniform . . .” is quite clear, and it is settled that this mandate applies to all species of taxes. As was stated in *Saulsbury v. Bethlehem Steel Company*, 413 Pa. 316, 196 A.2d 664 (1964):

The question of whether or not the constitutional requirement of uniformity applies to a particular kind of tax depends upon the peculiar wording of the requirement itself. The Pennsylvania Constitution specifically states that ‘All taxes shall be uniform, upon the same class of subject.’ (Emphasis supplied). This language is as broad and comprehensive as it could possibly be and must necessarily be construed to include all kinds of taxes, be they in the nature of property or excise levies. The Pennsylvania constitutional provision is all inclusive and is clearly not limited to requiring uniformity on property taxes alone. . . .

It is thus quite clear that the instant tax must satisfy the requirement of uniformity.

The substantive content of the Uniformity Clause is of course less susceptible to precise definition than is the scope of its application. However, certain general principles are well established. As this Court declared in the *Allentown School District Mercantile Tax Case*, 370 Pa. 161, 87 A.2d 480 (1952):

⁹*Kelley v. Kalodner*, 320 Pa. 180, 192, 181 A. 598, 603 (1935); see Callender, *The Constitution—Should It Be Revised?* 29 Pa.B.A.Q. 205 (1958).

¹⁰Cooley on Taxation, Sec. 267 (4th ed. 1924).

[The Uniformity Clause] means that the classification by the legislative body must be reasonable and the tax must be applied with uniformity upon similar kinds of business or property and with substantial equality of the tax burden to all members of the same class. . . .

* * * * *

Uniformity requires substantial equality of tax burden While taxation is not a matter of exact science and perfect uniformity and absolute equality in taxation can rarely ever be attained, *Wilson v. Philadelphia*, 330 Pa. 350, 352, 198 A. 893, the imposition of taxes which are to a substantial degree unequal in their operation or effect upon similar kinds of business or property, or upon persons in the same classification, is prohibited: Cf. *Com. v. Overholdt and Co., Inc.*, 331 Pa. 182, 190-91, 200 A. 849; *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 599, 15 S.Ct. 673, 39 L.Ed. 759. Moreover while reasonable and practical classifications are justifiable, where a formula or method of computing a tax will, in its operation or effect, produce arbitrary or unjust or unreasonably discriminatory results, the constitutional provision relating to uniformity is violated. *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 184 A. 37; *Hans Rees' Sons v. State of North Carolina*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879.

We may aptly repeat what was said by (former Chief) Justice Maxey in *Com. v. Overholdt & Co., Inc.*, 331 Pa., supra, page 191, 200 A. at page 853. 'A tax to be uniform must operate alike on the classes of things or property subject to it. . . .' *Id.* at 167-168, 170, 87 A.2d at 483, 484.

In addition to these general principles, two prior decisions of this Court are particularly pertinent to our disposition of this appeal.

The first of these, *Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598 (1935), involved a 1935 Pennsylvania statute imposing an annual tax upon the entire net income of Pennsylvania residents and upon net income received by nonresidents from property owned or from any business or occupation carried on in the Commonwealth. That act authorized many exemp-

tions for purposes of calculating "gross income" and numerous deductions for the computation of "net income." It likewise sought to enact a standard deduction for living expenses (\$1,000 in the case of single persons and \$1,500 in the case of married persons and heads of households), and an additional \$400 deduction for each dependent under the age of eighteen. The tax was then imposed upon net income at a graduated rate: incomes under five thousand dollars were taxed at 2%; incomes between five and ten thousand dollars at 2.5%; incomes between ten and twenty-five thousand dollars at 3%; etc.

Reasoning as follows, this Court declared the tax invalid:

The question then arises, does the act fulfill the rule of uniformity prescribed by the Constitution. Plaintiffs contend it does not, and for several reasons. The first is that the provision exempting from taxation those persons whose incomes fall below \$1,000 or \$1,500, depending upon whether they are single or married, shows upon its face a lack of uniformity. There can be no doubt that these exemptions were inserted for the purpose of putting the burden of the tax upon those most able to bear it, *but it results in taxing those whose incomes arise above a stated figure merely because the Legislature believes their incomes are sufficiently great to be taxed. It is obvious that the application of the tax is not uniform. . . .*

Moreover, the tax is in violation of the uniformity clause in its application to the persons whose incomes fall within the various brackets designated in the act. . . . 320 Pa. at 188-89, 181 A. at 602 (emphasis added).

The *Kelley* decision, in other words, clearly involved an alternative holding: the tax was deemed constitutionally deficient both because of the personal exemptions and because of the graduated rate.

The second of the two decisions most significant to the instant case is *Saulsbury v. Bethlehem Steel Company*, supra, decided in 1964. In that case we ruled that an "occupation and occupational privilege tax" which exempted individuals with an annual income of less than \$600 transgressed the limits of uniformity. In so holding, this Court reaffirmed the rule of *Kelley v. Kalodner* and largely on the basis of that decision concluded that:

If a tax is levied on an occupational privilege, it must apply to all who share the privi-

lege. Part of the class may not be excused, regardless of the motive behind the action. (emphasis added).

413 Pa. at 320, 196 A.2d at 666

It is true that the challengers of the constitutionality of state or local taxation bear a heavy burden in their efforts to overturn such legislation. See, e.g., *Commonwealth v. Life Assurance Company of Pennsylvania*, supra, 419 Pa. 376-77, 214 A.2d at 214. Nevertheless, in comparing the taxing schemes in *Kelley* and *Saulsbury* with that involved in the instant case, the conclusion is unescapable that the personal income tax presently challenged violates uniformity. Although the Tax Reform Code of 1971 purports to impose a flat 3.5% tax upon "taxable income," the concept of "taxable income" already reflects the federal personal exemptions for the taxpayer and his qualified dependents. . . . Thus, built-in to the Tax Reform Code of 1971 are *exactly the same elements of nonuniformity as were condemned in both Kelley and Saulsbury*.

EAGEN, Justice (dissenting)

Neither from my understanding of the Uniformity Clause, nor from past decisions by our Court in this area of law nor indeed from the reasoning of the majority am I inexorably led to conclude that the general features of the Personal Income Tax . . . violate Article VIII, Sec. 1 of the Pennsylvania Constitution and for this reason I am compelled to dissent.

In 1935 this Court answered with a resounding NO the question of whether Pennsylvania could enact a *graduated* personal income tax which would comport with the Uniformity Clause of the Taxation and Finance Article of the Constitution. *Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598 (1935). But just as importantly we did not say that the Legislature could never enact any form of income tax. The injunction was simply that the constitutional mandate of uniformity must be observed.

My review of the decisions of this Court encourages me in the conclusion that the Legislature in framing Article III of the Tax Reform Code has remained faithful to the constitutional guidelines and nice distinctions of the concept of uniformity as set down by this Court.

At the outset it might be helpful for purposes of clarity and comparison to review briefly the majority's position. It is their contention that although the Tax Reform Code of 1971 purports to impose a flat 3.5 percent tax on taxable income, the concept of 'taxable income' already reflects the federal personal exemptions for the taxpayer and his qualified

dependents and hence embodies exactly the same elements of nonuniformity as were condemned in *Kelley v. Kolodner*, supra, and *Saulsbury v. Bethlehem Steel Company*, 413 Pa. 316, 196 A.2d 664 (1964). "The effect of the Personal Income Tax . . . is entirely nonuniform by imposing differing tax burdens upon persons enjoying identical privileges." [Opinion of the Majority, page 62].

The rejoinder to this position is that the Legislature in resorting to the federal system for its tax base in the present instance acted in no wise differently than it did in imposing the Corporate Net Income Tax Act of 1935, 72 P.S. 3420a et seq., a taxing statute which was upheld by this Court in *Turco Paint & Varnish Company v. Kalodner*, 320 Pa. 421, 184 A. 37 (1936) and again in *Commonwealth v. Warner Bros. Theatres, Inc.*, 345 Pa. 270, 27 A.2d 62 (1942).

The contention in the *Turco Paint and Varnish Company* case was that the corporate net income tax could not be uniform *because of the process by which net income was determined*.

Despite the fact that permitted deductions from gross income might vary drastically with respect to corporations having the same gross income and therefore result in widely varying taxable net income, our Court *did not* find this use of net income returned to and ascertained by the Federal Government as a Pennsylvania tax base to be violative of the Uniformity Clause. As Mr. Chief Justice Kephart wrote:

Plaintiff has not pointed to a single provision of the act which would demonstrate a legislative intent to impose a graded income tax. The rate used, 6 percent, is the same for all corporations. The tax base to which this rate is to be applied is also identical. It is the net income attributable to this state. It certainly should be axiomatic that the same impost, when applied to the same subject matter, does not make the tax graded simply because of the fact that one association, owning more of the particular taxable subject matter than another, pays, on this account, a greater sum total of tax.

320 Pa. at 426, 184 A. at 40.

A compelling question now arises: If a federally determined base (and one freighted with exemptions and deductions) is held to meet the constitutional test of uniformity in the instance of the corporate net income tax, why does not the same hold true for the personal income tax; how does it come to pass that the base of the latter tax is so fatally defective?

* * * * *

Discussion Notes

1. The Pennsylvania Court states that the “substantive content of the Uniformity Clause is of course less susceptible to precise definition than is the scope of its application.” 444 Pa. at 48, 279 A.2d at 59. What does this mean?

2. Massachusetts proposed an amendment to its constitution that would have permitted a graduated personal income tax, seeking to overcome a limitation similar to that recognized in *Amidon v. Kane*. Its attempt to limit corporate spending to influence the referendum was struck down, on fed-

eral constitutional grounds, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

3. In *State ex rel. Harvey v. Morgan*, 139 N.W. 2d 585 (Wis. 1966) the Wisconsin Supreme Court upheld state “circuit breaker” property tax relief legislation in the face of a uniformity clause challenge. Circuit breaker legislation provides for state rebates or credits to persons whose local property taxes exceed a certain portion of their income. The court held such legislation was not really a “tax” bill, but rather a welfare-type police power measure.

4. The “Tax Revolt” and State Constitutions

The famous Proposition 13 was an initiated amendment which created Article 13A of the California Constitution, adopted in June, 1978. It has been amended several times since then.

California Constitution, Article XIII A. Tax Limitation

Section 1. Ad Valorem tax on real property; maximum amount; application

Section 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.

Section 2. Full Cash value; reassessment; newly constructed property; seismic safety; value of replacement dwelling; full cash value base; change in ownership; family transfers

Section 2. (a) The full cash value means the county assessor’s valuation of real property as shown on the 1975-76 tax bill under “full cash value” or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valu-

ation. For purposes of this section, “newly-constructed” does not include real property which is reconstructed after a disaster, as declared by the Governor, where the fair market value of the real property, as reconstructed, is comparable to its fair market value prior to the disaster. Also, the term “newly constructed” shall not include the portion of reconstruction or improvement to a structure, constructed of unreinforced masonry bearing wall construction, necessary to comply with any local ordinance relating to seismic safety during the first 15 years following that reconstruction or improvement.

However, the Legislature may provide that under appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property which is eligible for the homeowner’s exemption under subdivision (k) of Section 3 of Article XIII and any implementing legislation may transfer the base year value of the property entitled to exemption, with the adjustments authorized by subdivision (b), to any replacement dwelling of equal or lesser value located within the same county and purchased or newly constructed by that person as his or her principal residence within two years after the sale of the original property. For purposes of this section, “any person over the age of 55 years” includes a married couple one member of which is over the age of 55 years. For purposes of this section, “replacement dwelling” means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, and any land on which it may be situated. For purposes of this section, a two-dwelling unit shall be considered as two separate single-family dwellings. This paragraph shall not apply to any replacement dwelling which was purchased or newly constructed prior to the effective date of this paragraph.

* * * * *

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.

(c) For purposes of subdivision (a), the Legislature may provide that the term "newly constructed" shall not include both of the following:

(1) The construction or addition of any active solar energy system.

(2) The construction or installation of any fire sprinkler system, other fire extinguishing system, fire detection system, or fire-related egress improvement, as defined by the Legislature, which is constructed or installed after the effective date of this paragraph.

(d) For purposes of this section, the term "change in ownership" shall not include the acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from the property replaced by eminent domain proceedings, by acquisition by a public entity, or governmental action which has resulted in a judgment of inverse condemnation. The real property acquired shall be deemed comparable to the property replaced if it is similar in size, utility, and function, or if it conforms to state regulations defined by the Legislature governing the relocation of persons displaced by governmental actions. The provisions of this subdivision shall be applied to any property acquired after March 1, 1975, but shall affect only those assessments of that property which occur after the provisions of this subdivision take effect.

(e) Notwithstanding any other provision of this section, the Legislature shall provide that the base-year value of property which is substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to comparable property, within the same county, that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property.

This subdivision shall apply to any comparable replacement property acquired or newly constructed on or after July 1, 1985, and to the determination of base-year values for the 1985-86 fiscal year and fiscal years thereafter.

(f) For the purposes of subdivision (e):

(1) Property is substantially damaged or destroyed if it sustains physical damage amounting to more than 50 percent of its value immediately before the disaster. Damage includes a diminution in the value of property as a result of restricted access caused by the disaster.

(2) Replacement property is comparable to the property substantially damaged or destroyed if it is similar in size, utility, and function to the property which it replaces, and if the fair market value of the acquired property is comparable to the fair market value of the replaced property prior to the disaster.

(g) For purposes of subdivision (a), the terms "purchased" and "change in ownership" shall not include the purchase or transfer of real property between spouses since March 1, 1975, including, but not limited to, all of the following:

(1) Transfers to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor.

(2) Transfers to a spouse which take effect upon the death of a spouse.

(3) Transfers to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation.

(4) The creation, transfer, or termination, solely between spouses, of any co-owner's interest.

(5) The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of the spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation.

(h) For purposes of subdivision (a), the terms "purchased" and "change of ownership" shall not include the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children, as defined by the Legislature, and the purchase or transfer of the first \$1,000,000 of the full cash value of all other real property between parents and their children, as defined by the Legislature. This subdivision shall apply to both voluntary transfers and transfers resulting from a court order or judicial decree.

(i) Unless specifically provided otherwise, amendments to this section shall be effective for

change of ownerships which occur, and new construction which is completed, after the effective date of the amendment.

Section 4. Special taxes; imposition

Section 4. Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Section 5. Effective date of article

Section 5. This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

Section 6. Severability

Section 6. If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

Discussion Notes

1. Proposition 13 was upheld against a variety of constitutional attacks, many of which had to do with the procedure by which it was adopted. *Amador Valley Joint Union High School Dist. v. Board of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281 (1978). See generally, George Lefcoe and Barney Allison, "The Legal Aspects of Proposition 13: The Amador Valley Case," *Southern*

California Law Review 53 (November 1979): 173.

2. Does Proposition 13 read like constitutional language? Why would it be put into the constitution?

3. Does a constitutional provision like Proposition 13 leave much room for judicial interpretation? Read the next case with that question in mind.

City and County of San Francisco v. Farrell 32 Cal. 3d 47, 648 P.2d 935 (1982)

MOSK, Justice.

In 1978, the voters adopted Proposition 13 (now art. XIII A of the Const.) which places limitations on the taxation powers of state and local government. Section 4 provides, "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district."

In our recent decision in *Los Angeles County Transportation Commission v. Richmond* (1982) 31 Cal.3d 197, 182 Cal. Rptr. 324, 643 P.2d 941, we interpreted the effect of this provision as it applies to "special districts," holding that as used in Section 4 that term encompasses only entities empowered to levy a property tax. The present action involves the meaning of another term used in Section 4: the issue is whether a payroll and gross receipts tax, the proceeds of which are placed into a city's general fund to be used for general governmental expenditures, constitutes a "special tax" so that a two-thirds vote of the electors is required in order to adopt such a tax.

Prior to March 28, 1980, San Francisco, a charter city and county, imposed on businesses operating in the city a tax of 1.1 percent on payrolls or gross re-

ceipts. The proceeds of the tax were to be used for general revenue purposes. On April 1, 1980, ordinances increasing the tax rate to 1.5 percent became effective. These increases were to expire on June 30, 1980, but prior to that date, the board of supervisors placed on the election ballot an initiative measure proposing to extend the expiration date. The voters approved the extension by a majority vote of 55 percent on June 3, 1980.

On May 29, 1980, the mayor approved a request for a supplemental appropriation of \$1.1 million by the department of health to pay for improvement of the elevator system at the municipally owned Laguna Honda Hospital. The request specified that the appropriation was to come from the proceeds of the increases in the payroll and gross receipts taxes.

Respondent Farrell, the city's controller, refused to certify that funds were available for the proposed expenditure. He asserted that the increased tax adopted by the voters constituted a "special tax" as defined in Article XIII A, Section 4 of the Constitution, and it had not been lawfully collected because its imposition was not approved by two-thirds of the electorate, as required by that section. . . .

In claiming that the imposition of an increase in the payroll and gross receipts taxes does not require a two-thirds vote of the electorate, the city makes two basic arguments. It claims that Section 4 does not apply to charter cities. In the alternative, it argues that the term "special taxes," as used in that provision, applies only to taxes earmarked for a specific purpose, and that since the payroll and gross receipts taxes at issue here are not so designated, their imposition is

not subject to the two-thirds vote requirement. We shall conclude that the city prevails as to the second of these assertions.

The rules of construction applicable to constitutional initiatives were set forth in detail in *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 219, 245-246, 149 Cal. Rptr. 239, 583 P.2d 1281, and it is not necessary to repeat them in detail here. In that decision, we upheld the constitutionality of various provisions of Article XIII A, and in doing so we applied the familiar rules that an initiative measure should receive a practical construction, that its literal language may be disregarded to avoid absurd results and to fulfill the intent of the framers, and that ambiguities in the wording of the measure may be clarified by reference to the material presented to the voters in the ballot pamphlet and the contemporaneous construction of the measure by the Legislature.

We expanded on these general propositions in *Richmond* with a qualification applicable specifically to a provision which, like section 4, requires a two-thirds vote for the adoption of a tax measure. The *Richmond* case involved the adoption of a sales and use tax by the Los Angeles County Transportation District. Prior to the enactment of Article XIII A, the Legislature had authorized the district to adopt such a tax for the purpose of improving public transit, upon a majority vote of the electors who voted in the election; the district had no authority to enact a property tax. The tax was approved by a majority but less than two-thirds of the voters after the effective date of the constitutional amendment. We held that the tax was valid despite the absence of a two-thirds favorable majority because the language of the section and extrinsic aids to its construction indicated that the term "special districts" in section 4 referred only to those entities authorized to levy a property tax.

In reaching this conclusion, we held that, while the requirement for a two-thirds vote as a condition for adoption of a tax is not unconstitutional (see *Gordon v. Lance* (1971) 403 U.S. 1, 6, 91 S.Ct. 1889, 1892, 29 L.Ed.2d 273), the language of section 4 must be strictly construed and ambiguities therein resolved so as to limit the measures to which the two-thirds requirement applies. In this connection, we reasoned that the two-thirds vote requirement in section 4 is inherently undemocratic; the requirement was imposed by a simple majority of the voters throughout the state upon a local entity to prohibit a majority (but less than two-thirds) of the voters of that entity from taxing themselves for programs or services which would benefit largely local residents; and the sales tax in issue in that case unlike the levy in *Gordon*, did not result in "committing . . . the credit of . . . generations yet unborn." (31 Cal.3d at pp. 203-205, 182 Cal. Rptr. 324, 643 P.2d 941.)

Two additional observations we made in *Richmond* are relevant to the present case: We recognized that section 4 is ambiguous in various respects, and that, although its language is framed affirmatively so as to authorize local entities to adopt "special taxes," it is actually a limitation on the enactment of such taxes because it requires a two-thirds vote for their approval.

With this background, we turn to the meaning of the term "special taxes" in section 4. The city claims that these words refer to a tax whose proceeds are used for a special purpose, while Farrell asserts that they refer to additional or supplemental taxes other than those specifically excepted.

There can be no doubt that the term "special taxes" is ambiguous in the sense that it has been interpreted to mean different things in different contexts. One meaning frequently attributed to it by cases and statutes is a tax "collected and earmarked for a special purpose, rather than being deposited in a general fund." . . .

Farrell, relying on some of a number of dictionary definitions of the word "special" as "supplemental to the regular" (Webster's 3d New Internat. Dict. (3d ed. 1971), "additional" or "extra" (Funk & Wagnall's Standard College Dict. (1968), claims that a "special tax" is an "extra, additional, or supplemental charge imposed . . . to raise money for public purposes."⁴

In construing the words of a statute or constitutional provision to discern its purpose, the provisions should be read together; an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning. . . .

Farrell's claim that the word "special" as used in Section 4 means "additional" or "extra" or "supplemental" effectively reads the word "special" out of the statute, since *any* taxes imposed by a local entity following adoption of Article XIII A would be encompassed within those descriptive terms. Moreover, the language used in section 3 of the article . . . indicates that the term "special taxes" in section 4 refers to some particular type of tax. Section 3 provides that state taxes enacted for the purpose of increasing revenue must be passed by a two-thirds vote of each house of the Legislature. The section states that "any" changes in state taxes to increase revenue must be enacted by the two-thirds vote. If the term "special" were to have the broad meaning suggested by

⁴These definitions are not the only nor indeed the first dictionary definitions of the word "special" in the authorities cited by Farrell. In both dictionaries upon which he relies, the first definition of "special" is a thing which is distinguished by some unusual or distinguishing quality or characteristic.

Farrell, it is very likely that section 4, like section 3, would have provided that “any” changes in taxes would require the votes of an extraordinary majority. Thus, the language of section 4 appears to support the city’s assertion that “special taxes” refers to a particular type of tax rather than to any and all exactions.

We turn next to Farrell’s claim that the material presented to the voters in the ballot pamphlet corroborates his view that the electorate understood and intended “special taxes” in section 4 to mean all taxes. The statement of the Legislative Analyst in the ballot pamphlet that “new taxes would . . . have to be approved by two-thirds of the local voters” would appear to support Farrell’s position. (Ballot Pamp., Proposed Amends. to Cal.Const. with arguments to voters, Primary Elec. (June 6, 1978), page 60.) However, this broad language is qualified by a preceding sentence which describes the initiative as allowing local governments to raise additional revenues by levying “other unspecified taxes,” indicating that perhaps not all “new taxes” must be approved by a two-thirds vote. In another portion of the analysis, section 4 is described as authorizing local governments to impose “certain” nonproperty taxes with the approval of two-thirds of the voters. (Id. at p. 56.) If anything, this statement favors the city’s view, since the use of the word “certain” implies that some but not all non-property taxes are subject to the two-thirds requirement.

The broadest reference in the pamphlet to the scope of section 4 is a statement by the proponents of the measure, who describe its effects as follows: “Limits property tax to 1% of market value, requires two-thirds vote of both houses of the legislature to raise any other taxes . . . and requires all other tax raises to be approved by the people.” (Ballot Pamp. *op. cit.* at p. 58.) Whether the voters accepted the Legislative Analyst’s statement that “certain” non-property taxes were subject to the two-thirds requirement or this broader description of the effect of the measure we cannot know. It seems apparent, however, that the ballot pamphlet provides little authoritative guidance to the meaning of “special taxes” in section 4.⁵

Nor does legislation following the enactment of article XIII A assist in deciding the issue before us. The parties refer to Sections 50075 through 50077 of the Government Code, enacted in 1979, as an indication of the Legislature’s interpretation of section 4. These provisions authorize the imposition of special taxes by local entities upon the concurrence of two-

thirds of the electorate voting on the measure. Section 50076 states that, as used in the article “‘special tax’ shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.” Farrell contends that this provision implies that the Legislature viewed an exaction for general revenue purposes to be a “special tax” within the meaning of section 4. However, section 50076 refers to a fee for services and we are not here concerned with whether such a fee may exceed the cost of the service provided, but with whether section 4 permits the levy of a tax for general revenue purposes without a two-thirds vote. The exception provided by section 50076 sheds little light on this question.

Farrell relies heavily on certain statements we made in *Amador* regarding the purpose of section 4. In holding that the provisions of article XIII A did not violate the constitutional prohibition against an initiative measure containing more than one subject (Cal. Const., art. II, Section 8, subd. (d)), we observed that the four sections of article XIII A are “functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief.” (22 Cal.3d at p. 230, 149 Cal.Rptr. 239, 583 P.2d 1281.) We explained this relationship as follows:

[S]ince any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes. Although sections 3 and 4 do not pertain solely to the matter of property taxation, both sections, in combination with sections 1 and 2, are reasonably germane, and functionally related, to the general subject of property tax relief. (Id. at p. 231, 149 Cal.Rptr. 239, 583 P.2d 1281.)

Admittedly, this language can be interpreted to mean that any tax levy (aside from the specified exceptions) comes within the two-thirds vote requirement of section 4, whether imposed for general or special revenue purposes. But there are persuasive reasons for not invoking such an interpretation. *Amador* itself warns against the use of its language as authority for propositions not before the court in that case. The opinion, stressing the “limited nature” of the inquiry involved there, cautions that interpretation or application of specific provisions of article XIII A should await cases in which the meaning of particular provisions is directly challenged. (22 Cal.3d at pp. 219-220, 149 Cal.Rptr. 239, 583 P.2d 1281.)

In deciding whether the payroll and gross receipts taxes come within the term “special taxes” in

⁵Other portions of the ballot pamphlet relied upon by Farrell are also uninformative. For example, he relies on the summary of the Attorney General, which states that Proposition 13 authorizes the imposition of “special taxes . . . by 2/3 vote of qualified electors.” This statement does not purport to define the exactions which are included in the term “special taxes.”

section 4, we are faced with considerations not before the court in *Amador*. We are asked to read the word “special” out of the phrase “special taxes,” in violation of settled rules of construction and in the face of the language of section 3, which indicates that the drafters knew how to say “any” taxes when that is what they meant. Our choice here is not simply between acceptance of one of a number of different meanings of an ambiguous term in a statute, but between disregarding the word “special” altogether in section 4, or affording it some meaning consistent with the intent of the voters in enacting the provision. Application of the rule of strict construction of provisions which require extraordinary majorities for the enactment of legislation is particularly appropriate in these circumstances.

In keeping with these principles, we construe the term “special taxes” in section 4 to mean taxes which are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes. This is a common meaning of the term, as is evident from the authorities cited above. More important, such a construction will provide the voters with the “effective” property tax relief we discussed in *Amador* to the extent the section clearly requires a two-thirds vote for the adoption of a “special tax,” while ascribing some meaning to every word used in the section. (See *Los Angeles County Transportation Commission v. Richmond*, supra, 31 Cal.3d 197, 208, 182 Cal.Rptr. 324, 643 P.2d 941.)

* * * * *

KAUS, Justice, dissenting.

As the various opinions in this case make clear, the terms of Proposition 13 itself provide no hint of what the drafters of the initiative had in mind when they used the term “special taxes” in article XIII A, section 4. As I noted in my separate opinion in *Los Angeles County Transportation Commission v. Richmond* (1982) 31 Cal.3d 197, 208-209, 182 Cal. Rptr. 324, 643 P.2d 941, however, “the description and discussion of [section 4] in the election pamphlet which was before the voters suggest to me that the purpose

of this section was simply to limit the authority of a city, county or special district to impose new ‘special taxes’ to replace property tax revenue that the city, county or special district lost as a result of the other portions of Proposition 13.” (Orig. italics).

If section 4 was indeed intended to restrict the ability of local entities to replace the property tax losses mandated by Proposition 13, then the interpretation of “special taxes” adopted by the court is clearly off the mark. As construed by the majority, section 4 places no limit whatsoever on the ability of local entities to levy the traditional, run-of-the-mill revenue-raising taxes for general municipal purposes, but—quite perversely—only makes it more difficult for such entities to levy much more unusual and more limited “special purpose” taxes. Since I can think of no plausible reason for the drafters to have intended such an irrational and ineffectual scheme, I must respectfully dissent.

In my view, section 4 will serve its apparent intended purpose only if the phrase “special taxes” is read to mean “new,” “additional,” or “supplemental” taxes which are enacted to replace tax revenue lost as a result of Proposition 13’s limitations on the property tax. Contrary to the majority’s suggestion, I do not believe that this interpretation reads the word “special” out of section 4 altogether. If the word “special” were completely eliminated, section 4 could be read to require a two-thirds vote of the electorate to authorize any tax levied by local entities after July 1, 1978, including the mere continuation of local taxes that were already in place before the adoption of Proposition 13. The inclusion of the modifier “special” in section 4 was intended to make it clear that local entities are permitted to maintain their pre-Proposition 13 nonproperty taxes without a two-thirds voter approval; only “new” or “additional” i.e., “special”—taxes, which would inevitably replace the property tax revenue withheld by other portions of Proposition 13, are subject to the two-thirds requirement.

In sum, given the purpose of the provision, I conclude that the tax in question is a “special tax” within the meaning of section 4 of Article XIII A. Accordingly, I would deny the requested writ.

Discussion Notes

1. Proposition 36, which was an initiative to amend Article XIII A to close “loopholes” created by cases such as the *Farrell* decision, was defeated at the polls in 1984.

2. See also, David M. Rosenberger, “Historical Perspective on Constitutional Limitation of Property Taxes in Michigan,” *Wayne Law Review* 24 (March 1978): 939; Note, “Proposition 2 1/2 in Massachusetts: Another Proposition 13 or a Tax

Reform Measure with Potential Constitutional Problems?” *New England Law Review* 15 (No. 2 1980): 309; Note, The Legal Ramifications of Proposition 13: Protecting State Fundamental Rights in Federal Court,” *Syracuse Law Review* 30 (Summer 1979): 937.

3. Review the materials at the end of Chapter 10, Section A, concerning state constitutional limits on mandates to local government as part of the “tax revolt.”

B. Limitations on Governmental Borrowing under State Constitutions

Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853) was, in the words of Chief Justice Jeremiah S. Black, “beyond all comparison, the most important cause that has ever been in this court since the formation of the government.” 21 Pa. at 158. He wrote, in upholding a city’s subscription of stock as a public purpose,

Neither has the legislature any constitutional right to create a public debt, or to levy a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative powers. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes.

21 Pa. at 168-69 (emphasis in original).

State constitutions have been amended over the years to contain many detailed provisions limiting state and local government power to borrow and finance a wide range of projects. These “debt limits” were inserted in state constitutions as responses to perceived abuses of the borrowing power usually through the sale of bonds for long term capital projects. See generally, M. David Gelfand, “Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers’ Revolt, and Beyond,” *Minnesota Law Review* 63 (April 1979): 545.

How strictly should these state constitutional debt limits be interpreted in modern times? Read the cases in this section with this question in mind.

Brack v. Mossman **170 N.W. 2d 416 (Iowa 1969)**

LeGRAND, Justice.

This is a class action by an Iowa City taxpayer against Ray B. Mossman, Elwin T. Jolliffe, and Howard R. Bowen, who are respectively treasurer, vice president and president of the University of Iowa; against the Board of Regents of the State of Iowa; and against the individual members of the Board. . . .

Plaintiff brought this action in equity alleging the action of the Board in authorizing construction of a multi-level parking ramp under chapter 262, Code of Iowa, 1966, is illegal and void. . . .

The plaintiff relies on two propositions for reversal. They are: . . . (2) the parking ramp project violates chapter 262, Code, for reasons hereafter discussed, including the claim the method of financing authorized is unconstitutional because under its terms the state incurs a debt without complying with section 5, Article VII, Constitution of Iowa.

* * * * *

It is conceded the net revenue from this parking ramp alone will not be sufficient to meet the bond obligation, but the revenue produced from the entire parking operations of the university will be more than adequate to do so. The bonds, when issued, will pledge the income from the entire integrated parking system to their payment. As the amount of the outstanding bonds is reduced, the net revenue will help finance the construction of other parking ramps on the campus, several of which are already scheduled between 1971 and 1976.

* * * * *

IV. Plaintiff concedes the “big issue” is whether this is a self-liquidating project. If not, it creates an indebtedness which the State is obligated to pay. This would violate Section 5, Article VIII of our Constitution. If the income from this facility alone would pay off the cost of its construction, there could be no question raised. *Iowa Hotel Ass’n. v. Board of Regents, supra*. Plaintiff admits as much. However, the record shows such income will not be sufficient to do so. The bonds which the Board intends to issue will pledge not only the income from the new parking ramp but also the income from the entire university parking system. It is this to which plaintiff objects.

Before discussing this further we mention that the method of financing set up in chapter 262, Code, is the so-called special-fund theory which has long been approved by virtually all states.

It permits public improvements to be constructed without resort to taxation and without pledging the credit of the State to payment. Payment is made from the income of the improvement itself. It is universally held such financing does not create a debt within the definition of that term as used in most state constitutions.

That this is a popular and approved practice see annotations at 72 A.L.R. 695, 96 A.L.R. 1393, and 146 A.L.R. 328.

Iowa is among the many states which have adopted its use. . . .

Courts which have dealt with special-fund financing are split into two groups. Some limit the governmental unit involved to those projects which will be completely self-liquidating from the income obtained from the new construction itself. Others permit the use of income from such construction and income from already existing facilities to defray the new construction costs.

Plaintiff is asking us to adopt the first or *strict* special-fund doctrine rather than the last or *broad* theory. He relies most heavily on *Boe v. Foss*, 76 S.Dak. 295, 77 N.W.2d 1, 10, which accepted the strict theory in ruling income from existing university dormitories could not legally be applied toward financing new ones.

The South Dakota court held the effect of permitting such withdrawal of money to which the State was already entitled inevitably required the spending of tax money to replace it. It held this created a state debt. Several other jurisdictions follow this formula.

We make no attempt to distinguish this case from the present one. We only say it represents the minor-

ity view and one with which we cannot agree. As said in *Lacher v. Board of Trustees*, 243 Md. 500, 221 A.2d 625, 630, the South Dakota doctrine is followed by only “a small minority of courts.”

The overwhelming weight of authority is to the contrary. Most courts hold that financing such as the Board proposes here—when authorized by statute and when the State cannot become obligated to pay—does not create a debt against the State.

Section 262.49, Code, provides in part:

No obligation created hereunder shall ever be or become a charge against the state of Iowa but all such obligations, including principal and interest, shall be payable solely:

1. From the net rents, profits and income arising from the property so pledged or mortgaged.

2. From the net rents, profits, and income which has not been pledged for other purposes arising from any similar building, facility, area or improvement under the control and management of said board.

3. From the fees or charges established by said board for students attending the institution for use or availability of the building, structure, area, facility or improvement for which the obligation was incurred. . . .” (Emphasis added.)

In addition the record shows the bonds themselves, when issued, will contain a clause limiting the source of their payment to parking revenue only.

It is beyond dispute Section 262.49 (2) intended that income from the *already existing parking system* could be applied to pay for new construction of like type. It is clear the existing system consists of “similar building[s], facilit[ies], area[s], and improvement[s]” whose income the statute says may be used for this purpose.

But plaintiff says the statute cannot constitutionally accomplish this because, regardless of its terms, it burdens the State with an obligation to pay the indebtedness incurred by the Board. If it does, plaintiff is correct in saying it violates Section 5, Article VII of the Constitution. We deem it unnecessary to discuss the provisions of Article VII since we hold no state indebtedness arises under the circumstances already set out.

* * * * *

Discussion Notes

1. Which view of the special fund theory, the strict or broad view, would the Iowa voters who ratified the state constitutional debt limit probably have favored? Would they favor the special fund theory at all?

2. Is the revenue bond financing mechanism a way of "getting around" state constitutional debt limits? If so, are there costs associated with this practice? See C. Robert Morris, Jr., "Evading Debt Limits with Public Building Authorities: The Costly Subversion of State Constitutions," *Yale Law Journal* 68 (December 1958): 234; Comment, "Judicial Demise of State Constitutional Debt

Limitations," *Iowa Law Review* 56 (February 1971): 646; Note, "Pennsylvania Constitutional Debt Limitations: Circumvention and Proposed Reform," *Temple Law Quarterly* 37 (Fall 1963): 69.

3. See *State ex rel. Dept. of Development v. State Building Commission*, 139 Wis. 1, 406 N.W.2d 728 (1987), holding that the state constitutional ban on state involvement in "internal improvements" applied to loans for low and moderate income housing.

4. See generally, Janice C. Griffith, "Moral Obligation" Bonds: Illusion or Security?" *Urban Lawyer* 8 (Winter 1976): 54.

State ex rel. Brown v. Beard 48 Ohio St.2d 290, 358 N.E.2d 569 (1976)

PER CURIAM.

The issue presented is whether respondents' actions with respect to the issuance and sale of revenue bonds herein constitute a lending of the state's credit in violation of Section 4, Article VIII of the Ohio Constitution.

Section 4, Article VIII, provides that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever." In *State, ex rel. Saxbe, v. Brand* (1964), 176 Ohio St. 44, 197 N.E.2d 328, this court held that a loan to a private borrower of proceeds from the sale of revenue bonds by a state agency constitutes a prohibited giving or lending of the state's credit.

However, respondents urge that the law has been modified by the adoption of Section 13 of Article VIII of the Ohio Constitution in 1965, and, as amended, in 1974. Section 13 provides for certain exceptions from the lending-of-credit limitation of Section 4 of Article VIII. Its stated purpose is "[T]o create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state . . . to acquire, construct, enlarge, im-

prove, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities."

Respondents contend that "when it gives financial assistance to the private building industry for the preservation of the jobs and creation of new equipment," its actions fall within the stated purpose of Section 13 because they are designed to improve the "economic welfare of the people." This language, however, is prefatory and must be evaluated in light of the specific thrust of the provision that the excepted state credit be "for industry, commerce, distribution, and research." The actions of the board herein, relating to issuance of revenue bonds for moderate and low cost housing, are not directly related to those specific purposes enumerated in Section 13 and must fail. To hold otherwise would render ineffective the provisions of Section 4 of Article VIII. Further, this court rejects respondents' argument that moderate and low cost housing is related to industry and commerce to such an extent as to fall within either of those constitutionally designated categories.

For reason of the foregoing, the actions of respondents herein are in violation of Section 4, Article VIII of the Ohio Constitution, and are therefore invalid.

Discussion Notes

1. In 1982, the voters in Ohio adopted the following section of Article VII of the Ohio Constitution:

Section 14 Financing of certain housing; revenue bonds; loans from corporations.

To create or preserve opportunities for safe and sanitary housing and to improve the economic welfare of the people of the state, it is hereby determined to be in the public interest and a proper public purpose for the state to borrow money and issue bonds and other obligations to make available financing, at reasonable interest rates to consumers substantially reflecting savings in the cost of money to lenders resulting from the implementation of this section, for the acquisition, construction, rehabilitation, modeling, and improvement of privately owned multiple-unit dwellings used and occupied exclusively by persons sixty-two years of age and older, and privately owned, owner occupied single family housing by providing loans to, or through the agency of, or originated by, or purchasing loans from, persons regularly engaged in the business of making or brokering residential mortgage loans, all as determined by or pursuant to law. Laws may be passed to carry into effect such purpose and to authorize for such purpose the borrowing of money by, and the issuance of bonds or other obligations of the state and to authorize the making of such loans, which laws, bonds, obligations, and loans shall not be subject to the requirements, limitations, or prohibitions of any other sec-

tion of Article VIII, or sections 6 and 11 of Article XII, Ohio constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued pursuant to laws enacted under this section.

The powers granted in this section shall be in addition to and not in derogation of existing powers of the state.

Any corporation organized under the laws of this state may lend or contribute moneys to the state on such terms as may be agreed upon in furtherance of laws enacted pursuant to this section.

2. For an exhaustive study of the Ohio provisions, see David M. Gold, "Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6 and 13 of Article VIII in Historical Perspective," *University of Toledo Law Review* 16 (Winter 1985): 405.

3. The issuance of revenue bonds by state and local government to finance construction of industrial plants has greatly increased in recent years. Often specific constitutional authorization is required because of otherwise restrictive state constitutions. See generally, Charles C. Mulcahy and Thomas P. Guszowski, "The Financing of Corporate Expansion Through Industrial Revenue Bonds," *Marquette Law Review* 57 (No. 2, 1974): 201; Donald A. Bell and Winton M. Hinkle, "A Guide to Industrial Revenue Bond Financing," *Washburn Law Journal* 9 (No. 3, 1970): 372. What impact could the federal government have on the use of revenue bonds by state and local governments?

Washington State Housing Finance Commission v. O'Brien 100 Wash. 2d 491, 671 P.2d 247 (1983)

DIMMICK, Justice.

Does the authority granted by the Legislature to the Washington State Housing Finance Commission violate the Washington State Constitution which prohibits lending of the state's credit? We find that it does not.

The Legislature created the Commission after investigating the impact of Washington's severe economic recession on the state's housing needs. It found that the sustained high interest rate in the mortgage market precluded home buying for many low to middle income families. The ramifications from the stagnant housing market were numerous. Home construction was at record lows, and current housing supply was critically below the population's needs, for both home buyers and renters. Many persons unable to procure financing to buy homes were forced into the rental market. With rental housing in high demand, low income units became difficult to find. Increasingly, substandard housing became occupied.

Recognizing both the housing need and the downward spiral effect on the state's economy if the housing situation were not remedied, the Legislature established a home mortgage program. Laws of 1983, ch. 161. Program funds are to be generated from the Commission's issuance of nonrecourse tax-exempt revenue bonds pursuant to federal law.¹ Using bond proceeds, the Commission is authorized to invest in, purchase, or make commitments to purchase home mortgages to provide "decent, safe, sanitary, and affordable housing for eligible persons." Laws of 1983, ch. 161, sec. 5, p. 697. Payments made on such loans will be remitted to the Commission's trustee bank by the lender. All payments, along with bond proceeds, are held in trust for the benefit of bondholders.

To commence the program the Commission adopted two resolutions on August 3, 1983. The first authorized the issuance of revenue bonds for mortgage aid to first time home buyers. The second resolution authorized revenue bonds to aid mortgagors of qualified multifamily residential housing. The Chairman and Secretary refused to sign the resolutions after being advised that they might be unconstitutional. The Commission thereupon brought this mandamus action to compel their signatures on both resolutions. We find the petition meritorious and grant the writ.

Although the course of decisions under the Washington constitution's lending of credit prohibition² has not been smooth, this court has firmly rejected, as violations of the clause, any legislative appropriation of tax revenues at the solicitation of private enterprise to aid or subsidize private commercial ventures. See, e.g., *State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wash.2d 216, 367 P.2d 605 (1961); *Johns v. Wadsworth*, 80 Wash. 352, 141 P. 892 (1914). At the time of our constitutional convention, fear of powerful corporate entities was uppermost in the minds of the convention members. The disastrous consequences to taxpayers as a result of corporate political clout were well known. L. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Washington Historical Quarterly 227, 239-40

¹Section 103(a)(1) of the Internal Revenue Code provides tax exempt status for certain government bonds. Bonds issued for residential housing programs are tax-exempt only if they meet the specific criteria of I.R.C. sections 103A and 103(b)(4)(A).

²Const. Art. VIII, sec. 5 provides:

The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.

(1913). The concern of the constitutional convention was "protection of [the] weak from the strong within." *Journal of the Washington State Constitutional Convention 1889*, at 682. The constitutional framers believed that government was not instituted to confiscate private property through taxation to enhance corporate profit. *Journal, supra*. Nor did they consider it proper for the state to put taxpayers at undeterminable risk by pledging future tax revenues for private benefit. See Knapp, at 270-71.

In the past we did not distinguish whether tax revenues or the state's status was used to confer a benefit. See, e.g., *State Health Care Facilities Auth. v. Ray*, 93 Wash.2d 108, 605 P. 2d 1260 (1980). Recently, however, we have focused primarily on the risk that the state program posed to the public treasury or taxpayer. *In re Marriage of Johnson*, 96 Wash.2d 255, 634 P.2d 877 (1981). In doing so, we recognized that the constitutional convention did not intend to hinder state government from carrying out its essential function to secure the health and welfare of the state's citizens. *In re Marriage of Johnson*, 96 Wash.2d 255, 634 P.2d 877 (1981); *Rauch v. Chapman*, 16 Wash. 568, 48 P. 253 (1897). Certainly, the lending of credit clause was not intended to insulate taxpayers from all risk and debt accruing from the public decisions of their governing representatives. Risk flowing from public ventures legitimately undertaken is inherent in our form of government. The difficulty underlying the lending of credit decisions is making the distinction between proper risk to the taxpayer from public decision making, and improper risk to taxpayers due to abdication of public control over the state's assets or status to private commercial decision making.

The "risk of loss" approach requires us to evaluate whether the state program "has safeguards absent in the schemes of the nineteenth century." *In re Marriage of Johnson, supra* 96 Wash.2d at 268, 634 P.2d 877. The safeguards must ensure that "[t]he public controls both the use of the State conferred 'asset' and the extent of its liability." *In re Marriage of Johnson, supra* at 268, 634 P.2d 877. The state must also retain the means to effectuate the project's public objective. Because these safeguards are central to the lending of credit clause, we now extend the same inquiry to state projects financed by nonrecourse revenue bonds.

We are satisfied that the Commission's authority meets these criteria. The primary purpose of the Commission's program is not to enhance the private sector's profit at the taxpayer's expense, but rather to

make decent housing available statewide.³ In determining legislative motive, we give great weight to the statutory declaration of purpose. *Public Employment Relations Comm'n v. Kennewick*, 99 Wash.2d 832, 664 P.2d 1240 (1983). While a legislative declaration does not conclusively establish its legitimacy, we accept the declaration unless it is shown to be arbitrary or unreasonable. The facts in the present controversy indicate that the legislative purpose, to rectify state housing deficiencies, is eminently reasonable.

The Legislature had before it studies and testimony on the state's economy and the housing market. From these they reasonably concluded that a public problem existed requiring state action. Uncontroverted testimony indicated that a significant portion of the state's population was inadequately housed. Further, it was apparent that the private sector had been unable to correct the housing scarcity resulting from continuing high interest rates and escalating construction costs.

The adequacy of private housing and the health of the state's economy have traditionally been concerns of state government. See e.g. *Housing Auth. v. Seattle*, 56 Wash.2d 10, 351 P.2d 117 (1960). The range of remedies available to meet these state problems must necessarily be wide. We leave the wisdom of a chosen remedy in the legislative arena. Obviously, if the program is successful, the private sector will benefit through increased housing starts, and increased activity in the housing and mortgage markets. Mortgage lenders will be entitled to an origination fee established by the Commission even though the Commission subsequently purchases the mortgage. Additionally, participating lenders will be compensated for servicing the mortgages (collecting mort-

gage payments, insurance premiums and property taxes, and making appropriate remittances to the Commission's trustee bank). Although we are inclined to view these fees as compensation rather than profit, the profit, if any, to actually be realized is speculative and subject to marketplace vagaries.

Our discussion of legislative motive does not imply that a finding of public purpose validates an otherwise impermissible lending of credit. *State ex rel. O'Connell v. Port of Seattle*, 65 Wash.2d 801, 399 P.2d 623 (1965). See *In re marriage of Johnson, supra*, 96 Wash.2d at 266, 634 P.2d 877. Gratuitous state aid to private enterprise or private persons although for a laudable public purpose is prohibited by our constitution. But state aid to a circumscribed class of the public, in furtherance of legitimate state objectives, may provide the necessary "consideration" for the aid. See *PERC v. Kennewick, supra*, 99 Wash.2d at 837-838, 664 P.2d 1240. We review the legislative purpose to confirm that the statutory objective is to benefit a deserving class of the public.

Nor should we be understood as taking upon ourselves the business of determining who belongs in the benefited class. In early cases upholding aid to the "poor and infirm," we deferred to the legislative determination of what constituted need. *State v. Guaranty Trust Co. of Yakima*, 20 Wash.2d 588, 148 P.2d 323 (1944). Our only task is to assess the reasonableness of that determination.

The Legislature found that persons at certain income levels could not afford adequate housing. The resulting high demand for rental units forced many low income persons into substandard housing. The Legislature's criteria for mortgage loan eligibility ensure that these persons' needs are met. The Commission's eligibility standards must consider at least the following: income; family size; cost, condition and energy efficiency of available residential housing; availability of decent, safe, and sanitary housing; age or infirmity of recipients. Laws of 1983, ch. 161, sec. 5(2), p. 697. These guidelines establish a reasonable nexus between the recognized need and the persons to be benefited.

Accordingly, we conclude that the purpose of the mortgage loan program is to benefit a class of citizens reasonably determined to require public aid to meet their housing needs, and not to benefit a specific private enterprise. Because such a purpose is well within the legitimate purview of state government, it does not conflict with the lending of credit prohibition.

We further find that the Legislature has enacted safeguards that retain public control over the extent of risk to the taxpayers and effectuation of the program's public purpose. In reviewing the statutory safeguards, our function is not to weigh the economic risk but only to ascertain that risk to the state remains

³Section 1 of the housing financing act provides in part: "It is declared to be the public policy of the state and a recognized governmental function to assist in making affordable and decent housing available throughout the state and by so doing to contribute to the general welfare. Decent housing for the people of our state is a most important public concern. Interest rates and construction costs have made it impossible for many Washington, citizens to purchase their own homes. Older people, disabled persons, and low and moderate income families often cannot afford to rent decent housing. There exists throughout the state a serious shortage of safe, sanitary and energy efficient housing available at prices within the financial means of our citizens. General economic development within the state is also impeded by a lack of affordable housing. The state's economy, which is dependent on the timber, wood products, and construction industries, has been damaged by inadequate investment in housing construction and rehabilitation. The result has been high unemployment and economic hardship affecting the prosperity of all the people of the state, particularly those in the wood products industry." Laws of 1983, ch. 161, sec. 1, p. 693-94.

within public control and is not abdicated to the private sector. The controls imposed on the mortgage loan program are impressive. The most significant risk to taxpayers from publicly financed projects is loss of tax revenues or pledging of future revenues. Under the mortgage loan program, however, there is no risk of this kind. Program funds must be derived entirely from the investment market, not from state appropriations. Laws of 1983, ch. 161, sec. 8(7), p. 700. The funds never enter the state treasury but are held in a special trust account. Sec. 17, p. 704. The bonds, although issued in the Commission's name, must contain a recital that they are not state obligations. Sec. 3, p. 695. Any obligation arising from the sale of bonds or the program is an obligation only of the Commission's special fund. . . .

Whether bond default would impact the state's credit rating is open to question. See 50 Wash.L.Rev. 440, 464-67 (1975). At least two factors minimize any potential risk to the state's credit rating. Unlike the situation in *Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983), a constitutional challenge has been brought prior to bond sales. In further contrast, the bonds are secured in case of default by property with relatively high marketability. Interestingly, a market evidently exists for these bonds despite the recent default on nuclear power plant bonds.

Other risks to taxpayers are kept within the public control. The authority to issue bonds is limited in amount and expires in 1986. Laws of 1983, ch. 161 sec. 5(1)(a), p. 697. The Commission's plan for raising and using program proceeds is subject to public hearing. Sec. 7, p. 698. The Commission has authority to set standards and guidelines for private lenders to follow in disbursement of program funds. Sec. 8(1), p. 699.

These controls also assure that the public objectives of the program will be met. Legislative intent in this regard is underscored by the requirement that program proceeds are to be made available to mortgagors in a fair and equitable manner. Sec. 12, p. 702. The Commission's program must meet other specific objectives, including the housing needs of low-income and moderate-income persons, the elderly and handicapped. Sec. 7, p. 698.

The Legislature's carefully conceived safeguards convince us that the state is not impermissibly abdicating its responsibility over the use of state status or the extent of state liability to the private sector. Finding that the state housing finance program is consistent with the state's legitimate function and that the risk to the state's taxpayers and effectuation of the public purpose remains under public control, we hold that the Commission's authority under Laws of 1983, ch. 161, does not violate Const. art. VIII, sec. 5.

* * * * *

ROSELLINI, Justice (dissenting).

I read the majority opinion as providing that the Washington State Constitution does not prohibit lending of the State's credit when it supports a statutory objective to benefit a deserving class of the public. I disagree.

Both article 8, section 5 and article 12, section 9 of the Washington State Constitution provide that the credit of the State shall not, in any manner, be given or loaned to, or in aid of any private individual, association or corporation.

It is clear that the State or a municipality lends its credit whenever it allows its unique governmental status or authority to be utilized for the purpose of enabling a private corporation or individual to obtain property or money which it could not otherwise acquire for the same price.

The Washington State Housing Finance Commission would be doing just that by passing on to private, nonindigent home buyers or tenants the substantial benefit of its unique ability (as a State instrumentality) under the Internal Revenue Code to issue bonds as tax exempt rates of interest.

That the loan of credit serves a laudable public purpose does not validate an otherwise unconstitutional loan or gift of state or municipal credit. In *Lassila v. Wenatchee*, 89 Wash.2d 804, 576 P.2d 54 (1978), this court held that const. art. 8, sec. 7 absolutely prohibits a municipality from acting as a conduit for private enterprise. In response to the argument that the loan of credit served a laudable public purpose, the *Lassila* court states, at pages 811-12, 576 P.2d 54:

An expected future public benefit also does not negative an otherwise unconstitutional loan. We have repeatedly held that a loan of money or credit by a municipality to a private party violates Const. art. 8, sec. 7 regardless of whether it may serve a laudable public purpose. . . .

The City contends we should liberally construe Const. art. 8, sec. 7 so that an expected future benefit will validate the loan. But, as we said in *State ex rel. O'Connell v. Port of Seattle*, *supra* [65 Wash.2d] at 806 [399 P.2d 623]:

If Article 8, sec. 7 is too restrictive in its terms, *that is a matter for the citizens of this state to correct through the amendatory process*. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem. Accordingly, the expected receipt of future public benefits cannot serve to validate an

otherwise unconstitutional loan of credit.
(Italics added.)

A decision of similar import is *Port of Longview v. Taxpayers*, 85 Wash.2d 216, 533 P.2d 128 (1974). In response to an addition to the Internal Revenue Code, which generally provided that for federal income tax purposes gross income does not include interest on the obligations of a state or political subdivision of a state issued to provide for air or water pollution control facilities, our State Legislature enacted legislation which sought to allow port districts to make available pollution control facilities to non-public entities. The act allowed this to be done by lease, lease purchase agreement, or other agreement binding such user to pay for the use of said facilities for the full term of the revenue bonds issued by the port for the acquisition of said facilities.

This court held this form of financing constitutes the loaning of money or credit by a municipality to any private party in violation of article 8, section 7. In *Port of Longview* this court approvingly adopted the following language of the Nebraska Supreme Court:

It seems clear to us that the revenue bonds are issued by the city in its own name to give them a marketability and value which they would otherwise not possess. If their issuance by the city is an inducement to industry, some benefits must be conferred, or it would be no inducement at all. Such benefits, whatever form they may take, necessar-

ily must be based on the credit of the city. The loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit. . . .

* * * * *

. . . It is not material what such undertakings may be called, or what forms are devised to conceal their main purpose, or how worthwhile they may appear to be, when the question of constitutionality is presented, their substance will be examined. The financing of private enterprises with public funds is foreign to the fundamental concepts of our constitutional system. To permit such encroachments upon the prohibitions of the Constitution would bring about, as experience and history have demonstrated, the ultimate destruction of the private enterprise system. *Port of Longview*, at 227, 533 P.2d 128 (quoting *State ex rel. Beck v. York*, 164 Neb. 223, 227, 229-30, 82 N.W.2d 269 (1957)).

The Nebraska Constitution was subsequently amended to specifically permit the kinds of financial arrangements found by the court in *Beck* to be violative of the ban against loan of credit. The Washington Constitution has also been amended to permit non-recourse revenue bonds and obligations to be used to finance industrial development projects. See Const. art. 32, sec. 1 (amend. 73).

* * * * *

Discussion Notes

1. Why would the Washington Legislature have included in the statute the language quoted in footnote 3 of the court's opinion? What is its legal effect?
2. Isn't the meaning of Article VIII, section 5

of the Washington Constitution, quoted in footnote 2 of the court's opinion, plain?

3. As to the history of the public purpose doctrine, see Note, "State Constitutional Prohibitions Against the Lending of State Credit to Municipal Corporations," *American University Law Review* 26 (Spring 1977): 669.

C. State Constitutional Limitations on State Spending— The Balanced Budget

Most state constitutions contain the requirement of a “balanced budget,” under which planned spending may not exceed anticipated revenues. This is another feature of state constitutions, similar to the item veto, which is being proposed at the federal level.

Wein v. State of New York **39 N.Y.2d 136, 347 N.E.2d 586 (1976)**

Chief Judge BREITEL.

* * * * *

In a desperate fiscal crisis the Nation’s largest city faces bankruptcy and the State lacks cash resources to tide the city over its immediate problems by outright grant of funds. The issue is whether appropriations, at an Extraordinary Session of the Legislature in mid-fiscal year, of \$250 million to the City of New York and \$500 million to the Municipal Assistance Corporation for the City of New York (MAC), to be funded by short-term State borrowing in the form of revenue or tax anticipation notes, constitute a gift or loan of the credit of the State to public corporations, in violation of constitutional limitations (NY Const. art. VII, sec. 8, subd. 1).

There should be an affirmance. The Constitution does not prohibit the State for a public purpose from giving or lending its money to assist a municipal or other public corporation. Nor does the constitution prohibit the State from short-term borrowing in advance of anticipated taxes and revenues to fund appropriations previously made. Indeed, short-term borrowing for this purpose is expressly and uncondi-

tionally authorized by the literal terms of section 9 of article VII. Hence, if the State chooses to use the proceeds of otherwise constitutionally valid short-term borrowing, payable out of anticipated revenues, in disbursement of an appropriation of money to assist for a public purpose a municipal or other public corporation, the State’s “credit” is not extended to the municipality or other public corporation in violation of constitutional limitations. The device is that the State gives cash in hand to the public corporation, albeit obtained by its own borrowing. Such borrowing is permitted in limited fashion by the Constitution, by short-term paper in advance of authentically anticipated revenues from taxes, Federal grants or long-term bonds authorized but not yet issued. The line is a narrow one, but one drawn by the Constitution.

* * * * *

Critical to understanding State finances is that the Constitution mandates a balanced budget (art VII, sec. 2). At the annual regular session of the Legislature, usually not later than February 1, the Governor must present a balanced budget, namely, a plan of expenditures and revenues which balance, with permissible contingencies which do not merit consideration in the present context. Temporary borrowing, discussed later, is permitted to anticipate planned committed revenues and, in certain limited situations, not now relevant, unanticipated needs. There is no express treatment in the Constitution governing appropriations made after the regular session and during the fiscal year at extraordinary sessions, but the implication is, and an essential one, that additional appropriations must be covered by matching revenues, or else the balanced budget of the regular session would be a device easily evaded at a later extraordinary session. A control on such evasion, how-

ever, and reinforcing the implication are the constitutional limitations on short-term borrowing.

There is flexibility in the Constitution, as there must be, because estimates of expenditures will never be fulfilled exactly and estimates of revenues will even less likely be fulfilled exactly. And this lack of capacity to prophesy expenditures and revenues in relatively ordinary times is minor when compared to changes of magnitude due to disasters, economic upheavals, war, the coming of peace after war, and the like. The Constitution is designed to permit survival, but it is also designed to prevent the repetition of fiscal abuse the evils of which history taught painfully to the people of this State.

For the reasons to be stated it is concluded that there has been no constitutional violation, but it is also apparent that the State in avoiding violation has been driven to the brink of valid practice.

* * * * *

In the Constitution of 1846, under an exception to the referendum requirement applicable to long-term bonds, the State was authorized to incur up to \$1 million of debt "to meet casual deficits or failures in revenues, or for expenses not provided for" (art VII, sec. 10). The \$1 million limit on such debt was not, however, considered applicable to temporary borrowing in anticipation of revenues or to cover unanticipated budgetary deficiencies. Thus, large debts were incurred by means of issuing tax anticipation notes (see 1915 Opns Atty Gen 161, 162-164; Problems Relating to Taxation and Finance [1938], *op. cit.*, at p. 75). This practice had been termed a violation of the "spirit" of the Constitution (Problems Relating to Taxation and Finance [1938], *op. cit.*, at p. 68).

To remedy the situation, the provision was revised in 1920 expressly to permit the State to contract short-term debt in anticipation of taxes and revenues. Instead of a \$1 million limit, which had become anomalously small, the short-term debt was limited to the amount of appropriations previously made and presumably in accordance with a balanced budget plan. For reasons that history makes clear, obligations issued for the money borrowed were required to be paid from taxes and revenues within one year of the date of issue (NY Const. of 1894, art. VII, sec. 2, as amd; see Revised Record [1915], *op. cit.*, at pp. 1270-1271). It was believed that the revised provision would suffice to cover customary tax anticipation loans as well as budget deficit loans (Problems Relating to Taxation and Finance [1938], *op. cit.*, p. 70).

With the onset of the Great Depression and the resulting large annual budgetary deficits, however, it became evident that tax and revenue anticipation loans, which had to be repaid within one year, were inadequate to close large fiscal gaps. The State was forced to "rollover," that is, replicate what was sup-

posed to be a one-instance temporary debt until it was finally retired. In 1938, a proposal was made to give the State the authority to contract five-year loans to finance budgetary deficits, but this proposal was never adopted. Instead, a bifurcated provision was made for bond anticipation notes, that is, notes in anticipation of proceeds from bonds authorized by referendum and limited by term to the probable usefulness of the project for which the bonds were authorized, payable within two years from the date of issue of the bond anticipation notes. The one-year limitation for "customary" tax and revenue anticipation notes was retained (NY Const., art. VII, sec. 9; see Problems Relating to Taxation and Finance [1938], *op. cit.*, at pp. 71-72; Journal of the Constitutional Convention [1938], *op. cit.*, Appendix 3, Doc No. 3, at p. 6).

Thus, the device of issuing tax and revenue anticipation notes was designed to permit the State to borrow temporarily to meet expenses for which appropriations under a balanced budget have been made, but for which revenues, both committed and anticipated, have not yet come in, thus adjusting the cash flow of taxes and revenues to expenditures. Put another way, these short-term obligations may be used to raise funds to offset temporary deficits in the fiscal year of issuance and payable not later than in some early portion of the next fiscal year (see 1932 Opns Atty Gen 119). According to the Constitution, however, and this is of critical significance, tax and revenue anticipation notes must be issued "in anticipation of the receipt of taxes and revenues"; they may not be issued in anticipation of a budgetary deficit (see Temporary State Comm, State Finance [1967], *op. cit.*, at p. 86).

Consequently, if it cannot reasonably be anticipated at the time the notes are issued that the State will have sufficient committed taxes and revenues, based on authentic estimates, to pay the obligations within one year of the date of issue, such borrowing is constitutionally impermissible. For example, if repayment of tax and revenue anticipation notes may only be made by creating, directly or indirectly, a budgetary deficit in the year of repayment, such borrowing is not an anticipation of the receipt of taxes and revenues and thus violates constitutional limitations (see Governor's Budget Message 1976-1977, at p. M10, recognizing and endeavoring to meet the problem). As was stated by the 1938 Subcommittee on Taxation and Finance of the Constitutional Convention Committee: "The spirit of the clause implied that the State must not have two or more budgetary deficits in succession. Unless the State intended that it would have sufficient revenue to retire the deficit loans, it really had no power to contract them" (Problems Relating to Taxation and Finance [1938], *op. cit.*, at p. 71). (For an example of an intractable deficit carry-over, see State Comptroller's 1975 Report, vol.

1, at p. 8, with reference to fiscal years 1972-1973, 1973-1974.)

Of course, such a violation of the "spirit" of this provision would be compounded by another tax or revenue anticipation note issue to offset a budgetary deficit in the second year, thus in effect "rolling over" the initial issue. In short, "rollovers" of revenue and tax anticipation notes are not consonant with constitutional limitations or their spirit. Of course, it would be naive not to recognize that the ingenuity of man can devise at least a verbalistic escape from limitations and perhaps even an escape through the inevitable loopholes in man's language to accomplish his purpose. But there must be a point, a determinable point, at which an otherwise plausible manipulation may and will be recognized and declared to be the doing indirectly of that which is forbidden to be done directly (see *People v. Westchester County Nat. Bank*, 231 NY 465, 476, *supra*; *People ex rel. Burby v. Howland*, 155 NY 270, 280, *supra*).

The \$250 million of RANs in the instant case, the only notes before Special Term, were validly issued in authentic anticipation of revenues to be received within one year of their date. The Governor has estimated that the 1975-1976 budget is currently in deficit in the amount of \$449 million. To meet the deficit and balance the budget the Governor has proposed drawing upon an estimated \$67 million in liquid assets of tax stabilization funds, and issuing \$382 million in additional tax notes in anticipation or committed taxes and revenues (Budget Message, at p. M10).

* * * * *

One may not leave the subject without observing that the device under scrutiny, even if it is not identifiable at this stage as a violation of constitutional limitations in control of the State's temporary debt, may in the course of time prove violative if it becomes the starting point for temporary refinancing in the nature of a "rollover." The device is not justified because of the extreme fiscal emergency but only because the particular appropriations and the particular RANs are in fact not violative of constitutional limitations. Their validity depends upon the prospect that the particular RANs will be paid as contemplated and there is nothing now at hand to suggest that they will not. Indeed, if the constitutional mandate for a balanced budget is obeyed, they must be paid.

* * * * *

JASEN, J. (dissenting).

I dissent and would hold that the appropriations contained in sections 22 and 23 of the New York State Financial Emergency Act for the City of New York and the notes issued to finance these appropriations are in violation of the State Constitution.

* * * * *

Our State Constitution, like the Constitutions of the other States, places restrictions on the power of the State to tax its citizens and to spend public resources. These limitations do not derive from any abstract considerations of how State fiscal affairs should or should not be managed. The constitutional proscriptions, instead, flow from the hard and bitter experiences of the people of these State when, on prior occasions in our history, hard times caught up with optimistic fiscal sleight-of-hand. In the formative years in the industrial development of New York, the State, through a variety of financial schemes, issued bonds and stocks to finance railroads, banks, turnpikes, hospitals, and other private enterprises then deemed essential for society. Contrary to expectations, these businesses defaulted on their obligations and the State, or rather its taxpayers, were required to make good on the securities. Moreover, the State was required to invest still more public money lest the value of its earlier investments be lost. As the extent of the State's obligations became fully known, a storm of opposition arose to the policy of advancing State money or State credit to private enterprise. (2 Lincoln, *Constitutional History of New York*, pp. 93-101; see, also, *Problems Relating to Taxation and Finance*, Documents of the New York State Constitutional Convention Committee [1938], vol. X, pp. 108-112.)

* * * * *

It should be pointed out that there are valid, constitutionally permissible means of assisting New York City. To obtain the necessary wherewithal to aid New York City, the State could have raised taxes or could have reduced expenditures in other areas. Such decisions are, of course, often politically and socially painful. That they are does not mean that they should be avoided. To be sure, the people of our State already bear the burden of a staggering amount of taxation. Understandably, the Legislature is extremely reluctant to add to that burden. On the other hand, a reduction in expenditures would necessitate the elimination of programs and cause a diminution in the level of services proved to the people, a result equally bitter to contemplate. However, as becomes clearer with each passing day, we do not live in a world of infinite resources. The State must, as all must, set a level of priority and apply whatever resources are available to meeting the needs that are the most vital. This is the essence of the budgetary process. The answer is not to make loans of credit in the brittle hope that in a year's time the situation will improve. That approach is not only unconstitutional, it is shortsighted. By loaning its credit to New York City, the State might jeopardize its own financial security. A crisis in the securities marketplace, a marketplace already unreceptive to securities issued by

the State of New York, might not only topple New York City, but New York State as well. The consequences of a State bankruptcy or even a temporary inability on the part of State government to finance its own operations, the true purpose for which anticipation notes may be issued, will permanently scar the people of this State. If the State must reduce expenditures or increase taxes in order to obtain the funds to aid New York City, the cost is still less than the price to be paid by a State-wide financial catastrophe. If the people are aroused by these temporary measures, it is not difficult to image their anger when, as in the past, they discover that as a result of gimmickry designed to deceive them, the State has been shorn of its financial foundation. The constitutional provision here under consideration was designed in part to ensure that the difficult decisions would be made, that the legislative and executive leadership would not take the easy way out. To sustain the sort of financial legerdemain involved here is to encourage the type of practice that, in part, has created the financial crisis before us.

I am well aware that the amount of money at issue is enormous and that the implications of a decla-

ration of unconstitutionality are of grave significance. However, the duty of the court in a constitutional democracy is also clear. When confronted with a legislative enactment in clear violation of the State Constitution, I believe that the court has no choice but to strike it down, notwithstanding the political, social or economic ramifications of the decision. To do otherwise is to challenge the rule of law by which all, legislators as well as individual citizens, must abide. The very magnitude of the illegality cannot serve as its shield. If the rule were otherwise, the larger violations, the ones most to be feared, would be immune from judicial scrutiny. Moreover, the holding of our court today does nothing that will discourage or deter the Legislature from developing and using ingenious methods to evade the constitutional limitations, secure in knowledge that our court will not strike them down. The court's decision today, while salvaging the financial scheme immediately before us, will, I fear, ultimately do a greater injury by depriving the people of a measure of their protection against State fiscal mismanagement.

For the reasons stated, I dissent.

Discussion Notes

1. For the next chapter in this litigation, see *Wein v. Carey*, 41 N.Y.2d 498, 362 N.E.2d 587 (1977), where the court concluded:

The fact is that there may be an indefinite series of deficits honestly suffered. All that is necessary to produce the result are successive years of unpredictable shortfalls in revenues or rises in required spending beyond estimates. Depressed economic conditions can affect both sides of the balance. Catastrophes, emergencies, or, in smaller scale, significant needs may arise, which, if unanticipated, may upset the balance on one side or the other. Indeed, it is unattainable for any budget plan, perfectly and honestly balanced in advance, to remain in balance to the end of the fiscal year. There must, as a practical matter, in every year be either a deficit or a surplus. Nothing in the *Wein* case (*supra*) suggests otherwise.

It is only when the estimates are dishonest that fault may be found with the

budget plan or that which is done pursuant to it. It is then that the use of anticipation notes to balance the imbalanced budget plan is an unconstitutional practice.

2. How precise is the practice of estimating governmental revenues? Can it be manipulated?

3. As a conclusion to this entire chapter on state and local governmental taxation and finance under state constitutions, consider Professor Frank P. Grad's observation:

The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents' real needs and active demands for service.

Frank P. Grad, "The State Constitution: Its Function and Form for Our Time," *Virginia Law Review* 54 (June 1968): 939.

Are the state constitutional government finance provisions obstacles or needed limitations on the powers of state and local governments?

State Constitutions and Public Education

Public education has been one of the primary obligations and functions of state and local government. Because of its importance, most state constitutions contain provisions requiring the legislature to provide for a “uniform” or “thorough and efficient” system of free public schools. Could the legislature make provision for public schools in the absence of such a mandate? What is the effect of inclusion of such provisions, and others relating to education, in state constitutions?

See generally, HULLIHEN W. MOORE, “In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971,” *University of Richmond Law Review* 5 (Spring 1971): 263; “Special Issue: Education,” *Texas Law Review* 63 (February 1985): 777.

A. Education Finance

State constitutions have provided the major basis for litigation over equality in financing public education. Such cases may be based either on broad, generally applicable equality guarantees, or on the more specific requirements of a “uniform” or “thorough and efficient” system of public education found in the education articles of state constitutions. The first major decision was *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241 (1971), which struck down the California school financing plan on the basis of state constitutional equal protection arguments. This was followed, however, by *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S.1 (1973), which upheld Texas’ School funding statutes against a federal equal protection challenge. Within several weeks after *Rodriguez*, the New Jersey Supreme Court decided *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973). The *Robinson* court, however, declined to decide the case on general equality grounds, because, as it noted:

We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act.

* * * * *

. . . [W]e stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure. Surely no need is more basic than food and lodging. . . . Essential also are police and fire protection, as to which the sums spent per resident vary with local deci-

sion. Nor are water and sundry public health services available throughout the State on a uniform dollar basis.
62 N.J. at 492, 495-96, 303 A.2d 283, 284.

Thus, the New Jersey Court used the state constitutional “thorough and efficient” education provision as a more specific and limited textual basis for its decision invalidating the school funding scheme. This technique justified the court’s limitation of its holding to the field of education and insured that its holding could not be expanded to other local services beyond education. See Robert F. Williams, “Equality Guarantees in State Constitutional Law,” *Texas Law Review* 63 (March/April 1985): 1214-15.

The New Jersey court’s interpretation of the education provision follows.

Robinson v. Cahill **62 N.J. 473, 303 A. 2d 273 (1973)**

* * * * *

The provisions relating to public education were added to the Constitution of 1844 by amendments adopted in 1875. Art. IV, sec. 7, para. 6, was amended by adding this sentence:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.

This provision is now Art. VIII, sec. 4, para. 1, of the 1947 Constitution. The other amendment in 1875 added Art. IV, sec. 7, para. 11, which prohibits “private, local or special laws” in “enumerated cases,” among which appears: “Providing for the manage-

ment and support of free public schools." The quoted provision is item (7) in Art. IV, sec. 7, para. 9, of the 1947 Constitution, with the word "control" substituted for the word "support."

* * * * *

A brief sketch of public education in our State is a necessary backdrop for the issue. Originally education was the province of private schools, including, of course, church-sponsored schools. Those too poor to pay tuition depended upon charity. In 1820 the townships were authorized to raise money by a vote at a town meeting but only for the education of "such poor children as are paupers." In 1828 the townships were authorized to raise moneys by vote at town meetings to build and repair schoolhouses. The State School Fund had been established in 1817 but it was not until 1829 that moneys were appropriated from that fund for the support of such schools. 1 Myers, *The Story of New Jersey* (1945) pp. 447-450. The Constitution of 1844 made a commitment by placing that fund, and all additions to it, beyond legislative diversion and mandating that the income "shall be annually appropriated to the support of public schools, for the equal benefit of all the people of the state." Art. IV, sec. 7, para. 6. *Everson v. Board of Education of Ewing Township*, 133 N.J.L. 350, 352-353, 44 A.2d 333 (E. & A. 1945), affirmed 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

There emerged a program of State appropriation coupled with local taxation. The system worked unevenly, in part because of disparities as to ratables. Then it was the urban areas which had the greater capacity to pay. And public education was not free; it was the custom to charge tuition for public schools. 1 Myers, *The Story of New Jersey* (1945) pp. 458-460.

In his 1868 report (pp. 22-24), the State Superintendent of Public Instruction advocated free public schools for every district. He pointed out the school law "only gives to the people the privilege of making them [the schools] free, if they desire, by local taxation." . . . His views received strong public support; the Legislature in 1871 almost unanimously passed "an act to make free the public schools of the State." 1 Myers, *op.cit.*, p. 472.

The 1871 statute (c. 527, p. 94) inaugurated a statewide school tax of 2 mills per dollar of assessed value of property, the tax "to be in lieu of all township school taxes . . . but if the moneys received by any township from the tax imposed by this act shall not be sufficient to maintain free schools for at least nine months in each year, then the inhabitants thereof shall raise, by township tax, such additional amount as they may need for that purpose," on pain of losing their share of the State tax. Sec. 1, p. 94. The State tax

was apportioned on the basis of the number of children included in the school census. Secs. 4 and 5, pp. 95-96. Each city and school district remained empowered to "raise by tax such other sums of money as they may need for school purposes," as authorized by prior law. Sec. 7, p. 96. It was made unlawful thereafter to charge tuition fees. Sec. 9, p. 97.

Thus public schools became free. It is notable that the proceeds of the statewide property tax were apportioned on the basis of the number of eligible pupils rather than the value of local ratables or the amounts the State tax yielded in the several districts. A shift to a ratables formula was made later, after the adoption of the 1875 amendment, for a reason unrelated to the equity of the 1871 basis for apportionment of the tax proceeds. The wealthier counties complained that the rural areas abused the statutory formula by deliberately undervaluing their ratables to avoid a fair share of the burden of the State tax. The charge was credited, and in 1881, to remedy that abuse, the basis for the apportionment of the tax revenues was changed to the tax contributions of the counties (i.e., the assessed value of the ratables) with respect to 90% of the State tax proceeds, the remaining 10% to be distributed equitably by the State Board of Education. *New Jersey School Report for 1881*, pp. 29-32. The 10%, which was used to aid the poorer counties, was later whittled down upon the continuing complaint of the more affluent counties. *Bateman Report* (1968) p. 16. Thus the State seemingly drifted into a formula of apportionment in which ratables rather than pupils became so prominent, not because ratables were deemed the fair basis for distribution of the tax proceeds, but as an antidote for an abuse with respect to valuation of the tax base. Had there been employed a direct remedy, i.e., statewide equalization of the assessments, thereby to insure an even distribution of the tax burden, it is likely that the per-pupil basis for distribution of the statewide tax proceeds would have retained its inherent equitable appeal.

The 1875 amendment added to Art. IV, sec. 7, para. 6, of the Constitution of 1844 the provision that:

The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.

There appears to be no helpful history spelling out the intended impact of this amendment.

We can be sure the amendment was intended to embody the principle of the 1871 statute that public education for children shall be *free*. It is also plain that the ultimate responsibility for a thorough and effi-

cient education was imposed upon the State. This has never been doubted. See for example, the passage we quoted above from *Society for Establishing Useful Manufacturers v. City of Paterson*, *supra*, 89 N.J.L. at 211-212, 98 A.440.

The obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation. But plaintiffs say that although the operation of schools may be delegated, the fiscal responsibility may not. Plaintiffs assert the amendment itself assures equality as among taxpayers. Alternatively they say the amendment assures equality among the pupils of the State and that such equality is not achieved and cannot be achieved by a system of taxation which depends upon the existing local tax base.

We cannot say the amendment of 1875 was intended to bar the delegation of the taxing responsibility to local government. We know that with respect to the cost of providing the schoolhouse itself, the 1871 statute left the burden with local government and that burden continued there after the 1875 amendment. As the State Superintendent's report for 1881 put it, "The spirit of the school law of New Jersey is that the State shall furnish the means for maintaining the schools while the local authorities shall provide suitable school accommodations" (p. 42). The 1871 statute was concerned with current operating expenses, and as to that subject, the statute was intended to raise by a statewide tax a general fund sufficient to meet the average per-pupil cost of providing the level of instruction then in view, with the city and school district retaining the power to tax to the end that districts "with more than ordinary enterprise," as the 1868 report quoted above expressed it, could provide education above the level the general State fund was intended to provide.

The question whether the tax burden should be borne statewide rather than locally was of course very much in mind at the time of the 1875 amendment. It was discussed in the State Superintendent's reports both before and after the adoption of the amendment.

* * * * *

It seems clear that the 1875 amendment has not been understood to prohibit the State's use of local government with local tax responsibility in the discharge of the constitutional mandate. In *Landis v. Ashworth (School District No. 44)*, *supra*, 57 N.J.L. 509, 31 A. 1017 a local tax for school purposes was attacked. One ground was that the school district was not a political division of the State capable of being

invested with the power to tax. As we have already mentioned, *Landis* rejected that view, finding the school district was a municipality.

Also relevant are cases which involved the question whether school districts could be classified for legislation under the companion amendment of 1875 prohibiting local or special laws "Providing for the management and support of free public schools." Art. IV, sec. 7, para. 11, of the Constitution of 1844 (now Art. IV, sec. 7, para. 9(7)). At one point doubt was expressed as to whether school districts could be classified in the face of that prohibition, *Lowthorp v. Trenton*, 62 N.J.L. 795, 44 A. 755 (E. & A. 1898), which issue was resolved in favor of the power to classify in *Riccio v. Hoboken*, 69 N.J.L. 649, 55 A. 1109 (E. & A. 1903), but in neither case was it doubted that the State could invest the responsibility, including the taxing power, in local government. Rather the question was whether all such local school governments must be of one structure. The 1875 amendments were assumed to permit the State to delegate "taxing powers to local school districts to raise funds for local school purposes," in *Everson v. Board of Education of Ewing Township*, *supra*, 133 N.J.L. at 353, 44 A.2d at 336.

It has been noted that the 1947 Constitutional Convention did not act upon a recommendation of the New Jersey Federation of Labor that education be funded out of State revenues. 5 Proceedings of the New Jersey Constitutional Convention of 1947, Appendix, at 893. Such inaction is of doubtful import, but our Constitution was amended in 1958 in terms which did assume that fiscal responsibility was properly reposed in the local school district. Art. VIII, sec. 4, para. 2, which preserves the fund for the support of free public schools was amended by adding:

The bonds of any school district of this State, issued according to law, shall be proper and secure investments for the said fund and, in addition, said fund, including the income therefrom and any other moneys duly appropriated to the support of free public schools may be used in such manner as the Legislature may provide by law to secure the payment of the principal of or interest on bonds or notes issued for school purposes by counties, municipalities or school districts or for the payment or purchase of any such bonds or notes or any claims for interest thereon.

In the light of the foregoing, it cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers. But we do not doubt that an equal educational opportunity for children was precisely in mind. The mandate that there be main-

tained and supported “a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years” can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State’s to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.

We refer again to *Landis v. Ashworth* (School District No. 44), *supra*, 57 N.J.L. 509, 31 A. 1017. There it was contended that the 1875 amendment prohibiting a special or local law with respect to the management and support of free public schools forbade “laws delegating to each school district the power of determining for itself what amount beyond the state appropriation shall be raised by tax therein for the support of public schools in the district, and the power of building schoolhouses and employing teachers, result in affording different degrees of instruction to the children in different districts, while it is the duty of the legislature to see that the same facilities for education are furnished to every child in the state” (pp. 511-512, 31 A. p. 1018). As we have just noted, that contention was based upon the “special or local law” provision of the Constitution. The court replied that a statute conferring the same powers upon the same class of political bodies does not cease to be a general law because the results may not be uniform. But the court did find that the 1875 amendment which imposed the school obligation on the State required equality within the intended range of that amendment, permitting local decisions only above and beyond that mandated education. The court said (p. 512, 31 A. p. 1018):

Nor can I think that the constitution requires the legislature to provide the same means of instruction for every child in the state. A scheme to accomplish that result would compel either the abandonment of all public schools designed for the higher education of youth or the establishment of such schools in every section of the state within reach of daily attendance by all the children there residing. Neither of these consequences was contemplated by the amendment of 1875. Its purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such

instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any. But, beyond this constitutional obligation, there still exists the power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed.

Landis could be misread if it is not kept in mind that when *Landis* was decided (1895), secondary schooling as we know it today was not generally available. Bole and Johnson, *The New Jersey High School: A History* (1964) pp. 28-36. It was not then an attribute of a thorough and efficient system of public schooling, and for that reason *Landis* found the constitutional requirement was not offended by the fact that “higher education” was not available for all children. But *Landis* held that the education comprehended by the constitutional obligation must be met by “securing the common rights of all.” And *Landis* of course did not say the common rights were those of 1875 or 1895. Today, a system of public education which did not offer high school education would hardly be thorough and efficient. The Constitution’s guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.

We are brought then to the question whether the State has fulfilled its obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education for students between the ages of 5 and 18. This is the question we flagged in *West Morris Regional Board of Education v. Sills*, 58 N.J. 464, 477 n. 7, 279 A.2d 609, 616 (1971), when we said “We of course do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command.”

The trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate. The constitutional mandate could not be said to be satisfied unless we were

to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.

Surely the existing statutory system is not visibly geared to the mandate that there be "a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." Indeed the State has never spelled out the content of the educational opportunity the Constitution requires. Without some such prescription, it is even more difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of education opportunity will emerge. The 1871 statute embraced a statewide tax because it was found that local taxation could not be expected to yield equal educational opportunity. Since then the State has returned the tax burden to local school districts to the point where at the time of the trial the State was meeting but 28% of the current operating expenses. There is no more evidence today than there was a hundred years ago that this approach will succeed.

On its face the statutory scheme has no apparent relation to the mandate for equal educational opportunity. The trial court's opinion discusses the existing scheme at length, and we need but summarize it. As the trial court pointed out, we are in a period of transition from one plan to another with respect to the current operating budget. The new plan, contained in the "State School Incentive Equalization Aid Law" (L.1970, c. 234), herein the "1970 Act," is but partially funded, and at the moment serves only to accomplish a modification of the plan it would one day supersede.

The plan which the 1970 Act would ultimately replace establishes a foundation program of \$400 per pupil. N.J.S.A. 18A: 58-3 as it existed when the 1970 Act was enacted. We are told that when that dollar figure was set, it was believed to be the average per pupil cost of providing elementary and secondary education. The figure is now grossly outdated. At any rate, that statute provides for State aid consisting of the difference between \$400 per pupil and the sum per pupil raised by a local tax of 10 1/2 mills per dollar of equalized valuation of taxable property within the school district. There is a minimum guaranty of \$75 per pupil, and by other provisions the State adds an additional \$25 per pupil throughout the State and \$27 per pupil in the major cities.

Under that program the State contributes about 28% of the statewide current operating costs, the balance being raised by local tax except for a small federal contribution. The 1970 Act is expected when fully funded to raise the State's share to 40% which,

when that Act was adopted, was said to be the national average of State aid.

The 1970 Act provides for State aid on the basis of "weighted pupils." The weighing is intended to reflect different costs of educating classes of pupils. Thus, to mention some of the categories, a child in kindergarten is weighted at .75, a child in elementary school at 1., and a high school student at 1.3, plus .75 units for each "AFDC" child (a child on welfare). N.J.S.A. 18A: 58-2. . . .

We have outlined the formula of the 1970 Act to show that it is not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the 1875 amendment mandates. We see no basis for a finding that the 1970 Act, even if fully funded, would satisfy the constitutional obligation of the State.

* * * * *

We repeat that if the State chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must *compel* the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity. Nor has the State *required* the school districts to raise moneys needed to achieve that unstated standard. Nor is the State aid program designed to compensate for local failures to reach that level. It must be evident that our present scheme is a patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate.

We have discussed the existing scene in terms of the current operating expenses. The State's obligation includes as well the capital expenditures without which the required educational opportunity could not be provided.

Upon the record before us, it may be doubted that the thorough and efficient system of schools required by the 1875 amendment can realistically be met by reliance upon local taxation: The discordant correlations between the educational needs of the school districts and their respective tax bases suggest any such effort would likely fail, and this wholly apart from the issues we left unresolved in Point 1.

Although we have dealt with the constitutional problem in terms of dollar input per pupil, we should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity. Nor do we

say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further and to tax to that further end, provided that such authorization does not become a device for diluting the State's mandated responsibility.

The present system being unconstitutional, we come to the subject of remedies. We agree with the trial court that relief must be prospective. The judiciary cannot unravel the fiscal skein. Obligations incurred must not be impaired. And since government must go on, and some period of time will be needed to establish another statutory system, obligations hereafter incurred pursuant to existing statutes will be

valid in accordance with the terms of the statutes. In other respects we desire the further views of the parties as to the content of the judgment, including argument as to whether the judiciary may, as the trial court did with respect to the "minimum support aid" and the save-harmless provision of the 1970 Act, 118 N.J. Super. at 280-281, 287 A.2d 187, order that moneys appropriated by the Legislature to implement the 1970 Act shall be distributed upon terms other than the legislated ones. A short date for argument will be fixed.

Subject to the modifications expressed in this opinion and the matters reserved in the preceding paragraph, the judgment of the trial court is affirmed.

Discussion Notes

1. For a discussion of *Robinson*, see Paul L. Tractenberg, "Reforming School Finance Through State Constitutions: *Robinson v. Cahill* Points the Way," *Rutgers Law Review* 27 (No. 3 1974): 365; Joel S. Berke and Judy G. Sinkin, "Developing a 'Thorough and Efficient' School Finance System: Alternatives for Implementing *Robinson v. Cahill*," *Journal of Law and Education* 3 (July 1974): 337.

2. See also, Annette B. Johnson, "State Court Intervention in School Finance Reform," *Cleveland State Law Review* 28 (No. 3 1979): 325; Comment, "A 'Uniform' Education: Reform of Local Property Tax School Finance Systems Through State Constitutions," *Marquette Law Review* 62 (Summer 1979): 565.

3. Can state constitutional provisions *restrict* or *interfere* with legislative solutions to the problem of inequality in school funding, which violate other provisions of the state constitution? See *Buse v. Smith* 74 Wis. 2d 550, 247 N.W. 2d. 141 (1976); Comment "State Constitutional Restriction

on School Finance Reform: *Buse v. Smith*," *Harvard Law Review* 90 (May 1977): 1528. (Constitutional provision requiring local taxes to be spent in the locality invalidates a "district power equalizer" formula which would have shifted local tax revenue from property-rich districts to property-poor districts.)

4. For an economic analysis of litigation to equalize funding for public schools, see Robert P. Inman and Daniel L. Rubinfeld, "The Judicial Pursuit of Local Fiscal Equity," *Harvard Law Review* 92 (June 1979): 1662; Note, "Equalization of Municipal Services: The Economics of Serrano and Shaw," *Yale Law Journal* 82 (November 1972): 89; Note, "A Statistical Analysis of School Finance Decisions: On Winning Battles and Losing Wars," *Yale Law Journal* 81 (June 1972): 1303.

5. How can a court measure whether a school system is providing a "thorough and efficient" education? By the resources put into the system ("input"), or by the educational product of the schools—the performance of students ("output")?

Serrano v. Priest 135 Cal. Rptr. 345, 557 P. 2d 929 (1977) (Serrano II)

* * * * *

RICHARDSON, Justice (dissenting).

I respectfully dissent. My disagreement with the majority focuses principally on part VIII of their opinion wherein they consider the application of article XIII of the California Constitution to the present school financing program, concluding that the system

is invalid as violative of the equal protection provisions of that Constitution. As I develop more fully below, I have serious reservations about the constitutional analysis indulged by the majority as it affects article XIII. My principal problem with the majority's thesis is *that the same Constitution expressly authorizes the essential elements of the challenged system.*

* * * * *

The same California Constitution which *generally* extends equal protection also *specifically* authorizes the essential elements of California's present system of school financing. As a matter of interpretive principle, the authority which the Constitution specifi-

cally extends with one hand cannot be generally withdrawn with the other.

The majority thoroughly explain that our public schools are financed from two major sources, the state school fund and local district taxes. As to the *former*, state aid to education is authorized by article IX, section 6, of the state Constitution, which directs the Legislature to provide a state school fund for apportionment each year in an amount not less than \$180 per pupil in average daily attendance; that the fund shall be apportioned annually as the Legislature may provide, through the school districts; and that the legislature must apportion at least \$120 per pupil in the district during the next preceding fiscal year, and at least \$2,400 to each school district in each fiscal year.

As to the *latter*, assistance to schools from local district taxation, the subject of plaintiff's challenge herein, is authorized by article XIII, section 21, of the Constitution which provides:

Within such limits as may be provided under Section 20 of this Article [allowing the Legislature to provide maximum local property tax rates and bonding limits], the Legislature shall provide for an annual levy by county governing bodies of school district taxes sufficient to provide annual revenues for each district that the district's board determines are required for its schools and district functions.

Paraphrased, section 21 requires the Legislature to adopt a school financing system in which each county may levy annually a school district tax in an amount sufficient to provide the revenues deemed necessary by each district board. Since under our Constitution property must be assessed in, and taxed only by, the county, city and district in which it is situated . . . it necessarily follows that article XIII of the Constitution, section 21 in conjunction with section 14, contemplates a school financing system in which each

individual district's needs are satisfied from the taxable wealth of that district, namely, the present system which the majority find unconstitutional. The majority describe the foregoing reasoning as a "non sequitur." If, however, section 21 empowers the legislature to provide for district tax levies to assure adequate school revenues, and if under section 14 the property subject to tax by the district to generate those revenues must repose within the district, wherein lies the "non sequitur"? Do not sections 14 and 21, in combination, authorize, *constitutionally*, a system whereby levy of taxes on local property within the district, supplemented by state aid, shall constitute the source of school financing?

The majority assert that the constitutional provision at issue was intended to authorize a different, more equitable, system not based upon disparities in district wealth. They concede that the state Constitution "allows variation in school district *expenditures*" (*ante*, p. 370 of 135 Cal.Rptr., p. 954 of 557 P.2d, italics added). One would presume that *expenditures* are more closely related to the quality of education than generalized equality in the value of properties subject to district school taxes. However, we emphasized in *Serrano I* that the state Constitution did *not* require an equality of spending between various school districts. Our words were ". . . we have never interpreted the constitutional provision to require equal school spending; . . ." (5 Cal.3d at p. 596, 96 Cal.Rptr. at p. 609, 487 P.2d at p. 1249.) Nonetheless, the majority insist that since the Constitution does not expressly authorize district wealth disparities as to the source of district revenues, the present system cannot be deemed protected by its shield. In the majority's view, "Such disparities. . . are the result of *legislative action, not constitutional mandate.*" (*Ante*, p. 371 of 135 Cal.Rptr., p. 955 of 557 P.2d, italics in original.) (In this connection, I do not contend, of course, that the California Constitution *mandates* the present system of school financing, but only that it *permits* or *authorizes* that system.)

Discussion Notes

1. Do most state constitutions contain provisions similar to those described by Justice Richardson?

2. How convincing is the position of Justice Richardson?

Hornbeck v. Somerset County Board of Education 458 A.2d 758 (Md. 1983)

MURPHY, Chief Judge.

This case involves a challenge to the constitutionality of Maryland statutes which govern the sys-

tem of financing public elementary and secondary schools in the State's twenty-four school districts, i.e., in the twenty-three counties of Maryland and in Baltimore City. The litigation focuses upon the existence of wide disparities in taxable wealth among the various school districts, and the effect of those differences upon the fiscal capacity of the poorer districts to provide their students with educational offerings and resources comparable to those of the more affluent school districts.

I

Maryland's public school system is administered pursuant to the provisions of the Education Article of the Maryland Code (1978). The State Board of Education, as head of the State Department of Education, is entrusted with the general care and supervision of the public elementary and secondary schools of the State; it is empowered to determine and carry out the State's public school policies and to adopt bylaws, rules and regulations for the administration of the system. Subject to the general authority of the State board, the State Superintendent of Schools is responsible for the administration of the Department. A county Board of Education in each county and a Board of School Commissioners in Baltimore City, together with their local school superintendents, are vested with control over educational matters in their respective school districts. Subject to applicable bylaws, rules and regulations of the State Board, the local authorities are empowered to determine the educational policies within their own school districts.

The State's public school system is primarily financed by a combination of State and local tax revenues.¹ Section 5-201 of the Education Article provides (with certain exceptions) that all State funds appropriated by the General Assembly to aid in support of the public schools shall be included within the General State School Fund. Section 5-201(c) directs payments of monies from the State School Fund for a number of specified public school expenses. . . .

In addition to these educational expenditures, each local subdivision spends substantial sums of money for the support of its local schools. Because of differences in assessed property valuations among the subdivisions, the amounts raised through local taxation and spent per pupil vary from district to district, depending upon the district's tax wealth and/or inclination to spend money to enhance the educational resources and opportunities available to its students. These discretionary local expenditures result in substantial spending imbalances between the districts—imbalances which are only partially offset by the State's equalization and other aid. Educational offerings in some school districts are therefore considerably greater than in others. That Maryland's system of financing its public schools is dependent in considerable part upon tax revenues raised by the local subdivisions and expended for the support of their local public school systems is thus entirely clear.

¹Federal aid is minimal, constituting approximately 8 percent of the total.

II

February 15, 1979, the Boards of Education of Somerset, Caroline and St. Mary's Counties, and the School Commissioners of Baltimore City, together with taxpayers, students, parents, public officials and the school superintendents in each subdivision (collectively the plaintiffs), filed a declaratory judgment action in the Circuit Court of Baltimore City. Characterizing their respective school districts as fiscally distressed, the plaintiffs claimed that the State's public school financing system violated (a) the Equal Protection Clause of the Fourteenth Amendment, (b) the equal protection guarantee of Article 24 of the Maryland Declaration of Rights, and (c) sec. 1 of Article VIII of the Maryland Constitution, which commands the General Assembly to "establish throughout the State a thorough and efficient System of Free Public Schools; and [to] provide by taxation, or otherwise, for their maintenance."³ Named as defendants in the action were the Comptroller of the Treasury, the State Superintendent of Schools, and, by intervention, Montgomery County, Maryland.

The complaint alleged that because of the insufficiency of school funds caused by the State's discriminatory, unequal and inadequate school financing system, the plaintiff school boards were unable to meet their constitutional obligations under state and federal equal protection guarantees or under the "thorough and efficient" clause of sec. 1 of Article VIII of the Maryland Constitution. In four separate causes of action, the plaintiffs alleged that

³In its entirety, Article VIII of the Maryland Constitution reads as follows:

Section 1. General Assembly to establish system of free public schools.

The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.

Section 2. Continuance of system in force at adoption of Constitution.

The System of Public Schools, as now constituted, shall remain in force until the end of the said first Session of the General Assembly, and shall then expire; except of far as adopted, or continued by the General Assembly.

Section 3. School Fund.

The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education.

the State's public school financing system unconstitutionally discriminates against and disadvantages all students in the State's fiscally distressed school districts by providing them lesser and inadequate educational opportunity; that the system unconstitutionally operates to the particular disadvantage of poor children attending public schools in the fiscally distressed school districts; that Maryland unconstitutionally discriminates against poor school children throughout the State by systematically denying equal educational opportunity to most of them; and that the State's public school financing system unconstitutionally discriminates against residents and taxpayers of Baltimore City by compelling them to impose unparalleled tax rates while still offering only a reduced level of education, a duality which promotes continuing "out-flight" of the City's tax base and threatens the City's fiscal vitality.

* * * * *

Judge Ross held that the State's public school financing system did not comply with sec. 1 of Article VIII of the Maryland Constitution which requires that the General Assembly, by law, establish throughout the State a "thorough and efficient" system of free public schools and provide by taxation, or otherwise, for their maintenance. After extensively reviewing the history underlying the establishment and financing of Maryland's public school system, Judge Ross concluded that the "thorough and efficient" language of Article VIII was straightforward and unambiguous; that it required a system which by contemporary standards was "full, complete and effective in every part of the State and not just in those subdivisions which for whatever reason happen to have the revenue wealth to provide such." The court said that the words "thorough and efficient" denote "a level of quality and that standard must be established and maintained in every subdivision"; that the General Assembly must provide the funds to achieve this end; that more was required than "a bare framework for delivering a minimum basic education." Judge Ross opined that the public school system could not at the same time be thorough and efficient throughout the State when substantial disparities in spending existed between school districts, particularly when the only explanation for the disparities was the availability of funds. He said:

If it takes \$2,328 per pupil to provide full and complete schools in one county, it would seem that it would cost substantially the same to do so in the others. On the other hand, if \$1,498 per pupil provides full and complete schools in one subdivision it can hardly be said that a system which permits

expenditure of \$2,328 and comparable amounts in other subdivisions is efficient. This is certainly true if one attributes to 'efficient' the concept of using the least wasteful means which is clearly a part of the current meaning of that word. It would seem that the system is either not full and complete in the low spending subdivision or it is wasteful in the high spending one.

For reasons extensively outlined in his opinion, Judge Ross next concluded that even if the language of Article VIII was ambiguous and required construction, its history and contemporaneous construction dictated the same interpretation, i.e., that a statewide free public school system be established which is full, complete and effective by contemporary standards throughout the State.

In summary, Judge Ross found from the evidence:

... that the present financing scheme significantly underfunds the plaintiffs' schools whose requirements are at least as great as any in the State, while it permits virtually unlimited spending in other subdivisions. As a result the quality of the schools in the plaintiffs' subdivisions is inferior to those in the wealthier subdivisions with respect to buildings, equipment, materials and staff.

Consequently, the court found that because the existing system failed to set a qualitative standard of education and to provide equal funding across the State, it was not "thorough and efficient" within the meaning of sec. 1 of Article VIII of the Maryland Constitution.

* * * * *

III

We first consider the meaning of sec. 1 of Article VIII of the Maryland Constitution which requires that the General Assembly establish "a thorough and efficient" system of free public schools throughout the State and "provide by taxation, or otherwise, for their maintenance." Of course, if the provisions of this section are clear and unambiguous, as the trial judge held, no construction or clarification is needed or permitted. See *Brown v. Brown*, 287 Md. 273, 412 A.2d 396 (1980); *Johns Hopkins Univ. v. Williams*, 199 Md. 382, 86 A.2d 892 (1952). Contrary to the position taken by Judge Ross, however, the provisions of sec. 1 do not, in our view, clearly and unambiguously compel the enactment of a statute mandating exact equality in per pupil funding and expenditures among the State's school districts as the constitutionally required means of establishing and maintaining a

“thorough and efficient” statewide system of free public schools. The meaning of sec. 1 is by no means free from doubt; the language of that section, on its face, is plainly susceptible of more than one meaning. Accordingly, to ascertain and effectuate the intent of the framers of the organic law and the people adopting it, it is essential that we consider the history underlying the enactment of sec. 1 and its contemporaneous construction by officials charged with administration of the government, including the legislature. . . . In this regard, it has been held that a contemporaneous construction placed upon a particular provision of the Maryland Constitution by the legislature, acquiesced in and acted upon without ever having been questioned, followed continuously and uniformly from a very early period, furnishes a strong presumption that the intention is rightly interpreted. . . . And, in considering contemporaneous exposition in construing the meaning of a constitutional provision, Maryland courts have always afforded great weight to debates and proceedings held in the course of constitutional conventions. . . . Of particular importance in this connection are the proceedings of the 1867 Constitutional Convention, as reported in P. Perlman, *Debates of the Maryland Constitutional Convention of 1867* (1923). See *Kadan, supra*, 273 Md. at 412, 329 A.2d 702.⁵

(A)

Although the Maryland Constitution of 1776 did not contain any provision relating to public school education, the General Assembly manifested its concern for educational matters in the early days of statehood. . . .

It was not until adoption of the Maryland Constitution of 1864 that a statewide system of free public schools was established in this State. Article VIII, sec. 1 of that document required the Governor to appoint a State Superintendent of Public Instruction with responsibility to develop “a uniform system of free public schools.” Section 2 of the article required the creation of a State Board of Education. Section 3 directed the appointment of school commissioners in each county in such numbers as the State Superintendent determined, the commissioners to be appointed by the State Board and to perform duties as directed by the State Superintendent or by the General Assembly. Section 4 direct the General Assembly to “provide a uniform system of free public schools, by which a school shall be kept open and supported free of expense for tuition in each school-district, for at

⁵Perlman’s account of the 1867 Constitutional Convention debates is taken from detailed articles appearing in the Baltimore Sun throughout the period of the Convention’s work.

least six months in each year.” Section 5 required the General Assembly to levy an annual tax of not less than ten cents on each one hundred dollars of taxable property throughout the State, for the support of the free public schools, the funds to be distributed among the counties and Baltimore City in proportion to their respective population between the ages of five and twenty years. This section prohibited the General Assembly from levying “any additional school-tax upon particular counties, unless such county express by popular vote its desire for such tax.” Section 5 also authorized Baltimore City “to provide for its additional school-tax as at present, or as may hereafter be provided by the General Assembly, or by the mayor and city council of Baltimore.” Section 6 directed the General Assembly to provide “a fund for the support of the free public schools of the State, by the imposition of an annual tax of not less than five cents on each one hundred dollars of taxable property throughout the State,” the proceeds thereof to be known as “the public-school fund,” and invested until the fund amounted to six millions dollars, after which the ten cent tax required by sec. 5 could be discontinued, if the General Assembly so determined. Section 6 further provided that the school fund would remain “forever inviolate as the free public-school fund of the State,” the interest therefrom to be disbursed for educational purposes only, as prescribed by law.

* * * * *

The “uniform” public school system established by Article VIII of the Constitution of 1864 was of short-lived duration.⁶ At the Maryland Constitutional Convention of 1867, a new Education Article was reported to the Convention by its twenty-five member Education Committee; it was adopted by the Convention without amendment and was identical in form and wording with what later became Article VIII of the Maryland Constitution of 1867. See Perlman, *Debates*, at 148. As proposed, the new Education Article did not contain any provision, as then existed in the 1864 Constitution, for the appointment of designated State education officials, for the mandatory imposition of State property taxes in specified amounts to fund the statewide system, or for the distribution and allocation of such tax reve-

⁶History indicates that the uniform public school system was favored by the “Unionists” who sought to remove local control of education from the local subdivisions. Because soldiers of the Union Army, then quartered in Maryland, were permitted to vote on the adoption of the 1864 Constitution, some historians speculate that the document’s ratification did not represent the will of a majority of Maryland’s citizenry. See L. Blauch, *The First Uniform School System of Maryland, 1865-1868*, 26 Md.Hist.Mag. 205, 225-226 (1931).

nues among the counties and Baltimore City. Nor did the new article contain a provision, as in the 1864 Constitution, that the statewide school system be "uniform." The new article required only that the free statewide system be "thorough and efficient," and funded "by taxation, or otherwise." It also directed that the existing "uniform" system would expire at the end of the first year after the adoption of the new constitution, unless the legislature elected to continue it.

Although no official transcript of the debates of the 1867 Convention was made, considerable historical evidence exists respecting the Convention's proceedings. As reported in Perlman, *Debates of the Maryland Constitution Convention of 1867*, at 198-203, 243-48, and 251-56, a number of delegates expressed dissatisfaction with the "uniform" public schools system created by the 1864 Constitution; they urged its termination. Some delegates assailed the large expense associated with the operation of the uniform system, with its centralized administration, lack of local control, and with the performance of the Superintendent of Public Instruction. Members of the Convention's Education Committee, in explaining the proposed new article to the delegates, said that it did not provide for a uniform system; that the subject "of incorporating into the constitution a detailed system was thoroughly discussed"; that the committee was of the "unanimous conclusion . . . that the constitution should not be encumbered with the details"; and that the "best plan was to leave the details . . . to the legislature." The comments of Delegate Kilbourne, a member of the Education Committee, appear to reflect the sentiment of the Education Committee. As reported in Perlman, *Debates*, at 200-01, Kilbourne "wanted this matter left to the Legislature." He said that:

He had been for abolishing the present system . . . [and] in no shape or form would he consent that the system should continue one day beyond the time indicated in this article, [June 11, 1867]. . . . The committee had ample evidence of the almost entire voice of the people of Maryland against the system. The reason why he was willing to leave this matter to the Legislature was because he was thoroughly convinced that no section of the State would send a delegate to the Legislature who would not be in favor of abolishing the present system. The enormous expenses of the system, the mode of raising the money and the mode of expending it, and the power of the superintendent, are all reasons why this system should be dispensed with. . . . The whole system has radical, fun-

damental objections. It would be supposed that it would be right to commit the expenditure of the funds to those who contributed them, but these funds are placed beyond the control of every parent and guardian in the State; those who bear the burdens are denied all share in their direction.

A number of amendments were nevertheless proposed to the Education Committee's report. . . .

None of the proffered amendments to the proposed new education article were adopted by the Convention and it was passed with only five dissenting votes. *Debates*, at 439. A resume of the work of the Convention was printed in *The Baltimore Sun* after the Convention's adjournment. It was there reported that the education article "makes it incumbent on . . . [the legislature], at its first session to provide for a new system, all the details of which, including the rate of taxation, are left to it." *Id.* at 36.

Perlman's accounts of the proceedings at the 1867 Constitutional Convention are confirmed by articles appearing in *The Baltimore American and Commercial Advertiser*, the *Baltimore Daily Commercial* and the *Baltimore Gazette*. In various articles, these newspapers reported that it was the intention of the Convention delegates in adopting the new education article to leave implementation of the details of the public school system to legislative determination. For example, Delegate McKaig, a member of the Education Committee, was quoted as saying: "[t]he object of the committee was to leave the Legislature entirely untrammelled." *Baltimore American*, June 21, 1867, at 4. Delegate Page was reported to have unsuccessfully introduced a motion to amend the first section of the new education article to require "a thorough, efficient and *uniform*" free public school system. *Id.*, June 12, 1867, at 4 (emphasis supplied). It was reported that efforts to include a constitutional provision guaranteeing local control of the public schools, and for a separate system in Baltimore City, were blunted by the firm position espoused by Education Committee members, most of whom favored local control, that the legislature be left free to adopt the system it deemed best. *Id.* June 12 and 22, at 4. See also *Baltimore Daily Commercial*, June 12, 1867, at 4. . . .

Following ratification of the Constitution of 1867, the provisions of Article VIII were implemented by ch. 407 of the Acts of 1868, which enacted a new public education article. The statute made provision for a general system of free public schools throughout the State. Educational matters affecting a county were placed under the superintendence of Boards of County School Commissioners. The Act required imposition of a ten-cent statewide property

tax to support the free public school system throughout the State, to be distributed to the City and to the counties on a school-age population basis. The statute specified that the State School Fund was to pay the salaries of teachers in the counties, and the expense of school books and stationery; and that if in apportioning the School Fund among the counties and Baltimore City, the share of any county was inadequate, the county could impose a local property tax sufficient to satisfy the deficiency; and that county voters could also impose other and additional taxes for public school purposes.

* * * * *

(B)

It is manifest from the history underlying the adoption of Article VIII of the 1867 Constitution, and from the consistent interpretation and application of its provisions by the legislative and executive branches of the State government for more than one hundred years, that the “thorough and efficient” language of sec. 1 does not mandate uniformity in per pupil funding and expenditures among the State’s school districts. The words of sec. 1 require no more than that the General Assembly, by law, establish a “thorough and efficient” system of free public schools throughout the State, funded by taxation or otherwise. That the general language of this constitutional directive constituted a clear departure from the specific and detailed education article provisions contained in the 1864 Constitution is clear. It is equally clear that nothing in the provisions of the newly adopted sec. 1 compelled the legislature to enact a law requiring that the funds raised to support the public schools system be apportioned in any particular way. Nor did the provisions of sec. 1, either explicitly or implicitly, inhibit local subdivisions from spending locally generated tax revenues for public school purposes in supplementation of amounts to be received from the state school fund. Obviously, in light of the historical evidence, the words “thorough and efficient,” in the context of their usage in sec. 1, are not the equivalent of “uniform.” Nor do these words impose upon the legislature any directive, in its establishment of the public school system, to so fund and operate it that the same amounts of money must be allocated and spent, per pupil, in every school district in Maryland. To conclude that a “thorough and efficient” system under sec. 1 means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State’s children. The development of the statewide system under sec. 1 is a matter for legislative determination; at most, the leg-

islature is commanded by sec. 1 to establish such a system, effective in all school districts, as will provide the State’s youth with a basic public school education. To the extent that sec. 1 encompasses any equality component, it is so limited. Compliance by the legislature with this duty is compliance with sec. 1 of Article VIII of the 1867 Constitution.

In so concluding, we have considered cases from other jurisdictions with state constitutions having a “thorough and efficient” education clause or like provision. *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979), involved a challenge to the statutory system by which the Philadelphia school district was funded under a state constitutional provision requiring that the legislature provide for the maintenance and support of a “thorough and efficient system of public education.” Pennsylvania’s statutory scheme, like Maryland’s, contained two primary sources of funding—state and local taxation. State funds were distributed pursuant to a formula akin to Maryland’s foundation level program for basic current expenses. Local tax revenues constituted the major source of school funding. It was contended that the “thorough and efficient” clause mandated exact equality of funding among the school districts. The Supreme Court of Pennsylvania rejected that claim. It said that the framers of the Pennsylvania Constitution had “considered and rejected the possibility of specifically requiring the Commonwealth’s system of education be uniform.” 399 A.2d at 367. Instead, the court noted that in enacting the “thorough and efficient” clause, the framers had “endorsed the concept of local control to meet diverse local needs” and had recognized “the right of local communities to utilize local tax revenues to expand educational programs subsidized by the state.” *Id.*

* * * * *

The Georgia Constitution makes it a “primary obligation” of the state to provide “an adequate education to the citizens of Georgia.” Under that state’s school financing system, the primary fund sources are state and local revenues. The bulk of the state money is distributed for “basic educational needs,” allotted pursuant to the average daily attendance per local district. To receive this aid, each district must contribute a set amount obtained from ad valorem taxation, referred to as “required local effort.” Local jurisdictions, however, may supplement this program with funds generated by local property tax assessments. In *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981), it was claimed that these local contributions, combined with the low level of state support, violated the state education clause. The court concluded from the evidence that a direct relationship existed between a district’s level of funding and the educational opportunities which a school district is able to provide its children. *Id.* 285 S.E.2d at 160. Nevertheless, it

held that the “adequate education” provisions of the state constitution “do not restrict local school districts from doing what they can to improve educational opportunities within the district, nor do they require the state to equalize educational opportunities between districts.” *Id.* 285 S.E.2d at 164. Furthermore, the court found that the legislature had not disregarded its obligation to provide an “adequate” education, as evidenced by the massive state financial commitment to public education. The court stated that “while an ‘adequate’ education must be designed to produce individuals who can function in society, it is primarily the legislative branch of government which must give content to the term ‘adequate.’” *Id.* 285 S.E.2d at 165.

Both the New Jersey and West Virginia Constitutions contain provisions requiring the establishment of a “thorough and efficient” system of free public schools. In *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973), the Court recognized the existence of wealth-based spending disparities among local school districts. It held that the “thorough and efficient” clause required equality of expenditures for a minimum mandated educational opportunity, i.e., one “which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.” *Id.* 303 A.2d at 295. The Court noted that the State had never established even minimal statewide standards for education; that absent such standards the tax burden could not be “left to local initiative with any hope that statewide equality of educational opportunity will emerge.” *Id.* The Court said that the State must compel the local districts to raise the money to provide for the constitutionally mandated education and that it could also authorize local governments to spend beyond the constitutionally mandated minimum education.¹³

¹³New Jersey’s legislature appears unwilling or unable to obey the “constitutional mandate” set forth in the *Robinson* case. The state is now in its seventh round of school financing litigation. See *Robinson v. Cahill*, 70 N.J. 155, 358 A.2d 457 (1976).

As in *Robinson v. Cahill*, *supra*, the court in *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va., 1979), found an absence of educational standards to “set the core values” for the state’s public school system. *Id.* at 878. Without actually deciding that the state’s educational system was so deficient as to violate the “thorough and efficient” clause of the state constitution, the court remanded the case for the development of educational qualitative standards consistent with the constitutional directive and for testing to determine whether each school district would be in compliance with the newly developed standards. In so ruling, the court emphasized that “great weight will be given to legislatively established standards, because the people have reposed in that department of government ‘plenary, if not absolute’ authority and responsibility for the school system.” *Id.* Moreover, the court stated that “[m]ere rote comparison with other more affluent counties does not necessarily serve to define the values of such a system.” *Id.* See also *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28 (1980).

In contrast to New Jersey and West Virginia, Maryland has, by legislation, and by regulations and bylaws adopted by the State Board of Education, established comprehensive statewide qualitative standards governing all facets of the educational process in the State’s public elementary and secondary schools. . . .

The record in this case demonstrates that Maryland has continuously undertaken to provide a thorough and efficient public school education to its children in compliance with Article VIII of the Maryland Constitution. That education need not be “equal” in the sense of mathematical uniformity, so long as efforts are made, as here, to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child. The current system, albeit imperfect, satisfies this test.

* * * * *

Discussion Notes

1. Footnote 13 of the Maryland opinion refers to the continuing litigation in New Jersey in *Robinson v. Cahill*. The latest chapter is *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985).

2. Is the history of Maryland’s rejection of a “uniform” system of public schools necessarily dispositive of the question of inequality of funding?

B. Right to Education

In the Interest of G. H. 218 N.W. 2d 441 (N.D. 1974)

VOGEL, Judge.

G. H., in whose interest this action was brought, was born on July 27, 1957, with severe physical handicaps which need not be detailed. She is educable, and is expected to finish her grade school education soon. At the time of her birth her family lived at Williston, Williams County, North Dakota, in Williston School District No. 1.

She spent some time at the Grafton State School (for retarded children), but did not really belong there, so she was sent to the Crippled Children's School at Jamestown, North Dakota, at the request of the superintendent of the Grafton State School. The Crippled Children's School is a private, nonsectarian, nonprofit institution. G. H. has now spent most of her 17 years of life there.

Her parents were unable to pay the charges at that school, even though approximately half of the expenses of the school are paid by charitable contributions. So the Williams County Welfare Board began paying the cost of keeping her in a foster home in Jamestown, while Williston School District No. 1 contracted with the Crippled Children's School to pay her tuition. . . .

All went well until the parents of G. H. moved to Minneapolis, Minnesota, in 1969, leaving her at the Crippled Children's School in Jamestown. Williston School District No. 1 stopped paying the tuition at the school as of September 1, 1969, while the County Welfare Board continued to pay for the foster home care. The Crippled Children's School continued to provide her with educational services, without reimbursement by anyone.

On March 20, 1970, Reuben E. Carlson, an officer of the State Public Welfare Board, petitioned the

district court of Stutsman County (where the Crippled Children's School is located) to make a determination concerning the care, custody, and control of G. H., and asserted that she was a deprived child without proper parental care or control; that her parents were not living together and were unable to provide a suitable home for her; that she had physical disabilities which make it necessary for her to attend the Crippled Children's School; and that her parents were unable to cope with her many needs because of her physical condition. The action was brought by Reuben E. Carlson, and the respondents were G. H. and her parents. After a hearing, the district court made findings on May 14, 1970, that G. H. is a deprived child, that her parents were unable to provide for her, that the causes of her deprivation were not likely to be remedied, that her mother was confined to a hospital for psychiatric treatment, that it was impossible for the parents to care for her, that the most suitable place for her was the Crippled Children's School, and that the parents had not established permanent residence outside the Williston area. The court further found that the Crippled Children's School had proper facilities for her education and that there were no public schools in the State of North Dakota with the necessary facilities which would accept her. The court further found that the Williams County Welfare Board was providing for her care and that up to September 1, 1969, when the parents left Williston, the Williston School District paid the tuition at the Crippled Children's School.

The court thereupon ordered that G. H. be taken under the juvenile jurisdiction of the court, that her care, custody, and control be transferred to the director of the Williams County Welfare Board, and that her father pay \$55 per month to the Williams County Welfare Board if his income warranted. Williston School District No. 1 was ordered to pay the education costs at the Crippled Children's School retroac-

tively to September 1, 1969, and continuously thereafter so long as she remains a student at the School.

* * * * *

When the appeal was perfected, all parties named in the title were represented by attorneys, except G. H. herself. On our own initiative, we requested the North Dakota Association for Retarded Children to file a brief amicus curiae. We are grateful to the Association for having done so and for enlisting the support of the National Center for Law and the Handicapped, which joined in the brief and participated in the oral argument.

CONSTITUTIONAL RIGHT TO EDUCATION

Two kinds of expenditures are involved in this appeal. The first is, perhaps inadequately, described as *subsistence*. This description includes the foster home care, including board and room of G. H., as well as payments for physical therapy and some incidental expenses for her. These sums have been paid for years by the Williams County Welfare Board. Although that board appealed from the order of the district court, it continued to make payments for subsistence, and concedes that it will continue to make the payments if no one else makes them.

The greatest disagreement arises over the second category of expenses, also described inadequately, the so-called *tuition* at the Crippled Children's School. This designation necessarily covers more than the ordinary kind of education, since education of handicapped children requires a different kind of physical plant to accommodate their physical handicaps, a different kind of teaching adapted to the mental handicaps which so often accompany the physical ones, and special kinds of teachers to assist in surmounting the problems arising from all the varieties of handicaps encountered.

The first question to arise, incredibly enough, is whether G. H. is entitled to have her tuition paid by anyone. A great many handicapped children in this State have had no education at all, which might indicate that they are entitled to none. A further shadow on their claim to an education has been cast, according to some of the briefs before us, by the decision of the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), which held that education is not a right mandated by the United States Constitution. We will return to the *Rodriguez* case later, but at this point we will consider whether the right to an education is a constitutional right un-

der the Constitution of this State. We held long ago that it is, and we now reiterate that holding.

The historic policy of this state, in common with the general policy of every other state in the Union, is to maintain a free public school system for the benefit of all children within specified age limits.

This policy existed prior to statehood and is crystallized in sections 147 and 148 of the State Constitution, which read as follows:

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without consent of the United States and the people of North Dakota.

[Sec. 147, Constitution of N.D.]

The legislative assembly shall provide, at its first session after the adoption of this constitution, for a uniform system for free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course.

[Sec. 148, Constitution of N.D.] *Anderson v. Breithbarth*, 62 N.D. 709, 245 N.W. 483, 484 (1932).

We are satisfied that all children in North Dakota have the right, under the State Constitution, to a public school education. Nothing in *Rodriguez, supra*, holds to the contrary. The State of New Jersey has held, since *Rodriguez*, the education is a right under the Constitution of that State. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973).

Handicapped children are certainly entitled to no less than unhandicapped children under the explicit provisions of the Constitution. Whether those who have been unconstitutionally deprived of education in the past have a constitutionally based claim for compensatory educational effort, we leave for future

determination. See *In re H.*, 72 Misc.2d 59, 337 N.Y.S.2d 969 (Family Court, Queens County, 1972).

For the present, we say only that failure to provide educational opportunity for handicapped children (except those, if any there are, who cannot benefit at all from it) is an unconstitutional violation of the foregoing constitutional provisions, as well as Section 11 of the North Dakota Constitution and Section 20 of the North Dakota Constitution, which provide that all laws of a general nature shall have a uniform operation and that no class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

We find nothing in *Rodriguez, supra*, to persuade us to a different view. On the contrary, education has long been the primary responsibility of the States, and it is only natural that their constitutions should provide for a right to an education; while the Federal Constitution, as *Rodriguez* points out, is silent on the subject of education.

* * * * *

WHO SHALL PAY?

Resolution of this question depends upon a decision as to the residence of G. H. for school purposes. That problem was exhaustively discussed in *Anderson v. Breithbarth, supra*. Although the statutes have been amended in many respects since then, the amendments would not change the result.

Section 15-59-07, relating to education of students with physical handicaps and learning disabilities, says nothing about residence, It tells only what is to be done if any school district "has" such a handicapped child.

The facts here are very similar to *Anderson*. In *Anderson*, a child had been more or less abandoned by her parents and left with relatives, who enrolled her in a local school. The school district challenged her right to attend the school without the payment of tuition by the district of her former residence or the district of her parents' then residence. We held that it was the residence of the child which was controlling, and that she was entitled to attend the school where she resided with relatives.

In the present case, if the Williston School District had facilities within its district to educate handicapped children such as G. H., she would no doubt still be living there, and *Anderson* would be exactly in point and controlling.

Does the fact that Williston has no such facilities, and therefore contracted with the Crippled Children's School to provide them, change the situation in any material way? We think not. A contract between a school district and the Crippled Children's School does not change the residence of the child, which remains within the contracting district.

* * * * *

We so hold, even though the child's parents have moved from the State of North Dakota and established residence elsewhere. G. H. has been determined to be a ward of the State. Her residence is separate from that of her parents. *Anderson v. Breithbarth, supra*. If Williston were not her residence, we would have to decide whether the responsibility for her care lay with the Social Service Board of the State.

* * * * *

Discussion Notes

1. *In the Interest of G. H.* concerned a child who was "educable." What are the education rights of those deemed "subtrainable"? See *Levine v. Institutions and Agencies Dept.*, 84 N.J. 234, 418 A.2d 229 (1980).

2. Concerning the state constitutional right to education as applied to mentally handicapped individuals, see also, *Dept. of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270-71 (Ill. 1958). Article X, section 1 of the Illinois Constitution of 1970 now provides: "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities." This provision apparently "overrules" *Haas*.

3. See also, *State v. Stecher*, 390 A.2d 408, 410 (Conn. 1977) ("the right to free public education is not measured by the physical or intellectual ability of the child.")

4. Review the New Mexico Attorney General's opinion in Chapter 5, Section H, concerning bilingual education.

5. For an excellent study of the rights of school children who cross school district lines to reside in spouse abuse shelters, see Nancy Ruth Johnson, "The Education Rights of School Age Children Who Reside in New Jersey Spouse Abuse Centers: An Analysis from the Child Advocate's Perspective," *Journal of Law and Education* 13 (April 1984): 239.

6. Could a right to education conflict with other state constitutional provisions concerning public education, such as those requiring a public referendum on bonds for school construction and renovation? See *In re Application of Freehold Bd. of Educ.*, 86 N.J. 265, 430 A.2d 905 (1981); Michael J. Guard and Jean A. La Maita, "Financing Public Education Facilities in New Jersey, After the Freehold Decision," *Seton Hall Law Review* 12 (No. 2 1982): 195.

7. Review the materials in Chapter 1 relating to the admission of new states, and *Wheeler v. Barrera* in Chapter 2, Section C, p.56.

C. Higher Education

Should state constitutions contain references to higher education? What effects might be predicted from inclusion of provisions relating to higher education in state constitutions?

The Regents of the University of Michigan v. State 395 Mich. 52, 235 N.W.2d 1 (1975)

COLEMAN, Justice.

* * * * *

The plaintiffs (Universities) maintain that 1971 P.A. 122 infringes upon their constitutional autonomy by (sec. 13) limiting the numbers of and tuition paid by out-of-state students, (sec. 20) unduly restricting the "construction of buildings or operation of institutions of higher education" and (sec. 26) requiring that there be no raise in tuition or student fees beyond the amount of revenue reported for budget purposes. . . .

ISSUES RAISED BY PARTIES

1.

Do the conditions and limitations imposed in 1971 P.A. 122, secs. 13, 20 and 26 (Higher Education Appropriation Act of 1971), unconstitutionally intrude upon the authority of the universities as set forth in Const. 1963, art. 8, secs. 4, 5 and art. 5, sec. 20?

2.

Does the provision in Const. 1963, art. 8, sec. 3 that the Michigan Board of Education "serve as the general planning and coordinating body for all public

education, including higher education" include the authority to veto prior to implementation by the universities?

GENERAL

Essentially we must address the distribution of power among the legislature and governor, the governing boards of the universities and the State Board of Education.

* * * * *

As defendants point out, "[T]his is the first major case in this area of Michigan constitutional law . . . to reach the Court since State Board of Agriculture v. Auditor General, 226 Mich. 417 [197 N.W. 160]," decided over 50 years ago in 1924 and the first case in this area to reach the Court under the 1963 constitution.

1.

1971 P.A. 122 Pertinent Constitutional Provisions Const. 1963, art. 8, sec. 4

The legislature shall appropriate moneys to maintain the University of Michigan, Michigan State University, Wayne State University, Eastern Michigan University, Michigan College of Science and Technology, Central Michigan University, Northern Michigan University, Western Michigan University, Ferris Institute, Grand Valley State College, by whatever names such institutions may hereafter be known, and other institutions of higher education established by law. The legislature shall be given an annual accounting of all income and expenditures by each of these educational institutions. Formal sessions of governing

boards of such institutions shall be open to the public.”²

Const. 1963, art. 8, sec. 5

. . . Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution’s funds . . .³

Const. 1963, art. 5, sec. 20

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial

²Convention Comment:

This is a revision of Sec. 10, Article XI, of the present [1908] constitution requiring the legislature to appropriate funds to maintain all state-supported institutions of higher education. All such institutions must give an annual accounting to the legislature of all income and all expenditures.

Constitutional status is conferred on all state-supported institutions of higher education which are now in existence or which may hereafter be established.

The concluding sentence of the section insures that formal sessions of the governing boards of such institutions will be open to the public.

³Convention Comment:

This is a revision combining Sections 3, 4, 5, 7, 8 and 16, Article XI, of the present [1908] constitution. The governing boards of the University of Michigan, Michigan State University and Wayne State University are placed on an equal basis in the supervision of their respective institutions and the control and direction all expenditures from the institutions’ funds.

Each of the boards is permitted to choose the president of its university as presently provided. All three boards are to be equal in size, which enlarges those of Michigan State University and Wayne State University for six to eight members. Such members are all to be elected for eight-year terms and vacancies are to be filled by appointment of the governor.

branches or from funds constitutionally dedicated for specific purposes.⁴

A capsule history provides perspective to these proceedings.

The University of Michigan was established by act of the Governor and judges of the Territory of Michigan on August 26, 1817. The act increased the public taxes 15% and appropriated the increase to the university. A priority of expenditure was created, the balance to be utilized “as shall be from time to time by law directed.” Control was in the Legislature.

On April 30, 1821, the Governor and judges repealed the August 26, 1817 act, replacing it by an act creating the University of Michigan “under the management, direction and government of twenty-one trustees, . . . a body politic and corporate.”⁵ This body also was given authority (sec. 5) to establish such other “colleges, academies and schools” as it thought proper and its funds permitted. Because of a series of federal acts providing land for support of education in the territories and reliance on its continuation, little reference was made to financial support and early constitutions.⁶ Control was in the university.

Mention of the university was made in Const.1835, art. 10, sec. 5 in a section which spoke largely to the preservation of the interest fund derived from sale of part of the federal lands. However, 1837 P.A. 55, “An Act to provide for the organization and government of the ‘University of Michigan’ ,” rested the government of the university in a board of

⁴Convention Comment:

This is a new section designed to provide for executive and legislative controls over state expenditures. The first sentence is intended to cover situations in which unforeseen efficiencies and economies might become possible.

The second sentence requires the governor, with the approval of the appropriating committees of the legislature, to reduce expenditures whenever it appears that revenues are not meeting estimates for a fiscal period. It is believed that this sentence removes any question as to the constitutionality of legislative control over general fiscal policy of the state. It would require current action to minimize impending year-end deficits.

The final sentence protects the separation of powers doctrine by preventing executive reductions of expenditures for the co-ordinate legislative and judicial branches of government. It would also prohibit the governor from making reductions in funds dedicated by the constitution for specific purposes.

⁵1 Terr.L.879.

⁶*Regents of the University of Michigan and the Legislature of the State, 1920-1950*, David B. Laird.

regents (sec. 3) and gave the regents power to expend all moneys for the use and benefit of the university (sec. 17).

Therefore, it appears that the Legislature took general control over this body, but delegated some control back to the regents.

In *Sterling v. Regents of University of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896), Justice Grant wrote of the history of the 1850 Constitution:

Under the Constitution of 1835, the legislature had the entire control and management of the university and the university fund. . . . The university was not a success under this supervision by the legislature. . . .

In 1850 the status of the university was re-established, and Const. 1850, art. 13 reads in essence the same as the 1908 provision and subsequently the 1963 provision.

Similarly, Michigan State University, the nation's first land grant college, and Wayne State University, the youngest of plaintiffs, passed through what plaintiffs term "a parallel course of legislative gestation and constitutional maturity."

Although decided long before the ratification of Const. 1963, *State Board of Agriculture v. Auditor General*, 226 Mich. 417, 197 N.W. 160 (1924), addressed the problem of what, if any, conditions can be imposed by the Legislature on appropriations to constitutionally recognized universities and colleges. As noted, the 1908 constitutional terms establishing the authority of the universities⁷ are similar to those employed in the present constitution.

The case substantially limited *Weinberg v. Regents of the University*, 97 Mich. 246, 56 N.W. 605 (1893), which had ruled that the Legislature could attach to an appropriation "any conditions it may deem expedient and wise." *State Board of Agriculture* ruled that an appropriation could be based upon a condition that the money be used for a specific purpose—within certain limitations. In speaking of *Weinberg*, the Court said:

[I]t did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college. It did not mean to say that in order to avail itself of the money appropriated the state board of agriculture must turn over to the Legislature management and control of the college, or of any of its activities. This logically leads us

to a consideration of the character of the condition attached to the appropriation involved in the instant case. Is it a condition that the Legislature has a power to make?

From this case the conclusion can be drawn that some but not all conditions can be imposed upon an appropriation to a constitutional college or university. However, the Legislature may not interfere with the management and control of those institutions. This landmark case makes it clear that the legislature within those limitations may appropriate state funds for a special purpose and if the university accepts the appropriation, it must use the funds for that purpose.

* * * * *

Sections 13 and 26 Section 13

It is a condition of this appropriation that no college or university having an enrollment of out of state students in excess of 20% of their total enrollment shall increase their enrollment of out of state students in their actual number or percentage over the actual numbers and percentages that were enrolled in the 1970-71 school year.

Further it is the intent of the legislature that an out of state student shall pay a student fee equal to approximately 75% of the cost of instruction at the respective institution of higher education.

In subsequent acts, however, the words, "[I]t is a condition of this appropriation" have been changed to "[I]t is legislative intent."

The Legislature has the right to state its advice or wishes through an expression on intent, so we deem it unwise to go forward (or backward) to meet an issue which no longer exists.

Section 26

We find also that the alleged ills of Section 26 have not appeared in any subsequent act and so likewise we consider it inappropriate to raise problems where none presently exist.

Section 20

It is a condition of this appropriation that none of the appropriations contained in this act shall be used for the construction of buildings or operation of institutions of higher education not expressly authorized in section 1. No contract shall be let for construction of any self-liquidating project at any of the state supported institutions of

⁷Const.1908, art. 11.

higher education without first submitting to the appropriate legislative committees, schedules for the liquidation of the debt for the construction and operation of such project. Funds appropriated herein to each institution of higher education may not be used to pay for the construction, maintenance or operation of any self-liquidating projects.

* * * * *

Second Sentence, sec. 20

The second sentence of sec. 20 requires that a university submit to the appropriate legislative committees schedules for the liquidation of the debt for construction and operation of a self-liquidating project. It does not prohibit the construction of a self-liquidating project. It only provides that the legislature be informed. It affords the legislature an overview of the total "plant" and a means by which to plan effectively for legislatively appropriated funds. There is no requirement of legislative approval. It provides only a method of notice of the total obligations of the universities. We find persuasive the following argument for the state by the Attorney General:

. . . this requirement of section 20 does not impinge upon plaintiffs-appellees' management of the operation of their respective universities. The universities are free to determine whether they will enter into contracts for the construction of self-liquidating projects. Further, the debt liquidation schedules are something the universities already have in their possession prior to entering into such contracts. Thus, this requirement imposes no burden upon the universities.

As it stands, this is a mere reporting measure, without corollary of supervision or control on the part of the committees receiving the information. Although it is, as plaintiffs claim, a pre-audit rather than post-audit provision, such reporting is merely an attempt to give the Legislature information which should be public knowledge. Universities may still enter into construction contracts for self-liquidating projects without prior legislative approval.

The legitimate interest of the governor and the legislature is served by notice of matters of possible consequences to the credit of the state and the total needs of the universities.

Accordingly, we find the second sentence of sec. 20 to be constitutional.

Third Sentence, sec. 20

The third sentence of sec. 20 precludes the use of operating funds to pay for the construction, maintenance or operation of any self-liquidating project.

The Universities would persuade us that the legislature has no valid interest in a self-liquidating project because it is just that self-liquidating or self-supporting. They argue that legislatively appropriated funds are not needed and so no legislative approval is required prior to the letting of such contract. We agree.

Defendants urge that this is a reasonable limitation since, by definition, the projects will generate revenues sufficient to pay for themselves. Further, they contend, if appropriated state funds may be used for self-liquidating projects, each becomes a "fait accompli in terms of the legislature having to provide state general fund moneys to be used for its construction, maintenance and operation."

Defendants contend that their carefully calculated appropriations would be meaningless if they could be so easily circumvented. The anticipated level of educational quality could be lowered through such a diffusion of funds. Also, the state therefore could become faced with a need for more money either during the same or following year to "maintain" the institution. State fiscal responsibility would become difficult or impossible to achieve. They argue that the condition has nothing to do with the control and management of the University.

Defendants maintain that the third sentence is a reasonable fiscal limitation in harmony with the requirements, responsibilities and limitations imposed upon the three branches of government.¹⁰

* * * * *

The third sentence of sec. 20 is a perfectly proper hortatory clause expressing the Legislature's desire to set up an orderly division between self-liquidating and other projects. It probably is good government. The universities would be wise to comply, and in all probability would disregard this legislative expression only to suffer understandable legislative reaction.

This Court therefore is asked to make a declaration of rights which will to some extent be ineffective because the real question here is not judicial power but legislative power.

We commend the Legislature upon its disposition to ensure harmony between two constitutional bodies. It is fundamental to effective and efficient government that the three branches of government make every effort to harmonize their activities and

¹⁰See *Regents of the University of Michigan v. Employment Relations Commission*, 389 Mich. 96, 108-110, 204 N.W.2d 218 (1973).

responsibilities. It is academic that whatever powers the universities may constitutionally hold, the Legislature holds the power of the purse. Regardless of what this Court might find, the matter remains one of power and politics.

As a practical matter most of the questions which arise involve directly or indirectly the Legislature's power of the purse which has a governmental reality which in some ways transcends the significance of the universities' constitutional power, although that cannot be ignored or denied.

It has been observed that our form of democratic government is like the bumblebee which aeronautical engineers say cannot fly—but does. Both presuppose that each segment performs its prescribed function in harmony with all other segments.

2.

Const.1963, art. 8, sec. 3

Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

* * * * *

The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.¹¹

Plaintiffs submit that art. 8, sec. 3 has a perfectly plain meaning, namely that whatever may be the role of the Board in serving as a general planning and coordinating body, that role is not to limit, interfere with or in any way diminish the power of the universities' boards of control to supervise their respective institutions and control and direct the expenditures of the institution's funds. Plaintiffs assume that their supervisory powers together with their control of expenditures over their funds authorize them to expand their respective educational programs via construction if need be without prior approval of the Board.

The Board contends that its prior approval is necessary to any new program or construction.

The parties argue the plain meaning of the section to contrary conclusions.

Section 3 begins with the word "Leadership." This word does not mean or imply control, domination or authority over other boards or institutions. The term "general supervision" is modified by the words "except as to institutions of higher education granting baccalaureate degrees." It follows that the Board specifically was not granted general supervision over the universities, but was afforded leadership.

The section further provides that the Board "shall serve as the general planning and coordinating body for all public education." This is a grant of general power but within the terms of "planning and coordinating" and not with any control, domination or authority over the excepted institutions.

The second sentence provides that the Board "shall advise the legislature as to the financial requirements in connection therewith." The word "advise" does not grant decisional power to the Board over the universities' boards. The words "financial requirements" are limited by "in connection therewith," referring to the "planning and coordinating." It does not appear that the constitutional convention

¹¹Convention comment:

This is a new section combining and enlarging upon the provisions in Sections 2 and 6, Article XI, of the present [1908] constitution. It attempts to embody two fundamental principles: (1) the concern of all people in educational processes as a safeguard for democracy; (2) greater public participation in the operation of educational institutions.

The enlarged state board provides a policy-making body on a state level. Michigan is one of three states that does not have such a board. Creation of a state board places the superintendent in the position of having constantly available a consultative and deliberative body of outstanding citizens who are representative of the people of the state.

* * * * *

It is proposed that the board be the unifying and coordinating force for education within the state and receive information from all of the various levels of public education. Such information would be considered by the board in determining advice to local school boards, governing boards of colleges and universities and the legislature as to the total needs of education in this state.

* * * * *

The concluding paragraph of the section preserves for boards of institutions of higher education the power to supervise their respective institutions and control and direct the expenditure of their funds as at present.

intended that the Board be a dominating authority over the Universities.

This conclusion is materially reinforced by the last sentence of sec. 3.

The convention comment is not necessary to the interpretation, but it was voted upon by the delegates and underscores this interpretation. The delegates explained that they intended the Board to be the unifying and coordinating force for education, receiving information so that the said Board could advise the Universities and the legislature as to the total needs of education within the state.

The comment ends by emphasizing that the section preserves to the Universities (and others) the "power to supervise their respective institutions and control and direct the expenditure of their funds as at present." (Emphasis added.) Emphasis of the words "as at present" is found also in the convention debates, referring to 1962, a time at which there was no question of the absolute independence of the universities vis-a-vis the Board.

Michigan is one of the few states to give independent constitutional status to its universities. When considering and voting upon the new constitution, the voters had before them the constitutional language and the explanatory "Convention Comments" adopted by the delegates. Therefore, it is not the prerogative of this Court to change the plain meaning of words in the constitution "as understood by the people who adopted it." *Bond v. Ann Arbor School Dist.*, 383 Mich. 693, 178 N.W.2d 484 (1970).

We agree with the Court of Appeals that "[t]he authority claimed by the State Board of Education is not granted them by the Constitution."

However, the words, "It shall serve as a general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith" must be granted meaning.

It is our opinion that the Universities must inform the Board of proposed new programs and the estimated financial requirements for each. From in-

formation before the Court, it appears that the current procedure is to submit proposals for new academic programs on a form supplied by Higher Education Management Services of the Board. This includes estimated total capital outlay needs for the first five years. The proposals are submitted to the Board for "approval."

We interpret "approval" as meaning only advice to the legislature and to the Universities. This advice relates to the overall planning and coordinating function of the Board and in no way carries with it the power to veto the proposed programs. In this context, the procedure is consistent with the constitutional language.

In other words, the Board is advisory in nature. However, in order to advise, it requires information. It is necessary to the intent of the constitution that the Board be informed of proposed new programs. Failure of the Board to recommend favorably to the legislature or to act at all does not preclude any of the Universities from going directly to the Legislature with its proposals and requests. The only requirement resting upon the Universities is to inform the Board so that it can knowledgeably carry out its advisory duties. The autonomy and independence of the Universities remain "as in the past."

3.

This case arises because two important elements of our government, the Legislature and the Universities, are zealous to perform well their constitutional missions in the service of the People. The Legislature has taken certain action pursuant to its responsibilities to supervise properly the spending of the People's money. The Universities seek to maintain their constitutional integrity to manage funds given into their charge in order best to perform their educational mission. It is obvious that these two functions can touch or overlap each other. Therefore understanding and good will is necessary that the People whom both elements represent be best served.

* * * * *

Discussion Notes

1. See generally, Joseph Beckham, "Constitutionally Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution," *University of Florida Law Review* 30 (Spring 1978): 546 (14 states provide some form of constitutionally autonomous higher education governance); Harold W. Horowitz, "The Autonomy of the University of California Under the State Constitution," *UCLA Law Review* 25 (October 1977): 23; Joseph Beckham, "Reasonable

Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status," *Journal of Law and Education* 7 (April 1978): 177.

2. See also *State ex rel. University of Minnesota v. Chase*, 220 N.W. 951 (Minn. 1928).

3. Review the materials in Chapter 8, Section C, on the "constitutionalization" of executive agencies and officers.

State Constitutional Change: The Processes of Amendment and Revision

Thomas Jefferson viewed a state constitution as something to be revised regularly, “so that it may be handed on, with periodical repairs, from generation to generation. . . .” Jefferson to Samuel Kercheval, July 12, 1816, quoted in A. E. Dick Howard, “Constitutional Revision: Virginia and the Nation,” *University of Richmond Law Review* 9 (Fall 1974): 1.

State constitutions can be, to a certain extent, adapted to changed circumstances through judicial interpretation. This process is, however, more pronounced at the federal level where amendment of the text of the constitution is much more difficult. State constitutions, by contrast, are relatively often-amended documents. Also, many states have had several complete revisions of their constitutions. As one study concluded: “As a method of constitutional change, it is probably true that interpretation has been less important than the more formal processes of amendment and revision.” Elmer E. Cornwell, Jr., Jay S. Goodman and Wayne R. Swanson, *State Constitutional Conventions: The Politics of Revision in Seven States* (New York: Praeger Publishers, 1975), p. 8.

This concluding chapter will examine the processes and requirements for alteration of the state constitutional text.

A. Introduction

James Willard Hurst,
*The Growth of American Law:
The Law Makers*

(Boston: Little, Brown & Co. 1950): 199-204.

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Chapter Ten

THE CONSTITUTION-MAKING PROCESSES

1. The Idea of Constitutionalism and the Agencies for Making Constitutions

* * * * *

At the outset we must distinguish between three methods of constitution making: (1) by convention, (2) by legislative proposal, and (3) by the initiative, in the three or four states that adopted this form and put it to use.

We must also distinguish between these institutions for making constitutional law and the idea of constitutional government. This chapter tells of the institutions rather than the idea, except as the latter helped form the institutions. As we continue, we shall see why people went to the trouble of using the formal processes of constitution making in order to pass what amounted often simply to specific legislation.

* * * * *

Plainly the idea of legitimacy, in some form, is inherent in the general notion of a government that exists subject to constitutional limitations. You might expect, therefore, that one of the first things that would concern those setting up constitution-making machinery would be this: they would fix a procedure that would insure against substantial cloud on their ti-

tle to make a constitution or on the validity of what they made. But this did not happen; we built our constitution-making procedures out of a generation of practice, rather than out of the logical development of any clear cut idea of constitutionalism. Men did not for some time realize that independence was going to come out of their fight with England; too, they had no precedent for the jobs they faced, of making new states and a new confederacy; and what they had to do, they had to do in a hurry and amid confusion. So there was much legally dubious procedure and a good deal of difference in practice when the first states called constitutional conventions between 1775 and 1789. Most of the bodies that framed constitutions adopted in this formative period had not originally been elected to do any such job, nor had they been given any specific mandate for it. Most of them did not submit to popular ratification the constitutions that they drew.

The Continental Congress, by its resolutions of May 10 and 15, 1776, perhaps meant to recommend that the legislatures in the states adopt permanent instruments of government. From 1776 through 1778 eleven constitutions were so framed and adopted in ten states, by bodies that were, in view of their lack of a mandate for this work, revolutionary in a legal and not merely a rhetorical sense. Only five of the state constitutions adopted by 1789 were put into effect through machinery specially made for the purpose, and one of these was submitted to no form of popular ratification. After 1789, at least thirteen conventions in twelve states newly formed from United States territories were irregularly called, because they were not authorized by Congress; of course in effect Congress later ratified these constitutions when it admitted the states. There were striking departures from regular procedure in the revision of existing constitutions in Pennsylvania in 1789, Delaware in 1792, Rhode Island in 1841, and Maryland in 1850. Six of the constitutions adopted in the formative period before 1790 contained no provision for their amendment. Clearly,

the procedures for constitution making in the states did not spring full grown from some ideal conception of constitutional government. Rather, they grew in fifty years of practice formed by experience.

If we look at what people put into their constitutions, we find a second case where an idea logically inherent in the concept of a constitution did not take hold in practice. Ideally, a constitution embodies only the fundamentals of government. Opponents of proposed amendments often raised this argument in the states. But, at least after the 1840's, the states amended their constitutions to include large amounts of procedural detail and specific legislation. That they did so was remarkable on two counts: Not only did the practice depart from the general notion of the dignity of constitutions; it also violated the proved practical wisdom of not freezing detailed policy into a form hard to change.

When we compare the idea of constitutionalism with the ways in which the constitution-making machinery worked, by far the most important contrast concerns the origins of the popular reverence for "the constitution." Our constitutional law begins in a very practical setting. Men framed, fought over, and adopted the first state constitutions and the Federal Constitution in an atmosphere of the utmost political realism. They saw they were dealing with the balance of power between interests, and they were frankly skeptical of the permanency of what they had done. The sanctity that came to surround the idea of constitutional principles was the growth of years and of many influences. It was fostered by the logic and prose of *The Federalist*, Marshall, and Webster; by the reverential histories of Fiske, Hildreth, and Bancroft; by the gathering of emotion and tradition about symbols by which generations fought their political battles; by the crystallization of doctrine by Cooley, and its practical development at the hands of big-business lawyers of the late nineteenth century.

Popular reverence for the "constitution" had important results in our law. For one thing, it secured broad and deep acceptance of the courts' role in enforcing constitutional limitations. In turn, the activity of the courts in appealing to the higher law undoubtedly strengthened people's belief in the value of constitutional limitations. Thus the idea of constitutionalism shaped, and was shaped by, the institutions of constitution making. But, however much it owed to the court, the reverence attached to "the constitution" gained little force from the operation of the more formal process for making constitutional law, by convention or amendment. Nor did the idea of constitutionalism substantially affect the way those processes worked.

This is not quite the paradox that it first appears. Except for the late invention of the initiative, the methods of formal constitution making became well established before 1850. But it is not at least until then, and mainly after the 1880's, that the constitutional idea fully enters the catalog of basic American beliefs. Only after 1880 does it become a powerful weapon in political and economic battles. Moreover, as has been suggested, we went about writing our early constitutions in a very practical atmosphere. Madison's notes of the Federal Convention, Elliot's records of the state ratifying conventions, and the history of such important early state conventions as those that produced the Massachusetts constitution of 1780 and the revision of 1820-1821, the Connecticut constitution of 1818, or the Pennsylvania constitutions of 1776, 1790, and 1838 show a uniformly realistic approach to the job. Like their successors, the first makers of constitutions saw their work in terms of contests for power and advantage, or the security of power and advantage already won. Sanctity, legend, symbolism did not spring from the immediate operations of formal constitution making, nor did they substantially direct those operations.

Discussion Notes

1. Review the materials in Chapter 1 concerning the making and acceptance of the first state constitutions.

2. How do our ideas about the symbolism of "the Constitution" vary between the state and federal constitutions?

* * * * *

William F. Swindler, "State Constitutions for the 20th Century"

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In their detailed study of "constitutional rigidity" in the matter of electoral majorities required for amending and modernizing state constitutions, Professor Kenneth Sears and Charles V. Laughlin a quarter of a century ago pointed out that needed changes in state charters were often thwarted by a mechanical demand of the amendment article, that a majority of all persons voting in the election in question would also have to vote for the constitutional

proposal.¹⁰⁶ Since even this restriction cannot be deleted except by an electoral majority so defined, and since political experience shows that there is a consistently smaller proportion of the total vote in a general election cast for constitutional proposals than for live candidates for office, it would appear that in states having such a limitation the chances of securing an adequate majority for constitutional change would be minimal. Of the states in the Sears-Laughlin study which fell into this category—Illinois, Minnesota, Mississippi, Oklahoma, Tennessee and Wyoming—none has a constitution newer than 1907, and Illinois as of 1968 had adopted only fourteen amendments in nearly a century. For states in this condition, certainly, constitutional rigidity is a prime factor in holding back modernization.

Another factor, described nearly forty years ago by Professor Walter F. Dodd, has to do with judicially non-enforceable provisions of state constitutions.¹⁰⁸ Such provisions may either be general policy statements, those against sin and in favor of civic virtue, or in affirmation of powers the government already possesses, or they may be hortatory rather than mandatory, or, as Dodd suggests, they may be mandatory in language but practically impossible to implement judicially. The obvious example is a constitutional formula for enacting legislation; state courts tend to shy away from confrontation with lawmaking bodies, on the question of whether the latter have literally conformed with the constitutional requirement, as often as possible.¹⁰⁹

A third problem, the reluctance of the people of a state to undertake the effort of modernizing their charters, was analyzed by Dr. W. Brooke Graves ten years ago. He identified three barriers to change: “psychological barriers,” or the irrational devotion to the “wisdom of the fathers” which drafted a working document for their own time; legal and political barriers, illustrated in part by the Sears and Laughlin study already described; and pressure group barriers.¹¹⁰ The latter have been further analyzed by Professors Cornwell and Goodman as “aspirants” to political advancement, “reformers” seeking to change the established order, “standpatters” seeking

to resist the changes, “stand-ins” participating in the revision “to satisfy private ego needs for recognition,” “statesmen” or political leaders seeking to dignify their image as constitution makers, and “chieftains” or bureaucrats seeking career advancement.¹¹¹ The combination of these barriers to modernization and disparate motivations for seeking modernization is a not insignificant dimension in constitution-making which is too often overlooked.

There is, finally, a problem represented in the opposite extreme, of constitutions too easily open to amendment. A study of the California Constitution in 1949 underlined this “amendomania” as flowing from (1) a too-easy procedure for enacting amendments, (2) a recurrent distrust of legislative motivation in developing certain statutory programs (3) a counterbalancing dislike for restrictive (or sometimes overly broad) judicial interpretation of the constitution or statutes, and (4) a sporadic urge to “return to fundamentals.”¹¹² The result, this study concluded, was that easy constitutional amendment was taking the place of direct legislation in the form of the popular initiative.¹¹³

* * * * *

In California, where exhaustive agenda for constitutional revision had been programmed to be submitted to the voters for biennial referenda, Phase II of the three phase plan was rejected in 1968. This rather emphatically says something about modernization of state constitutions—in the negative. When substantially more rejections than ratifications take place during a period when everyone is insisting that modernization is the crying need, some sober accounting is called for.

Much has been made of the fact that, in the spectacular failures in Maryland and New York in particular, the referendum on the new constitution was on an “all or none” basis. That was not true of the California three phase revision, but in any case, the method of submitting the proposal would appear to be of secondary importance; what is of primary importance is the fact that there is a substantial and consistent opposition to change. The particular reasons for the opposition may vary from state to state, but the net effect is the same, and that is to retard the expeditious development of flexible and efficient modern processes of government.

Offering to the electorate in a single package an integrated revision of the existing constitution has substantial logic but an even more substantial politi-

¹⁰⁶Laughlin, *A Study in Constitutional Rigidity*. I, 10 U. Chi. L. Rev. 141 (1943); Sears, *A Study in Constitutional Rigidity*. II, 11 U. Chi. L. Rev. 374 (1944).

¹⁰⁸Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. Pa. L. Rev. 54 (1931).

¹⁰⁹“A constitutional provision not judicially enforceable in one state may be so enforceable in another,” Dodd wrote, citing provisions for the form of drafting statutes, *id.*, at 93.

¹¹⁰Graves, *Current Trends in State Constitutional Revision*, 40 Neb. L. Rev. 560, 561-64 (1961). This is part of a symposium devoted to constitutional revision.

¹¹¹Cornwell & Goodman, *supra* note 70, at 83.

¹¹²Note, *California's Constitutional Amendomania*, 1 Stan. L. Rev. 279, 281-86 (1949).

¹¹³*Id.* at 287.

cal handicap. It permits disparate groups critical of different and unrelated elements in the draft proposal to unite into an aggregation of minorities which thus becomes an accidental majority in opposition. It hazards its chances for adoption on the unwarranted assumption that the average elector has the same sophisticated understanding of the flaws in the existing charter and the rationale of the new remedies which became apparent to the draftsmen in the course of their work on the revision. And the result of rejection is doubly disastrous, either because there is no provision in local procedure for resubmitting the proposals in separable form or because the onus of the first defeat continues to attach to the separate articles eventually resubmitted.

Thus in seven states in the period since November 1967, modernization of state constitutional machinery has been delayed for varying amounts of time. Of course, one must ask whether the draft constitutions actually embodied that much improvement—New York's lamented rejected document had signally failed to reform its unconscionably complex judicial article, while Virginia's just-adopted new charter elected to preserve the twenty-one year age qualification for voting without taking into account the opportunity for legislative response to the Congressional enactment of a lower voting age for national elections. Too much nonconstitutional, statutory matter has been retained both in the rejected charters and in those adopted, due, most likely, to the lack of political finesse often displayed by the leading reformers as against the ingrained habits and vested interests of the political practitioners.

The fact remains, however, that a number of specific losses have been incurred in these constitutional rejections: New York, in voting down a new charter because of the inseparable and controversial provisions on state aid to private and parochial schools and

assumption of local welfare financing, gave up the change to broaden the powers of the executive to reorganize state departments and agencies. Yet one of the greatest needs of the present is to change the executive branch from "a feeble institution" to one able to deal efficiently and economically with the administration of increasing amounts of money appropriated by legislatures for "the political, social and cultural responsibilities demanded of . . . a modern government." In Maryland, the new charter had sought to come to grips with another chronic issue of regional administration of over-lapping urban-rural services in population areas in transition from what was predominantly one to what may become predominantly the other. On the touchy subject of wire-tapping in the area of crime prevention and federally-guaranteed constitutional rights, the Rhode Island constitution-makers marched up the hill and down again, but even the limited concession to the case for banning wiretapping was lost when the whole constitution was lost.

Strengthening the executive branch, and liberalizing the provisions on pledging the state's credit in bond financing, were two proposals in the rejected Idaho constitutional revision. The 1970 voting on amendments as well as whole new constitutions was a spotty record, with some states moving into new areas of conservation and the combating of pollution while others disapproved either the ideas or the forms in which they were drafted. None of this is to disparage the very substantial advances which have been made in the 1970 and immediately preceding elections in various parts of the country, but only to note the progress is a slow and costly business, in other sections where the investment of time and talent as well as money has produced no measurable advance except in emphasizing that the need for modernization is not disposed of merely by thwarting it.

Discussion Notes

1. For one response to the "constitutional rigidity" described by Professor Swindler, see *State ex rel. Watt v. State Canvassing Bd.*, 78 N.M. 682, 437 P. 2d 143 (1968).

2. See also Lawrence M. Friedman, "State Constitutions in Historical Perspective," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 33.

3. See generally, Albert L. Sturm, "The Procedure of State Constitutional Change With Special Emphasis on the South and Florida," *Florida State University Law Review* 5 (Fall 1977): 569 and materials cited there; Walter F. Dodd, *The Revision and Amendment of State Constitutions* (Baltimore: Johns Hopkins University Press, 1910, Da Capo Reprint 1970); Thomas R. White, "Amendment and Revision of State Constitutions," *Uni-*

versity of Pennsylvania Law Review 100 (June 1952): 1132.

4. There are numerous timely law review symposia on state constitutional amendment and revision in the individual states.

5. On the major unsuccessful state constitutional revision attempts, see John P. Wheeler, Jr., and Melissa Kinsey, *Magnificent Failure: The Maryland Constitutional Convention of 1967-1968* (New York: National Municipal League, 1970); Thomas G. Pullen, Jr., "Why The Proposed Maryland Constitution Was Not Approved," *William and Mary Law Review* 10 (Winter 1968): 378; Robert B. McKay, "Constitutional Revision in New York State: Disaster in 1967," *Syracuse Law Review* 19 (1967): 207.

B. The Nature of State Constitutional Change

Opinion of the Justices 263 Ala. 158, 81 So.2d 881 (1955)

To the House of Representatives of Alabama
State Capitol
Montgomery, Alabama

Gentlemen:

In response to House Resolution No. 7, we submit the following:

House Bill No. 9 provides as follows:

“A Bill”

To Be Entitled

An Act

“Proposing amendments of the Constitution of Alabama (1901) relating to representation in the Legislature.

* * * * *

In connection with the bill The House of Representatives has requested the opinion of the Justices of the Supreme Court on the following important constitutional questions:

Question 1. Is it within the power of the Legislature to propose the amendments of the Constitution of 1901 as set out in said bill, or would such proposal contravene the provisions of Section 284 of the Constitution, as amended?

Question 2. Does the Legislature have the power to propose an amendment to the Constitution repealing the last sentence in Section 284, as amended?

Question 3. Do the proposed amendments change the basis of representation in

the Legislature to other than a population basis contrary to the provisions of Section 284 of the Constitution, as amended?

We first direct our attention to Question 2 because the answers to the other questions are dependent upon the answer to Question No. 2: “Does the Legislature have power to propose an amendment to the Constitution repealing the last sentence of Section 284, as amended?” That sentence reads: “Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by Constitutional amendments.”

Our Declaration of Rights comprises the first thirty-six (36) sections of the Constitution of Alabama of 1901. Section 2 reads:

That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

Section 36 provides:

That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.

We submit that there is no stronger language in our Constitution than that just quoted, yet it is generally held that a section of the Declaration of Rights may be amended.—Annotation 36 A.L.R. 1456.

Surely it is self-evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they "shall forever remain inviolate."

In *Downs v. City of Birmingham*, 240 Ala. 177, 198 So. 231, 234, where it was argued that the suspension of certain unnamed sections of the Constitution by amendment XXVI-A, The Sparks Amendment, was not such an amendment as could be made under Section 284, and that the benefits of certain sections of the Constitution were themselves inviolate and could not be affected by a subsequent constitutional amendment, this Court said:

That article [XVIII beginning with Section 284] is confined to the procedure to be pursued in amending the Constitution, assuming the amendment is one which is permissible. Section 2 of Article I of the Constitution is the only one which specifically authorizes an amendment. . . . (Emphasis supplied.)

The mode of making amendments is mandatory and exclusive. . . .

But the character or nature of an amendment is not prescribed. It may extend to a "change (in the) form of (the) government." Section 2, Constitution. This may be in any respect, except that it must continue to be a "republican form," Article IV, section 4, Constitution of the United States; *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581, must not impair the obligations of contracts, nor otherwise violate section 10, Article I, of the Constitution of the United States, nor violate the Fourteenth Amendment of the Constitution of the United States, nor any other provisions of it.

* * * * *

Except as thus restricted, there is no limitation on the power to amend or rewrite the Constitution. Black on Constitutional Law, section 28, page 51; 16 Corpus Juris Secundum, Constitutional Law, secs. 7, 39, pages 29, 80; *Collier v. Gray*, 116 Fla. 845, 157 So. 40; 11 Am.Jur. 628; *Scruggs v. Mayor, etc., Huntsville*, 45 Ala. 220, 223.

Every proposal which effects a change in the Constitution or adds or takes away from it is an amendment. 16 Corpus Juris Secun-

dum, Constitutional Law, sec. 7, p. 31; 11 Am.Jur. 629, sections 24-25. It need not be germane to any other feature of it, nor to the feature which is thus amended, provided it is clear and definite in its provisions.

—16 Corpus Juris Secundum, Constitutional law, sec. 7, p. 31.

* * * * *

. . . But all rights acquired under the Constitution are subject to the further provisions of it which permit an amendment extending even to that exact right thus acquired, subject to the restrictions of the Federal Constitution, to which we have referred. *No right can be acquired under the Constitution which cannot be abrogated by an amendment of the Constitution, in so far as that Constitution is concerned.* This extends to contract and property rights, and would be effective in that respect but for the Constitution of the United States, which imposes a limitation on the state's Constitution and amendments of it or by state legislation. [Emphasis supplied.]

It has been seriously attempted to exempt from the operation of that principle the features of what is called in the Constitution the "Bill of Rights," such as is embraced in the first thirty-six sections of our Constitution, which comprise Article I of it. Emphasis has been placed on the last clause of that section, which is as follows: "and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."

* * * * *

We are clear that it does not put a limitation on the power of amendment of the Constitution, but on the power of legislation. . . .

In no quarter can we find a denial of the power to amend the Constitution by depriving one of rights created by it, except as prohibited by the Constitution of the United States. . . .

Certainly rights under section 284 "are no more inviolate than those under the Bill of Rights, in so far as the power to amend" it "is concerned in respects not controlled by the Constitution of the United States."

Four members of this Court stated their views in Opinion of the Justices, 254 Ala. 183, 47 So.2d 713, 714, where they said:

The power to propose amendments to the Constitution is not inherent in the legislative department, and in the absence of a provision in the Constitution conferring such power on the legislature, it has no capacity thus to initiate amendments. Where, however, by the Constitution, the legislative department is authorized to submit amendments to the Constitution, its authority in that regard is restricted only by the limitations contained in that instrument and by the prohibitions of the Federal Constitution. . . .

The only comment necessary is that the Constitution of 1901 authorizes our legislature to submit constitutional amendments, Article XVIII, secs. 284-287 prescribe the method, and the proposal here, HB # 9, is in proper form to be submitted as a constitutional amendment.

That Section 284 is no more privileged from amendment than any other section is proven by the fact that the people did amend it in 1933.—See Amendment XXIV.

We do not think it necessary to give further citations on such a self-evident matter, but to demonstrate that other jurisdictions hold as we do, we cite a few authorities.

Since constitutional provisions derive their force from the people themselves, not from the legislature, and under the American theory of government all power is inherent in the people, including the right to make changes in the organic instrument of government, there are practically no limits except those contained in the Federal Constitution as to the changes which may be made in the Constitution of a state, where such alterations are made in the prescribed manner. . . .

—11 Am.Jur., sec. 23, pp. 627-628, Constitutional Law.

Every part of a state Constitution may be amended, including the provisions authorizing the making of amendments, (citing *Washington v. State*, 75 Ala. 582, 51 Am.St.Rep. 479).

—11 Am.Jur., sec. 24, p. 629, Constitutional Law.

Where authority is given the legislature by the constitution to propose amendments, such authority is not restricted to amendment or repeal of any section or part of the constitution already existent.

—16 C.J.S., Constitutional Law, sec. 9, a (1).

There is no dissent from the proposition that a constitutional provision or amendment may be repealed, since a provision for amendment is universally inserted, and by virtue thereof any other existing provisions, may be expunged.

—Annotation 36 A.L.R. p. 1456, citing cases.

The power to amend, revive or reenact a law rests with the people of the State. They can amend the Constitution in any particular that they desire.

—*Stephens v. State*, 138 Tex.Cr.R. 43, 133 S.W.2d 130, 131.

The people adopted the Constitution, and the people alone can change it, . . .”

—*Brawner v. Curran*, 141 Md. 586, 119 A. 250, 255.

It therefore follows that it is our opinion that the people have the power and authority to amend any section, or any part thereof, in the existing Constitution, subject to the limitations noted in the *Downs* case, *supra*, and our answer to Question No. 2 is in the affirmative.

* * * * *

Respectfully submitted,
ROBERT T. SIMPSON,
DAVIS F. STAKELY,
PELHAM J. MERRILL,
JAMES J. MAYFIELD,
Justices

House Bill No. 9 and the questions propounded to the Justices by House Resolution No. 7 have been copied in extenso in the opinion signed by a majority of the Justices. We see no reason to restate the questions involved. We will hereafter, at times, refer to the opinion set out above as the majority opinion.

* * * * *

As the outset, it should be borne in mind that the Constitution of 1875 provided that the whole number of senators shall be not less than one-fourth or more than one-third the whole number of representatives, and that the House of Representatives shall consist of not more than one hundred members, *who shall be apportioned by the General Assembly among the several counties of the state, according to the number of inhabitants in them, respectively.*

Also, it should be borne in mind that the legislative act calling the Convention of 1901 contains Section 15, which reads as follows:

Be it further enacted, That if such convention be called it shall incorporate in any constitution it may form and adopt the same basis of representation in the General As-

sembly as is now provided in the present Constitution of the State. Article IX, Constitution of 1875. Acts 1900-1901, pp. 224-230.

* * * * *

At that time, Mr. Coleman of Greene County, a delegate to the Constitutional Convention of 1901, proposed an amendment to Sec. 284, as it was then framed, which, as finally adopted by the Convention, reads as follows:

Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment.

The proposed amendment was not only adopted by the Convention, but was ratified and approved by the people themselves. The intent and meaning of this constitutional provision is made crystal clear by the statements made on the floor of the Convention by its author and others. Mr. Coleman stated:

Now the great reason some provision of this kind should appear either here or in the report of the Committee on Representations is this: When the Convention assembles as a Convention, of course it can change this provision if it sees proper. When you submit an amendment to the Constitution to the people, on one single question, it can never be presented in all its force and with all its merits. *This simply provides that it shall not be altered by a simple amendment made to the Constitution. It should always remain upon a population basis until another Constitutional Convention shall be called, when it can then properly consider all these protections and provisions which are necessary.* (Emphasis supplied.)

Official Proceedings, Constitutional Convention 1901, Vol. 3, p. 3913.

* * * * *

Mr. O'Neal, also a delegate to the Convention, said in support of the amendment:

We intend to let the representation be what is it (sic) today, and I, for one, am in favor of putting it in the Constitution, so that it can not be changed except by the people of Alabama in Convention assembled. . . .

* * * * *

The question now is to state this question definitely so as to remove all suspicion from the minds of the people of the black

belt in future. We need their assistance in ratifying this Constitution; we expect it; we are going to have it. We can not have it, though, unless we treat them with fairness and justice, and I say that every sentiment of justice and fairness requires that we make a declaration here which can not be misunderstood or misrepresented, as to our intention relative to representation. (Emphasis supplied.)

A mere reading of the foregoing makes it crystal clear that the Constitutional Convention of 1901 did not intend that the basis of representation should ever be changed until it was changed by another constitutional convention, duly and legally assembled under the law.

The power to initiate amendments to the Constitution is not inherent in the legislative department, and in the absence of a provision in the Constitution conferring such power on the legislature, it has no capacity thus to initiate amendments. . . .

It was said in *Johnson v. Craft*, supra [205 Ala. 386, 87 So. 380]:

* * * * *

. . . the instrument itself prescribes the exclusive modes by which it may be altered or amended, or its effect and operation changed. Otherwise than as these exclusive modes contemplate and authorize the Constitution's alteration, its character is permanent, its force and influence enduring. Both of these exclusive modes are plainly stated in sections 284-287 of the Constitution. Only through a constitutional convention, called and convened as provided in the existing organic law, or through amendment proposed and adopted as provided in the existing organic law, can the Constitution be altered or changed. . . .

Upwards of 60 years ago this court had occasion to consider and to pronounce constitutional principles referable to the change by amendment of the organic law. The opinion then delivered by Justice Goldthwaite established *Collier v. Frierson*, 24 Ala. 100, as a leading authority in our country on the subject under consideration. Many courts of the highest repute, as well as text-writers, have accorded the doctrine there announced the unreserved acceptance its obvious soundness deserves, and have given that pronouncement its own great place in the constitutional jurisprudence of the republic. With a brevity, and also a comprehension, that is notable and gratifying, it was there said:

“We entertain no doubt, that, to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the legislature, or any other department of the government, can dispense with them. To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law.”

* * * * *

The provisions of the Constitution providing for its amendment are mandatory, not directory—binding on the people themselves and concluding every department, body, officer, and agency under its authority. Authorities supra; 12 C.J. pp. 688, 689. *The power granted the Legislature to propose amendments to the Constitution is a particular, special power, not possessed by the Legislature otherwise than through grant by the instrument itself. It can only be exercised in the mode prescribed, and the mode defined is the measure of the power. . . .* It results from the system and the provision of the Constitution that in proposing amendments to that instrument, to be voted upon by the electorate, the Legislature is not exercising its other power to make laws. . . .

So, the Legislature is without power in the first instance to initiate a constitutional amendment to reapportion the Legislature other than on a population basis.

It is not a question of the people’s right to amend or change the Constitution. The point is, that the Legislature has been denied the right, by the people themselves in adopting the Constitution, to initiate a proposal to reapportion the Legislature of Alabama by such an amendment.

The majority opinion of the Justices states:

Surely it is self-evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they “shall forever remain inviolate.”

We have no quarrel with that statement of a fundamental principle. But let us emphasize again, that is not the question before us. *The question is, the mode, manner or method of removing a provision from the Constitution. One method is by a constitutional convention, the other by constitutional amendment, initiated by the Legislature in conformity with Section 284, supra. Section 284, supra, is the only authority for the Legislature to initiate constitutional amendments, and that section not only does not authorize the Legislature to initiate an amendment changing the basis of representation in the Legislature, but specifically and emphatically withholds from the Legislature the power or authority to do so.*

If the people of Alabama want to change the basis of representation in the Legislature, there are no barriers to prevent it. The way is open, clear and unobstructed—by a constitutional convention—called and assembled under the provisions of the Constitution itself.

* * * * *

The prohibition contained in the last sentence of Section 284, supra, when considered in connection with 286 of the Constitution, which latter section, according to the opinion of the Justices this day released, is to the effect that a limited constitutional convention is prohibited, simply reflects the determination that the population basis of representation was considered so fundamental that it should be placed beyond the reach of temporary political currents and reconsidered only in connection with a general review of the entire basic structure of the government.

* * * * *

Question 2 should be answered in the negative.

* * * * *

Respectfully submitted,
 J. ED LIVINGSTON,
 Chief Justice
 THOMAS S. LAWSON,
 JOHN L. GOODWYN,
 Justices.

Discussion Notes

1. Article V of the United States Constitution provides certain limits on amendments. Should that provide a “federal analogy” in support of such provisions in state constitutions?

2. Review the materials in Chapter 5, Section G, having to do with the mandatory nature of

the mechanisms for constitutional amendment.

3. Where an amendment to the state constitution is in conflict with existing provisions, are the earlier provisions repealed by implication? See *Johnson v. Hicks*, 225 Ga. 576, 170 S.E.2d 410 (1969).

Gatewood v. Matthews 403 S.W.2d 716 (Ky. 1966)

WILLIAMS, Judge.

W. C. Gatewood, individually and for all residents, voters and taxpayers of the Commonwealth of Kentucky, brought this suit in the Franklin Circuit Court demanding a declaration of rights and seeking to enjoin the Attorney General and the Secretary of State from certifying the question of adoption of a proposed Constitution. . . .

By amendment to KRS 7.170, the 1964 General Assembly established the “Constitution Revision Assembly” to carry on a program of study, review, examination and exposition of the Constitution of Kentucky, to propose and publish drafts, amendments, or revisions thereof, and to report the result of its work to the General Assembly. Pursuant to that mandate, a Constitution Revision Assembly was appointed by majority vote of the Governor, Lieutenant Governor, Speaker of the House, and Chief Justice of the Court of Appeals. The Assembly was composed of all former living Governors, one delegate from each of the 38 Senatorial Districts, and five delegates from the State-at-large. The Assembly conducted detailed studies on each section of the Constitution. At the conclusion of its labors it recommended to the 1966 General Assembly a draft of a reformed Constitution.

In 1966, the General Assembly passed Senate Bill 161, which submits to the voters at the general election on November 8, 1966, adoption or rejection of the Constitution prepared by the Constitution Revision Assembly. S.B. 161 requires publication of the proposed Constitution in at least two newspapers of general circulation published in Kentucky, once not less than ninety days before and once not less than seven days before the date of the election. It further directs the Attorney General to cause “the proposed Constitution and schedule or summaries thereof to be further publicized by other communication media in order that the voters of the Commonwealth may have a reasonable opportunity to become informed on the issue to be decided by them.”

The primary question to be considered is whether by the terms of Sections 256 and 258 of the Constitution the people have imposed upon themselves exclusive modes of amending or of revising their Constitution.

Section 258 authorizes the General Assembly to enact a law at two successive sessions providing for taking the sense of the people as to the necessity and expediency of calling a convention for the purpose of revising the Constitution. Section 256 provides for the proposal of amendments to the Constitution by the General Assembly.

It is the appellant’s contention that those sections do represent exclusive modes of reforming the Constitution. He points out that in each of the former constitutions of this Commonwealth there has been a section which established procedure for revision. (Article XI, 1792 Const.; Article IX, 1799 Const.; Article XII, 1850 Const.; and sections 256-263, 1891 Const.) It is his argument that whatever power the Constitution has conferred upon the legislature in reference to proposing amendments or other modes of revision must be strictly pursued.

This is the first time this Court has had before it the question of whether sections 256 and 258 provide exclusive modes for changing the Constitution. In several cases we have considered efforts to amend or revise the Constitution in compliance with one of those sections. In each case this Court has held that such effort must follow precisely the procedure established in that particular section. *Harrod v. Hatcher*, 281 Ky. 712, 137 S.W.2d 405 (1940); *Arnett v. Sullivan*, 279 Ky. 720, 132 S.W.2d 76 (1939); *McCreary v. Speer*, 156 Ky. 783, 162 S.W. 99 (1914). In no case have we held that sections 256 and 258 are the exclusive modes of changing the constitution.

Here the proposed procedure does not follow the dictates of section 256 or 258 of the Constitution. In fact, there is no section specifically setting out the mode of revision prescribed in S.B. 161. If there be authority for such action it must be derived from the sovereign power of the people as delineated in section 4 of the Bill of Rights:

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace,

safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.

These words were supposedly penned by Thomas Jefferson as section 2, Article XII, of the 1792 Constitution. In any event they express the historical experience of the people in securing a government in which they have freedom of action not permitted by "the Divine Right of Kings." They simply and forcefully state the doctrine of popular sovereignty. The doctrine was recognized in *Miller v. Johnson*, 92 Ky. 589, 18 S.W. 522, 15 L.R.A. 524 (1892), where it was said:

It is conceded by all that the people are the source of all governmental power; and, as the stream cannot rise above its source, so there is no power above them. Sovereignty resides with them, and they are the supreme law-making power. Indeed, it has been declared in each of the several constitutions of this state that 'all power is inherent in the people'; and this is true, from the very nature of our government. . . .

The Bill of Rights has always been recognized as the supreme law of the Commonwealth. That fact is emphasized by section 26 of the Constitution, which is carried over from the past constitutions:

To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

It is inconceivable to assume the people might be divested of the power to reform their government by the procedures established in sections 256 and 258 of the Constitution. Nowhere is that power limited either expressly or by necessary implication. In fact, one portion of a resolution offered at the 1890 Convention is as follows:

Resolved, That the Constitution shall not be altered, amended or changed in any way except as provided in this article.

Vol. I, *Debates, Constitutional Conventions*, 1890, p. 144.

It was not adopted. The power of the people to change the Constitution is plenary, and the existence

of one mode for exercising that power does not preclude all others.

History shows there were popular ratifications of both the 1850 and 1891 Constitutions despite the lack of provision therefor. *Miller v. Johnson*, supra. The legislative limitation that a constitution adopted by a convention should not become effective until ratified by a vote of the people was upheld in *Gaines v. O'Connell*, 305 Ky. 397, 204 S.W.2d 425 (1947), where we said:

The challenge of this limitation upon the Convention, if one should be held, is that the constitutional provisions with respect to this mode of revision deal with every phase of the calling, organization and duties of a convention, and contain no authority for the General Assembly to bind the members to submit their work to a vote of the people. Hence, it is argued, the framers of the present constitution did not intend to confer upon the Legislature the power to restrict or limit the action of the convention.

* * * * *

Since the constitution of Kentucky . . . contains no inhibition or restriction upon the General Assembly in this matter of initiating a call for a Constitutional Convention, it was at liberty to exercise its plenary power in attaching the condition to the submission of the question of calling a convention. When they vote upon it, they will do so with the assurance that the result of the deliberations of the Convention, if called, will be submitted to them for ratification or rejection. By this course, the people keep a firm hold upon their liberties and may obtain a charter of government wanted by the majority.

* * * * *

And in *Chenault v. Carter*, Ky., 332 S.W.2d 623 (1960), we held that the legislature was not prohibited from limiting a convention to consideration of only twelve subjects.

In a landmark opinion the Supreme Court of Rhode Island reversed a former opinion which applied the rule "expressio unius est exclusio alterius," in holding the amendatory language of their constitution was the exclusive mode of revision. In *Re Opinion To The Governor*, 55 R.I. 56, 178 A. 433 (1935). Their constitution provided that the people had a right "to make and alter their constitutions of government" by any "explicit and authentic act of the whole people." That Court approved an act of the General Assembly calling for a convention, although no such

procedure was provided in the constitution. The Court said:

The power granted to the General Assembly by article 13 can naturally and reasonably be viewed as an *additional* rather than an exclusive power, and the recognized rule is that if two constructions of a constitutional provision are reasonably possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted. . . .

The people of Georgia voted approval of a constitution submitted by their General Assembly in 1945. The Bill of Rights of the Constitution of Georgia, Article I, section 5, provided:

The people of this State shall have the inherent, sole and exclusive right to regulating their internal government and the police thereof, and of altering and abolishing their Constitution whenever it may be necessary to their safety and happiness.

The Supreme Court of Georgia, in *Wheeler v. Board of Trustees, etc.*, 200 Ga. 323, 37 S.E.2d 322 (1946), held that the sections of the Georgia Constitution providing different modes of changing the Constitution did not limit the sovereign power of the people to approve the Constitution submitted to them by the General Assembly, and it further held that it is the vote of the people that gives life to the Constitution. The language used by that Court in upholding the doctrine reposing sovereign power in the people, is as follows:

We now consider whether the instrument is valid as a new constitution. The constitution of 1877, article 13, section 1, paragraph 2 (Code, sec. 2-8602), provides as follows: 'No Convention of the people shall be called by the General Assembly to revise, amend or change this constitution, unless by the concurrence of two-thirds of all the members of each house of the General Assembly. The representation in said convention shall be based on population as near as practicable.' It is contended, that this provision means that a completely revised or new constitution can be formulated by a convention, and in no other manner. We are now dealing with a written constitution—the original law by which our system of government was set up. It creates the government. By its provisions the three branches of our

government—legislative, executive, and judicial—are created. The three branches of government must look to it for all their power and authority. Not so with the sovereign power, the people. Under our system of government all power and authority is vested in the sovereign people, subject only to such limitations as they have expressly imposed upon themselves by this organic law, the constitution. With this as the basis from which we reason, is it true that this provision of the constitution of 1877 limits the power of the sovereign people to a convention as the only means by which they can have a completely revised or new constitution? The language does not say so. The section purports to do nothing more than to place limitations upon the legislative branch of government as to the manner in which a convention can be called by this branch of the government. If we should say that the sovereign people themselves can adopt a new constitution by the convention method only, we would by implication be writing into this clause of the constitution a limitation on the sovereign power of the people. We do not hesitate to say that a court is never justified in placing by implication a limitation upon the sovereign. This would be an unauthorized exercise of sovereign power by the court. . . .

In the ultimate sense, the legislature does nothing unless and until the people ratify and choose to give the revised constitution life by their own direct action. In this respect the legislature merely performs the role of messenger or conduit. The process is no more than corollary to the right of petition and address reserved to the people in section 1 of the Constitution.

We cannot accept the proposition that section 4 has been preserved throughout all these years as a mere relic, a museum piece without meaning or substance as a viable principle of free government. To the contrary, it seems clear to the majority of this Court that in each of our four constitutions the Bill of Rights has been purposefully set aside as supreme and inviolate because it represents those things that are basic and eternal, all other matters being transitory and subject to change. It follows that nothing else in the Constitution can be construed as a limitation, restriction or modification of any of these fundamental rights.

Each of the four constitutions of this state has provided a method or methods of amendment and revision. Significantly, in none of them have such speci-

fied procedures been declared exclusive. The reason is obvious. The right of each generation to choose for itself is inalienable, as it was recognized and said from the very beginning. Being thus inalienable, that that right cannot be cut down or subjected to conditions any more than it could be completely denied by one generation to another. So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.

As a practical matter, the intent of the framers of the Constitution is more than satisfied by this proposed action. Section 258 directs that two sessions of the legislature provide for a vote by the people on calling a convention. Two sessions were apparently thought necessary adequately to inform the public of the impending election. Further, the right to vote for delegates assured the people of a voice through their elected representatives. Here the procedure goes even further. News and information are disseminated faster and more efficiently today than was anticipated when the Constitution was drafted. But even more significant is the fact the people need not rely on a representative to speak for them. They participate directly and individually. Each person may cast his vote for or against the adoption of the proposed constitution knowing full well what it says. Another thing of significance is that until he casts his vote the document is as nothing. Only a majority vote of the people can give it force and effect.

The question to be submitted to the voters is set out in S.B. 161, as follows:

Are you in favor of reforming the Constitution of the Commonwealth to cause same to be in the same form and language as finally submitted to the Governor and the General Assembly of Kentucky by the Constitution Revision Assembly and set forth in Senate Bill No. 161 enacted at the Regular Session of the General Assembly of Kentucky held in the year 1966 and as heretofore scheduled and published as required by law?

Suffice it to say the question conforms to the requirement of the statute, KRS 118.-170(3), and affords an intelligible opportunity to the voters to express a clearly defined preference. . . .

The action taken by the legislature does not violate the form or the spirit of the Constitution of Kentucky or the Constitution of the United States. When the people vote on the proposed Constitution it will be an expression of the inalienable right of the ultimate sovereign to reform the government. That right is guaranteed by Section 4 of the Bill of Rights, and is

not preempted by the inclusion in the Constitution of alternate modes of revision.

* * * * *

HILL, Judge (dissenting).

I am not so much disturbed by the immediate result of this decision as I am by the establishment of a constitutional principle which is both contrary to logic and legal precedent and destructive to six sections (258-263) of the present Constitution of the Commonwealth of Kentucky.

The authors of our Constitution outlined in section 258 definite and specific steps for its revision. This is the one and only mode of revision contained therein. Had the authors intended any other mode of revision, they would have said so. Had they intended its revision in "any manner as they (the people) may deem proper," as is urged by appellees, section 258 would have been an indulgence in idle curiosity and speculation. I believe there is no reasonable-minded person in this Commonwealth who doubts that it was the intention of the authors of the Constitution to provide an exclusive plan for revision.

It appears to me that the only justification for the majority opinion is expediency. The net result of the opinion recognizes the right of the legislature to repeal the Constitution either in toto or by piecemeal. Nowhere in the Constitution is the legislature given the authority to formulate or submit to the people a new constitution. Here we are testing a legislative act and not a process of revision of the Constitution. The legislature either has or does not have the authority to legislate on this important question.

The only source of power which appellees are able to invoke is section 4 of the Constitution. This section provides as follows:

All power is inherent *in the people*, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, *they* have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper. (Emphasis added.)

On its face, this section is an expression of political philosophy. It is a cocky boast of a sovereign people reveling in the enjoyment of new-won freedom and sovereignty. It is said this philosophy came from the pen of Jefferson. Appellant argues it only has historic value. I would not degrade it on that theory but would recognize that it may well leave in "the people" a residual power to accomplish ends not otherwise provided for in the Constitution. It should be recognized, however, that the practical application of

this section is almost impossible. It provides no plan of implementation. Who are "the people?" Certainly, they are not the legislature. Under this section how do "they" (the people) act? I point out these difficulties in section 4 simply to emphasize the general, broad, and vague nature of the reservation of power contained therein and to further emphasize the utter dependence of section 4 upon section 258 for its implementation.

* * * * *

The truth is, "the people" spoke when they enacted and adopted the Constitution of the Commonwealth of Kentucky. Until "they" speak again, the legislature exercising the general powers of government must conform to the plain mandates of that document.

* * * * *

In the argument, those defending this Act were forced to frankly concede that if a new Constitution could be adopted in this manner then the legislature itself could write the document. This is obviously true, and the majority of the court must accept this fact. This being so, the present safeguards for the revision or amendment of the Constitution are now obviously discarded and obsolete.

Be it remembered for all time to come that the new Constitution contains specific provisions for the revision and amendment of that document (Article XIV). Under the majority decision these provisions are nothing more than suggested methods of accomplishing those ends. They can be ignored by the legislature. I wonder if "the people" who will vote on the new Constitution will realize that the solemn methods of revision and amendment therein contained are little more than camouflage and that the legislature is in no way bound by them.

* * * * *

Discussion Notes

1. Is Judge Hill correct, when as a part of his dissenting opinion he asserts that, under the majority opinion, the legislature is not bound by the

state constitutional provisions governing constitutional change?

2. Is there an argument based on "negative implication" at work in this case?

C. State Constitutional Change: Amendment or Revision?

Review the materials on California's Proposition 13 in Chapter 11 Section A. 4, and consider the following challenge to that initiated constitutional amendment.

Amador Valley School District v. State Bd. of Equalization 22 Cal.3d 208, 583 P.2d 1281 (Cal. 1978)

RICHARDSON, Justice.

In these consolidated cases, we consider multiple constitutional challenges to an initiative measure which was adopted by the voters of this state at the June 1978 primary election. This measure, designated on the ballot as Proposition 13 and commonly known as the Jarvis-Gann initiative, added article XIII A to the California Constitution. Its provisions are set forth in their entirety in the appendix to this opinion. . . . As will be seen, the new article changes the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing power of state and local governments.

* * * * *

We stress initially the limited nature of our inquiry. We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate article XIII A legally in the light of established constitutional standards. We further emphasize that we examine only those principal, fundamental challenges to the validity of article XIII A as a whole. In doing so we reaffirm and readopt an analytical technique previously used by us in adjudicating attacks upon similar enact-

ments, in which "Analysis of the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged." (*County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 666, 114 Cal.Rptr. 345, 347, 522 P.2d 1345, 1347 [declaratory relief action to determine validity of the 1973 conflict of interest law, Gov.Code, sec. 3600 et seq.].) As will appear, we have concluded that, notwithstanding the existence of some unresolved uncertainties, as to which we reserve judgment, the article nevertheless survives each of the serious and substantial constitutional attacks made by petitioners.

It is a fundamental precept of our law that, although the legislative power under our constitution framework is firmly vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." (Cal.Const., art. IV, sec. 1.) It follows from this that, "[t]he power of initiative must be liberally construed . . . to promote the democratic process." . . . Bearing in mind the foregoing interpretive aid, we briefly review the basic provisions of article XIII A. We caution that, save only as to the specific constitutional issues resolved, our summary description and interpretation of the article and of the implementing legislation and regulations do not preclude subsequent challenges to the specific meaning or validity of those enactments.

* * * * *

We examine petitioners' specific contentions.

1. Constitutional Revision or Amendment

The petitioners' primary argument is that article XIII A represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a "revi-

sion” of the state Constitution rather than a mere “amendment” thereof. As will appear, although the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people. Because a revision may not be achieved through the initiative process, petitioners’ first contention strikes at the very validity of article XIII A in its inception and in its entirety. Were we to conclude that the Proposition 13 initiative constituted a revision not an amendment, that would end our inquiry; the initiative would be invalid for its failure to meet the constitutional requirements of a revision.

The applicable constitutional provisions are specific. Article XVIII (entitled “Amending and Revising the Constitution”) presently provides in full:

SEC. 1. *The Legislature* by roll call vote entered in the journal, two-thirds of the membership of each house concurring, *may propose an amendment or revision* of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.

SEC. 2. *The Legislature* by roll call vote entered in the journal, two-thirds of the membership of each house concurring, *may submit* at a general election the question whether to call a convention to *revise* the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.

SEC. 3. *The electors may amend* the Constitution *by initiative*.

SEC. 4. A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail. (Italics added.)

We think it significant that prior to 1962 a constitutional revision could be accomplished *only* by the elaborate procedure of the convening of, and action

by, a constitutional convention (art. XVIII, sec. 2). This fact suggests that the term “revision” in section XVIII originally was intended to refer to a substantial alteration of the entire Constitution, rather than to a less extensive change in one or more of its provisions. Many years ago, in *Livermore v. Waite* (1894) 102 Cal. 113, 118-119, 36 P. 424, 426, we described the fundamental distinction between revision and amendment as follows: “The very term ‘constitution’ implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term ‘amendment’ implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.”

While the Constitution itself does not specifically distinguish between revision and amendment, we are considerably aided in an evaluation of petitioners’ primary argument by our earlier analysis of the issue in *McFadden v. Jordan* (1948) 32 Cal.2d 330, 196 P.2d 787 (cert. den. 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1080). In *McFadden*, we struck down an initiative measure which would have added 21,000 words to our then existing 55,000-word constitution. We held that the initiative was “revisory rather than amendatory in nature,” because of the “far reaching and multifarious substance of the measure. . .” (p. 332, 196 P.2d p. 788) which dealt with such varied and diverse subjects as retirement pensions, gambling, taxes, oleomargarine, healing arts, civic centers, senate reapportionment, fish and game, and surface mining. We noted that the proposal would have repealed or substantially altered at least 15 of the 25 articles which then comprised the Constitution. (P. 345, 196 P.2d 787.)

We held in *McFadden* that the measure under scrutiny therein was clearly a revision, both because of its varied aspects and because of the “substantial curtail[ment]” of governmental functions which it would cause. (Pp. 345-346, 196 P.2d 787.) Example, one provision would have created a state pension commission with comprehensive governmental powers to be exercised by five named commissioners. We concluded that “The delegation of far reaching and mixed powers to the commission, largely if not almost entirely in effect, unchecked, places such commission substantially beyond the system of checks and balances which heretofore has characterized our governmental plan.” (P. 348, 196 P.2d p. 798.)

In addition, although the subject of taxation was only one of many covered by the *McFadden* initiative,

nevertheless we observe that the proposed taxation amendment would have accomplished, *by itself*, a far more substantial change in the state's taxation scheme than that effected by Proposition 13. The far reaching nature of the *McFadden* measure is demonstrated by the fact that it not only would have destroyed the power of cities and counties to tax and regulate their own budgets and expenditures (p. 344, 196 P.2d 787), but also the 2 percent gross receipts tax proposed therein was to have been *the only* tax permitted to any agency on real or personal property, or on any business enterprises. (Pp. 336-337, 196 P.2d 787).

Finally, we stressed in *McFadden* that "The proposal is offered as a *single amendment* but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a *revised* constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article." (P. 346, 196 P.2d p. 796, italics in original.)

Taken together our *Livermore* and *McFadden* decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. In illustration, the parties herein appear to agree that an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change.

In both its quantitative and qualitative aspects, however, article XIII A appears demonstrably less sweeping than the initiative measure at issue in *McFadden*. As noted above, the *McFadden* measure consisted of 21,000 words and covered many different subjects, whereas XIII A comprises approximately 400 words and, as we discuss more fully below, is limited to the single subject of taxation (with particular

emphasis upon real property taxation). Although petitioners suggest that 8 articles and 37 sections of the existing Constitution may be affected by the new article, our analysis suggests that the article's quantitative effect is less extensive.

Our review of petitioners' description of numerous asserted changes indicates that the claims may be based upon possible errors in petitioners' interpretation of the new article. For example, they argue that at least three constitutional articles will be modified by the new requirement that the available real property tax revenues be apportioned "to the districts *within* the counties" (sec. 1, subd. (a), italics added), thereby excluding those districts which encompass more than a single county. However, implementing legislation has included such multicounty districts within the tax allocation scheme. (See Gov. Code, sec. 26912, subd. (d).) In addition, petitioners assume that article XIII A will annul or amend the various "home rule" provisions of the state Constitution (art. XI, secs. 3-7), an assumption we discuss and reject below. Finally, we note that the majority of those changes emphasized by petitioners pertain to a single existing constitutional provision, article XIII, which already contains 33 separate sections dealing with the subject of taxation and assessment procedure. Since article XIII doubtless was premised upon the assumption that local taxation would be unrestricted by any tax rate and assessment limitations such as those adopted by XIII A, it is not surprising that many of these sections may be said to be affected by the new taxation scheme. Nevertheless, we decline to hold that article XIII A accomplished a revision of the Constitution by reason of its *quantitative* effect upon the existing provisions of that document.

Petitioners insist, however, that the new article also will have far reaching *qualitative* effects upon our basic governmental plan, in two principal particulars, namely, (1) the loss of "home rule" and (2) the conversion of our governmental framework from "republican" to "democratic" form. A close analysis of XIII A convinces us that its probable effects are not as fundamentally disruptive as petitioners suggest.

a.) *Loss of home rule.* The principle of home rule involves, essentially, the ability of local government (technically, chartered cities, counties, and cities and counties) to control and finance local affairs without undue interference by the Legislature. . . . It is undeniably true that a constitutional limitation upon prevailing local taxation rates and assessments will have a potentially limiting effect upon the management and resolution of local affairs. Reduced taxes may be expected to generate reduced revenues, inevitably resulting in a corresponding curtailment of locally financed services and programs. To conclude, how-

ever, that the mere imposition of tax limitations, per se, accomplishes a constitutional revision would in effect bar the people from ever achieving any local tax relief through the initiative process. Petitioners have cited to us no authorities which support such a broad proposition, and our own research, disclosing only one case, indicates a contrary rule. (See *School Dist. of City of Pontiac v. City of Pontiac* (1933) 262 Mich. 338, 247 N.W. 474, 477 [initiative measure adopting a 1 1/2 percent tax limitation on assessed value, and requiring two-thirds approval of electorate to increase taxes, was a constitutional amendment, not a revision].)

* * * * *

b.) *Loss of republican form of government.* Continuing their thesis that XIII A is a constitutional revision not an amendment under our *McFadden* holding, petitioners next maintain that the operation of the article, and particularly section 4 thereof, will result in a change from a “republican” form of government (i.e., lawmaking by elected representatives) to a “democratic” governmental plan (i.e., lawmaking directly by the people).

Contrary to petitioners’ assertion, however, we are convinced that article XIII A is more modest both in concept and effect and does not change our basic governmental plan. Following the adoption of article XIII A both local and state government will continue to function through the traditional system of elected representation. Other than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired. The requirement of section 4 that any “special taxes” must be approved by a two-thirds vote of the “qualified electors” restricts but does not abolish the power of local governments in the raising of revenue. We decline to hold that such a “super-majority” requirement, the two-thirds vote, standing alone and limited to the subject of taxes, constitutes a substantial constitutional revision which cannot be accomplished through an initiative. Similar voting requirements in financial matters have not been uncommon. For example, prior to the adoption of article XIII A, our Constitution required the assent of two-thirds of the qualified electors to incur indebtedness exceeding in any year the income and revenue provided for that year. (Art. XVI, sec. 18.) We have, within another context, previously described other examples of constitutional provisions sanctioning deviations from simple “majority rule.” (See *Westbrook v. Mihaaly* (1970) 2 Cal.3d 765, 797-798, fn. 64, 87 Cal.Rptr. 839, 471 P.2d 487.)

It should be borne in mind that notwithstanding our continuing representative and republican form of

government, the initiative process itself adds an important element of direct, active, democratic contribution by the people. (See *In Re Pfahler* (1906) 150 Cal. 71, 77-78, 88 P. 270 [holding that the constitutional guarantee of a republican form of government is inapplicable to the local governmental level].) We thus conclude that section 4 of article XIII A, and its requirement of substantial popular support, beyond that of a bare majority for the approval and adoption of “special” local taxes adds nothing novel to the existing governmental framework of this state.

In summary, we believe that it is apparent that article XIII A will result in various substantial changes in the operation of the former system of taxation. Yet, unlike the alterations effected by the *McFadden* initiative discussed above, the article XIII A changes operate functionally within a relatively narrow range to accomplish a new system of taxation which may provide substantial tax relief for our citizens. We decline to hold that such a limited purpose cannot be achieved directly by the people through the initiative process. As succinctly and graphically expressed a number of years ago in a study of the California procedure, “. . . the initiative is in essence a *legislative battering ram* which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end. Virtually every type of interest-group has on occasion used this instrument. It is deficient as a means of legislation in that it permits very little balancing of interests or compromise, but it was designed primarily for use in situations where the ordinary machinery of legislation had utterly failed in this respect. It has served, with varying degrees of efficacy, as a vehicle for the advocacy of action ultimately undertaken by the representative body.” (Key & Crouch, *The Initiative and the Referendum in Cal.* (1939) p. 485, italics added.)

The foregoing language, written almost 40 years ago, seems remarkably prophetic given the apparent historic origins of article XIII A. Although we express neither approval nor disapproval of the article from the standpoint of sound fiscal or social policy, we find nothing in the Constitution’s revision and amendment provisions (art. XVIII) which would prevent the people of this state from exercising their will in the manner herein accomplished. Indeed, if the foregoing description of the initiative as a “legislative battering ram” is accurate it would seem anomalous to insist, as petitioners in effect do, that the sovereign people cannot themselves act directly to adopt tax relief measures of this kind, but instead must defer to the Legislature, their own representatives. We conclude that article XIII A fairly may be deemed a constitutional amendment, not a revision.

Discussion Notes

1. The *Amador Valley* case is discussed in George Lefcoe and Barney Allison, "The Legal Aspects of Proposition 13: The Amador Valley Case," *Southern California Law Review* 53 (November 1979): 173.

2. Regarding one aspect of the impact of Proposition 13, see *Sonoma County Organization of*

Public Employees v. County of Sonoma, 23 Cal.3d 296, 591 P.2d 1 (1979) (impairment of the obligation of public employee contracts).

3. What is the distinction between quantitative and qualitative impact, as utilized by the court in *Amador Valley*? Keep that distinction in mind when reading the next case.

**Adams v. Gunter
238 So.2d 824 (Fla. 1970)**

DREW, Justice.

William D. Gunter, Jr., as a taxpayer citizen of the State of Florida, prepared and presented to Tom Adams, Secretary of State of Florida, a "Petition for A One House Legislature Pursuant to Article XI, Section 3: Initiative" for approval as to form and content before proceeding with the circulation thereof. The Secretary of State declined to approve the petition, whereupon these proceedings for declaratory decree were instituted under Chapter 86, Florida Statutes 1969, for the purpose of resolving the controversy between the parties.

* * * * *

This direct appeal . . . presents for the first time the question of whether an initiative petition proposing an amendment to the constitution of 1968 is defective and unauthorized when the proposed amendment would amend, modify, change or otherwise affect several other provisions of the same constitution.

Article XI of the Constitution of 1968 contains five sections, all relating to amendments. For clarity in the discussion which follows, Article XI in its entirety is set forth below:

**ARTICLE XI
AMENDMENTS**

* * * * *

Sec. 3. Initiative

The power to propose amendments to any section of this constitution by initiative is reserved to the people. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts respectively

and in the state as whole in the last preceding election in which presidential electors were chosen.

* * * * *

Of assistance also in the resolution of this question are the following excerpts from the Minutes of the Interim Constitutional Revision Committee, viz:

Section 3 discussed next. The section was approved as it reads on page 71 of October 30 draft; however, there is a flag to Style and Drafting that such subcommittee should prepare amendments to be introduced on floor during special session to correct language applying to revision of entire articles as well as amendments to a section. Section 3, until so amended, will read:

Section 3. INITIATIVE.—The power to propose amendments to any section of this constitution by initiative is reserved to the people. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight per cent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen." [Excerpt from Minutes of the Interim Constitutional Revision Committee on October 30, 1967.]

In Article XI, Representative Pettigrew moved that on page 63, Section 3, line 7, the word "section" be amended to read "article." Senator Friday spoke in opposition to this amendment. Representative Reed offered substitute motion to strike the words "any section of" on line 7. Representative Sessums offered an amendment to the substitute motion by inserting the words "article

or” before the word “section.” Mr. Pettigrew withdrew his motion. Mr. Reed’s substitute motion as amended by Mr. Sessums would amend the sentence to read: “The power to propose amendments to any article or section of this constitution by initiative. . . .” Representative Eddy spoke in opposition to all these amendments and requested that the language remain as it appears in the December 11 Draft. Vote was taken on the motion to amend. MOTION FAILED by vote of 6 yeas and 13 nays (see Roll Call No. 6 attached). Vote taken on motion to amend line 7 by striking the word ‘section’ and inserting ‘article.’ MOTION FAILED by voice vote. Representative Wolfson moved that Article XI be adopted as the recommendation of the committee. MOTION CARRIED by voice vote.” [Excerpt from Minutes of the Interim Constitutional Revision Committee on June 17, 1968.]

Of pertinence also is the distinction between the words “amend” and “revise.” Webster’s Collegiate Dictionary, Fifth Edition, defines these words as follows: “Amend— . . . To change or modify in any way for the better; to improve; to better; hence, to change or alter in any way, esp. in phraseology; . . . Specif., in parliamentary procedure to alter (as a bill) formally by some addition or modification” and “Revise— . . . to look at or over again in order to correct or improve; as to revise a printer’s proof. To make a new, improved, or up-to-date version of; as to revise the game laws. Act of revising; revision.” That these distinctions were debated and considered at length in selecting the language to be incorporated in Article XI is clear from the Minutes of the Constitutional Revision Committee quoted above.

* * * * *

The provisions of the 1968 Constitution herein quoted at length had no counterpart in any of the previous constitutions of the state.⁵ Amendments to the present Constitution may be brought about as follows:

- (1) The Legislature may propose an amendment of “a section” or “revision of one or more articles” or “the whole” Constitution;
- (2) Ten years after the adoption of the Constitution and every twenty years thereafter a Constitutional Revision Commission, established by the

⁵For a detailed and scholarly discussion of the provisions of prior constitutions relating to amendments, see the concurring opinion of Mr. Justice Thornal in *Rivera-Cruz v. Gray*, 104 So.2d 501 at 506 (Fla.1958).

Constitution, shall meet and at such meeting may propose for adoption “a revision of this Constitution or any part of it.”

(3) The electors of the state may propose amendments to “any section” of the Constitution by initiative; and

(4) The electors may by petition containing a declaration that a constitutional convention is desired call a convention to consider a revision of the “entire Constitution.”

The Constitution is divided into twelve Articles and each Article is divided into numbered Sections. Throughout Article XI the words “amendment” and “revision” are used to denote entirely different things. The words were carefully and deliberately selected and it is clear from the language of Article XI that the people have reserved the right to bring about an amendment to any *section* of the Constitution by following the provisions set forth therein. The people have also reserved unto themselves the power to bring about a complete revision of the *entire Constitution*. It is equally clear from Article XI that where more than one section of the Constitution is to be amended it is called a revision, and such revision contemplates deliberative action of either the Legislature or a convention duly assembled in order to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies. Deliberation, discussion, and drafting is a part of the scene of parliamentary procedures and essential when more than one section of a constitution is to be amended.

This case presents a classic example of why Article XI was so framed. Assuming that the petition herein should receive the approval required and become a part of the Constitution, it would be immediately necessary to amend numerous other provisions of the Constitution. This fact is recognized in the proposal itself. Paragraph (c) thereof provides that the Legislature in the General Election of 1972 “shall propose . . . such further amendment to this Constitution and shall pass such laws as shall be necessary to implement this amendment.” The quoted provision in itself condemns the proposal. It is the type of amendment which this Court condemned in *Rivera-Cruz v. Gray*, *supra*, which concerned the so-called “daisy-chain amendments” to the Constitution of 1885. In that case this Court enjoined the submission to the electors of the proposals to revise the Constitution by submitting to the people interlocking amendments to each article thereof (except Article V), with the provision that unless all articles were adopted the election failed. We held in that case that such an attempt to amend the Constitution amounted to a revision without conforming to the

then provisions of the Constitution of 1885, concerning revision. We said: "When the Constitution uses the word 'amendment' it has reference to an article or articles, while the word 'revision' relates to the whole instrument."⁶ Our present Constitution is decidedly analogous. This document uses the word "amendment" with reference to a section rather than an article as did the 1885 Constitution.

Mr. Justice Thomas in writing for the Court in *Rivera-Cruz* used the following language which is pertinent to the disposition of the problem here: ⁷

If the changes attempted are so sweeping that it is necessary to include the provisions interlocking them, then it is plain that the plan would constitute a recasting of the whole Constitution and this, we think, it was purposed to accomplish only by a convention under Sec.2 which has not yet been disturbed.

The proposal here to amend, Section 1 of Article III of the 1968 Constitution to provide for a Unicameral legislature affects not only many other provisions of the Constitution but provides for a change in the form of the legislative branch of government, which has been in existence in the United States Congress and in all of the states of the nation, except one, since the earliest days. It would be difficult to visualize a more revolutionary change. The concept of a House and a Senate is basic in the American form of government. It would not only radically change the whole pattern of government in this state and tear apart the whole fabric of the Constitution, but would even affect the physical facilities necessary to carry on government.

Without attempting to enumerate all of the sections of the Constitution which would be affected to a greater or lesser degree by the adoption of this amendment, it is significant to note the following:

1. Section 2 of Article III would have to be rewritten;
2. Sections 3(c) (1), 3(d), 3(c), and 3(f) of Article III would have to be revised to be applicable to the Unicameral theory;
3. Sections 4(a) (b) (c) and (d) of Article III would require revision;
4. Section 5 of Article III would require revision;
5. Sections 8(b) and (c) of Article III would require revision;
6. Section 9 of Article III would require revision;
7. Section 11(a) (21) of Article III would require revision;

8. Section 15(a) (b) and (c) of Article III would require reconsideration and revision;

9. Substantially all of Section 16 of Article III regarding legislative apportionment would require revision;

10. Perhaps the most sweeping change would have to be made in Section 17 of Article III regarding impeachment. This section would have to be completely recast and revised;

11. Section 6(a) of Article IV would require reconsideration, as would Section 7(b) of the same article;

12. In Article V it would be necessary to change the language in Section 13 and 13(a);

13. Section 1 of Article X relating to amendments to the United States Constitution would require change;

14. It would require a complete revision of Article XI relating to the method of amending the constitution because of the repeated references to the House and Senate throughout that article;

15. Section 9, 11, 12 and 14 of Article XII would have to be amended.

It is clear from the recitations above that the power reserved to the people to amend any section of the Constitution, includes only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose. There are many sections of the Constitution which would lend itself to such amendments; for instance, in Article X of the Constitution there are thirteen sections. An amendment to most, if not all, of these sections could be complete within itself and not substantially affect other provisions of the Constitution or require further amendments thereof. There are many other similar sections in the document.

If it should become necessary in the course of events for the people to bring about such cataclysmic change as that which would result in the adoption of the amendments here under consideration, or if the legislature should fail or refuse to act, the people have reserved unto themselves a means of bringing about such a revisions by initiating under the provisions of Section 4 of Article XI a convention to consider a revision of the entire Constitution. This Section is available to the people to bring about a Unicameral legislature if that is their desire.

In *Rivera-Cruz, supra*, this Court cited *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787, 789. This California case involved a purported initiative amendment to the Constitution of California, the result of which would be to substantially alter or repeal at least

⁶*Rivera-Cruz v. Gray*, 104 So.2d 501 at 505 (Fla.1958).
⁷*Id.* at 503.

fifteen of the twenty-five articles of the California Constitution.

* * * * *

We conclude with the observation that if such proposed amendment were adopted by the people at the General Election and if the Legislature at its next session should fail to submit further amendments to revise and clarify the numerous inconsistencies and conflicts which would result, or if after submission of appropriate amendments the people should refuse to adopt them, simple chaos would prevail in the government of this State. The same result would obtain from an amendment, for instance, of Section 1 of Article V, to provide for only a Supreme Court and Circuit Courts—and there could be other examples too numerous to detail. These examples point unerringly to the answer.

The purpose of the long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 was to eliminate inconsistencies and conflicts and to give the State a workable, accordant, homogeneous and up-to-date document. All of this could disappear very quickly if we were to hold that it could be amended in the manner proposed in the initiative petition here.

* * * * *

THORNAL, Justice (concurring).

I concur in the opinion and judgment prepared by Justice Drew. I do this because I feel that it announces a very wise and salutary approach to the construction and application of the constitutional provision involved. Moreover, I feel that it evidences a courageous application of a rule of restraint which the people themselves have incorporated in our Constitution to protect it against precipitous and spasmodic changes in the organic law. It would be easy to do as appellee urges us to do by transferring to the electorate the burden of making our decisions on an idealistic pronouncement “to let the people decide.” This, however, is not, in my view, the fulfillment of our judicial responsibility. It is often much more difficult for us as judges to take a stand and “do the people’s will” when the responsibility is clearly ours under the law. It is the sort of responsibility which frequently we would as soon not have but which, nevertheless, we must assume as judicial officers.

It is perfectly clear to me that by Fla. Const. art. XI, the people of this state have provided several methods for changing the organic law. As Justice Drew points out, “amendment” or “revision” can be accomplished under Section 1. “Revisions” can be accomplished under Section 2 or Section 4, and,

“amendment” can be accomplished under Section 3. Instead of doing violence to the “will of the people” as the appellee insists, the position of the majority as announced by Justice Drew is in full measure a fulfillment of the clear wishes of the people of this state.

* * * * *

ERVIN, Chief Justice (dissenting).

The majority opinion rejects as constitutionally improper a proposed people’s initiative amendment to Section 1 of Article III of the State Constitution that would change the legislature from a two-house body, consisting of a senate and a house of representatives, to a unicameral legislature, i.e., a senate consisting of not more than one hundred senators.

The majority objects to the proposed initiative amendment on grounds that it would amend more than one section of the Constitution; that it would amount to a revision of the State Constitution, and that if the proposed amendment is approved it would be immediately necessary to amend numerous other provisions of the Constitution. It is categorized by the majority as amounting to a “daisy-chain amendment.” It is declared to be a most radical and revolutionary proposal that would “tear apart the whole fabric of the Constitution.” It is said that the power “reserved to the people to amend any section of the Constitution, includes only the power to amend any section in such manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose.”

I am unable to agree to such restrictive limitations upon the power of the people to initiate amendments to any section of the Constitution.

A cursory reading of *Rivera-Cruz v. Gray* (Fla.1958), 104 So.2d 501, will indicate the proposed amendment before us is not a “daisy-chain.” It does not purport to revise the constitution or major portion of it but simply undertakes to amend the section creating a two-house legislature by changing it to a unicameral legislature.

When the Legislature amends an existing statute, its amending enactment may have spillover effects that incidentally affect other statutory provisions, but in all the years it has been enacting amendments the Florida Legislature has never been denied the power to amend because its amendment germane to the subject of a particular existing section and complete in itself will have collateral effects on other statutes. An amendment’s repugnancy to or inconsistency with other laws may create situations requiring judicial interpretation or subsequent legislation, but the power to make a germane original

amendment or change in the law which is complete in itself has never been shackled because such amendment will have side effects on other provisions of law. 50 Am.Jur. Statutes sec. 214; 30 Fla.Jur. Statutes sec. 69.

The same rules apply in amending sections of the State Constitution. In *Gray v. Golden* (Fla.), 89 So.2d 785, this Court said:

. . . here we are dealing with a proposed amendment for a single purpose and in so doing the legislature may legally propose it so as to limit or modify other provisions than the one proposed to be amended.

Text 789.

Compare *State ex rel. Elder v. Sours*, 31 Colo. 369, 74 P. 167.

Because a proposal may be radical, chaotic or revolutionary in the minds of some is no justification for its rejection ab initio as unconstitutional. After all, a great degree of confidence must necessarily be reposed in the good judgment of the people as has been reserved in them by the initiative provision to weed out the chaotic, the radical, and the revolutionary.

The great danger here to public morale is in denying to the people what plainly was indicated to them in the proposed 1968 Constitution: that they were given the power to initiate substantial germane changes to any section or sections of the Constitution, not merely watered-down minuscule ones which would never substantially affect any other section or article of the Constitution. Such a judicial delimitation upon the power of the people to meaningfully exercise the initiative function ties their hands in making any material changes in the Constitution.

* * * * *

The great pity produced in the majority opinion is that the people believed in adopting the 1968 Constitution they had the power to initiate major changes in the Constitution; that they had a "club in the closet," so to speak, to use when all other instrumentalities and sources for organic change failed to materialize. With this popular conception of the initiative provision of the 1968 Constitution in mind, it is difficult to believe that Section 1 of Article III of the constitution, which merely provides a two-house legislature, could not be changed by the people themselves by simple germane amendment complete in itself to a one-house legislature.

* * * * *

This dissent could be lengthened considerably by citations from other state supreme courts on the point that the people's will should be deferred to by the courts in their initiative proposals and that restrictions thereon should not be countenanced. However, I will only quote in conclusion from *In Re Initiative Petition No. 259*, etc., 316 P.2d 139 (Okl.1957), where the Supreme Court of Oklahoma stated the general rule of construction of initiative provisions which had been established by earlier case law:

"The people reserve to themselves the power to propose laws and amendments to the Constitution, . . . This power so reserved to the people should not be crippled, avoided, or denied by technical construction by the courts. It is the duty of the courts to construe and preserve this right as intended by the people in adopting the Constitution and thereby reserve unto the people this power."

BOYD, Justice (dissenting).

I must respectfully dissent from the majority opinion.

The initiative section of the 1968 Constitution is a recognition of the inherent power of the people to propose and adopt amendments to the Constitution by petition of the people at large, and without the necessity of relying upon public officials to initiate such amendments. This Court should give liberal construction to this provision in order that the power of the people to amend their government will not be unreasonably limited.

The proponents of the amendment for the unicameral Legislature have recognized that adoption of this amendment would create many problems in government wherein other provisions of the Constitution contemplate a bicameral Legislature. In order to eliminate difficulties which might so arise, there is contained in the proposed amendment a clause authorizing the Legislature to enact appropriate legislation to adjust the unicameral legislative effort to those aspects of government created in contemplation of a bicameral Legislature. The position of this Court should be that since the people have the capacity to adopt, preserve and defend the Constitution of Florida they have the capacity to make amendments to same at their discretion. It is the duty of the legislative, executive and judicial branches of government to make such adjustments as may be required to comply with the will of the people.

Discussion Notes

1. The constitutional restrictions operating in the principal case were eased by the voters in a constitutional amendment adopted in 1972. See *Weber v. Smathers*, 338 So.2d 819, 822-23 (Fla. 1976).

2. See generally, Note, "Legislative Efforts to Amend the Florida Constitution: The Implica-

tions of *Smathers v. Smith*," *Florida State University Law Review* 5 (Fall 1977): 747; *Moore v. Brown*, 350 Mo. 256, 165 S.W.2d 657 (1942).

3. For another consideration of the different procedures available for state constitutional amendment, as opposed to revision, see *State v. Manley*, 441 So. 2d 864 (Ala. 1983).

D. Procedural Limitations on State Constitutional Change

There are procedural limitations on the mechanisms for state constitutional change that are similar to those for the enactment of statutes. Do these limitations have the same purposes? Read the following cases with this question in mind.

Amador Valley School District v. State Bd. of Equalization 22 Cal.3d 208, 583 P.2d 1281 (1978)

* * * * *

2. The Single-Subject Requirement

Our Constitution provides that “An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” (Art. II, sec. 8, subd. (d).) Acknowledging that its general reference is to the subject of taxation, petitioners nonetheless argue that article XIII A covers many subjects and, indeed, is so sweeping and extensive in its practical effect and import as to encompass nearly the entirety of “government.” In this regard, their argument is somewhat related to their prior contention that article XIII A constitutes a revision of the Constitution, rather than an amendment. Accordingly, many of our previous observations regarding the revision and amendment procedures have application to their one-subject assertions.

The single-subject requirement of article II was adopted in 1948, possibly in response to the many-faceted initiative measure which we invalidated in *McFadden*, supra. Only a year later, in *Perry v. Jordan* (1949) 34 Cal.2d 87, 207 P.2d 47, we had occasion to construe the new constitutional provision. In *Perry*, we adopted and applied the “reasonably germane”

test previously developed by earlier decisions construing a similar single-subject restriction applicable to legislation (see Cal.Const., art. IV, sec. 9). We quoted with approval the following language from an earlier opinion in which we had upheld the legislative adoption of the Probate Code in a single enactment: “. . . [W]e are of the view that the [single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, *all parts of which are reasonably germane*. [Citation.] The provision was not enacted to provide means for the overthrow of legitimate legislation. [Citation.]

Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a *single scheme* may be properly included within a single act. [Citation.] The Legislature may assert in a single act all legislation *germane* to the general subject as expressed in its title and within the field of legislation suggested thereby. [Citation.] . . . A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose is *germane* within the rule. . . .” (*Evans v. Superior Court* (1932) 215 Cal. 58, 62, 8 P.2d 467, 469 italics added.)

In *Perry*, the challenged initiative measure had as its general subject the repeal of constitutional provisions governing aid to the aged and blind. We noted that the repeal measure would have several collateral effects, including (1) vesting the Legislature with power to reduce pension payments, (2) giving the counties the responsibility of administering pension programs, (3) imposing on relatives liability for benefits, and (4) raising the minimum age qualification for benefits. (*Perry v. Jordan*, supra, 34 Cal.2d at pp.

93-94, 207 P.2d 47.) Nonetheless, and referring to the foregoing features of the initiative, we unanimously rejected the single-subject challenge, observing that “All those things obviously pertain to any plan—single subject—of aid to the needy aged and blind. They are merely administrative details.” (Id., at p. 94, 207 P.2d at p. 50.)

We thus draw from *Perry* its primary lesson that an initiative measure will not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are “reasonably germane” to each other. We note also the existence of a more restrictive test recently proposed in the dissenting opinion of Justice Manuel in *Schmitz v. Younger* (1978) 21 Cal.3d 90, 100, 145 Cal. Rptr. 517, 522, 577 P.2d 652, 657, wherein he suggested that “an initiative’s provisions must be functionally related in furtherance of a common underlying purpose.” Our analysis of article XIII A convinces us that the several elements of that article satisfy either standard in that they are both reasonably germane to, and functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief.

As previously noted, article XIII A consists of four major elements, a real property *tax rate* limitation (sec. 1), a real property *assessment* limitation (sec. 2), a restriction on *state* taxes (sec. 3), and a restriction on *local* taxes (sec. 4). Although petitioners insist that these four features constitute separate *subjects*, we find that each of them is reasonably interrelated and interdependent, forming an interlocking “package” deemed necessary by the initiative’s framers to assure effective real property tax relief. Since the total real property tax is a function of both rate and assessment, sections 1 and 2 unite to assure that both variables in the property tax equation are subject to control. Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes. Although sections 3 and 4 do not pertain solely to the matter of *property* taxation, both sections, in combination with sections 1 and 2, are reasonably germane, and functionally related, to the general subject of property tax relief.

Among other purposes, the single-subject requirement was enacted to minimize the risk of voter confusion and deception. (*Schmitz v. Younger*, supra, 21 Cal.3d 90, 97, 145 Cal.Rptr. 517, 577 P.2d 652 [dis. opn.].) We may take judicial notice of the fact that the advance publicity and public discussion of article XIII A and its predicted effects were massive. (Evid.Code

sec. 452, subd. (g).) The measure received as much public attention as any other ballot proposition in recent years. These circumstances would seem to dilute the risk of voter confusion or deception by reason of the inclusion of the four principal features of the article in one ballot proposition. Moreover, the official voters pamphlet mailed to all registered voters contained an elaborate and detailed explanation of the various elements of Proposition 13. (See *Morris v. Priest* (1971) 14 Cal.App.3d 621, 625, 92 Cal.Rptr. 476.)

Petitioners contend, however, that adoption of XIII A violated a second important purpose underlying the single-subject requirement, namely, to avoid “exploiting” the initiative process by combining in a single measure several provisions which might not have commanded majority support if considered separately. (See *McFadden v. Jordan*, supra, 32 Cal.2d 330, 346, 196 P.2d 787.) Petitioners rely upon cases from several other jurisdictions expressing this principle. For example, in *Kerby v. Luhrs* (1934) 44 Ariz. 208, 36 P.2d 549, the court struck down an initiative measure which would have added to the Arizona Constitution such diverse provisions as (1) a new tax on copper production, (2) a new method of valuing public utility property, and (3) a new state tax commission. According to the court in *Kerby*, any of these provisions, singly, could have been adopted “without the slightest need of adopting” the others. (36 P.2d p. 554.) Although each provision related to the general subject of “taxation,” the *Kerby* court found no other connection between them, characterizing the measure as “logrolling of the worst type . . .” (36 P.2d p. 555.)

Unlike the enactment condemned in *Kerby*, however, the four elements of article XIII A not only pertain to the general subject of taxation, but also are reasonably interdependent and functionally related to each other. More importantly, no apparent “logrolling” is involved in this case. Each of the four basic elements of article XIII A was designed to interlock with the others to assure an effective tax relief program.

Petitioners assert that each of the four separate elements of article XIII A might not have been approved had each element appeared separately on the ballot. They speculate that various classes of voters may have favored some, but not all, of these elements; petitioners would require a showing that *each* of the several provisions of an initiative measure is capable of gaining approval by the electorate, independent of the other provisions. We are unable to accept such a contention, concluding that petitioners’

proposed single-subject test is far too strict, and lacks support in the authorities. Aside from the obvious difficulty of ever establishing satisfactorily such “independent voter approval,” this standard would defeat many legitimate enactments containing isolated, arguably “unpopular,” provisions reasonably deemed necessary to the integrated functioning of the enactment as a whole. We avoid an overly strict judicial application of the single-subject requirement, for to do so could well frustrate legitimate efforts by the people to accomplish integrated reform measures. As we have previously observed, the initiative procedure itself was specifically intended to accomplish such kinds of reforms through its function as a “legislative battering ram.” We should dull or blunt its force only for reasons that are constitutionally mandated, and accordingly we conclude that article XIII A does not violate the single-subject requirement of article II.

* * * * *

6. Initiative Title and Summary

According to petitioners, the pre-election petitions which were circulated to qualify the initiative measure contained a misleading title and summary. The *title*, “Initiative Constitutional Amendment—Property Tax Limitation,” was assertedly defective in its implication that only *property* taxes would be affected by the measure; in fact, other forms of state and local taxes were also involved. (Art. XIII A, secs. 3, 4.) Further, the *summary* of the measure stated in part that it “[a]uthorizes specified local entities to impose special taxes except . . . [real property taxes].” In fact, section 4 of the measure *restricts* the imposition of such “special taxes” by imposing a two-thirds vote requirement. It is argued that each of these variances is fatal to the constitutional validity of the article.

Petitioners further observe that the sample ballots distributed in Alameda and San Diego Counties also contained the foregoing “defects.” As for other counties, the ballot materials were corrected by court order: The title was changed to “Tax Limitation—Initiative Constitutional Amendment,” and the summary was revised to read “[a]uthorizes imposition of special taxes by local government (except on real property) by 2/3 vote of qualified electors.” According to respondents, these corrections were incorporated into the voters pamphlet subsequently mailed to *all* registered voters. Nevertheless, petitioners insist that the petition signers, and certain voters in Alameda and San Diego Counties, may have been misled or confused by the incorrect title and summary.

Prior to the circulation of an initiative measure, the Attorney General is required to prepare a title and summary of its “chief proposes and points”—not exceeding 100 words. (Cal.Const. art. II, sec. 10, subd. (d); Elec.Code, secs. 3502, 3503.) The Attorney General’s statement must be true and impartial, and not argumentative or likely to create prejudice for or against the measure. (Elec.Code, sec. 3531.) The main purpose of these requirements is to avoid misleading the public with inaccurate information. (See *Clark v. Jordan* (1936) 7 Cal.2d 248, 249-250, 60 P.2d 457; *Boyd v. Jordan* (1934) 1 Cal.2d 468, 471, 35 P.2d 533.) We have said, however, that the title and summary need not contain a complete catalogue or index of all of the measure’s provisions and “if reasonable minds may differ as to the sufficiency of the title, the title should be held sufficient.” (*Epperson v. Jordan* (1938) 12 Cal.2d 61, 66, 82 P.2d 445, 448.) As a general rule the title and summary prepared by the Attorney General are presumed accurate, and substantial compliance with the “chief purpose and points” provision is sufficient. (*Perry v. Jordan*, supra, 34 Cal.2d 87, 94, 207 P.2d 47.)

In the present case, we conclude that the title and summary, though technically imprecise, substantially complied with the law, and we doubt that any significant number of petition signer or voters were misled thereby. We deem that the title, stressing only the property tax aspects of the initiative, was reasonably sufficient in light of the fact that the measure was principally addressed to the subject of real property tax relief. Similarly, the original summary was not so incomplete as to be fatally defective, because it alerted petition signers and voters alike to the fact that the measure contained a provision affecting the imposition of special taxes by local agencies. The summary’s omission of any reference to the two-thirds vote requirement was not critical for, as we noted above, the initiative measure was extensively publicized and debated, in all of its several aspects, and a corrected summary was contained in the voters pamphlet which was mailed to all voters. We repeat our observation of some time ago that we ordinarily should assume that the voters who approved a constitutional amendment “. . . have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered. . . .” (*Wright v. Jordan* (1923) 192 Cal. 704, 221 P. 915, 919.)

We conclude that the initiative title and summary comply with existing legal requirements.

Discussion Notes

1. See George Lefcoe and Barney Allison, "The Legal Aspects of Proposition 13: The Amador Valley Case," *Southern California Law Review* 53 (November 1979): 173. See also *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984).

2. Are there distinctions between these types of procedural limitations and those applicable to the enactment of statutes?

3. In *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984) the Florida Supreme Court declared the following initiative amendment invalid on single-subject, and title and summary grounds, and ordered it withdrawn from the ballot:

Citizens' Rights in Civil Actions

In civil actions: (a) no party can be found liable for payment of damages in excess of his/her percentage of liability; (b) the Court shall grant a summary judgment on motion of any party, when the Court finds no genuine dispute exists concerning the material facts of the case; (c) noneconomic damages such as pain and suffering, mental anguish, loss of consortium, and loss of capacity for the enjoyment of life shall not be awarded in excess of \$100,000 against any party.

[The] Amendment establishes citizens' rights in civil actions: provides a party in a lawsuit shall not be required to pay more damages than the jury found him/her responsible for personally; requires courts to dispose of lawsuits when no dispute exists

over the material facts thus avoiding unnecessary costs; and allows full recovery of all actual expenses such as lost wages, accident costs, medical bills, etc., but limits noneconomic damages to a maximum of \$100,000.

Why would the proponents of this amendment seek to place it in the state *constitution*? How does the procedural posture of the amendment in *Evans* differ from that in *Amador Valley*?

4. Often more than one state constitutional amendment is submitted to the voters at the same election. State constitutions provide specific requirements for this situation. See *Carter v. Burson*, 230 Ga. 511, 198 S.E. 2d 151 (1973) (Constitution provided "When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each amendment separately."). See also *In re Interrogatories Propounded by the Senate*, 181 Colo. 1, 536 P.2d 308 (1975).

5. Would a typographical error, resulting in different versions of a state constitutional amendment being approved in the House and Senate before ratification by the voters void the amendment? See *State ex rel Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607, 615 (1976).

6. If a portion of a state constitutional amendment is invalid for some reason, can it be "severed," leaving the valid portion in effect? See *McWhirter v. Bridges*, 249 S.C. 613, 155 S.E. 2d 897 (1967).

E. State Constitutional Conventions

**James Willard Hurst,
*The Growth of American Law:
The Law Makers***

(Boston: Little, Brown and Co., 1950),
pp. 205-06.

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The agencies that drew most of the constitutions adopted during the War for Independence had not been specially called for this purpose. This was largely due to the pressure of the times. Massachusetts set the enduring pattern by its procedure in adopting its constitution of 1780: It submitted to the voters the question of calling a constitutional convention; it used that distinct agency for the framing of a constitution, and submitted the convention's product to the voters. This constitution was the political testament of John Adams; as might be expected there was an unusual measure of intellectual leadership behind the whole venture. But the careful double submission to the voters and the use of the separate agency of the convention seem to have come from a wide belief that this was the proper way to do the job.

The central idea of the convention took hold readily. But there was much variation in the procedures for calling such bodies and approving their work. Men showed little sense of the high danger of allowing any question to exist about the legitimacy of agencies charged with so basic a task. Potentially, the most serious question was, who might lawfully take the initiative in calling a convention. From the late nineteenth century on, constitutions commonly said that this authority was in the legislature. Before that time the matter was often uncertain. The courts seem never to have claimed the power. Presidents Lincoln and Johnson called conventions in certain seceded

states. They claimed authority as commander in chief; Congressional partisans contested the claim, and students have doubted its merit. With these exceptions, the executive branch did not take the initiative in calling constitutional conventions. Pennsylvania, for a brief time, and Vermont until 1867, experimented with a Council of Censors especially charged with the proposal of constitutional changes; in neither case was the device found satisfactory.

The legislature might thus have appeared to hold the initiative in constitutional changes, if only by default of other agencies. But two difficulties remained. One was readily answered. Many constitutions, and almost all of those adopted after the 1820's, provided that the voters should pass on amendments proposed by the legislature; from this it was argued that such was by implication the only proper way to amend. The courts held this to be a justiciable question, and found little trouble in answering it. They ruled that a general revision of a constitution, done in convention, was so different from specific amendment that the provision for proposal of specific amendments could not fairly be interpreted to bar general revision by convention. This recognized what had become well-settled practice, backed by popular acceptance; in 1887 Jameson noted twenty-seven conventions that had been called for constitutional revision under the general authority of the legislature. Rhode Island had a long history of trouble over its constitution, and there alone had judges denied the legislature's power to call a convention. But in 1935, in a decision not without political overtones, the Rhode Island Supreme Court overruled local precedent and held that the legislature might summon a convention even though the constitution did not expressly authorize it.

* * * * *

Discussion Notes

1. On the evolution of the constitutional convention, see John Alexander Jameson, *A Treatise on Constitutional Conventions* (Chicago: Callaghan and Co., 4th Ed. 1887); Note, "State Constitutional Change: The Constitutional Convention," *Virginia Law Review* 54 (June 1968): 995; Thad W. Tate, "The Social Contract in America,

1774-1787: Revolutionary Theory as a Conservative Instrument," *William and Mary Quarterly* 22 (July 1965): 375.

2. Could the initiative be used to call a constitutional convention? See Comment, "Convening a Constitutional Convention in Washington Through the Use of the Popular initiative," *Washington Law Review* (May 1970): 535.

**Snow v. City of Memphis
527 S.W.2d 55 (Tenn. 1975)
appeal dismissed 423 U.S. 1083 (1976)**

FONES, Chief Justice.

* * * * *

Plaintiffs Snow, et al., filed a declaratory judgment action in the Chancery Court of Shelby County, asserting that the Constitutional Convention of 1971 exceeded the limitation of the call and created a fifth classification of real property when it defined residential property containing two or more rental units as commercial property. An adjudication declaring said amendment unconstitutional, as violative of Article XI, Section 3, Tennessee Constitution and the 14th Amendment, U.S. Constitution, was sought. From a decree sustaining plaintiff's contention, the City of Memphis, the County of Shelby, and the Attorney General of Tennessee, perfected a direct appeal to this Court.

* * * * *

Article II, Section 28 of the Constitution of Tennessee was amended, in compliance with the second method prescribed in Article XI, Section 3 of said Constitution. The process was initiated by the Legislature's enacting Chapter 421, as amended by Chapter 597, Public Acts 1968. Said legislation submitted five questions to the electorate; only one of which, Question 3, received approval of the majority of the voters, in November, 1968.

The Question 3 call is set out in its entirety in Appendix A. The call provides, in affirmative terms, that Article II, Section 28 of the Constitution shall require the classification of property into three classes, real property, intangible personal property, and tangible personal property, and that the Convention shall classify real property *only* into four sub-classifica-

tions, (a) public utility, (b) industrial and commercial, (c) residential, and (d) farm.

Delegates were elected to a Constitutional Convention in August, 1970, and in August, 1971 the Convention convened for the purpose of altering and reforming Article II, Section 28 of the Constitution of Tennessee, pursuant to the Question 3 call.

On September 14, 1971, the Convention adopted Resolution 74, which was approved by the voters in August, 1972.

Resolution 74, now Article II, Section 28 of the Constitution of Tennessee (see Appendix B), in setting out the classification of residential property, added the following: ". . . provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property."

This action of the Convention is said by the property owners to create a fifth subclassification of real property beyond the limits of the call, in violation of Article XI, Section 3 of our Constitution.

* * * * *

The first issue presented by the plaintiffs' attack on the constitutionality of taxing two or more rental units as commercial property depends upon the proper interpretation and application of the phrase in Article XI, Section 3 of our Constitution, proscribing that no amendment shall become effective, "unless within the limitations of the call of the convention." That phrase has been before this Court for interpretation in connection with the Question 3 call in three prior cases.

The Question 3 call is substantially different from any prior call of a limited constitutional convention.¹ Its departure from the tenor of prior calls provided the issue in *Illustration Design Group v. McCannless*, 224 Tenn. 284, 454 S.W.2d 115 (1970).

¹Compare Appendix A with the three prior calls of limited constitutional conventions in Appendices C, D and E. The first legislative call of a limited constitutional convention was in 1949 and the first limited constitutional convention in this state's history convened in 1953.

Plaintiffs asserted that Chapter 421 of Public Acts of 1968, as amended was unconstitutional because the legislature had exceeded the limits of its power in drafting the call, by undertaking to dictate the specific terms of the amendment, thus usurping the function of the Constitutional Convention. In rejecting that contention, the Court said, *inter alia*,

It will be observed that, by the provision of the Constitution above quoted (Art. 11, sec. 3, par. 2), the people have not only delegated authority to the Legislature to propose the call for a convention, and thus limit and define the scope and action of such convention, but they have expressly limited the consideration and action of the convention to the proposals already approved by a vote of the people and within the limits of the call, by this language:

“. . . and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, . . .”

454 S.W.2d 120.

The Court appears to place a great deal of emphasis on the effect of the language, “unless within the limitations of the call.” Its holding has been urged upon this Court in three subsequent lawsuits, including this one, as demanding a literal interpretation of that phrase with the result that it is said a constitutional convention must confine its deliberations and actions strictly within the detailed terms of the call. Said cases are *Southern Railway Company v. Dunn*, 483 S.W.2d 101 (Tenn. 1972), and *Southern Railway Company v. Fowler*, 497 S.W.2d 891 (Tenn.1973).

In *Fowler*, the plaintiffs contended that the Constitutional Convention exceeded the limitations of the call by sub-classifying tangible personal property, and in authorizing the Legislature to subclassify intangible personal property. The case was tried in the Chancery Court of Davidson County and then Chancellor Drowota, now a member of the Court of Appeals, filed a Memorandum opinion containing these incisive observations with respect to *Illustration Design Group v. McCanless*, *supra*:

This present litigation has revealed at least two adverse effects of the *Illustration Design Group* holding. The first is a very practical concern. That is, *Illustration Design Group* invites litigation like these present suits after every effort to amend the Constitution by the Convention method. Having granted the Legislature power to, in effect, draft proposed amendments, the Legisla-

ture can be expected to use that power to the fullest possible extent. The Constitutional Convention in the exercise of its discretion may frequently change or amend the Legislature’s draft amendment (the Call). Assuming ratification, it can be safely predicted that opponents of the amendment will consistently bring suits like the present seeking to invalidate the ratified proposal on grounds that the Constitutional Convention exceeded the scope of its authority as defined by the Call.

The second adverse effect, apparent from this present experience, is of constitutional significance. Stated simply, permitting the Legislature to draft every detail of a proposed constitutional amendment, and then requiring the Convention to adhere strictly to (i.e. rubber-stamp) the Legislature’s product, effectively emasculates the Convention as an institution of constitutional dignity. It removes from the Convention all discretion in framing changes in the fundamental law of this State.

As conceived by Article XI, Section 3, Constitution of Tennessee, the Constitutional Convention in its sphere of authority is an institution of at least equal dignity with the Legislature. The holding of *Illustration Design Group* makes the Constitutional Convention a puppet of the Legislature. It deprives the Convention of all significance as a constitutional institution.

It is apparent to this Court that such restrictions upon the function of a limited Constitutional Convention are contrary to the intent of the 1953 convention, and to legal and historical precedent in framing constitutional law in Tennessee and our sister states.

The issue thus presented, is of great significance in the fundamental law of this State and must be clarified.

A brief review of the background and events leading directly to the amendment of the second paragraph of Article XI, Section 3 of our Constitution, dealing with the Convention method of amendment, is appropriate.

The pre-amended provision as it appeared in our 1870 Constitution, with respect to amending by the Convention method, provided as follows:

The Legislature shall have the right, at any time by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when upon such submission, a majority of all the

votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed.

By Senate Joint Resolution No. 20, Public Acts of 1945, the Legislature authorized and directed the Governor to appoint a Constitution Revision Commission. The purpose of the Commission was to make a study of the needs for revision of the Constitution of Tennessee and present its recommendations to the 1947 Session of the General Assembly. Seven distinguished lawyers were appointed by the Governor and, after more than a year of study, the Commission's report was submitted to the 75th General Assembly on November 8, 1946.

Said Commission recommended that nine sections of the Constitution be changed and devoted most of its report to the procedure best calculated to bring about the suggested changes. Eleven efforts to amend the 1870 Constitution by the legislative method had failed because of the obstacle of obtaining voter ratification by a majority of all those voting for representatives.² We judicially note, that in said efforts to amend by that process, only a small percentage of the voters who voted for representatives cast their ballots either for or against constitutional amendments, leaving the required majority of those voting for representatives, unattainable. After a careful study of the authorities, said Commission reached the conclusion that a limited constitutional convention was authorized by the above quoted Convention method contained in the 1870 Constitution, but an opinion from the Attorney General was requested. (Report of Constitution Revision Commission, pp. 2-8).

Attorney General Beeler rendered the requested opinion on May 16, 1946, finding a limited Constitutional Convention invalid and unconstitutional. Of significance to our inquiry is the following excerpt from his opinion:

The last sentence of Art. 11, Sec. 3, is the one using the wording "to alter, reform or abolish." This sentence and these words do not confer upon the Legislature the power or authority to limit the Constitutional Convention to a consideration of any particular amendments; *but a Constitutional Convention once called and assembled is sovereign in character and must be left free to either "alter, reform or abolish" and existing Constitution.*

²"—And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Representatives, voting in their favor,—” Article 11, Section 3, Constitution of 1870.

To hold otherwise would be to reduce the Constitutional Convention to nothing more nor less than a rubber stamp. Its members would be shackled and manacled . . . in common, every day language "hamstrung" and "hogtied." The framers of this constitutional provision intended to provide the State with the benefit of the collective coordinate judgment of the individual members making up the Constitutional Convention and it was not intended that the Legislature by a limiting Act could short-circuit the Constitutional Convention by the submission to it of certain specific amendments. To hold otherwise would be to reduce the Convention to a servile agency of State Government. (Emphasis supplied).³

The suit was brought by Cummings in his official capacity as Secretary of State, seeking a declaratory judgment as to the constitutionality of Chapter 49 of the Public Acts of 1949, for the immediate purpose of determining whether or not the Secretary of State should expend public funds for the holding of the special election on November 8, 1949, submitting the question of calling the limited Constitutional Convention. The court observed that it must be conceded that authority is granted to the Legislature to propose to the people a call of a convention to alter, reform or abolish the Constitution as a *whole*; that the question to be determined was whether or not the call could *limit* the convention to amending the Constitution *in part*. 223 S.W.2d, at 921. In upholding the 1949 Act and establishing the limited constitutional convention as a political entity, Justice Burnett, writing for the Court, said:

The power to "alter, reform or abolish" the Tennessee Constitution resides in the people not in the Legislature. . . . The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States.

* * * * *

The Constitutional provision above quoted does not prohibit the revision or amendment of *a part* of the Constitution by the Convention method. . . . The thing that the people

³Among the cases relied upon by Attorney General Beeler in reaching the foregoing conclusion were: *Carton v. Sec. of State*, 151 Mich. 337, 115 N.W. 429; *Goodrich v. Moore*, 2 Minn. 61, Gil. 49; *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472.

call a Convention for is not to revise or to write a new Constitution but *only a part* thereof. The people having thus voted to circumscribe the limits of their elected Convention delegates, in the particulars as provided for in the Act, bind these delegates within these limits. (Emphasis supplied).

223 S.W.2d, at 923.

An examination of the call portion of Chapter 49, Public Acts of 1949, at issue before the Court in *Cummings*, reveal that the *parts* of the Constitution proposed to be submitted for Convention consideration are described only by article and section number and the subject matter of the section.

The 1949 call for a Constitutional Convention was rejected by the voters. The 1953 Constitutional Convention was called by Chapter 130, Public Acts of 1951, and approved by the people at the election held on August, 7, 1952. Said call omitted three issues that were included in the 1949 call and designated the six issues submitted by article and section number and subject matter.

One of the six issues before the Convention was Article XI, Section 3. As amended by that Convention and ratified by the people, the Convention method of our Constitution reads as follows:

The Legislature shall have the right by law to submit to the people, at any *general election*, the question of calling a convention to alter, reform, or abolish this Constitution, *or to alter, reform or abolish any specified part or parts of it*; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention, the delegates to such convention shall be chosen at the next general election and the convention shall assemble for the consideration of such proposals as shall have received a favorable vote in said election, in such mode and a manner as shall be prescribed. *No change in, or amendment to, this Constitution proposed by such convention shall become effective, unless within the limitations of the call of the convention, and unless approved and ratified by a majority of the qualified voters voting separately on such change or amendment at an election to be held in such manner and on such date as may be fixed by the convention. No such convention shall be held oftener than once in six years.*

The additions to the 1870 section (underlined above), dealing with the Convention method, provide explicit authorization for a limited constitutional convention. We have carefully examined the Journal of

the Constitutional Convention of 1953 and it is abundantly clear that the purpose in adding the additional language that now appears in said paragraph, including the phrase "within the limitation of the call" was to confirm in the amending clause of the Constitution, the holding in *Cummings v. Beeler*, legalizing the political entity known as a limited constitutional convention, to make it mandatory that the work product of the Convention be submitted for ratification or rejection by the people, and to limit conventions to one in six years. The proponents of the amendment so stated, and the opponents of the amendment, expressed complete confidence in the efficacy of *Cummings v. Beeler*, supra, as firmly establishing the limited constitutional convention, and considered any amendment to the Convention method to be unnecessary. Journal of Proceedings of Tennessee Limited Constitutional Convention, 1953, pp. 239, 763, 781-784.

The Constitution Revision Commission, the Supreme Court and, finally, the Limited Constitutional Convention of 1953, implicitly, if not explicitly, envisioned as the only limitation upon a constitutional convention the restriction of its deliberations to a particular section and the subject matter of that section of the Constitution; that a convention could be limited to a *part* of the Constitution, whereas, therefore there was respectable opinion, including the Attorney General, that it could not be limited in any manner whatsoever.

We are convinced that it was never conceived that within the specified section and the subject matter thereof any further or additional restrictions would or could be placed upon a constitutional convention.

Accordingly, we hold that any restrictions in the call, exceeding a recitation of the subject matter of the existing section designated for consideration, are not binding upon the Convention, and the Convention is free to abolish, or to alter or amend the section to such extent and in such manner as it deems proper. If the Legislature, as the agent of the people, desires to submit to the people the question of calling a Constitutional Convention to consider new subject matter, not embraced in the Constitution, it, of course, may do so by an appropriate description of such subject matter, corresponding to the descriptive format used to describe the subject matter of existing Constitutional sections in the 1949, 1951, and 1962 calls. To the extent that the legislature includes affirmative proposals in the call, beyond the scope aforesaid, the excess is mere surplusage, in the nature of gratuitous advice, and even though approved by the people, is not binding on the Convention, nor does it invalidate the call or the subsequent action of the Convention.

It must be remembered that the Convention method, whether limited or unlimited, is subjected to two votes by the people, the ultimate repository of all power. The primary purpose of the call vote is to determine whether or not the people are willing to *permit* a convention to *consider* altering, amending or abolishing the whole Constitution, or specified parts thereof. An affirmative vote for a convention, for limited or unlimited purposes, is a grant by the people to a historic deliberative body to write constitutional, fundamental law as distinguished from statutory law. Imperfection in the call, such as affirmative proposals exceeding the limits heretofore defined, does not invalidate the amending process. The second vote ratifies or rejects the word for word end result of the Convention's deliberative effort. The final validating step by the people is the most significant action in the entire amending process.

The courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment, after it has been ratified by the people. . . .

Applying the foregoing principles to the instant case, we do not interpret the Question 3 call as prohibiting the definition of residential rental property containing two or more rental units, as commercial property.

* * * * *

Appendix A

(The call to be printed in full on each ballot or voting machine as provided in Chapter 421, Public Acts, 1968 [as amended]) "Question 3. Shall a convention be called to alter and reform Article II, Section 28 of the Constitution so as to require the classification of property into three classes for purposes of taxation, to wit:

**Real Property
Intangible Personal Property
Tangible Personal Property**

Provided that said Convention shall classify Real Property only into four (4) subclassifications, to wit:

- (a) Public Utility Property, to be assessed at not less than 45 per cent or more than 55 per cent of its value, the exact percentage to be fixed by the convention.
- (b) Industrial and Commercial Property, to be assessed at not less than 35 per cent or more than 45 per cent of its value, the exact percentage to be fixed by the convention;
- (c) Residential Property, to be assessed at not less than 25 per cent or more than 35

per cent of its value, the exact percentage to be fixed by the convention; and

- (d) Farm Property, to be assessed at not less than 20 per cent or more than 25 per cent of its value, the exact percentage to be fixed by the convention.

Exemption of Tangible Personal Property. Said convention shall further provide and establish an exemption, which shall cover a taxpayer's personal household goods and furnishings, wearing apparel and other such tangible property, the total of which exemption shall not be less than \$5,000.00 or more than \$7,500.00, as shall be determined by the Convention.

Exemption of Intangible Personal Property. The Convention shall further provide that money deposited in an individual's personal or family checking or savings account shall be exempt from taxes, in an amount to be determined by the convention.

No exemption other than those specified herein shall be authorized by the Convention in the case of either tangible personal property or intangible personal property. The ratio of assessment to value of property in each class or sub-class, as shall be established by the convention, shall be equal and uniform throughout the State, and each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

Said Constitutional Convention, if called, shall not be authorized to amend the Constitution so as to permit a personal income tax, except as already authorized under the present Constitution; and the said Convention, if called, may consider the further provisions of Article 2, Section 28, but no action taken shall be in conflict with the provisions hereof.

* * * * *

Opinion on Petition to Rehear

FONES, Chief Justice.

The petition to rehear asserts that we have usurped the power of the people to control a constitutional convention and have misread and overruled *Illustration Design Group, Inc. v. McCannless*, supra.

We fully recognize that it is the people and not the legislature who approve or reject the submission of constitutional subjects to the consideration of a limited constitutional convention. The legislature in proposing a convention, and in proposing the subjects for its consideration, is not exercising its legislative power to enact statutory law. It is acting as an agency of the people, performing the first step in the amending process by the convention method.

It should be remembered that there are two (2) methods by which our Constitution may be amended: the legislative method and the convention method. Article Eleven, Section Three, Constitution of Tennessee. When the legislative method is used, the proposed amendment is drafted in toto, by the legislature and after the legislative approval prescribed in paragraph one of Article Eleven, Section Three, the amendment is submitted to the people for approval or rejection. When the convention [sic] method is used, historically, the convention has drafted and proposed amendments, upon those *subjects* included in the call. Paragraph two of Article Eleven, Section Three says that the delegates to such convention shall assemble for the consideration of such proposals as shall have received a favorable vote in the "call" election.

The convention method involves a vote of the people at three (3) separate elections covering a period of years and the expense of convening and maintaining delegates to a convention. It is sheer folly to pursue the convention method unless the purpose is to have the convention draft amendments, that a busy legislature does not have the time to consider. If the legislature has the time to draft constitutional amendments then it should use the legislative method provided in paragraph one, Article Eleven, Section Three. The only legitimate purpose in calling a constitutional convention is to obtain its work product, to wit, a thoroughly debated, maturely deliberated, proposed constitutional amendment to recommend to the people. The people then make the final judgment upon its merit.

In drafting the Question Three call, the legislature deviated from the consistent prior procedure of merely designating specific subjects to be considered by a convention. This has created a serious problem. This is the fourth lawsuit attacking the constitutionality of the Question Three amendment. The basic contention in each case has as its substance, the extensive draft by the legislature of the subject matter of the amendment. The constitutional amending process by the convention method is threatened with instability, and at the center of the storm is the single issue of how far the legislature may go, as an agency of the people, in drafting a subject or a proposal for consideration by a limited constitutional convention.

No one could successfully contend that in calling an unlimited constitutional convention the legislature could draft the whole or any part of a proposed constitution. There is no authority anywhere for such

a contention. The only distinction between an unlimited constitutional convention and a limited constitutional convention is that a limited constitutional convention can only consider a *specified part or parts* of the constitution while an unlimited constitutional convention may consider the *whole* of the Constitution, and alter, reform or abolish any part, or all of it. The first three and one half lines of paragraph two Article Eleven, Section Three so provide. *Cummings v. Beeler*, supra, in establishing the validity of the limited constitutional convention so held.

* * * * *

The assertions in the petition to rehear with respect to *Illustration Design Group, Inc. v. McCanless*, supra, reflect a misunderstanding of our opinion in the instant case.

In referring to the legislative function of proposing the subjects the people may want a limited constitutional convention to consider, that case uses phrases which do not appear in any of the authorities cited therein and have caused confusion to the bench and bar of this State. Instead of what we consider the appropriate language derived from *Cummings v. Beeler*, supra, to wit, that the proposed call should specify the part or parts of the Constitution or the subject, the case under discussion used the following phrases:

delineating the scope and power of such convention"

defining its scope and powers" (454 S.W.2d at 119)

define the scope and action of such convention"

but they have expressly limited the consideration and action of the convention to the proposals already approved by a vote of the people
(454 S.W.2d at 120)

We agree with the result reached in *Illustration Design Group, Inc.*, supra. We disagree with the use of the foregoing phrases, but only insofar as said phrases are interpreted to mean that the legislature may go further than the specification of parts of the Constitution or subjects, to be considered by a limited constitutional convention, and undertake to draft a substantial portion of the amendment itself.

The petition to rehear is denied.

Discussion Notes

1. Can a constitutional convention called by the legislature generally be limited in the subject matter it is authorized to address? White, "Amendment and Revision of State Constitutions," 1134-35, 1142; Strum, "The Procedure of State Constitutional Change" 583; R. K. Gooch, "The Recent Limited Constitutional Convention in Virginia," *Virginia Law Review* 31 (June 1945): 708.

2. A similar debate is, of course, currently raging at the federal level. See Note, "Limited Federal Constitutional Conventions: Implications of the State Experience," *Harvard Journal on Legislation* 11 (November 1973): 127.

3. Florida's unique Constitution Revision Commission, an appointed body with authority to place proposed constitutional changes directly on the ballot, is described in Steven J. Uhlfelder, "The Machinery of Revision," *Florida State University Law Review* 6 (Summer 1978): 575. See also Walter H. Nunn, "The Commission Route to Constitutional Reform: The Arkansas Experience," *Arkansas Law Review* 22 (Summer 1968): 317.

4. With reference to state constitutional drafting, see Arnold B. Kanter and Wayne W. Whalen, "Thoughts on Constitutional Drafting," *Harvard Journal on Legislation* 9 (No. 1 1971): 31.

F. Access to the Ballot for State Constitutional Change

Meyer v. Grant 108 S.Ct. 1886 (1988)

JUSTICE STEVENS delivered the opinion of the Court.

In Colorado the proponents of a new law, or an amendment to the State Constitution, may have their proposal placed on to the ballot at a general election if they can obtain enough signatures of qualified voters on an "initiative petition" within a six-month period. One section of the state law regulating the initiative process makes it a felony to pay petition circulators.¹ The question in this case is whether that provision is unconstitutional. The Court of Appeals for the Tenth Circuit, sitting en banc, held that the statute abridged the appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution. We agree.

I

Colorado is one of several States that permits its citizens to place propositions on the ballot through an initiative process. Colo. Const., Art. V, sec. 1; Colo. Rev. Stat. secs. 1-40-101 to 1-40-119 (1980 and Supp. 1987). Under Colorado law, proponents of an

initiative measure must submit the measure to the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three-member title board, which prepares a title, submission clause, and summary. After approval of the title, submission clause, and summary, the proponents of the measure then have six months to obtain the necessary signatures, which must be in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the petitions may be filed with the Secretary of State, and the measure will appear on the ballot at the next general election. Colo. Rev. Stat. secs. 1-40-101 to 1-40-105 (1980 and Supp. 1987).

State law requires that the persons who circulate the approved drafts of the petitions for signature be registered voters. Colo. Const., Art. V, sec. 1(6). Before the signed petitions are filed with the Secretary of State, the circulators must sign affidavits attesting that each signature is the signature of the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered voter. Colo. Rev. Stat. sec. 1-40-109 (Supp. 1987). The payment of petition circulators is punished as a felony. Colo. Rev. Stat. sec. 1-40-110 (1980), n. 1. *supra*.

Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experiences as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required num-

¹Colorado Rev. Stat. sec. 1-40-110 (1980) provides:

Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C. R. S. (1973).

ber of signatures within the allotted time. They then brought this action under 42 U.S.C. sec. 1983 against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment.

After a brief trial, the District Judge entered judgment upholding the statute on alternative grounds. First, he concluded that the prohibition against the use of paid circulators did not burden appellees' First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot.³ The restriction on their ability to hire paid circulators to speak for them was not significant because they remained free to use their money to employ other spokesmen who could advertise their cause. Second, even assuming, *arguendo*, that the statute burdened appellees' right to engage in political speech, the District Judge concluded that the burden was justified by the State's interest in (a) making sure that an initiative measure has a sufficiently broad base to warrant its placement on the ballot, and (b) protecting the integrity of the initiative process by eliminating a temptation to pad petitions.

A divided panel of the Court of Appeals affirmed for the reasons stated by the District Court. After granting rehearing en banc, however, the court reversed. The en banc majority concluded that the record demonstrated that petition circulators engage in the communication of ideas while they are obtaining signatures and that the available pool of circulators is necessarily smaller if only volunteers can be used.

Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. . . . In short, like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a di-

³In support of its conclusion that the prohibition against the use of paid circulators did not inhibit the placement of initiative measures on the general ballot, the District Court compared Colorado's experiences with that of 20 States which have an initiative process but do not prohibit paid circulators. It noted that since 1910, Colorado has ranked fourth in the total number of initiatives places on the ballot. This statistic, however, does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that these respondents would have had greater success if they had been able to hire extra help. As the District Court itself noted, "the evidence indicates [appellees'] purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." 741 F. 2d 1210, 1212 (CA10 1984) (Appendix)

rect restriction which "necessarily reduces the quantity of expression. . . ." *Buckley*, 424 U.S. at 10.

828 F.2d 1446, 1453-1454 (CA10 1987).

The Court of Appeals then rejected the State's asserted justifications for the ban. It first rejected the suggestion that the ban was necessary either to prevent fraud or to protect the public from circulators that might be too persuasive:

The First Amendment is a value-free provision whose protection is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, [371 U.S. 415, 445 (1963)]. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, [323 U.S. 516, 545 (1945)] (Jackson, J., concurring).

828 F. 2d, at 1455.

The court then rejected the suggestion that the ban was needed to assure that the initiative had a broad base of public support because, in the court's view, that interest was adequately protected by the requirement that the petition be signed by five percent of the State's eligible voters. Finally, the Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because, unlike *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which involved only commercial speech, this case involves "core political speech."

II

We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amdt. 1. The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. As we explained in *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940), "[t]he freedom of speech and the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are se-

cured to all persons by the Fourteenth Amendment against abridgment by a State.”

Unquestionably, whether the trucking industry should be deregulated in Colorado is a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions. “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Id.*, at 101-102. The First Amendment “was fashioned to assure unfettered interchange in ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.⁴ Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as “core political speech.”

⁴The record in this case demonstrates that the circulation of appellees’ petition involved political speech. Paul Grant, one of the appellees, testified about the nature of his conversations with voters in an effort to get them to sign the petition:

[T]he way we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, “Are you a registered voter?”

.....

If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, “Please let me know a little bit more.” Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign.

.....

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limits the size of the audience they can reach.⁶ Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue. When called upon to consider the constitutionality of the statute at issue here in another context in *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983), that court described the burden the statute imposes on First Amendment expression:

As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. That the statute in question circulate petitions cannot be doubted. We can take judicial notice of the fact that it acts as a limitation on ACORN’s ability to often more difficult to get people to work without compensation than it is to get them to work for pay. As the dissent in *State v. Conifer Enterprises, Inc.*, 82 Wash. 2d 94, 508 P.2d 149 (1973) (Rosellini, J., dissenting), observed:

“The securing of sufficient signatures to place an initiative meas-

[We try] to explain not just the deregulation in this industry, that it would free up to industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be \$150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

2 Record 10-11.

This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

⁶Paul Grant testified that compensation resulted in more people being “able and willing” to circulate petitions. 2 Record 19-20. As he succinctly concluded: “[M]oney either enables people to forego leaving a job, or enables them to have a job.” *Ibid.*

ure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome—so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.”

Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees’ First Amendment rights is acceptable.

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado’s prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open “more burdensome” avenues of communication, does not relieve its burden on First Amendment expression. *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986). Cf. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296, 299 (1981). The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Relying on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. In *Posadas* the Court concluded that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.” *Id.*, at 345-346. The Court of Appeals quite properly pointed out the logical flaw in Colorado’s attempt to draw an analogy between the present case and *Posadas*. The decision in *Posadas* does not suggest that “the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling.” 828 F.2d, at 1456. Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in

initiative petitions. And, as the Court of Appeals further observed:

Posadas is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely “commercial speech which does ‘no more than propose a commercial transaction. . . .’” *Posadas*, [478 U.S., at 340], (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, [425 U.S. 748, 762 (1976)]. . . . Here, by contrast, the speech at issue is “at the core of our electoral process and of the First Amendment freedoms,” *Buckley*, [424 U.S., at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23,32 (1968))]—an area of public policy where protection of robust discussion is at its zenith. 828 F.2d, at 1456-1457.

We agree with the Court of Appeals’ conclusion that the statute trenches upon an area in which the importance of the First Amendment protections is “at its zenith.” For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

III

We are not persuaded by the State’s arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained. *Id.*, at 1455.⁷

⁷Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators. See Brief for Appellants 17. “But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Buckley*, 424 U.S. 1, 48-49 (1976). The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights. As we said in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791 (1978), paid advocacy “may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others in wholly foreign to the First Amendment. . . .” *Buckley*, 424 U.S., at 48-49. . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.” Cf. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“[t]he State’s fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech”).

The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. . . . Further, the top of each page of the petition must bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not

qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative.⁸ These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting. Cf. *First National Bank of Boston v. Bellotti*, 435 U.S., at 790 (“[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue”).

“[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.” *Buckley v. Valeo*, 424 U.S., at 50. That principle applies equally to “the discussion of political policy generally or advocacy of the passage or defeat of legislation.” *Id.*, at 48. The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

⁸Section 1-40-106 provides in part:

(1) At the top of each page of every initiative or referendum petition shall be printed, in plain red letters no smaller than the impression of ten-point boldface type, the following:

Warning

It Is a Felony:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to sign such petition when not a qualified elector.

**Do Not Sign This Petition Unless
You Are a Qualified Elector**

**To Be a Qualified Elector,
You Must Be:**

- (a) At least eighteen years of age.
- (b) A citizen of the United States.
- (c) A resident of the state of Colorado and have resided in the state at least thirty-two days.
- (d) A resident of the precinct in which you live for a least thirty-two days. Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning.

* * * * *

Discussion Notes

1. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), relied on in the *Grant* case, involved a proposed state constitutional amendment to permit a graduated income tax.

2. See Note, “Initiative and Referendum—Power of the Legislature to Affect the Initiative

and Referendum Processes by Prohibiting Payment of Compensation to Circulators of Petitions,” *University of Kansas Law Review* 22 (Summer 1974): 654; Note, “All the Free Speech Money Can Buy: Monopolization of Issue Perception in Referendum Campaigns,” *University of Miami Law Review* 35 (1980): 157.

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