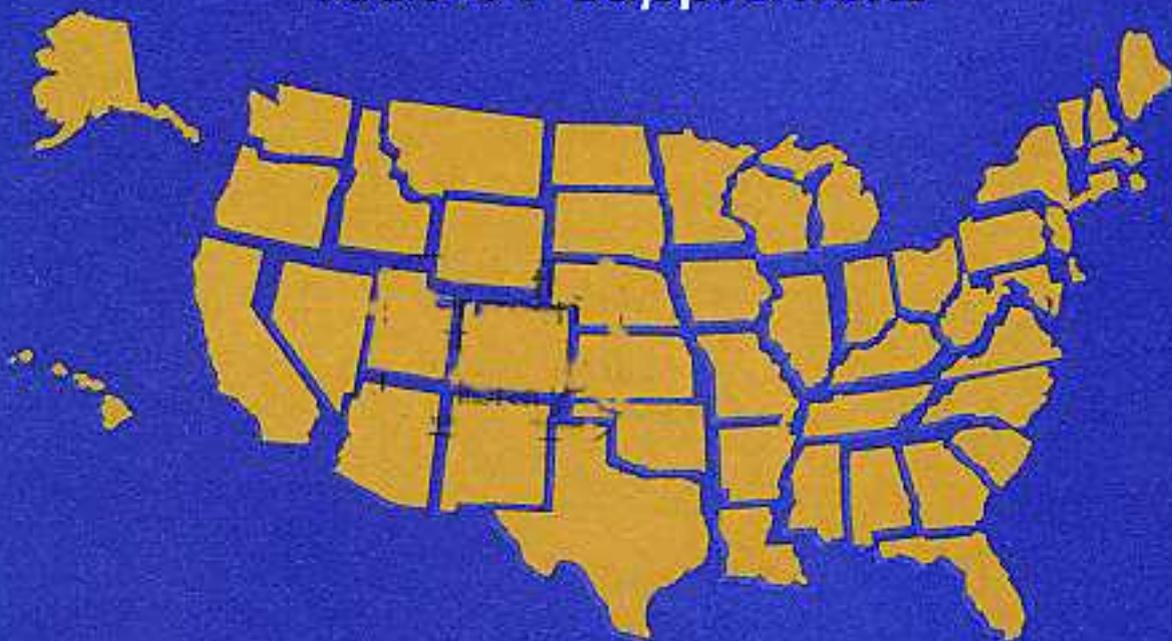


# STATE CONSTITUTIONAL LAW

## *Cases and Materials* 1990-91 Supplement



ADVISORY COMMISSION ON  
INTERGOVERNMENTAL RELATIONS  
Washington, DC 20575

M-172  
August 1990

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M-172

**State  
Constitutional  
Law:  
Cases  
and  
Materials**

Compiled by  
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**1990-91 Supplement**

# 1990-91 Supplement

This supplement is intended to be used with *State Constitutional Law: Cases and Materials*, published by the Advisory Commission on Intergovernmental Relations (ACIR) in 1988. *The additions are keyed to the pages of the original publication.*

United States Supreme Court Justice William J. Brennan, Jr., had the following to say about the 1988 publication:

I congratulate you most enthusiastically upon your *State Constitutional Law*. I'd been hoping for some time that a casebook would be published. With the growing interest in reliance by state courts on their own constitutions, it's been very badly needed. I shall certainly encourage any deans I run into to follow the lead of the other law schools already using it.

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## Introduction

### At end of page 3:

New research sources in state constitutional law include an "Annual Issue on State Constitutional Law," published in the *Rutgers Law Journal* for the first time in 1989. The issue includes commentary on all the important state constitutional interpretations during the previous year. See especially, Earl M. Maltz, Robert F. Williams, and Michael Araten, "Selected Bibliography on State Constitutional Law, 1980-1989," *Rutgers Law Journal* 20 (Summer 1989): 1093. See also Bernard D. Reams, Jr., and Stuart D. Yoak, eds., *The Constitutions of the States: A State-by-State Guide and Bibliography to Current Scholarly Research* (Dobbs Ferry, N.Y.: Oceana, 1988); "The 1970 Illinois Constitution in Review: A Symposium on Issues for Change," *Northern Illinois University Law Review* 8 (1988): 565; "Symposium on the Texas Constitution," *Texas Law Review* 68 (June 1990): 1337.

A 1988 national poll by ACIR revealed that 52 percent of the respondents did not know that their state had its own constitution. John Kincaid, "The New Judicial Federalism," *The Journal of State Government* 61 (Sept./Oct. 1988): 169. In 1989, ACIR made the following finding:

Even among lawyers, state constitutional law is relatively unknown and little practiced. Compared to the U.S. Constitution, state constitutions are less frequently mentioned in the history and civics classes of public schools or the university, and regular reporting of state constitutional decisions, as well as the statistics of state court activities, has been, until very recently, quite rare. Even the law schools seldom offer courses in state constitutional law. If the American federal system is to be properly balanced—giving full rein to the potentials of local governments, the states, and the national government—then the field of state constitutional law needs to be developed more fully.

The Commission recommended that "law schools teach state constitutional law as part of their regular curriculum, that state bar examiners include a section on state constitutional law in their bar exams, and that public and private institutions support research on state constitutional law." Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives* (1989) pp. 2, 3.

In 1988, West Publishing Company introduced its *State Constitutional Law in a Nutshell*, by Thomas C. Marks, Jr., and John F. Cooper. Also in 1988, the National Association of Attorneys General began publishing an annual law review, *Emerging Issues in*

*State Constitutional Law*, two issues of which have appeared. In Fall 1989, the first issue of the quarterly publication *State Constitutional Commentaries and Notes* appeared, under the editorship of Stanley H. Friedelbaum, director of the Edward McNall Burns Center for State Constitutional Studies at Rutgers University. Finally, Greenwood Press has announced the publication of a 50-volume reference work on each state's constitution, three of which will be available in late 1990.

## The Evolving State Constitutions during the Founding Decade

### Æ end of page 13:

For more detailed discussion of state constitution making during the Founding era, see Robert F. Williams, "The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism," *Temple Law Review* 62 (1989): 541. See also Robert J. Steinfield, "Property and Suffrage in the Early American Republic," *Stanford Law Review* 41 (1989): 335; "Symposium on State Constitutional History: In Search of a Usable Past," *Albany Law Review* 53 (Winter 1989): 253; Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

Consider the following perspective on the state constitutions of the Revolutionary period:

The growing importance attached to written constitutions reveals the change in mentality that had been worked by the spread of print culture between the sixteenth and the eighteenth centuries. By the 18th century, the middle class, then on the verge of acquiring political power, had learned to read. Reading was of fundamental importance because it promoted a transformation in the way humans learn. Reading involved a move from learning through hearing to learning through seeing, a change that had far-reaching implications for political culture. Reading promoted a desire for precise information, and hence encouraged belief in the perfectibility of knowledge. One who reads is encouraged to define, to classify, and to specify. In the eighteenth century, this new mentality was characterized as "clarity of mind." In other words, reading creates a mentality that wishes to set precise rules and boundaries. The desire to set down in writing universal principles, grounded in reason, was promoted by the underlying imperative for precision that the print revolution had engendered.

Patrick H. Hutton, "The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions," *Vermont History* 56 (Summer 1988): 158.

**Coyle v. Smith**  
**Page 20, Discussion Notes:**

**Discussion Notes**

4. For a brief discussion of the process of approval of the Arizona constitution during the admission process, *see* John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20 (Spring 1988): 1.

**State Constitutions as Instruments of Lawmaking**  
**Following page 25:**

**Omaha National Bank v. Spire**  
**223 Neb. 209, 389 N.W.2d 269 (1986)**

GRANT, Justice.

This is a declaratory judgment action brought by the plaintiff-appellant, The Omaha National Bank, a corporation, against the defendant-appellee, Attorney General of the State of Nebraska. . . .

Omaha National further alleged that on November 2, 1982, the voters of the State of Nebraska adopted Initiative Petition 300, which purports to amend article XII of the Nebraska Constitution by adding a new section, designated as sec. 8. **As** stated in the initiative petition, the enactment provided in **part** as follows:

That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

Sec. 8(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

. . . .

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment.

Omaha National alleged that "[i]f Initiative 300 is construed to apply to the acquisition and administration of farm and ranch lands by [Omaha National] for non-corporate and non-syndicate beneficiaries, it will greatly limit [Omaha National's] ability to carry on a trust business in the State of Nebraska."

\* \* \* \* \*

With regard to appellant's contentions, we are aided not only by the briefs of appellant and amici but by a law review article prepared by appellant's counsel. See Brown & Brown, *Constitutionality of Nebraska's Initiative Measure Prohibiting Corporate Farming and Ranching*, 17 Creighton L.Rev. 233 (1984). In opposition thereto, we have available the defendant's brief, and those of certain amici who support the Attorney General's position in **part**, as well as a responding law review article. See Lake, *Constitutionality of "Initiative 300": An Answer*, 17 Creighton L.Rev. 261 (1984).

We first discuss Omaha National's contention that Initiative 300 is statutory in nature rather than an amendment to the Constitution of the State of Nebraska. The authority of the people of Nebraska to amend the Constitution of the State of Nebraska is set in article III, sec. 2, of that Constitution, which provides in part:

The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the electors of the state and if the petition be for the amendment of the Constitution, the petition therefore shall be signed by ten per cent of such electors. . . . (Adopted, 1912. Amended, 1920.)

Other provisions of article 11, secs. 2 and 4, set out further procedural requirements that must be met before an enactment initiated by a petition becomes a part of the statutory law of Nebraska or a part of the Nebraska Constitution, as provided in article III, sec. 4. There is no allegation in this court that all requirements to enact Initiative 300 were not met, but only an attack on the effect of what was done by the electorate of Nebraska.

The initiative petitions circulated and filed with the Secretary of State of the State of Nebraska stated in part:

We, the undersigned legal voters of the State of Nebraska . . . respectfully demand that the following constitutional amendment shall be submitted to the voters of the State of Nebraska. . . .

That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and sub-sections as numbered, notwithstanding any other provisions of this Constitution.

The ballot submitted to the electorate afforded the voters the opportunity to vote “For” or “Against” in response to the question, “Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation. . . ?” The ballot also stated:

“A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation.

“A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land.”

The parties stipulated, “On November 2, 1982, the voters of Nebraska passed Initiative Petition 300 . . . which states that it amends Article XII of the Nebraska Constitution. . . .”

With that background, Omaha National would have us determine that Initiative 300 is not a constitutional amendment but a statute passed by the initiative process. Omaha National contends that the Preamble to our Constitution controls and that all amendments to that Constitution must fully comply with the 31 words set out in that Preamble, or such enactments are statutes only and not constitutional amendments. The Preamble states: “We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska.”

In support of this assignment of error—that Initiative 300 is a statute and not a constitutional amendment—Omaha National first contends that the Preamble to our Constitution is a part of that Constitution and that a proposed enactment must be one that relates directly to the purposes set out in the Preamble, or the enactment is a statute rather than a constitutional amendment. Omaha National reasons that if the proposed enactment is one which changes the “declaration of rights” or the “frame of government,” as set out in the Nebraska Constitution Preamble, the enactment is an amendment; if not, it is a statute. Brief for Appellant at 14.

There are at least two reasons we cannot adopt the position of Omaha National in this regard. First, the Preamble is not a part of the Constitution, but only a general statement of purpose. . . .

Similarly, we hold that the State of Nebraska does not derive any of its substantive powers from the Preamble to the Nebraska Constitution. The Preamble cannot exert any power to secure the declared objects of

the Constitution unless, apart from the Preamble, such power can be found in, or can be properly implied from, some express delegation in the Constitution.

Secondly, even if the Preamble were considered to be an operative part of our Constitution, it could be amended in any way that any other part of the Constitution may be amended. No part of the Constitution, including the Preamble, is inviolable. To hold to the contrary would give absolute finality to a portion of the Constitution and would thwart the express will of the people when they retained the right to amend their Constitution. The people specifically reserved this right to themselves in secs. 2 and 4 of article III and in article XVI of the Nebraska Constitution.

Even if, as we have held, the provisions set out in the Preamble do not control the determination as to whether Initiative 300 is an amendment or a statute, Omaha National’s position remains—that Initiative 300 is a statute and not an amendment. That position is based on a three-step approach: (1) Labeling a legislative measure as a constitutional amendment does not make it so. (2) A constitutional amendment must deal with fundamental rights or the organization of government. (3) If an initiative measure is statutory in nature, it is, regardless of its label, void if it conflicts with constitutional provisions.

Basic to a consideration of this contention is article 111, sec. 2. The pertinent part of that article is set out above. The people of Nebraska have established a Constitution, and within that Constitution they have set forth a procedure which sets out methods in which they may amend that Constitution. The word “amendment,” as defined in Black’s Law Dictionary 74 (5th ed. 1979), means: “To alter by modification, deletion, or addition.” To the same effect, see Webster’s Third New International Dictionary, Unabridged 68 (1981). For this court to hold that we must make an independent judgment as to whether an enactment is an amendment or a statute before it may be considered as an amendment to the people’s Constitution would be to give the judicial branch of our government an effective veto over the rights the people have reserved to themselves to change their Constitution.

We can put it no clearer than did the trial court in its memorandum:

The ultimate source of power in any democratic form of government is the people. Our Nebraska Constitution is a document belonging to the people. Subject only to the supremacy clause of the United States Constitution, the people may put in their document what they will. Even to the shock and dismay of constitutional theoreticians, the people may add provisions dealing with “non-fundamental” rights, as well as provisions bearing the most tenuous of relationships to the notion of what constitutes the basic framework of government. The

people may add provisions which legal scholars might decry as legislative or statutory in nature, But the people may do it nonetheless.

We hold that the deciding factor in determining whether a proposed initiative enactment is an amendment or a statute is the manner in which the proposal is denominated in the initiative petition submitted to the voters; provided, of course, that the provisions of the remainder of article III, sec. 2, of our Constitution are complied with. In part, that section provides: "If the [initiative] petition be for the enactment of a law, it shall be signed by seven per cent of the electors of the state and if the petition be for the amendment of the Constitution, the petition therefore shall be signed by ten per cent of such electors."

Voters are involved in an initiative proceeding at two separate and distinct times. First, a petition must be signed by electors equal in number to at least 7 percent or 10 percent of "[t]he whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition. ..." Neb. Const. art. III, sec. 4. The signers of an initiative petition are stating that they desire to submit a specific proposed enactment to the voters. By signing the petition, those signers have stated the form of the proposed enactment.

The issue stated on the initiative petition, therefore, sets out the issue which the signers of that petition desire to submit to the electorate. If an initiative petition states that the signers wish to submit an amendment to the Constitution to the voters, the persons who sign such a petition want an **amendment** voted on. If such a petition were to obtain the number of signatures equal to 7 percent of the electors of those who voted in their most recent election for the office of Governor, but not 10 percent of such electors, the petition could not then be submitted to the voters of the state as a proposed law. The petition signers have stated that each desires an amendment, not a law, to be voted on.

Similarly, if an initiative petition sets out that the signers want a proposed law submitted to the electorate, the mere fact that the petition contains a number of signatures equaling 10 percent or more of the appropriate number of electors could not mean that the petition could be voted on as an amendment. Each of the signers has stated that that voter wants to have a law voted on—not a constitutional amendment. To hold otherwise would mean that numbers control, and not the specific intention of people signing a petition.

The differences between a law enacted by the initiative procedure and an amendment are obvious and great. While a law enacted by the initiative process may not be vetoed by the Governor of the state (article III, sec. 4), any law may later be repealed by the Legislature. An amendment to the Constitution, on the other hand, may not be repealed by the Legis-

lature, but only by the people in a subsequent amendment to the Constitution.

In response to appellant's approach, we hold that under the Nebraska Constitution, in an initiative proceeding, the labeling attached to a proposed enactment determines the nature of the proposed enactment. Otherwise, neither the signers of initiative petitions nor the voters at an election will ever know what they are signing or voting for. There are voters who would not sign a petition for, nor vote for, a constitutional amendment, while they would so sign and vote for an initiative statute, and vice versa.

It then follows that a proposed amendment to our Constitution does not have to deal with fundamental rights or the organization of government, but may deal with any subject.

Such an approach not only leaves the people of this state in charge of their Constitution, as a matter of logic, but follows the stated conclusions of this court and accords completely with past actions of Nebraska voters. In *In re Senate File 31*, 25 Neb. 864, 41 N.W. 981 (1889), we held that a proposed amendment to our Constitution could be submitted to the electorate. The proposed amendment provided that "the manufacture, sale, and keeping for sale of intoxicating liquors as a beverage in this state shall be licensed and regulated by law." *Id.* at 869-7441 N.W. at 982. A licensing provision could hardly be considered as affecting a "declaration of rights" or "frame of government," and yet this proposed enactment was held to be proper to submit, as an amendment, to the people for their vote.

Similarly, in 1934, an amendment was submitted to the people, and adopted as article III, sec. 24, of the Nebraska Constitution, authorizing parimutuel wagering on horseraces. In 1958, the voters again amended the same article to permit bingo games. In short, the people of the State of Nebraska have amended their Constitution in many ways that disinterested observers might well conclude were theoretically legislative in nature.

In so holding that the people of Nebraska may amend their Constitution in any way they see fit (so long as the amendment does not violate the Constitution of the United States or conflict with federal statutes or treaties), we find ourselves in agreement with the holding of the Supreme Court of the United States in construing amendments of the U.S. Constitution. In *National Prohibition Cases*, 253 U.S. 350, 386, 40 S.Ct. 486, 488, 64 L.Ed. 946 (1920), the Court held, in the face of contentions that the 18th amendment to the Constitution of the United States was really only an exercise of ordinary legislative power:

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquids for beverage purposes, as embodied in the Eighteenth

Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

Article V of the U.S. Constitution places only two restrictions on the right to amend that Constitution:

Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The 18th amendment of the U.S. Constitution did not conflict with the express conditions of the amendment process, and the amendment was determined to be part of the Constitution, although legislative in nature.

In *Ex Parte Marsh v. Bartlett*, 343 Mo. 526, 121 S.W.2d 737 (1938), the Missouri Supreme Court upheld an amendment legislative in nature. The amendment provided generally for the repeal of existing fishing statutes and established a "Conservation Commission." The court held that the people had delegated to the Missouri General Assembly the authority to legislate, "subject to the referendum clause, and to propose constitutional amendments by enactment of joint and concurrent resolutions"; and that the people had reserved "to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independently of the legislative assembly. . . ." 343 Mo. at 537, 121 S.W.2d at 742. We note also that a contention was made in that case that the amendment was submitted in such a fashion that the voters did not know whether they were voting on a law or an amendment, a concern not present in the instant case, since Initiative 300 was clearly labeled an amendment.

Omaha National contends that earlier Missouri cases have adopted the position first set forth in *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 438-39, 130 S.W. 689, 696 (1910) that "the petitioners [for an initiative amendment to the Missouri Constitution] have no right to undertake to put in the Constitution, which is regarded as the organic and permanent law of the State, mere legislative acts providing for the exercise of certain powers."

Omaha National's reliance on *Halliburton* was shown to be misfaced when in *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 404-05 (Mo.1984), the Missouri Supreme Court stated:

This holding in *Halliburton*, however, is no longer good law. . . . The 1945 Constitution resolved the *Halliburton* problem by discouraging use of the initiative for constitutional

amendments while encouraging use of the process for statutes. "[T]he entire theory of the Committee in drafting this section 58 [now Sec. 50, Art.III] was to try to make it necessary for those people who want to write legislative matters into the constitution to so announce it by placing an enacting clause that says we are trying to write this matter into the constitution, . . ." and getting the additional signatures on the proposed constitutional amendment.

Legislative matters may now be enacted as amendments to the Missouri Constitution subject only to the provisions that the initiative show, on its face, that it proposes an amendment to the Constitution. This conclusion squares entirely with our holding herein.

\* \* \* \* \*

The position we take herein has been adopted by the Supreme Court of Michigan in *City of Jackson v. Com'r of Revenue*, 316 Mich. 694, 26 N.W.2d 569 (1947), and by the Supreme Court of Oklahoma in *In re Initiative Petition Number 259, etc.*, 316 P.2d 139 (Okla. 1957).

Since we have determined that Initiative 300 was adopted as an amendment and not a statute, we need not consider whether Initiative 300, if a statute, is in violation of our Constitution.

If it then be contended that even if Initiative 300 is an amendment to our Constitution, it conflicts with that same Constitution, we find that position without merit. We agree with the Massachusetts Supreme Judicial Court, which stated in a footnote simply that "[i]t is difficult to comprehend how the proposed constitutional amendment can be 'unconstitutional' under our Constitution." *Answer of the Justices*, 375 Mass. 847, 849, n. 2, 377 N.E.2d 915, 916 n. 2 (1978).

Similarly, in *Floridians Against Casino Takeover v. Let's Help*, 363 So.2d 337, 341-42 (Fla. 1978), the Supreme Court of Florida stated:

"[C]onflict" with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. Such an assertion ignores established patterns of constitutional construction. When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.

It would completely subvert our role as one of the three branches of government established by the people in the Constitution to expand our jurisdiction to tell the voters of this state that although the Constitution states that the people have reserved the power to amend that Constitution, they may only amend it in

ways that we determine are fundamental or have something to do with our “organic” law. Omaha National’s first assignment is without merit. We affirm the holding of the trial court that Initiative 300 is an amendment of the Constitution of Nebraska.

## Pacific States Telephone and Telegraph Company v. Oregon Page 41, Discussion Notes:

### Discussion Notes

4. What if the initiative provisions had been in the Oregon constitution at the time it applied for admission to the Union?

5. See *State v. Wagner*, 752 P. 2d 1136, 1197 n. 8 (Or. 1988) (Linde, J., dissenting):

8. Another question that has not been briefed is whether a plebiscite that bypasses the legislature and the governor in order to repeal parts of the Bill of Rights and to impose a penal regime which is morally repugnant to a substantial minority of citizens remains compatible with the state’s obligation to maintain a republican form of government, U.S. Const. **Art. IV, para. 4**, as well as with the original purposes of amended Or. Const. **Art. IV, para. 1**. An initiative measure not only short-circuits the hearings, study, debate, and adjustments made in the normal legislative process, see *OEA v. Phillips*, 302 Or. 87, 106-07, 727 P. 2d 602 (1986) (Linde, J., concurring), it replaces a representative body’s resistance to overriding intensely felt minority concerns with a purely majoritarian plebiscite. The question whether republicanism limits this process dropped from sight for lack of judicial opinions after the United States Supreme Court held it beyond the reach of the federal courts in its more generalized form, i.e., whether the existence of a nonrepublican feature would make the entire state government illegitimate, *Pacific Telephone Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (challenge to a license tax enacted by an initiative measure).

This did not relieve state courts of responsibility under their state constitutions and the Supremacy Clause, U.S. Const., **Art. VI**, to determine whether their governments had acted by institutions or processes that remained “republican” within the meaning of the Guarantee Clause, as this court did in *Kiernan v. Portland*, 57 Or.

454, 111 P. 379, reh. den., 57 Or. 454, 112 P. 402 (1910) and *Kaddery v. Portland*, 44 Or. 118, 74 P. 710, reh. den., 44 Or. 118, 75 P. 222 (1903). See also *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P. 2d 223 (1973); *Kohler v. Tugwell*, 292 F.Supp. 978, 985 (ED La 1968) (Wisdom, J., concurring); see generally, Tribe, *American Constitutional Law* 98-100 (2d ed. 1987); Heaton, *The Guarantee Clause: A Role for the Courts*, 16 Cumb.L.Rev. 477 (1985-8); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn.L.Rev. 513 (1962); Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972).

The case of *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), referred to by Justice Linde, held that a guarantee clause claim was justiciable in state court. For further elaboration of this theme by Justice Linde, see Hans A. Linde, “When is Initiative Lawmaking Not ‘Republican Government’?” *Hastings Constitutional Law Quarterly* 17 (Fall 1989): 159.

## Trombetta v. State of Florida Page 49, Discussion Notes:

### Discussion Notes

3. In *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931), the United States Supreme Court held that a federal Court sitting in Arizona could direct a verdict for the defendant on the grounds of contributory negligence or assumption of the risk, despite the following Arizona constitutional provision: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.”

4. For cases on the Federal Age Discrimination Act and its effect on state constitutional mandatory retirement provisions for judges, see *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988); “Developments in State Constitutional Law: 1988,” *Rutgers Law Journal* 20 (Summer 1989): 1034-35.

5. In *McDaniel v. Paty*, 435 U.S. 618 (1978) the United States Supreme Court struck down, on federal constitutional grounds, a Tennessee statute which, based on a state constitutional prohibition on clergy serving in the legislature, barred clergy from serving in a state constitutional convention.

**Note on Garcia v. San Antonio Metropolitan Transit Authority**  
Page 54, top Discussion Notes:

**Discussion Notes**

3. Could there be any other limit on Congress' power to legislate with respect to matters of importance to the states? How about to override state constitutional rights? See Calvin R. Massey, "Antifederalism and the Ninth Amendment," *Chicago-Kent Law Review* 64 (1989): 987; "Federalism and Fundamental Rights: The Ninth Amendment," *Hastings Law Journal* 38 (1987): 305.

**Wheeler v. Barrera**  
Page 59, Discussion Notes:

**Discussion Notes**

4. In *Aguilar v. Felton*, 473 U.S. 402 (1985), the U.S. Supreme Court held that providing Title I educational services in parochial schools violated the First Amendment's Establishment Clause.

**McInnis v. Cooper Communities, Inc.**  
At end of page 62:

**3. Conflict with Federal Regulations**

Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

*Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982) [quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)].

**State Constitutional Protections beyond Minimum Federal Constitutional Rights**  
At end of page 69:

Compare the following statement to Monrad Paulsen's 1951 quote on page 68

Yet, with an increased awareness on the part of the Iowa bar and bench of the potential presented by reliance on the Iowa Constitution as an independent source of power and protection, the predictions of Justice Brennan and others may come true. The state of Iowa for one can make sure its reopened laboratory is active and productive. For if our liberties are not protected in Washington, the only hope is in Des Moines.

Michael A. Giudicessi, "Independent State Grounds for Freedom of Speech and of the Press: Article I, Section 7 of the Iowa Constitution," *Drake Law Review* 38 (1988-89): 29.

**Michigan v. Mosley**  
Page 77, Discussion Notes:

**Discussion Notes**

4. See 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): 375-76

It is now becoming clear that Supreme Court dissenting opinions may influence the legislative branch or state courts as well as current or future Court majorities. That is, Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis. One might ask, then, whether Justice Brennan's and Marshall's dissents, among others, have not enjoyed a much higher vindication rate in state cases than Holmes ever achieved in later Supreme Court decisions.

5. For an argument that Justice Brennan's approach does not serve the interests of federalism, see Earl M. Maltz, "False Prophet—Justice Brennan and the Theory of State Constitutional Law," *Hastings Constitutional Law Quarterly* 15 (Spring 1988): 429.

**Cooper v. Morin**  
Page 87, Discussion Notes:

Discussion Notes

8. Mass. General Laws c. 276, sec. 1 (1986 ed.) provides:

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

This statute provides more protection, *statutorily*, than *United States v. Robinson*, 414 U.S. 218 (1973). See discussion in *Commonwealth v. Madera*, 402 Mass. 156, 521 N.E. 2d 738,740 (1988). See also John C. Cooper, "Beyond the Federal Constitution: The Status of State Constitutional Law in Florida," *Stetson Law Review* 18 (Spring 1989): 268-72.

**People v. Class**  
Page 110, end of bottom Discussion Note 1:

See also *Brown v. State*, 657 S.W. 2d 797 (Tex. Crim. App. 1983).

**Robert F. Williams,**  
"In the Supreme Court's Shadow. . ."  
Following page 117:

Justice Robert Utter made the following comments in *Sofie v. Fibreboard Cop.*, 771 P. 2d 711,725 (Wash. 1989):

The dissenters make much out of their citation to *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed. 2d 365 (1987). As we state above, the conclusion in *Tull* has no bearing on this court because we base our decision on adequate and independent state grounds. Since 1889, Washington's jurisprudence on the right to a jury in civil trials has always been based on the state constitution. *Tull* and *Di-*

*mick v. Schiedt, supra*, may provide material for our analysis, but they do not direct us.

Chief Justice Callow's advocacy of *Tull* conceptually distorts the rule we developed in *State v. Gunwall*, 106 Wash. 2d 54,720 P.2d 808 (1986), which in turn relied on the concurring opinion of Justice Handler in the New Jersey decision of *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982). Chief Justice Callow relies on *Gunwall* and *Hunt* to support his implication that this court should defer to Supreme Court interpretation of a comparable federal provision unless an analysis of the six *Gunwall* criteria indicate that we should take an independent course. Callow, C.J., dissenting, at 730.

This implication is contrary to the reasoning of Justice Handler and was specifically rejected by him in *Hunt*. In footnote 3 of his opinion, he stated, "To the extent that Justice Pashman suggests in his concurring opinion that this approach establishes a presumption in favor of federal constitutional interpretations, *supra* at 355, 450 A.2d 952, 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." *Hunt*, at 367 n. 3, 450 A.2d 952.

After criticism that the *Gunwall* criteria could be misinterpreted to support the view now espoused by the dissent<sup>8</sup> this court clarified the test in *State v. Wethered*, 110 Wash.2d 466,472,755 P.2d 797 (1988). In *Wethered*, we reemphasized the statement that the *Gunwall* factors were nonexclusive and added that they were to be used as interpretive principles of our state constitution.

**Following page 124:**

**State v. Mollica**  
114 N.J. 329,554 A.2d 1315 (1989)

HANDLER, J.

In this case federal law-enforcement officers without a search warrant obtained hotel billing records relating to the use of an occupant's room telephone. They then turned these records over to state law-enforcement officers who, using this information, obtained search warrants and undertook a search of defendants' hotel rooms, seizing evidence of gambling offenses. In the ensuing criminal prose-

<sup>8</sup> See Note, *Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 62 Wash. L.Rev. 569 (1987).

cution two major issues emerged. The first is whether New Jersey's constitutional protections against unreasonable search and seizure extend to hotel billing records relating to a person's use of his or her hotel-room telephone. The second is whether such a state constitutional protection applies when the seizure of such evidence is by federal officers who thereafter transfer the evidence to state officers for prosecutorial use against a defendant.

\* \* \* \* \*

It therefore follows ineluctably that the official seizure of hotel-telephone billing or toll records relating to a guest's use of a hotel-room telephone is subject to the requirements of antecedent probable cause and the issuance of a search warrant. *See Hunt, supra*, 91 N.J. at 348 (police wrongfully obtained toll billing records where these were procured "without any judicial sanction or proceeding."). In this case there was no attempt to show antecedent probable cause for the seizure of these telephone toll records, nor was any search warrant sought or obtained to authorize their seizure. Hence, the seizure of these telephone records is critically vulnerable to a challenge under the State Constitution. Whether that challenge can succeed in this case, however, depends on the applicability of the state constitutional doctrine expressed in *Hunt, supra*, 91 N.J. 338, to the seizure of the telephone records by federal agents. This poses the second substantive issue in this appeal.

#### IV.

With regard to law-enforcement activities, a state constitution ordinarily governs only the conduct of the state's own agents or others acting under color of state law. It is this fundamental understanding of the jurisdictional reach of state constitutions that has guided courts in determining whether, if at all, a state constitution can be applied to the officers of another state exercising only the lawful authority of that state. This principle is illustrated throughout the abundant case law that has addressed an issue presently before us: the use by officers of one jurisdiction of evidence seized by agents of another jurisdiction acting lawfully pursuant to their own governmental authority and in accordance with legal standards that are less protective than those of the jurisdiction in which the evidence is sought to be used. The historical development and application of this principle, although complicated by the various stages of extension of the exclusionary rule to federal and state agents, is nonetheless instructive.

The problem of evidence acquired and used respectively by officers who are subject to differing legal standards has been with us a long time. It was raised sharply when the Supreme Court, in *Weeks v. United*

*States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), first instituted the exclusionary rule. In doing so, the Court held that the rule would not apply with respect to the conduct of non-federal officers who had not "acted under any claim of federal authority." *Id.* at 398, 34 S.Ct. at 346, 58 L.Ed. at 658. This was based on the Court's view that "the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach [only] the federal government and its agencies." *Id.* at 398, 34 S.Ct. at 346, 58 L.Ed. at 658.

For many years, federal standards for lawful searches and seizures were usually more protective than the standards followed by the several states. . . . This disparity required federal courts to evaluate the etiology of evidence that was turned over to federal officers for federal prosecutorial use after having been seized by state officers. Such an inquiry was necessary to determine whether the state officers, who had obtained the evidence in accordance with state standards less protective than federal mandates, had acted wholly independently of federal officers. Because state officers were not subject to the fourth amendment and its remedial exclusionary rule, it was recognized that any evidence that was independently obtained by state officials could be "turned over to the federal authorities on a silver platter." *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949); *see Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927). Such evidence could then be used by the federal agents provided they had not violated federal-constitutional standards by participating in the initial seizure.

The essential principle underlying the development of this "silver platter" doctrine is that protections afforded by the constitution of a sovereignty control the actions only of the agents of that sovereign entity. As the Supreme Court stated in *Burdeau v. McDowell*: "[the] origin and history [of the fourth amendment] clearly show that it was intended as a restraint upon the activities of a sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . ." 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 1051 (1921). This principle explains why the conduct of ordinary citizens acting only in their capacity as private individuals will not trigger the constitutional protections that would otherwise apply if the identical acts were undertaken by government agents exercising governmental authority. . . .

By parallel reasoning, a state's constitution that will not be invoked to control the conduct of its private citizens will not be applied to control the conduct of the officers of a foreign jurisdiction. *See Commonwealth v. Wallace*, 356 Mass. 92, 95, 248 N.E.2d 246, 248 (1969) (statements obtained by Canadian police treated just like statements related by private citizens in United States); *State v. Olsen*, 212 Or. 191, 317 P.2d 938 (1957) (search in Washington by Washington po-

lice, independent of Oregon agents, is analogous to search by private individuals); *Kaufman v. State*, 189 Tenn. 315, 320, 225 S.W.2d 75, 77 (1949) (officers of other state jurisdiction treated as being “in the same plight . . . as private citizens . . .”). The law-enforcement officers of another state jurisdiction have been analogized to the private citizens of the forum jurisdiction in terms of the applicability of the latter’s constitutional restrictions. See, e.g., *Pooley v. State*, 705 P.2d 1293, 1301 (Alaska App. 1985) (Alaska court allows admission of evidence obtained in Alaska through actions of California official in California airport that might have violated Alaska state constitution); *People v. Phillips*, 41 Cal.3d 29, 79-80, 711 P.2d 423, 455-57, 222 Cal.Rptr. 127, 160 (1985) (California court allows admission of evidence obtained through Utah officials’ inspection of inmate’s mail in Utah jail, although such inspection illegal under California law); *McClellan v. State*, 359 So.2d 869, 873 (Fla.App. 1978) (evidence seized in Alabama pursuant to valid Alabama search warrant held admissible in Florida trial despite invalidity of warrant under Florida standards), cert. den., 364 So.2d 892 (1978).

This treatment of officers of another jurisdiction with respect to the admissibility of evidence seized by such officers is analogous to the treatment accorded the officers of a foreign country, who, in the exercise of their own government’s authority, are not subject to the federal constitution. . . .

The critical element in these lines of cases is the agency *vel non* between the officers of the forum state who seek to use the evidence and the officers of the state who obtained the evidence. It is this element—the presence or absence of agency between the officers of the two sovereigns—that determines the applicability of the constitutional standards of the forum jurisdiction. This is illustrated by early cases in which the courts of a state chose to dismiss or not address contentions of illegality of the seizure under its constitutional standards because its own officers were not involved in the seizure. . . .

The essential dynamic of the silver platter doctrine remains pertinent in the context of the parallel jurisdiction that is exercised by federal and state officers within the territorial boundaries in each of the several states. However, as a result of *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), which held that fourth amendment search-and-seizure standards were applicable to the states through the fourteenth amendment, the application of the doctrine changed from its pristine form, exemplified by *Byars* and *Lustig*. In light of *Wolf*, the Supreme Court, in *Elkins v. United States*, 364 U.S. 206, 212, 80 S.Ct. 1437, 1442, 4 L.Ed.2d 1669, 1675 (1960), observed that “[t]he foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches

did not violate the Federal Constitution—thus disappeared in 1949.” With the uniform extension of the exclusionary rule to evidence offered in all of the state courts, traditional silver platter applications and considerations of intergovernmental agency were no longer necessary to sterilize evidence gathered in violation of fourth amendment standards. See *Mapp v. Ohio*, supra, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

This era of constitutional homogeneity faded, however, when various states began to establish search-and-seizure standards more protective than the minimum standards derived from the fourth amendment. See, e.g., *State v. Johnson*, 68 N.J. 349 (1975). With this development of differing standards, the silver platter doctrine surfaced in situations implicating the parallel jurisdiction of federal and state officers. It again became necessary as a condition for use in a state court to sanitize evidence that may have been obtained under less protective federal-constitutional standards. However, the polarity of the transfer process was reversed. Instead of evidence being transferred to federal officers from state officers working under more lenient local standards, evidence might now flow to state officers from federal officers governed by more lenient standards.

As with the earlier manifestations of the silver platter doctrine, and as seen in the numerous post-*Mapp* examples of interstate transfers of evidence, the salient factor continues to be agency *vel non* between the officers of the respective jurisdictions. The nature of the relationship between the officers participating in the search or seizure and the officers seeking to make use of such evidence is critical.

Because federal officers necessarily act in the various states, but in the exercise of federal jurisdictional power, pursuant to federal authority and in accordance with federal standards, state courts treat such officers as officers from another jurisdiction. See *State v. Bradley*, 105 Wash.2d 898, 719 P.2d 546 (1986) (neither state law nor state constitution controls federal officer’s conduct in border search, which is equivalent to search conducted in a different jurisdiction). This understanding obtains even though the conduct of such officers would not satisfy the requirements of the state’s constitution. See *Morales v. State*, 407 So.2d 321 (Fla.App. 1981) (evidence seized by Coast Guard in manner inconsistent with state standards is admissible in state criminal trial); *Stare v. Dreibelbis*, 147 Vt. 98, 511 A.2d 307 (1986) (affirming conviction for transporting drugs within state when evidence used was obtained by federal officers using methods consistent with federal standards, although impermissible by Vermont standards). Stated simply, state constitutions do not control federal action.

Recognition of this inherent jurisdictional limitation on the application of the state constitution is consonant with principles of federalism. It is now firmly recognized that state constitutions do not simply mirror the federal constitution; they are a basis for independent rights and protections that are available and applicable to the citizens of the state. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). Reflecting this, states have the power to impose higher standards than required by the federal constitution. *See Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

We have in many areas acknowledged in our State Constitution protections that exceed those provided under the federal constitution. . . .

Because the constitution of a state has inherent jurisdictional limitations and can provide broader protections than found in the United States Constitution or the constitutions of other states, the application of the state constitution to the officers for another jurisdiction would disserve the principles of federalism and comity, without properly advancing legitimate state interests. Such considerations also serve in large measure to explain why it does not offend the constitutional principles of a forum jurisdiction to allow the transfer of criminal evidence from the officers of another jurisdiction to those of the forum when the evidence has been obtained lawfully by the former without any assistance by the latter.

In determining the validity of a search and seizure conducted by officers of another jurisdiction, the critical assumption that obviates the application of the state constitution is that the state's constitutional goals will not thereby be compromised. In our jurisdiction, we recognize that an essential objective of our constitutional protection against unreasonable search and seizure and the remedial exclusionary rule is to deter unlawful police conduct. *See Delguidice v. New Jersey Racing Comm'n*, 100 N.J. 79 (1985). These constitutional protections may also implicate concerns for judicial integrity. *Id.* at 88-89. Further, the exclusionary rule serves to vindicate the impairment of an individual's state constitutional right to be free from unreasonable search and seizure. *State v. Novembrino, supra*, 105 N.J. 95.

None of these constitutional values, however, is genuinely threatened by a search and seizure of evidence, conducted by the officers of another jurisdiction under the authority and in conformity with the law of their own jurisdiction, that is totally independent of our own government officers. Thus, in that context, no purpose of deterrence relating to the conduct of state officials is frustrated, because it is only the conduct of another jurisdiction's officials that is involved. *See, e.g., Pooley, supra*, 705 P.2d at 1302-03. Judicial integrity is not imperiled because there has been no misuse or perversion of

judicial process. *See, e.g., Phillips, supra*, 41 Cal.3d at 79-80, 711 P.2d at 455-57, 222 Cal.Rptr. at 160. Further, no citizen's individual constitutional rights fail of vindication because no state official or person acting under color of state law has violated the State Constitution. *See Burdeau, supra*, 256 U.S. at 475, 41 S.Ct. at 576, 65 L.Ed. at 1051.

In this case, the telephone toll records relating to the use of Ferrone's hotel-room telephone were obtained by federal agents exercising federal authority in a manner that was in conformity with federal standards and consistent with federal procedures. *See Smith v. Maryland, supra*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220. Once seized legally, no legal prohibition barred the interjurisdictional transfer of this evidence. *See United States v. Lester*, 647 F.2d 869, 875 (8th Cir.1981) ("Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for use different from that for which it was originally taken."), *quoted in* 1W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, sec. 1.6, at 119 (2d ed. 1987). There was no federal restriction against such a transfer. Nor was there any state-constitutional, statutory, or regulatory proscription against the receipt of such evidence. Thus, in constitutional terms, the transfer can be analogized to transfer from private citizens, which do not implicate constitutional limitations. *See United States v. Jacobsen*, 466 U.S. 109, 113, 117-18, 104 S.Ct. 1652, 1656, 1658-59, 80 L.Ed.2d 85, 94, 96-97 (1984) (both the seizure of evidence by a private citizen not acting with the knowledge of the government and the transfer of such evidence to government authorities do not implicate search-and-seizure standards).

We endorse the principle that federal officers acting lawfully and in conformity to federal authority are unconstrained by the State Constitution, and may turn over to state law-enforcement officers incriminating evidence, the seizure of which would have violated state constitutional standards. This holding, however, is subject to a vital, significant condition. When such evidence is sought to be used in the state, it is essential that the federal action deemed lawful under federal standards not be alloyed by any state action or responsibility. We are required therefore to determine whether in any legally significant degree the federal action can or should be considered state action.

## V.

This case thus requires us to consider the implications of the silver platter doctrine and its key element: intergovernmental agency. An important aspect of this determination is whether for constitutional purposes the federal agents can be said to be acting under the "color of state law." The assessment of the agency issue necessarily requires an examina-

tion of the entire relationship between the two sets of government actors no matter how obvious or obscure, plain or subtle, brief or prolonged their interactions may be. The reasons and the motives for making any search must be examined as well as the actions taken by the respective officers and the process used to find, select, and seize the evidence.

Our answer to this kind of question can be informed by silver platter decisions in the era before *Elkins*. Many of these considered the significance of the relationship between federal and state officers in the search and seizure of evidence in determining the applicability of more protective federal-constitutional standards to actions by state officers. As earlier noted, the critical element in the application of the silver platter approach was the agency *vel non* between the officers of the respective jurisdictions. . . . Differing relationships and interactions may suffice to establish agency. Thus, antecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency. See, e.g., *Shurman v. United States*, 219 F.2d 282 (5th Cir.) (refusing to find joint operation where federal agent merely informed state officer of suspicion that defendant's car contained narcotics, without requesting any action), *cert. den.*, 349 U.S. 921, 75 S.Ct. 661, 99 L.Ed. 1253 (1955); *Droutman, supra*, 143 N.J. Super. at 328-29 (search and seizure by private citizen not subject to constitutional limitations as government had no preknowledge and did not acquiesce in search); see also, e.g., *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (airline employee said to have been acting in joint operation with federal customs officer where he would not have conducted a search but for the insistence of the federal agent). This inquiry thus will always pose a fact-sensitive exploration that is influenced greatly by the surrounding circumstances.

Here, the trial court examined the actual relationship between the federal and state police officers in terms of the initial search and seizure of the hotel telephone toll records. Its factual findings would lead to the conclusion that the federal officers were not the agents of our state police. See *Mollica I, supra*, 214 N.J. Super. at 664. There may well be in this record facts sufficient to justify the conclusion that there was an insufficient connection between the respective officers, thus permitting the state's prosecutorial use of the seized evidence. Nevertheless, the trial court invalidated the search and seizure, and resultant turn-over of the telephone toll records. It may have assumed under all the circumstances that the connec-

tion between federal and state officers, such as it was, justified application of the State Constitution. We cannot be sure of the intended effect of the trial court's findings in light of our opinion, which reformulates the standards governing the application of the State Constitution and explains the heightened significance of intergovernmental agency and cooperation in the acquisition of criminal evidence. It is therefore appropriate to remand the matter to the trial court to enable it to reconsider its findings or determine anew the issues of intergovernmental cooperation, agency and state action either on the existing or a supplemental record.

#### Discussion Notes

1. See generally, Comment, "Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions," *Arizona State Law Journal* 20 (Spring 1988): 285.

#### Following page 126:

### State v. Smith 301 Or. 681, 725 P.2d 894 (1986)

CAMPBELL, Justice.

The question is whether Article I, section 12, of the Oregon Constitution requires that persons detained for questioning by law enforcement officers be given warnings similar to those required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), under the federal Fifth Amendment? We hold that it does not.

Two deputy sheriffs responding to a report of a vehicle off the road observed defendant about 150 yards from the disabled vehicle. When defendant saw the deputies he began to run, but stumbled and fell. The deputies approached defendant and assisted him back to their patrol car. The deputies suspected that defendant had been drinking, but at that time did not connect him with the disabled vehicle or suspect him of any crime. Defendant denied owning the vehicle. He told the police that he and another person had been drinking behind a nearby warehouse.

The officers learned from their dispatcher that defendant owned the car. Defendant then admitted

<sup>1</sup>Article I, section 12, of the Oregon Constitution provides: "No person shall \*\*\* be compelled in any criminal prosecution to testify against himself."

<sup>2</sup>The Fifth Amendment to the federal constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides: "No person \*\*\* shall be compelled in any criminal case to be a witness against himself \*\*\*"

that he owned the car and that he had been driving it when it went off the road. He was then arrested, given *Miranda* warnings, and later made further incriminating statements.

At trial on the charge of driving while under the influence of intoxicants, defendant moved to suppress his statements to the officers, relying on both the federal and state constitutions. The motion to suppress was denied. The trial court found that defendant's initial responses were obtained during a field interrogation and that he was not "in custody" for the purposes of *Miranda v. Arizona* until he was arrested. The trial judge further found that defendant's incriminating statements were made voluntarily.

Defendant was convicted. He appealed, relying on both the Fifth Amendment and Article I, section 12, of the Oregon Constitution. The Court of Appeals affirmed the trial court. 70 Or.App. 675,691 P.2d 484 (1985). In his petition for review to this court defendant relied solely on Article I, section 12, saying that it requires a *Miranda*-type warning to be given earlier in point of time than does the federal Fifth Amendment under *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

## THE RIGHT TO REMAIN SILENT IN OREGON

The State of Oregon has recognized that its citizens have the right to remain silent in various circumstances by virtue of two statutory schemes, the adoption of common-law rules, and a constitutional provision. That right is spelled out in the following:

(1) ORS 135.070(1) provides that in a preliminary hearing the magistrate shall inform the defendant that he is not required to make a statement.

(2) ORS 136.425(1) provides that a confession or admission of a defendant "cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats."

(3) *State v. Wintzingerode*, 9 Or. 153, 163 (1881), held that the common-law rules governing the admissibility of confessions are in force in Oregon, including the rule that "confessions made by a prisoner while in custody, and induced by the influence of hope or fear, applied by a public officer having the prisoner in his charge" are not admissible in evidence.

(4) Article I, section 12, of the Oregon Constitution provides in part: "No person shall \* \* \* be compelled in any criminal prosecution to testify against himself."

One of the issues in this case is whether the Oregon Constitution requires warnings similar to those specified in *Miranda v. Arizona*. In *Miranda* the Court required that "[p]rior to any questioning, the

person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 86 S.Ct. at 1612. In our review of the Oregon law, in addition to the right to remain silent, it will be necessary for us to examine defendant's related right to an attorney and defendant's right to know that any statement he or she makes may be used in evidence.

\* \* \* \* \*

The above cases consistently demonstrate that under a combination of the common-law rules and ORS 136.425 that: (1) there is a distinction between judicial and extra-judicial confessions; (2) an out-of-court confession is not inadmissible because the defendant has not been advised of the right to counsel, the right to remain silent and of the fact that any statement may be used against the defendant; (3) the confession is initially deemed to be involuntary and the burden is upon the state to prove that it was voluntary; (4) the ultimate test is whether the confession was free and voluntary; (5) the key to the "free and voluntary" character of the confession is the inducement made to the defendant—was there any promise or threat made to the defendant which would elicit a false confession; and (6) since 1957 "admissions" have been treated the same as "confessions."

(4) *Article I, section 12, of the Oregon Constitution.*

The relevant portion of Article I, section 12, of the Oregon Constitution is:

"No person shall \* \* \* be compelled in any criminal prosecution to testify against himself."

Our cases have not always been consistent when considering this provision of the Oregon Constitution.

\* \* \* \* \*

This brings us to *State v. Mains*, 295 Or. 640,669 P.2d 1112(1983), and *State v. Sparklin*, 296 Or. 85,672 P.2d 1182(1983), from which it could be inferred that this court has already adopted an Oregon *Miranda* rule. In fact, the Court of Appeals has so inferred in *State v. Kell*, 77 Or.App. 199,712 P.2d 827 (1986), and *State v. Rowe*, 79 Or.App. 801, 720 P.2d 765 (1986).

In *State v. Mains, supra*, one of the issues was whether the defendant was entitled to *Miranda*-type warnings before he was examined by a state psychiatrist. We noted that the details of the *Miranda* warnings were regarded as a judicial means to effectuate the federal Fifth Amendment's guarantee against self-incrimination. We went on to elaborate:

"The Oregon Constitution similarly guarantees the right not to be compelled to testify

against oneself in a criminal prosecution. Or. Const., Art I, sec. 12. Like the United States Supreme Court, this court is called upon from time to time to specify the procedure by which a guarantee is to be effectuated. Such specifications are not the same as interpretations of the guarantee itself, that is to say, they may not always and in all settings be the only means toward its effectuation but may be adapted or replaced from time to time by decisions of this court or by legislation in the light of experience or changing circumstances. In the absence of legislation, we believe that the following are the relevant information and warnings required in the setting of a psychiatric examination of a defendant conducted on behalf of the state to guarantee the right not to be compelled to testify against oneself in a criminal prosecution under Article I, Section 12, of the Oregon Constitution.” 295 Or. at 645,669 P.2d 1112.

\* \* \* \* \*

We think that a fair reading of the above cases commencing with *State v. Andrews, supra*, through *State v. Sparklin, supra*, demonstrates that Article I, section 12, of the Oregon Constitution includes and guarantees to a defendant the common-law rule that before a confession or admission can be received in evidence the state must prove that it was voluntarily made without inducement from fear or promises. To hold otherwise would mean that if an involuntary confession was received in evidence the defendant would be forced to testify against himself or herself. Article I, section 12, includes both the common-law rule requiring confessions to be voluntary and the common-law privilege granting every person the right to refuse to testify against himself or herself.

Presently included in the common-law rule on voluntary confessions is the sub-rule that an extrajudicial confession is admissible even though the officer to whom it is made did not inform the accused of his right to consult counsel, of his right to remain silent and of the fact that his declarations would be used against him. *State v. Henderson, supra*. The tail goes with the hide and the *Henderson* rule is a part of this court’s interpretation and application of the right to remain silent guaranteed by Article I, section 12. Nowhere in Article I, section 12, is there any mention of any required warnings. It does not say that the defendant shall be informed of the right to an attorney, of the right to remain silent, and of the fact that any statement may be used against the defendant.

In 1983, prior to the publication of the decisions in *State v. Mains, supra*, and *State v. Sparklin, supra*, the law of this state did not require Oregon *Miranda* warnings. *Mains* and *Sparklin* merely assumed without deciding that the Oregon Constitution required

warnings similar to those required in *Miranda v. Arizona*. Our prior caselaw, spanning more than a century, concerning the requirement of voluntary confessions and admissions was not considered or discussed.

## CONCLUSION

If this court had a strong reason for doing so it could overrule the *Henderson* line of cases and require *Miranda-type* warnings to help ensure the guarantees of Article I, section 12. That is what the United States Supreme Court did in *Miranda v. Arizona*. The Fifth Amendment is similar to Article I, section 12. (See footnotes 1 and 2.) This court previously has said that the difference in the language of the two constitutional provisions is not important. *State v. Cram, 176 Or. 577, 580, 160 P.2d 283 (1945)*.

There is no question that the Oregon Constitution does not require the giving of *Miranda-type* warnings. Nor does any state statute require the warnings, except at the preliminary hearing procedure before a magistrate. *ORS135.070 et seq.* What is at issue is the appropriate procedure “by which a guarantee [here, the right not to be compelled] is to be effectuated.” *State v. Mains, supra, 295 Or. at 645, 669 P.2d 1112*.

In *Miranda v. Arizona* the United States Supreme Court elevated the required warnings to constitutional status through the application of the Fourteenth Amendment due process provision to the Fifth Amendment guarantee against compulsion. The warnings then were given constitutional status, the violation of which automatically resulted in suppression of the confession regardless of the underlying question of compulsion. Since the adoption of that court-made guarantee, the United States Supreme Court has seen fit to fashion “exceptions” to the requirement to ease the obviously inelastic proscription of the requirement. . . .

It has been said that one reason for the *Miranda v. Arizona* decision was to negate the necessity for an *ad hoc* determination of voluntariness. History has shown the folly of this theory. First, a defendant remains free to contest the voluntariness of his confession even in cases where the warnings were given. Secondly, the horde of cases on this point suggests that the *ad hoc* inquiry of voluntariness has been replaced with the *ad hoc* (or, at least, the ever-shifting) determination of *when* the warnings must be given. See, e.g., *Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)*. The federal shift has been to the judicially created battlefield of “custody,” with its subjective/objective components and the search for the ever-elusive “free-to-leave” standard. Raising the warning incantation to constitutional status has not seemed to lessen the litigation upon appeal. A WESTLAW search of reported decisions discloses over 3,300 federal court and over 10,000 state appellate court decisions, including 269 appel-

late court decisions from Oregon that have wrestled with *Mirundu v. Arizona*.

From the advantage of 18 years of hindsight, the United States Supreme Court in *Berkemer v. McCarty, supra*, gave the following reasons for the *Mirunda* warnings:

“\* \* \* The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the ‘inherently compelling pressures’ generated by the custodial setting itself, ‘which work to undermine the individual’s will to resist,’ and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. \* \* \*” 468 U.S. at 433, 104 S.Ct. at 3147 (footnotes omitted; emphasis in original).

*Miranda v. Arizona* was more specific about one of the reasons for the warnings:

“\* \* \* The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965).” 384 U.S. at 446, 86 S.Ct. at 1613 (footnote omitted).

It is not the purpose of this opinion to argue with *Miranda v. Arizona*, but it made a mistake including Oregon within the “part of the country” where physical brutality and violence by the police exist. We have cases that show police misconduct. . . .

No one has demonstrated to us how an Oregon *Mirandu* rule would help eliminate police misconduct of the type set forth in the above examples. We do not understand how an Oregon rule identical to the federal rule would increase the chances to “relieve inherently compelling pressures generated by custodial settings which work to undermine the individual’s will to resist.” If we adopted a different Oregon *Mirunda* rule or placed a different interpretation upon the present federal rule, then we have created confusion. We doubt that the “task of scrutinizing individual cases to try to determine, whether particular confessions were voluntary” would have created a greater case load for the courts than the flood of cases in the last 20 years that have tried to determine the correct application of the federal *Mirundu* warnings.

Oregon is in this situation: We have the federal *Miranda* warnings. By virtue of the Fifth Amendment and the Fourteenth Amendment we have no choice. We are not arguing about that. *Miranda v. Arizona* is

now 20 years old. A whole generation of police, lawyers, and judges has grown up with the federal *Miranda* warnings. We will not speculate what Oregon would be like without them. We also have a body of law on confessions. The bottom line in Oregon for over 100 years has been that before a confession or admission can be received in evidence, the state must prove that it was free and voluntary. For the most part during the last 20 years our law on confessions has been in a standby position gathering rust. Most of the questionable confessions and admissions have been eliminated by the federal *Miranda* rule. However, it is possible to have an involuntary confession or admission even though the *Mirundu* warnings have been properly given. We think that it is important to keep the Oregon law on confessions and admission intact.<sup>12</sup>

To adopt an Oregon *Mirunda* rule identical to the federal rule without any commitment to future interpretation would be unwise. We would be in the same position as we are today, except that the ranch would have been sold with no down payment. To adopt an Oregon *Mirundu* rule identical to the federal rule and tie it to future interpretation by the federal caselaw would be foolish. We do not know what may be waiting in the alley. To adopt an Oregon *Miranda* rule identical to the federal rule and place our own future interpretation on it would only further confuse an already confused area of the law. To adopt an Oregon *Mirandu* rule different from the federal rule is not warranted.

Article I, section 12, of the Oregon Constitution prohibits compulsion, which we interpret to require voluntariness. Past judicial decisions of this court have used the evidentiary device of “deeming” any confession to be involuntary and require the state to bear the burden of overcoming that judicial predisposition. In cases where the state has given *Mirandu*-

<sup>12</sup>The federal *Mimndu* warnings have become a part of our culture. They have been widely discussed and quoted in all areas of our society. In some places the name of “Ernesto Miranda” is better known than the names of “Babe Ruth” and “Calvin Coolidge.”

In the event the United States Supreme court retracts or retreats from the present *Mimndu* warnings, Oregon might consider warnings similar to those set out in the English “Judges’ Rules.” Those rules were described by Justice Harlan in his dissent in *Miranda v. Arizona*, 384 U.S. at 522, 86 S.Ct. at 1652 53

“\* \* \* In that country, a caution as to silence but not counsel has long been mandated by the ‘Judges’ Rules,’ which also place other somewhat imprecise limits on police cross examination of suspects. However, in the court’s discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges’ Rules, so long as they are found voluntary under the common law test. \* \* \*”

Warnings similar to the English “Judges’ Rules” would be consistent with Oregon’s *State v. Henderson*, 182 Or. 147, 184 P.2d 392 (1947), line of cases.

type warnings and avoided any form of compulsion, the state has met its burden. Where the *Miranda*-type warnings were not given, the burden fully remains on the state to establish that the confession was voluntary.

We know of no strong and compelling reason to overturn a long-standing precedent of this court in order to adopt a rule which we consider to be unnecessary and confusing under the present circumstances.

The Court of Appeals is affirmed.

\* \* \* \* \*

LINDE, Justice, dissenting.

Throughout its history, Oregon's Bill of Rights has guaranteed that no one may be compelled in any criminal prosecution to testify against himself. Or. Const., Art. I, sec. 12. Throughout practically all of that history, Oregon statutes have secured this guarantee in a preliminary hearing by requiring that the magistrate inform a defendant of his rights to remain silent and to counsel, so that a defendant would not from ignorance of those rights or from the stress of his situation feel compelled to testify against himself. ORS 135.070(1), General Laws of Oregon sec. 379 (Deady & Lane 1843-1864). Failure to give this information requires the exclusion of any evidence obtained thereby. ORS 136.435.

The plurality opinion begins by stating the question to be whether the Oregon Constitution itself requires law enforcement officers to give prescribed warnings before interrogating a detained person. That loads the question, because the Constitution obviously does not mention warnings. But the Constitution forbids the state to prosecute upon "compelled" statements of the defendant. The question is how this guarantee is to be made effective. Like the legislature that adopted the Deady Code provision in 1864 and reenacted it in 1981, I believe that one obvious way to reduce the likelihood of "compelled" admissions or confessions is to tell suspects that they need not answer questions, that their answers maybe used against them, and that they may consult counsel. Like the United States Supreme Court in applying the Fifth Amendment, I further believe that these warnings that Oregon long has required in a magistrate's hearing are equally necessary and by analogy extend to interrogation by law enforcement officers before a detained person is brought before a magistrate.

### I.

Only three years ago this court held warnings to be required in order to give effect to Article I, section 12. in *State v. Mains*, 295 Or. 640, 645, 669 P.2d 1112 (1983). . . .

All but one member of the court joined in the *Mains* opinion; there was no dissent. Thereafter, the quoted paragraph was repeated and applied to police interrogation in *State v. Sparklin*, 296 Or. 85, 88, 672

P.2d 1182 (1983), in which the court went on to hold that the familiar federal *Miranda* formulation of the warnings also satisfied Oregon requirements. Again, there was no dissent.

Today, three members of the court would disown what the court wrote in *Mains* and *Sparklin*. The other three members of the court would stand by the principle there stated, although, as Justice Jones's concurring opinion shows, we disagree on its application to the facts in this case.

Judge Campbell's opinion for three judges, all of whom joined in *Sparklin*, attempts to dismiss *Mains* and *Sparklin* as "assuming" to require warnings to carry out Article I, section 12. That will not hold water. Presumably the author of *Mains* saw a reason for including the careful statement of this court's duty "to specify the procedure by which [Article I, section 12] is to be effectuated." Presumably the court read and agreed with that statement and with its further elaboration in *State v. Sparklin*. The judges joining in the plurality opinion can hardly say that they erroneously "assumed" something about the proper application for the Oregon Constitution, as if that depended on someone other than themselves. When this court assumes a disputed proposition for purposes of argument only, it knows how to say so. Nor can *Sparklin's* reliance on Article I, section 12, be dismissed as *obiter dicta*, when the court went on to deal with and to reject on the merits *Sparklin's* claim for more elaborate warnings than those required by *Miranda*. Had the court not first concluded that Oregon law independently required warnings before interrogation, it could never have reached a question what those warnings should be.

The plurality should not so readily denigrate its recent opinions as "assumptions" and "*dicta*." I doubt that the court would welcome seeing a trial court or the Court of Appeals dismiss in that fashion a directive that is stated in the terms used in *Mains*. In fact, the Court of Appeals in this and in other cases correctly understood that *Sparklin* required cautionary warnings as a matter of state law; only the circumstances under which they are required was disputed. . . .

But I leave to members of the plurality whether it is more embarrassing to say that they did not mean what they wrote or joined in *Mains* and *Sparklin*, or that they did not know their own minds. Conceding that judges like other mortals may change their minds, the present decision on its own merits is a wrong and backward step.

\* \* \* \* \*

### III.

Arguments about precedents can show the weakness of a judicial opinion, but to little effect. As I have said, a judge who thinks he was wrong may change his mind. Today's decision is wrong on its own merits.

The plurality itself treats its recital of the earlier cases only as a prologue to its conclusion. The conclusion does not purport to follow from the quoted opinions. Rather, the plurality's retreat from our 1983 opinions expressly rests on its rejection of a need for *Miranda* warnings in Oregon, at least at this time. The plurality singles out "police brutality" as the reason why *Miranda* warnings may once have been needed elsewhere but are not needed in Oregon today. If courts explain a rule of law as a deterrent to "police misconduct," it is little wonder if law enforcement officers and some members of the public think that the judges are against the police. Nor are warnings before questioning simply a matter of judicial convenience, to be abandoned if they do not reduce the "case load," as the plurality suggests. The practice of explaining a detained person's rights before questioning has a legal footing independent of any police misconduct or numbers of appeals.

As to the first argument, I do not know how the conduct of Oregon police officers compares with that of police officers elsewhere. The record before us contains nothing about that, nor should it. A rule should not be derived from stereotypes and judicial generalizations about police conduct that differs over time, from one place to another, and with respect to different kinds of crimes, suspects, and circumstances. What we may assume about a rule of law is that officers (or others) ordinarily will abide by the rule; when a rule requires a search warrant or a cautionary warning, officers will obtain a warrant or give a warning, and if the rule allows them to search without a warrant or to question people without informing them of their rights to counsel and to remain silent, officers ordinarily will search or interrogate without seeking a legally unnecessary warrant or volunteering gratuitous advice not to answer their questions. We may assume this, not as an empirical fact, but because any rule is premised on the assumption that it affects and guides conduct, especially official conduct, unless it is known never to be enforced.

The plurality says that Oregon should be satisfied to return to the common-law rules governing the exclusions of "involuntary" confessions as they stood at the time of *State v. Henderson*, if the Supreme Court of the United States would let it. *Henderson* was decided almost 40 years ago. Under that standard, law enforcement officers could pursue their questioning of any person in their own way and in any setting, leaving it to later dispute and adjudication whether the answers were "voluntary." It is hard to believe that this court in the 1980s would wish to return to the 1940s and 1950s and revive all the problems that led the United States Supreme Court 20 years ago to conclude that *ad hoc* determinations of voluntariness were inadequate to safeguard due process of law, let alone the rights to counsel and against self-incrimination.

No generation would choose to relive that history unless it has forgotten it. I shall not recount it in detail here. In sum, for 30 years after *Brown v. Mississippi*,

297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936), the Supreme Court granted *certiorari* in case after case to review convictions based on confessions to state officers. Some of the confessions, as in *Brown*, had been obtained by physical torture, some by long, uninterrupted questioning of an isolated prisoner by relays of officers, and some by playing on the inexperience and fear of young, black, or ignorant suspects, and by denying them access to legal counsel or to family or friends. . . . Some of the cases involved "police brutality," others did not, nor even "police misconduct," unless intensive questioning before letting a suspect see a defense lawyer or a magistrate is first defined as misconduct.

Because the Supreme Court had not then held the states to the express constitutional standards of the federal Fifth and Sixth Amendments, the Court reviewed these cases only for "due process of law" under the Fourteenth Amendment, and it held that "involuntary" confessions (though not denial of access to counsel) violated due process. One effect was to turn the "voluntariness" of every confession into a federal constitutional question to be decided by appellate courts, including the United States Supreme Court. Eventually, of course, the court recognized the rights to remain silent, to the assistance of counsel, and to the exclusion of unlawfully obtained evidence as essential elements of due process, and it formulated the *Miranda* warnings as necessary to safeguard against the uninformed, thoughtless or frightened sacrifice of those rights.

The striking fact about the Supreme Court's cases under the "voluntariness" standard extolled by today's plurality opinion is that in each case a state trial court let a jury find that the defendant's confession was voluntary. In each case, a state appellate court affirmed that finding before the Supreme Court held that, on the undisputed facts, the confession was involuntary.

The plurality says that it is important to keep Oregon law on involuntary confessions and admissions intact. Of course it is. No one suggests that reading a suspect a statement of his rights does away with the rule against involuntary confessions or admissions. Obviously a suspect may still wrongfully be induced to confess by "hope or fear," *State v. Wintzingerode*, 9 Or. 153, 163 (1881), after the warnings have dutifully been read to him. But in Oregon, too, the fact is that despite repeated recitals of the rule, not once has this court actually found a confession "involuntary" by reasons of the coercive pressures of police questioning, although a few cases have excluded confessions induced by promises of leniency. But the requirement of warnings, as I have said, has independent legal footing.

#### IV.

What Article I, section 12, of the Oregon Constitution guarantees is that no person "be compelled in any criminal prosecution to testify against himself." As the United States Supreme Court recently repeated:

“The privilege against self-incrimination en-joined by the Fifth Amendment is not designed to enhance the reliability of the fact-finding determination; it stands in the Constitution for entirely independent reasons. *Rogers v. Richmond*, 365 U.S. 534, 540-541 [81 S.Ct. 735, 5 L.Ed.2d 760] (1961) (Involuntary confessions excluded ‘not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system’).”

*Allen v. Illinois*, \_\_\_ U.S. \_\_\_, \_\_\_, 106 S.Ct. 2988, 2995, 92 L.Ed.2d 296, 308 (1986).

Article I, section 12, like other constitutional provisions, is addressed to the conduct of public officials, not to the reaction of the individual private citizen. It forbids acts designed or likely to compel self-incriminating answers. That a person in fact gives no such answer does not exonerate acts of the proscribed kind, any more than a fruitless search yielding no seizure exonerates a failure to obtain a required warrant. The application of Article I, section 12, therefore poses an issue beyond the common-law test whether a particular confession in fact was “voluntary.” Application of Article I, section 12, corresponds to the United States Supreme Court’s shift in the 1960s from its earlier, unsatisfactory, “due process” review of confessions deemed “involuntary” on appeal to the direct application of the Fifth (and the Sixth) Amendment to investigatory practices. For an Oregon court, unlike the federal courts, the difference between “voluntariness” and application of Article I, section 12, requires no shift at all, because the direct application of the state’s own guarantees in its courts does not depend upon any intermediate “due process” clause.

\* \* \* \* \*

To conclude, I have refrained from stating that Article I, section 12, itself requires warnings before questioning. Sometimes it is unavoidable to spell out in detail how a broad constitutional principle is to be administered, but there is no need for a court to freeze details into constitutional law when guidance can be found in laws like ORS 135.070(1) and 136.435 that can be further considered and refined by the ordinary lawmaking process. Regrettably, the court’s present approach is to say that if the legislature wants to protect the rights of Oregonians beyond the inescapable minimum that this court finds in the constitution itself, the legislature is free to do so. I believe, to the contrary, that a court should assume that individual liberty is to be protected unless and until politically accountable lawmakers legislate to the contrary and force the constitutional issue. “It is the government that

must ask lawmakers for authority against the citizen, not the citizen that must ask lawmakers to enact laws against ‘inherent’ official power.” *State v. Brown*, 301 Or. 268, 298, 721 P.2d 1357 (1986) (Linde, J., dissenting).

Today’s plurality opinion would take Oregon back 40 years and overturn all that has been learned about the inadequacy of excluding “involuntary” confessions as a protection for the constitutional right against self-incrimination, if the United States Supreme court did not bind Oregon to more civilized national standards than the plurality ascribes to our own laws. It is a reminder that, despite recent progress in many state courts, people in Oregon as elsewhere still need the protection of federal law for the basic liberties common to the national and the states’ bills of rights.”

LENT, J., joins in this dissenting opinion.

Page 133, after the Discussion Notes:

**Southcenter Joint Venture v. National Democratic Policy Committee**  
113 Wash.2d 413, 780 P.2d 1282 (1989)

ANDERSON, Justice.

**FACTS OF CASE**

This case presents the question of whether a political organization has a right under the free speech provi-

<sup>10</sup> Justice Brennan recently told the American Bar Association:

“[W]e must not be beguiled with thinking that, because state supreme courts are increasingly evaluating their state constitutions and concluding that those constitutions should be applied to confer greater civil liberties than their federal counterparts, we can safely ignore the deterioration being worked on Fourteenth Amendment protections. We can and should welcome this development in state constitutional jurisprudence—indeed, my own view is that this 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. \* \* \* “But this most welcome development does not mean that we can stop resisting cut backs, particularly by the Supreme Court of the United States, of Fourteenth Amendment protections. One of the great strengths of our federal system is that it provides a double source of protection for the liberties of our citizens. Federalism is not served when the federal half of that protection is crippled.”

“The Fourteenth Amendment,” address by Justice William J. Brennan, Jr., American Bar Association Section on Individual Rights and Responsibilities. New York University Law School (August 8, 1986). See also Cabranes, *The Need for Continued Federal Protection of Individual Rights*, 15 Conn. L. Rev. 31 (1982).

sion of the Constitution of the State of Washington to solicit contributions and sell literature in a privately owned shopping mall. We conclude that it does not.

Southcenter Joint Venture (Southcenter) owns the Southcenter Shopping Center, an enclosed shopping mall comprised of numerous retail stores. The Southcenter Shopping Center will be referred to herein simply as the "mall". Southcenter acquired the mall from its previous owner in December of 1985. At all times pertinent herein, it maintained a policy of allowing charitable, civic and political groups to use designated "public service centers" within the mall. Southcenter promulgated regulations governing the use of these areas by such outside groups. These regulations required that groups wishing to use the public service centers first submit an application to do so. One of the regulations prohibited solicitation of funds in the mall.

On June 20, 1986, an organization named the National Democratic Policy Committee (NDPC) submitted an application requesting the use of a public service center. The NDPC is a political organization apparently devoted to advancing the political views of one Lyndon LaRouche. Despite its name, the NDPC is not affiliated with the Democratic Party.

In its application, the NDPC stated that it wished to use a public service center for the purposes of distributing literature, signing up members, and soliciting contributions. Southcenter denied the application due to its regulation against soliciting funds. . . .

## ISSUE TWO

CONCLUSION. The free speech provision of the Constitution of the State of Washington (Const. art. 1, sec. 5) affords protection to the individual against actions of the State. It does not protect an individual against the actions of other private individuals. The free speech provision of our state constitution thus does not afford the NDPC a constitutional right to solicit contributions and sell literature at the mall.

\* \* \* \* \*

It is significant that the position we adopt herein commands the support of the overwhelming majority of courts that have addressed this issue. The highest courts of Connecticut, Michigan, New York, North Carolina, Pennsylvania and Wisconsin have all recently concluded in cases involving similar facts that the free speech provisions of their respective state constitutions do not protect against infringement by private individuals. It appears that only the California and New Jersey courts have gone so far as to discover such a right in their state constitutions.

Our decision on the "state action" issue in this case is also consistent with the decision of this court in *Alderwood Assocs. v. Washington Envtl. Coun.*, 96

Wash.2d 230, 635 P.2d 108 (1981). In *Alderwood*, the Washington Environmental Council asserted that it had the right to solicit signatures for an initiative at a shopping mall. A 4-member plurality of this court, i.e., less than a majority of the court, maintained that there was no "state action" requirement under the free speech and initiative provisions of the state constitution. That plurality then followed what it termed a "balancing approach" for determining when these guaranties prevail over the rights of a private property owner and concluded that the balance tipped in favor of the initiative supporters in that case.

Although a fifth member of the court, Justice Dolliver, concurred "with the result," he sharply rejected the plurality's reasoning, branding its free speech analysis "constitution-making by the judiciary of the most egregious sort." *Alderwood*, at 248, 635 P.2d 108 (Dolliver, J., concurring). The concurrence nonetheless reasoned that the activity of soliciting signatures for an initiative was authorized by the initiative provision of the state constitution (Wash. Const. art. 2, sec 1(a) (amend. 72) and the initiative and referendum statute (RCW 29.79). As the concurring opinion pointed out, unlike the free speech provision, the initiative provision is not part of our state constitution's Declaration of Rights and does not establish a right against the government but declares that the people are part of the legislative process.

The remaining four members of the court of *Alderwood* dissented. The dissent agreed with the objection of the concurrence to the plurality's free speech analysis, though it disagreed with the analysis of the concurrence concerning the initiative provision of the state constitution.

Thus, in *Alderwood*, a 5-member majority of this court rejected the argument now posited by the NDPC that the free speech provision of our state constitution does not require "state action." As a consequence, the holding in *Alderwood* was simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners. We expressly do not here disturb that holding.

\* \* \* \* \*

UTTER, Justice (concurring in the result).

I agree with the majority that, given the facts of this case, Const. art. 1, sec. 5 (hereinafter section 5) does not allow the petitioners the right to solicit donations and memberships within a private shopping mall. The majority's rationale for reaching this result, however, is one with which I cannot agree.

In applying the interpretive criteria we developed in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808

(1986),<sup>[1]</sup> I find a different basis for our common result. There simply is no compelling reason why we should append a state action requirement to section 5 when the plain language and drafting history of the provision suggest otherwise. Worse, the majority fails to address arguments that the state action doctrine is generally inappropriate at the state level. It also does not articulate what form of state action in today's case and leaves trial courts, which must frequently apply our rules, without guidance. The majority also fails to discuss the fact that for 8 years the courts of our state—including the court below—have successfully used the balancing test developed in *Alderwood Assocs. v. Washington Envtl. Coun.*, 96 Wash.2d 230, 635 P.2d 108 (1981). The rulings of these courts indicate that *Alderwood* functions as a more coherent limiting principle than the ill-defined state action doctrine. Such a balancing approach is mandated by *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83-87, 100 S.Ct. 2035, 2041-44, 64 L.Ed.2d 741 (1980), in cases where a state seeks to enforce a state constitutional speech right. The majority leaves undisturbed the result in *Alderwood* which recognizes the state's duty to enforce an individual's right to petition on certain private property. See *Alderwood*, 96 Wash.2d at 251-53, 635 P.2d 108 (Dolliver, J., concurring). Thus, this court must use a balancing approach when analyzing that manifestation of the right to speech; we do not give an adequate rationale why balancing should not be used in the speech issue presented today. Further, in abandoning the *Alderwood* test, the majority also leaves without a principled underpinning the possibility of enforcing speech rights against other types of private infringements—such as actions by political parties, private universities, labor unions, private clubs, and civic organizations. These are common problems in our complex society. For these reasons, I concur with the majority in result only.

## I

Analysis of this case following the nonexclusive criteria developed in *State v. Gunwall*, *supra*, shows that the state action doctrine is incongruent with much of the state constitution in general and with section 5 in particular. The first two *Gunwall* criteria involve the text of the state constitutional provision. These two criteria encourage analysis of the language of the provision itself as well as textual contrasts with its federal parallel. *Gunwall*, 106 Wash.2d at 61, 720 P.2d 808.

The majority does undertake a brief analysis of section 5's language. As the majority must acknowledge, the text makes no reference to governmental actions. The provision states simply: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The

unambiguous nature of these words stands as a major obstacle to any attempt to read a state action requirement into them. If constitutional provisions are textually clear, this court will give the words their plain meaning. See *Anderson v. Chapman*, 86 Wash.2d 189, 191, 543 P.2d 229 (1975). Such a plain meaning here could not include a state action requirement—the language simply is not present in section 5.

Moreover, as the majority also acknowledges, the committee that drafted the speech provision specifically deleted state action language from its finished product. The first version of section 5 read: "*That no law shall be passed* restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject." (Italics mine.) Tacoma Daily Ledger, July 13, 1889, at 4, col. 3; see also Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 U. Puget Sound L.Rev. 157, 172 (1985) (hereinafter "*Right to Speak*"). After a number of revisions, the Preamble and Declaration of Rights Committee submitted the text of the speech provision minus the state action language to the convention for passage. This version was based in part on the speech guarantee of the California constitution. *Right to Speak*, at 175-77. The convention passed this version of section 5 without debate.

The most logical and direct conclusion one can draw from this history is that the committee members considered the impact of the state action language and decided against it. One must assume that they were aware of United States Supreme Court cases on state action, notably the seminal *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), decided just a few years before the convention. Likewise, the committee members must have been familiar with Justice Harlan's dissent in that case: he argued that the Fourteenth Amendment would allow Congress to regulate private behavior that discriminated against nonwhites. *Civil Rights Cases*, 3 S.Ct. at 27 (Harlan, J., dissenting). This example, as well as the state-action-less Thirteenth Amendment, demonstrated to the Washington Constitution's framers that even the federal constitution, when aiming to secure personal liberties, could directly regulate the actions of private individuals.

The deliberateness of omitting the state action language becomes even more apparent when one compares the language of section 5 with other provisions in Washington's Declaration of Rights. Many of these other provisions contain an express state action requirement. . . .

The majority concludes, however, that the omission of "state action" language in section 5 served another purpose. It posits a "much more likely and reasonable explanation." First, the majority surmises that the framers thought the state action language redundant. Second, it hypothesizes that the framers sought to protect freedom of speech from assaults by all branches of government rather than simply the

<sup>[1]</sup>The majority claims, at page 1290 n. 37, that its analysis, "reflects consideration of the relevant *Gunwall* criteria." Nonetheless, the opinion makes no overt reference to that case's interpretive criteria and interaction with section 5.

Legislature, as might be implied by the First Amendment's reference to "Congress shall make no law." Majority, at 1287-88. Given the fact that the majority cites no authority for either prong of this "explanation," one must accept it for what it is: mere conjecture.

\* \* \* \* \*

## II

Aside from the specific language of section 5, reasons inherent to the structure of our state constitution argue against a generalized state action requirement in state constitutional jurisprudence. The majority cursorily dismisses commentary developing these reasons as "an array of theoretical arguments" and declares that constitutional analysis "must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned." Majority, at 1290, quoting *State v. Gunwall*, 106 Wash.2d at 63, 720 P.2d 808. Ironically, these dismissed reasons relate directly to the fifth criterion we announced in *Gunwall*: "[d]ifferences in structure between the federal and state constitutions." *Gunwall*, at 62, 720 P.2d 808.

One cannot overlook the fact that the state action doctrine was developed around the text of and policies behind the Fourteenth Amendment to the federal constitution—not the constitution of any individual state. The Fourteenth Amendment is drafted around a scheme specifically aimed at the actions of states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

(Italics mine.) As mentioned above, the United States Supreme Court formally developed the state action requirement for cases involving federal legislation based on the Fourteenth Amendment in the *Civil Rights Cases*, *supra*.

The marked contrast between the state and federal texts is, once again, one of the more obvious reasons why "state action" should not be required when interpreting a state constitution. At a deeper level, however, these textual differences highlight interests of federalism essential to the application

<sup>7</sup> In this area of state constitutional interpretation, where records of the delegates' debates and committee members' discussions are scanty, reasoned theoretical discussion—supported by legal and historical authority—is essential to our task. In this regard, even the majority's position is no more than a "theoretical argument." Status as such an argument, however, is not necessarily belittling, as the majority would acknowledge in its own argument's case. What is essential is, as the majority tell us, "a process that is at once articulable, reasonable and reasoned," in other words, a fair examination of ideas, authority, and evidence. The majority fails to do this.

of the federal constitution but irrelevant to state constitutional jurisprudence.

\* \* \* \* \*

Thus, while the applicability of state action to a case like the one at hand is apparently a matter of controversy, the majority does not shed any light on the subject. It would have us affix a state action requirement to section 5—when the plain language of that provision suggests otherwise—and then not tell us how to use it. The majority's adherence to the "conceptual disaster area"<sup>18</sup> of state action leaves behind a number of unanswered questions. Primarily, under the constitutional interpretive criteria adopted by this court, what aspects of the federal doctrine, if any, are appropriate? What exceptions will we adopt? How does the federal requirement—with its numerous exceptions—transpose to a state constitutional provision which is admittedly more protective than its federal counterpart? See majority, at 1286. The majority does not answer these questions.

### Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Company Page 137, Discussion Notes:

#### Discussion Notes:

3. Is there any possible remaining remedy for advocates of free speech rights on private property in Pennsylvania? See *Coatesville Development Co. v. United Food and Commercial Workers*, 374 Pa.Super.330, 542 A.2d 1380 (1988) (common law rights). For a discussion of common law alternatives to state constitutional rights analysis, see Judith S. Kaye, "A Midpoint Perspective on Directions in State Constitutional Law," *Emerging Issues in State Constitutional Law* 1 (1988): 25-27.

<sup>18</sup> Black, The Supreme Court, 1966 *Term Foreword: 'State Action,' Equal Protection, and California's Proposition 13*, 81 Harv.L.Rev. 69, 95 (1967). Indeed, law reviews are full of commentary and criticism of the state action doctrine (or "anti doctrine" as described by Professor Tribe). Some scholars advocate abandoning the doctrine altogether. See generally Chemerinsky, *supra* note 16. Professor Chemerinsky argues that one of the original assumptions behind the state action doctrine was that the common law generally protected individual rights from private invasions. Individual rights expanded under constitutional analysis as applied to government action—largely through a normative analysis—while a more positivist common/private law lagged behind. The common law, then, did not fulfill its function of protecting private invasions of natural rights recognized by the courts under the constitution. Chemerinsky goes on to argue that under any theory of individual rights (positivist, natural law, or consensus), the state action doctrine is obsolete.

## People v. Zelinski

Page 142, Discussion Notes:

### Discussion Notes:

5. In *Luedtke v. Nabors Alaska Drilling, Znc.*, 768 P.2d 1123, 1129-30 (Alaska 1989), the Alaska Supreme Court held that the privacy provision in the Alaska Constitution, Article I Sec. 22, did not apply to private action in the employee drug testing context.

6. On the state action doctrine under state constitutions generally, see Kevin Cole, "Federal and State 'State Action': The Undercritical Embrace of a Hypercriticized Doctrine," *Georgia Law Review* 24 (Winter 1990): 327; John Devlin, "Constructing an Alternative to 'State Action' as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal," *Rutgers Law Journal* 21 (1990): \_\_\_\_; Jennifer Friesen, "Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?" *Hastings Constitutional Law Quarterly* 17 (Fall 1989): 111; Scott E. Sundby, "Is Abandoning State Action Asking Too Much of the Constitution?" *Hastings Constitutional Law Quarterly* 17 (Fall 1989): 139.

## Florida v. Casal

Page 152, Discussion Notes:

### Discussion Notes:

4. For further information on Florida's search and seizure amendment, see Christopher Slobogin, "State Adoption of Federal Law: Exploring the Limits of Florida's 'Forced Linkage' Amendment," *University of Florida Law Review* 39 (Summer 1987): 653. See also *State v. Ridenour*, 453 S.O.2d 193, 194 (Fla. App. 1984) (Hubbart, J., concurring):

HUBBART, Judge (concurring).

I concur in the opinion and judgment of the court, I write separately, however, to express my sincere regret at the passage of the recent amendments to Article I, Section 12 of the Florida Constitution, inasmuch as they amount, in effect, to a virtual repeal of the entire state constitutional right. By these amendments, Florida no longer has a separately protected constitutional right of search and seizure; it is now inexorably linked to the Fourth Amendment and has no independent existence apart from the Fourth Amendment. I doubt whether the voters realized that they were,

in effect, repealing Article I, Section 12 of the Florida Constitution when they overwhelmingly approved the recent amendments in the November 1982 elections, but that is exactly what they did. Perhaps, with the passage of time, we will learn what a mistake that decision was and will act to restore Article I, Section 12 to its rightful place in the Florida Constitution. Until then, I think it clear that Article I, Section 12 of the Florida Constitution is a dead letter and that decisions such as *State v. Sarmiento*, 397 So.2d 643 (Fla. 1981), interpreting this constitutional provision to give our citizens greater rights than that guaranteed by the Fourth Amendment, are, most regrettably, relics of the past.

5. In a state like Florida, what if there is also an explicit *privacy* provision in the state constitution? See *Shaktman v. State*, 553 So.2d 148, 150-51 (Fla. 1989):

The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest. In an opinion which predated the adoption of section 23, the First District aptly characterized the nature of this right:

A fundamental aspect of personhood's integrity is the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.

*Bryon, Harless, Schaffer, Reid & Assocs., Znc. v. State ex rel., Schellenberg*, 360 So.2d 83, 92 (Fla. 1st DCA 1978). *quashed and remanded on other grounds*, 379 So.2d 633 (Fla. 1980). Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over "majoritarian sentiment" and thus cannot be universally defined by consensus.

The telephone numbers an individual dials or otherwise transmits represent personal information which, in most instances, the individual has no intention of communicating to a third party. **This** personal expectation is not deflected by the fact that the telephone company has that information. **As** the Supreme Court of Colorado noted:

The concomitant disclosure to the telephone company, for internal business purpose, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government. . . . [I]t is somewhat idle to speak of assuming risks in a context where, as a practical matter, the telephone subscriber has no realistic alternative.

*People v. Sporleder*, 666 P.2d 135, 141 (Colo.1983) (citations omitted).

We agree with the Third District that the privacy interests of article I, section 23 are implicated when the government gath-

ers telephone numbers through the use of a pen register. *See Winfield v. Division of Pan-Mutuel Wagering*, 477 So.2d 544, 548 (Fla.1985). This gathering of private information clearly affects a matter within that zone of privacy. Accordingly, we adopt the analysis of the district court and answer the first certified question in the affirmative?

See also *Riley v. State*, 549 So.2d 673 (Fla.1989); *State v. Brown*, 755 P.2d 1364, 1370-71 (Mont.1988); *State v. Jones*, 706 P.2d 317 (Alaska 1985); Slobogin, "State Adoption of Federal Law," pp. 710-16.

<sup>8</sup> We add that the district court concluded and the petitioners now concede that article I, section 12 of the Florida Constitution, is not implicated by the facts of this case.

Page 161, following the Discussion Notes:

**Davidson v. Rogers**  
**281 Or. 219, 574 P.2d 624 (1978)**

HOLMAN, Justice.

Plaintiff brought an action for libel based upon a magazine article published by defendants. Only general damages were requested. Defendants' demurrer to the complaint was sustained upon the basis that the facts stated were insufficient to constitute a cause of action for *general damages* because it was not alleged that a retraction had been requested of defendants and refused by them as required by ORS 30.160. Plaintiff appeals.

Plaintiff concedes that under our present decision in *Holden v. Pioneer Broadcasting Co. et al.*, 228 Or. 405, 365 P.2d 845 (1961) he cannot maintain his action. However, he urges us to reconsider that decision and to hold that the statute is unconstitutional as being in violation of that part of **Art. I, sec. 10**, of the Oregon Constitution which provides that " \* \* \* every man shall have remedy by due course of law for injury done him in his person, property or reputation."

We see no reason to depart from this court's prior decision upon the subject. The language of the constitution does not specify that the remedy need be the same as was available at common law at the time of the adoption of the constitution; and the statute, while restricting the remedy, does not abolish the cause of action. Even though a retraction is not requested, the right of action still exists for an intentional defamation and, in any event, for recovery of specific demonstrable economic loss. Such a limita-

tion is not violative of **Art. I, sec. 10**, for the reason that it does not wholly deny the injured party a remedy for the wrong suffered. *Holden v. Pioneer Broadcasting Co. et al.*, *supra* at 412, 365 P.2d 845; *Noonan v. City of Portland*, 161 Or. 213, 244, 88 P.2d 808 (1939); *Pullen v. Eugene*, 77 Or. 320, 328, 146 P.822, 147 P. 768, 147 P. 1191, 151 P. 474, Ann. Cas. 1917B 933 (1915).

In addition, the legislature has made available a retraction as a substitute for the remedy which the law would otherwise have provided. *Holden v. Pioneer Broadcasting Co. et al.*, *supra* 228 Or. at 415, 365 P.2d 845. As a practical matter, retraction can come nearer to restoring an injured reputation than can money, although neither can completely restore it.

If the specific remedies available at common law were frozen at the adoption of Oregon's Constitution, the legislature would have been helpless to enact limitations upon actions such as those provided by the Workmen's Compensation Law and the guest passenger statute, or to concern itself with other similar matters about which it is usual for legislatures to take action.

The judgment of the trial court is affirmed.

LINDE, Justice, concurring.

In joining the court's opinion I do not endorse everything that was said in *Holden v. Pioneer Broadcasting Co.*, 228 Or. 405, 365 P.2d 845 (1961). Some of the points made by the dissenters in that case and by Justice Lent today are well taken. But I think the question whether retraction of a defamatory statement is an "alternative remedy" that can satisfy article I, section 10, was and remains a false issue.

The guarantee in article I, section 10, of a "remedy by due course of law for injury done [one] in his person, property, or reputation" is part of a section

dealing with the administration of justice.<sup>1</sup> It is a plaintiffs' clause, addressed to securing the right to set the machinery of the law in motion to recover for harm already done to one of the stated kinds of interest, a guarantee that dates by way of the original state constitutions of 1776 back to King John's promise in Magna Charta chapter 40: "To no one will We sell, to no one will We deny or delay, right or justice."<sup>2</sup> It is concerned with securing a remedy from those who administer the law, through courts or otherwise. But ORS 30.160 and 30.165 do not purport to entitle anyone to the "remedy" of a retraction. Indeed, if they did, they really would raise genuine constitutional difficulties. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). These sections merely provide the publisher of the alleged defamation

<sup>1</sup> Article I, section 10, provides:

No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

<sup>2</sup> See Sources of Our Liberties 145, 342, 348 (R. Perry ed. 1959); A.E. Howard, *The Road from Runnymede* 210, 284, 297, 483, 484 (1968). As a claim to a remedy provided by the government, this section should not be confused with the guarantee of Magna Charta chapter 39 against deprivations by the government "except by the lawful judgment of [one's] peers and by the law of the land," which gave us the "law of the land" and "due process" clauses of our 18th century constitutions. Several of these constitutions contained both of these distinct guarantees. For instance, the first constitution of Maryland in 1776 declared in one paragraph

That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

and in another:

That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land. Md. Decl. of Rights secs. XVII, XXI (1776).

See also Pa. Const. art. IX, secs. 9, 11 (1790), Del. Const. art. I, secs. 7, 9, (1792), Ky. Const. art. XII, secs. 10, 13 (1792). Other states adopted only one or the other, as did the precursors of Oregon's version of Magna Charta chapter 40 stated in article I, section 10. A century earlier William Penn had included the equivalent of Magna Charta chapter 40 in his Frame of Government for Pennsylvania (see the Laws Agreed Upon in England art. V (1682) reprinted in B. Schwartz, *The Bill of Rights: A Documentary History* 140 (1971)), and New York included both it and a version of chapter 39 in its Charter of Liberties and Privileges (1683). B. Schwartz *supra* at 165.

with an opportunity to retract if he wishes by this means to limit his possible liability. A step taken by a putative defendant which the law does not compel but leaves entirely to his own balance between his sense of innocence or stubbornness on the one hand and his sense of obligation or calculation of risk on the other is not a "remedy by due course of law." If an optional retraction plays a role at all in the validity of limiting the measure of damages for defamation, it would have to be that the retraction is deemed to reduce the "injury," not that it is a substitute legal remedy.

But the validity of ORS 30.160 does not rest on the contingency of a retraction. The statute does not withdraw the common-law action for defamation. It limits the financial scope of the remedy, at least for unintentional defamation, to a measure of damages that corresponds to injuries measurable in money.

We need not pursue here the question how far the legislature must retain money damages as a constitutionally required remedy for noneconomic injuries when they existed at common law. Defamation is a special case, addressed by more than one provision of article I, Oregon's Bill of Rights. The focus of section 10 is on assuring a remedy to one whose reputation has been injured. At the same time, article I, section 8, forbids all laws "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," with the proviso that "every person shall be responsible for the abuse of this right." They yield a coherent view of freedom and responsibility. The responsibility prescribed in section 8 is to others for injuries done to them, such as the injury to reputation accorded constitutional statute in section 10. Laws limited to remedying such injuries alone are not laws restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever. Laws that in terms impose sanctions on speech or writing beyond the needs of remedying such injuries, whether statutory or common law, are restraints and restrictions forbidden by section 8. See *Deras v. Myers*, 272 Or. 47, 535 P.2d 541 (1975). Given the interrelation of our two explicit sections on freedom of speech and press and the right to a remedy for injury to reputation, a statute that matches financial compensation for unintentional defamation to demonstrable injuries measurable in money arguably exhausts the scope of that remedy under article I, section 8. In any event, it satisfies article I, section 10.

## Sterling v. Cupp Page 163, Discussion Notes:

### Discussion Notes:

3. In *Grubbs v. Bradley*, 552 F. Supp. 1052, 1124-25 (M.D. Tenn. 1982) a federal district judge made the following statements:

*C. State Law Claims*

Article I, Section 16 of the Tennessee Constitution is a verbatim duplication of the Eighth Amendment to the United States Constitution. At the time of its enactment, 1870, it is assumed that the framers intended the provision to be entirely coextensive with the parallel Eighth Amendment. As noted, *supra*, the Eighth Amendment's cruel and unusual punishments clause at the time **was** thought to be strictly a prohibition upon the imposition of tortures and other barbarous forms of punishment.

Thus, the framers of the Tennessee Constitution apparently thought that in order to ensure the humane treatment of incarcerated offenders, a separate provision **was** needed. Article I, Section 32 of the Tennessee Constitution provides:

That the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.

This provision has never been construed in any reported case.

In view of the development of federal Eighth Amendment litigation, and the now well-established principle that the cruel and unusual punishments clause requires the humane treatment **of** prisoners, and their housing in facilities that provide for basic needs in accordance with "evolving standards of decency," *Trop, supra* 356 U.S. at 101, 78 S.Ct. at 598, the court is convinced that the protections intended to be ensured by Tenn. Const. **Art. I, sec. 32**, are now provided by the Eighth Amendment. In the opinion of the court, Art. I, sec. 32 simply does not afford greater protection than is now available under the aegis of the Eighth Amendment. See n. 2 and accompanying text, *supra*.

Therefore, the standards applicable to conditions of confinement by virtue of the Eighth Amendment are equally applicable to both of the relevant provisions of the Tennessee Constitution. Despite the rather unique language of the state constitution, that document does not, insofar as is relevant here, substantially extend the rights guaranteed to lawfully incarcerated persons under the United States Constitution.

**Page 164**, following the Discussion Notes:

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

SHAW, Justice.

We have on appeal *In re T.W.*, 543 So.2d 837 (Fla. 5th DCA 1989), which declared unconstitutional section 390.001(4)(a), Florida Statutes (Supp.1988), the parental consent statute. We have jurisdiction. *Art. V, sec. 3(b)(1)*, Fla. Const. We approve the opinion of the district court and hold the statute invalid under the Florida Constitution.

**I.**

The procedure that a minor must follow to obtain an abortion in Florida is set out in the parental consent statute and related rules. Prior to undergoing an abortion, a minor must obtain parental consent or, alternatively, must convince a court that she is sufficiently mature to make the decision herself or that, if she is immature, the abortion nevertheless is in her best interests. Pursuant to this procedure, T.W., a pregnant, unmarried, fifteen-year-old, petitioned for a waiver of parental consent under the judicial bypass provision on the alternative grounds that (1) she was sufficiently mature to give an informed consent to the abortion, (2) she had a justified fear of physical or emotional abuse if her parents were requested to consent, and (3) her mother was seriously ill and informing her of the pregnancy would be an added burden. The trial court, after appointing counsel for T.W. and separate counsel as guardian ad litem for the fetus, conducted a hearing within twenty-four hours of the filing of the petition.

The relevant portions of the hearing consisted of T.W.'s uncontroverted testimony that she was a high-school student, participated in band and flag corps, worked twenty hours a week, baby-sat for her mother and neighbors, planned on finishing high school and attending vocational school or community college, had observed an instructional film on abortion, had taken a sex education course at school, would not put her child up for adoption, and had discussed her plans with the child's father and obtained his approval. She informed the court that due to her mother's illness, she had assumed extra duties at home caring for her sibling and that if she told her mother about the abortion, it would kill her." Evidence was introduced showing that the pregnancy was in the first trimester.

The guardian ad litem was accorded standing and allowed to argue that the judicial bypass portion of the statute was unconstitutionally vague and that parental consent must therefore be required in every instance where a minor seeks to obtain an abortion. The trial court ruled that the judicial bypass provision

of the statute was unconstitutional because it failed to make sufficient provision for challenges to its validity, was vague, and made no provision for testimony to controvert that of the minor. The court denied the petition for waiver and required T.W. to obtain parental consent under the remaining provisions of the statute.

The district court found that the statute's judicial alternative to parental consent was unconstitutionally vague, permitting arbitrary denial of a petition, and noted the following defects: failure to provide for a record hearing, lack of guidelines relative to admissible evidence, a brief forty-eight-hour time limit, and failure to provide for appointed counsel for an indigent minor. The court declared the entire statute invalid, quashed the trial court's order requiring parental consent, and ordered the petition dismissed. The guardian ad litem appealed to this court. The Florida Attorney General was granted permission to appear as amicus curiae. The guardian filed a number of motions to block the abortion but was unsuccessful and T.W. lawfully ended her pregnancy, which would normally moot the issue of parental consent.

Because the questions raised are of great public importance and are likely to recur, we accept jurisdiction despite T.W.'s abortion. *See Holly v. Auld*, 450 So.2d 217 (Fla.1984). . . .

The seminal case in United States abortion law is *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There, the Court ruled that a right to privacy implicit in the fourteenth amendment embraces a woman's decision concerning abortion. Autonomy to make this decision constitutes a fundamental right and states may impose restrictions only when narrowly drawn to serve a compelling state interest. The Court recognized two important state interests, protecting the health of the mother and the potentiality of life in the fetus, and ruled that these interests become compelling at the completion of the first trimester of pregnancy and upon viability of the fetus (approximately at the end of the second trimester), respectively. Thus, during the first trimester, states must leave the abortion decision to the woman and her doctor; during the second trimester, states may impose measures to protect the mother's health; and during the period following viability, states may possibly forbid abortions altogether. Although the workability of the trimester system and the soundness of *Roe* itself have been seriously questioned in *Webster v. Reproductive Health Services*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the decision ~~for~~ now remains the federal law. Subsequent to *Roe*, the Court issued several decisions dealing directly with the matter of parental consent for minors seeking abortions. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Bellotti v. Baird*, 443

U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

To be held constitutional, the instant statute must pass muster under both the federal and state constitutions. Were we to examine it solely under the federal Constitution, our analysis necessarily would track the decisions noted above. However, Florida is unusual in that it is one of at least four states having its own express constitutional provision guaranteeing an independent right to privacy, see Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 Fla.St.U.L. Rev. 632, 691 (1977) (others include Alaska, California, and Montana): and we opt to examine the statute first under the Florida Constitution. If it fails here, then no further analysis under federal law is required.

As we noted in *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985), the essential concept of privacy is deeply rooted in our nation's political and philosophical heritage. . . .

In 1980, Florida voters by general election amended our state constitution to provide:

Section 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, sec. 23, Fla. Const. This Court in *Winfield* described the far-reaching impact of the Florida amendment:

The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a

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<sup>4</sup> See Alaska Const. art. I, sec. 22; Cal. Const. art. I, sec. 1; Mont. Const. art. II, sec. 10. A second group of states has incorporated the privacy right into constitutional provisions dealing with additional matters. See Ariz. Const. art. II, sec. 8; Haw. Const. art. I, secs. 6, 7; Ill. Const. art. I, secs. 6, 12; La. Const. art. I, sec. 5; S.C. Const. art. I, sec. 10; Wash. Const. art. I, sec. 7.

strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

*Winfield*, 477 So.2d at 548. In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.

Consistent with this analysis, we have said that the amendment provides “an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions.” *Rasmussen v. South Fla. Blood Serv.*, 500 So.2d 533, 536 (Fla. 1987) (footnote omitted). We have found the right implicated in a wide range of activities dealing with the public disclosure of personal matters. See *Barron v. Florida Freedom Newspapers*, 531 So.2d 113 (Fla. 1988) (closure of court proceedings and records); *Rasmussen* (confidential donor information concerning AIDS-tainted blood supply); *Winfield* (banking records); *Florida Bd. of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1983) (bar application questions concerning disclosure of psychiatric counselling). Florida courts have also found the right involved in a number of cases dealing with personal decisionmaking. See *Public Health Trust v. Wons*, 541 So.2d 96 (Fla. 1989) (refusal of blood transfusion that is necessary to sustain life); *Corbett v. D’Alessandro*, 487 So.2d 368 (Fla. 2d DCA), *review denied*, 492 So.2d 1331 (Fla. 1986) (removal of nasogastric feeding tube from adult in permanent vegetative state); *In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984) (removal of life support system from brain-dead infant); see also *Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980) (removal of respirator from competent adult, decided prior to passage of privacy amendment under general right of privacy).

The privacy section contains no express standard of review for evaluating the lawfulness of a government intrusion into one’s private life, and this Court when called upon, adopted the following standard:

Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden *can* be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

*Winfield*, 477 So.2d at 547. When this standard was applied in disclosural cases, government intrusion

generally was upheld as sufficiently compelling to overcome the individual’s right to privacy. We reaffirm, however, that this is a highly stringent standard, emphasized by the **fact** that no government intrusion in the personal decisionmaking **cases** cited above **has** survived.

Florida’s privacy provision is clearly implicated in a woman’s decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one’s body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment. See *Wons; Perlmutter*.

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one’s **body** is to become the vehicle for another human being’s creation; second, when and how—this time there is no question of “whether they—one’s **body** is to terminate its organic life.

L. Tribe, *American Constitutional Law* 1337-38 (2d ed. 1988). The decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman. See *Roe*, 410 U.S. at 153, 93 S.Ct. at 727. The Florida Constitution embodies the principle that “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy. A woman’s right to make that choice freely is fundamental.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 2185, 90 L.Ed.2d 779 (1986).

The next question to be addressed is whether this freedom of choice concerning abortion extends to minors. We conclude that it does, based on the unambiguous language of the amendment: The right of privacy extends to “[e]very natural person.” Minors are natural persons in the eyes of the law and “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights.” *Danforth*, 428 U.S. at 74, 96 S.Ct. at 2843. See also *Ashcroft; City of Akron; H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); and *Bellotti*.

## 11.

Common sense dictates that a minor’s rights are not absolute; in order to overcome these constitutional rights, a statute must survive the stringent test announced in *Winfield*. The state must prove that the statute furthers a compelling state interest through the least intrusive means. The *Roe* Court recognized two state interests implicated in the abortion decision: the health of the mother and the potentiality of

life in the fetus. Under *Roe*, the health of the mother does not become a compelling state interest until immediately following the end of the first trimester because until that time, “mortality in abortion may be less than mortality in normal childbirth.” *Roe*, 410 U.S. at 163, 93 S. Ct. at 731. Due to technological developments in second-trimester abortion procedures, the point at which abortions are safer than childbirth may have been extended into the second trimester. See *City of Akron*, 462 U.S. at 429 n. 11, 103 S.Ct. at 2492 n. 11. We nevertheless adopt the end of the first trimester as the time at which the state’s interest in maternal health becomes compelling under Florida law because it is clear that prior to this point no interest in maternal health could be served by significantly restricting the manner in which abortions are performed by qualified doctors, whereas after this point the matter becomes a genuine concern. See *id.* Under Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother.<sup>6</sup> Insignificant burdens during either period must substantially further the important state interests. Compare *id.* at 430, 103 S.Ct. at 2492 (“Certain regulations that have no significant impact on the woman’s exercise of her right may be permissible where justified by important state health objectives.”).

Under *Roe*, the potentiality of life in the fetus becomes compelling at the point in time when the fetus becomes viable, which the Court defined as the time at which the fetus becomes capable of meaningful life outside the womb, albeit with artificial aid. *Roe*, 410 U.S. at 160, 163, 93 S.Ct. at 730, 731. Under our Florida Constitution, the state’s interest becomes compelling upon viability, as defined below. Until this point, the fetus is a highly specialized set of cells that is entirely dependent upon the mother for sustenance. No other member of society can provide this nourishment. The mother and fetus are so inextricably intertwined that their interests can be said to coincide. Upon viability, however, society becomes capable of sustaining the fetus, and its interest in preserving its potential life thus becomes compelling. See *Webster*, 109 S.Ct. at 3075 (Blackmun, Jr., concurring/dissenting). Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. Under current standards, this point generally occurs upon completion of the second trimester. See *id.* at 3075 n. 9 (no medical evidences exists indi-

cating that technological improvements will move viability forward beyond twenty-three to twenty-four weeks gestation within the foreseeable future due to the anatomic threshold of fetal development). Following viability, the state may protect its interest in the potentiality of life by regulating abortion, provided that the mother’s health is not jeopardized.

### III.

The challenged statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. Such a substantial invasion of a pregnant female’s privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life. However, where parental rights over a minor child are concerned, society has recognized additional state interests—protection of the immature minor and preservation of the family unit. For reasons set out below, we find that neither of these interests is sufficiently compelling under Florida law to override Florida’s privacy amendment.

In evaluating the validity of parental consent and notice statutes, the federal court has taken into consideration the state’s interests in the well-being of the immature minor, see *Ashcroft*; *City of Akron*; *Matheson*; *Bellotti*; *Danforth*, and in the integrity of the family, see *Matheson*; *Bellotti*. In *Bellotti*, the Court set forth three reasons justifying the conclusion that states can impose more restrictions on the right of minors to obtain abortions than they can impose on the right of adults: “[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” *Bellotti*, 443 U.S. at 634, 99 S.Ct. at 3043. The Court pointed out that “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *id.* at 635, 99 S.Ct. at 3044, and that the role of parents in “teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens,” *id.* at 638, 99 S.Ct. at 3045. In assessing the validity of parental consent statutes, the federal Court applied a relaxed standard; the state interest need only be “significant,” not “compelling,” to support the intrusion.

We agree that the state’s interests in protecting minors and in preserving family unity are worthy objectives. Unlike the federal Constitution, however, which allows intrusion based on a “significant” state interest, the Florida Constitution requires a “compelling” state interest in all cases where the right to privacy is implicated. *Winfield*. We note that Florida does not recognize these two interests as being sufficiently compelling to justify a parental consent requirement where

<sup>6</sup> Restrictions to protect the state’s interest in the potentiality of life, as explained *infra*, also may be imposed, but only after viability, as defined *infra*, is reached.

procedures other than abortion are concerned. Section 743.065, Florida Statutes (1987), provides:

**743.065** Unwed pregnant minor or minor mother; consent to medical services for minor or minor’s child valid. —

(1) **An** unwed pregnant minor may consent to the performance of medical or surgical care or services relating to her pregnancy by a hospital or clinic or by a physician licensed under chapter 458 or chapter 459, and such consent is valid and binding as if she had achieved her majority.

(2) **An** unwed minor mother may consent to the performance of medical or surgical care or services for her child by a hospital or clinic or by a physician licensed under chapter 458 or chapter 459, and such consent is valid and binding as if she had achieved her majority.

(3) Nothing in this act shall affect the provisions of s. 390.001 [the abortion statute].

Under this statute, a minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child—no matter how dire the possible consequences—except abortion. Under *In re Guardianship of Barry*, 445 So.2d 365 (Fla. 2d DCA 1984) (parents permitted to authorize removal of life support system from infant in permanent coma), this could include authority in certain circumstances to order life support discontinued for a comatose child. In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned. We fail to see the qualitative difference in terms of impact on the well-being of the minor between allowing the life of an existing child to come to an end and terminating a pregnancy, or between undergoing a highly dangerous medical procedure on oneself and undergoing a far less dangerous procedure to end one’s pregnancy. If any qualitative difference exists, it certainly is insufficient in terms of state interest. Although the state does have an interest in protecting minors, “the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions.” *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129, 1139 (Fla. 1989). We note that the state’s adoption act similarly contains no requirement that a minor obtain parental consent prior to placing a child up for adoption, even though this decision clearly is fraught with intense emotional and societal consequences. See ch. 63, Fla.Stat. (1987).

The parental consent statute also fails the second prong of the *Winfield* standard, i.e., it is not the least intrusive means of furthering the state interest.

\* \* \* \* \*

GRIMES, Justice, concurring in part, dissenting in part.

The United States Constitution does not explicitly refer to the right of privacy. However, in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court construed the due process clause of the fourteenth amendment to provide a right of privacy with respect to a woman’s decision to have an abortion. In several subsequent decisions, the United States Supreme Court has delineated the extent to which the state may qualify or otherwise burden a woman’s right to have an abortion.

In 1980, the Florida Constitution was amended to specifically guarantee persons the right to privacy. As a consequence, it was thereafter unnecessary to read a right of privacy into the due process provision of Florida’s equivalent to the fourteenth amendment. However, this did not mean that Florida voters had elected to create more privacy rights concerning abortion than those already guaranteed by the United States Supreme Court. By 1980, abortion rights were well established under the federal Constitution, and I believe the privacy amendment had the practical effect of guaranteeing these same rights under the Florida Constitution. If the United States Supreme Court were to subsequently recede from *Roe v. Wade*, this would not diminish the abortion rights now provided by the privacy amendment of the Florida Constitution. Consequently, I agree with the analysis contained in parts I and II of the majority opinion, which I read as adopting, for purposes of the Florida Constitution, the qualified right to have an abortion established in *Roe v. Wade*.

In part III, however, the majority opinion interprets the Florida Constitution differently than the United States Supreme Court has interpreted the federal Constitution with respect to a minor’s right to an abortion. Recognizing that the constitutional rights of children may not be equated with those of adults, the United States Supreme Court in *Bellotti v. Baird*, 443 U.S. 622, 633-34, 99 S.Ct. 3035, 3042-43, 61 L.Ed.2d 797 (1979), said:

The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: “[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.” *May v. Anderson*, 345 U.S. 528, 536, 73 S.Ct. 840, 844-97

L.Ed. 1221 (1953) (concurring opinion). The unique role in our society of the family, the institution by which “we inculcate and pass down many of our most cherished values, moral and cultural.” *Moore v. East Cleveland*, 431 U.S. 494, 503-504, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Referring to the need for parental guidance upon the decisions of minors, the Court went on to say:

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can “properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.” *Ginsberg v. New York*, 390 U.S. [629], at 639, 88 S.Ct. [1274], at 1280 [20 L.Ed.2d 195 (1968)].

*Id.* 443 U.S. at 638-39, 99 S.Ct. at 3045-46 (footnotes omitted). In *H.L. v. Matheson*, 450 U.S. 398, 411, 101 S.Ct. 1164, 1172, 67 L.Ed.2d 388 (1981), the Court acknowledged the impact of abortion on a minor when it said that:

The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.

Thus, the United States Supreme Court has consistently recognized that a state statute requiring parental consent to a minor’s abortion is constitutional if it provides a judicial alternative in which the consent is &-viated if the court finds that the minor is mature enough to make the abortion decision or, in the absence of the requisite maturity, the abortion is in the minor’s best interest. *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); *Bellotti*.

While purporting to acknowledge the state’s interest in protecting minors and in preserving family unity, the majority reaches the conclusion that these interests as reflected in the instant statute must fall in the face of its broad interpretation of the privacy amendment. In effect, the Court has said that the state’s interest in regulating abortions is no different with respect to minors than it is with adults. Under this ruling, even immature minors may decide to have an abortion without parental consent. I do not agree with either the majority’s broad interpretation of the privacy amendment or its limited view of the state’s interest concerning the conduct of minors.

## Tucker v. Toia Page 166, Discussion Notes:

### Discussion Notes:

3. The New York Constitutional provision applied in *Tucker* is what Professor Burt Neuborne has recently referred to as a “positive” as opposed to “negative” right. See Burt Neuborne, “Foreword: State Constitutions and the Evolution of Positive Rights,” *Rutgers Law Journal* 20 (Summer 1989): 881. See also Peter Galie, “Social Services and Egalitarian Activism,” in *Human Rights in the States* (Stanley Friedelbaum, ed., 1988).

4. See also Article XI, Sec. 4 of the North Carolina Constitution, which provides “Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore, the General Assembly shall provide for and define the duties of a board of public welfare.” This provision, dating from 1868, is discussed in Dennis R. Ayers, “The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent,” *Wake Forest Law Review* 20 (Summer 1984): 330-34. See also *Board of Managers v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953); Michael A. Dowell, “State and Local Governmental Legal Responsibility to Provide Medical Care for the Poor,” *Journal of Law and Health* 3 (1988-89): 6-7 (“Fifteen states have constitutional provisions which authorize or mandate the provision of medical care for the poor.”).

## Butte Community Union v. Lewis 712 P.2d 1309 (Mont. 1986)

MORRISON, Justice.

The District Court of the First Judicial District issued a preliminary injunction enjoining Dave Lewis,

Director of Montana's Department of Social and Rehabilitation Services (SRS), from implementing certain provisions of House Bill 843 (Chapter No. 670, 1985 Mont. Laws). Lewis appeals. We affirm the issuance of the preliminary injunction and issue a permanent injunction for the same purpose.

In response to a complaint filed by Butte Community Union in February of 1984, the Honorable Arnold Olsen issued a preliminary injunction June 29, 1984, prohibiting the Department of Social and Rehabilitation Services (SRS) from implementing proposed regulations establishing AFDC guidelines as the guidelines for determining general assistance (GA) benefits. Thereafter, the 1985 Montana Legislature enacted House Bill 843 establishing cash payment levels for GA recipients in accordance with Judge Olsen's order. House Bill 843 also eliminates GA payments to able-bodied individuals under thirty-five who have no minor dependent children and substantially restricts GA payments to able-bodied individuals between thirty-five and fifty who have no minor dependent children.

On June 3, 1985, Butte Community Union (respondents) filed an amended complaint challenging the constitutionality of HB 843 and requesting the court to issue a preliminary injunction forbidding SRS from implementing that part of HB 843 which restricts or denies GA benefits to able-bodied individuals with no minor children. Following a hearing and briefing by the parties, the trial court issued a preliminary injunction on July 1, 1985, the date HB 843 was to go into effect.

In its findings, conclusions and order, the trial judge held that Art. XII, section 3(3) of the Montana Constitution establishes a fundamental right to welfare "for those who, by reason of age, infirmities, or misfortune may have need for the aid of society." That section states:

(3) The legislatures shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reasons of age, infirmities, or misfortune may have need for the aid of society.

He further held that respondents (plaintiffs below) raised serious questions concerning whether HB 843 establishes an impermissible, discriminatory constitutional classification, thus violating the respondents' constitutional guarantee of equal protection. Finally, he held that a preliminary injunction should issue because respondents established a *prima facie* case that HB 843 is unconstitutional and because they showed that it is "doubtful whether or not they will suffer irreparable injury before their rights are fully litigated."

The preliminary injunction was issued and SRS appeals, raising the following general issue:

Whether the defendant, Dave Lewis, as a public official, should be enjoined from implementing those provisions of HB 843 which restrict or deny general

assistance benefits to able-bodied persons under the age of fifty who do not have minor dependent children?

The following sub-issues are assigned for review:

1. Whether the District Court used an incorrect standard for issuing the preliminary injunction?

2. Whether HB 843 violates art. XII, section 3(3), of the Montana Constitution?

3. Whether HB 843 violates equal protection or due process constitutional guarantees?

4. Whether HB 843 violates the Montana Human Rights Act?

We hold that Dave Lewis, as a public official, should be permanently enjoined from implementing the pertinent provisions of HB 843. However, our reasons for this injunction differ markedly from those of the trial judge. We find that the Montana Constitution does not establish a fundamental right to welfare for the aged, infirm or misfortunate. However, because the constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution, we hold that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis and that HB 843 must fall under such scrutiny.

Respondent contends that the result of this legislation is forbidden by the Constitution. Respondent argues the Legislature must fund welfare for the misfortunate. However, because the legislation at issue today is discriminatory in nature, determining its constitutionality calls for equal protection analysis. It is not necessary that we address the broader question of whether there is a constitutional directive to the Legislature for the funding of welfare which can not be avoided under any set of circumstances.

The fourteenth amendment to the Federal Constitution and article 11, section 4 of the Montana Constitution provide that "[n]o person shall be denied the equal protection of the laws." The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. J. Nowak, R. Rotunda and J.N. Young, *Constitutional Law*, Chpt. 16, sec. 1 (2d ed. 1983).

Equal protection analysis traditionally centers on a two-tier system of review. If a fundamental right is infringed or a suspect classification established, the government has to show a "compelling state interest" for its action. If the right is other than fundamental, or the classification not suspect, the government has only to show that the infringement or classification is rationally related to a governmental objective which is not prohibited by the Constitution. J. Nowak, *supra*.

In the instant case, the trial judge held the right to welfare to be fundamental. We can not agree. In order to be fundamental, a right must be found within Montana's Declaration of Rights or be a tight "without which other constitutionally guaranteed rights would have little meaning." *In the Matter of C.H.* (Mont. 1984), 683 P.2d 931, 940, 41 St. Rep. 997, 1007. Welfare is neither.

**Art. XII, sec. 3(3)** of the 1972 Montana Constitution, the section on which the trial judge relies, is not part of the Declaration of Rights. Art. 11, sec. 3 is the only section in the Declaration of Rights which arguably could create a right to welfare. It states:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right. . . of pursuing life's basic necessities. . .

Mont. Const., art. 11, sec. 3 (1972). The official committee comment to that provision states:

The intent of the committee on this point is not to create a substantive right for all for the necessities of life to be provided by the public treasury.

There is no constitutional right to welfare within the Montana Constitution's Declaration of Rights. Further, the right to welfare is not a right upon which constitutionally guaranteed rights depend. In fact, welfare is more properly characterized as a benefit. Since welfare is not a fundamental right, strict scrutiny does not apply and the State need show something less than a compelling state interest in order to limit that right.

\* 4 4 \* \*

We proceed to develop our own middle-tier test for determining whether HB 843 violates the Montana Constitution. We do so because although a right to welfare is not contained in our Declaration of Rights, it is sufficiently important that art. XII, sec. 3(3) directs the Legislature to provide necessary assistance to the misfortunate. A benefit lodged in our State Constitution is an interest whose abridgement requires something more than a rational relationship to a government objective.

A need exists to develop a meaningful middle-tier analysis. Equal protection of law is an essential underpinning of this free society. The old rational basis test allows government to discriminate among classes of people for the most whimsical reasons. Welfare benefits grounded in the Constitution itself are deserving of great protection.

\* \* \* \*

SHEEHY, Justice, specially concurring:

In addition to my concurrence with the majority opinion, I wish to state some observations.

For the purposes of this case, I am willing to concede that a fundamental right to welfare for the individuals affected does not exist. There is however a constitutionally-mandated duty upon the legislature to provide economic assistance "as may be necessary" for the misfortunate who need the aid of society. **Art. XII sec. 3(3)**. When that duty is shirked by the legislature, upon whatever pretense, the class discriminated against has at least a constitutional right for redress in the courts. I am unable to distinguish the fine line

between "fundamental right" for the discriminated class and the constitutional right for redress.

I do not wish to be bound by the statement in the majority opinion that fundamental rights under the Montana Constitution must be found within the Declaration of Rights, Art. 11. The Article holds itself open to unenumerated rights which may not be denied to the people. **Art. II, sec. 34**.

**Page 168, Discussion Notes:**

Discussion Notes:  
3. See also Suzanna Sherry, "The Early Virginia Tradition of Extra-Textual Interpretation," *Albany Law Review* 53 (Winter, 1989): 297.

**Page 177, at end of page:**

4. Waiver of State Constitutional Rights

**Woodruff v. Bd. of Trustees of Cabell Huntington Hospital**  
**319 S.E.2d 372 (W.Va. 1984)**

\* \* 4 4 \*

Because the collective bargaining agreement in question contains a provision prohibiting picketing and patrolling by hospital union members. the issue of waiver of free speech rights is raised. First, waiver of free speech, assembly, association, and petition rights under the West Virginia Constitution will be addressed. Second, waiver of first amendment rights under the federal constitution will be examined.

Article III, sec. 1 of the West Virginia Constitution provides that:

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

These inherent rights, of which members of society may not by contract divest themselves, include the freedoms of speech and press under article III, sec. 7 of the West Virginia Constitution, and the rights to assemble, associate, and petition under article III, sec. 16 of the West Virginia Constitution. No parallel provision to this section of our state constitution appears in the United States Constitution. Therefore, with respect to the waiver of fundamental constitutional rights, our state constitution is more stringent in its limitation on waiver than is the federal constitution. We therefore hold that, under article III, secs. 1,

7, and 16 of the West Virginia Constitution, collective bargaining agreements in the public sector may not contain provisions abrogating employees' fundamental constitutional rights, including rights of expression, assembly, association, and petition. The petitioner employees' activities in the present case were unquestionably exercises of all four of these fundamental constitutional rights. We therefore conclude that the respondents' termination of the petitioner employees violated their fundamental constitutional rights under article 11, secs. 1, 7, and 16 of the West Virginia Constitution.

**Discussion Notes:**

1. See also *Choi v. State*, 316 Md. 529, 560 A.2d 1108 (1989) (state constitutional standard for waiver of privilege against self-incrimination stronger than federal standard).

**Page 188, Discussion Notes:**

**Discussion Notes:**

3. In 1986, Justice Thomas L. Hayes had the following to say about the *Jewett* opinion he authored:

There was some discussion on the court about publishing a law review article advising lawyers to look to the state constitution, but I had the feeling that if we took that course the article would be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school. I believed an article would not get our message across. Ultimately the court agreed that if we were to tell our lawyers: "Look to your Vermont constitution and, when you do, brief it adequately," we could do so only in a judicial opinion.

Thomas L. Hayes, "Clio in the Courtroom," *Vermont History* 56 (Summer 1988): 149.

4. For the views of Vermont's Attorney General on the reemergence of state constitutional law, see Jeffrey Amestoy and Julie Brill, "State Constitutions from the Attorney General's Perspective: *An* Institutional Schizophrenia," *Emerging Issues in State Constitutional Law* 1 (1988): 229; Jeffrey Amestoy, "State Constitutional Law: *An* Attorney General's Perspective," *Vermont Law Review* 13 (1988): 337.

**Page 200, Discussion Notes:**

**Discussion Notes:**

3. In *Thies v. State Board of Elections*, 124 Ill.2d 317, \_\_\_, 529 N.E.2d 565, 568 (1988), the Illinois Supreme Court noted: "This case involves one of the rare instances where resorting to the debates of the convention reveals that the exact question presented for review in this court was asked and answered by the delegates to the convention."

**Page 204, Discussion Notes:**

**Discussion Notes:**

3. Constitutional history is valuable whether or not one subscribes to a jurisprudence of original intent. For those who do, history becomes controlling—important because it does, or should, determine constitutional interpretation. For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen. State constitutional history has become more important as the United States Supreme Court has become less protective of individual rights.

Stephen E. Gottlieb, "Foreword: Symposium on State Constitutional History: In Search of a Usable Past," *Albany Law Review* 53 (Winter 1989): 258. See also, Pierre Schlag, "Framers Intent: The Illegitimate Uses of History," *University of Puget Sound Law Review* 8 (Winter 1985): 283.

4. We cannot assume, as a matter of *a priori* truth, that there is a unitary tradition of constitutional law across the several states or even within a single one. The existence of a meaningful tradition is an assertion to be proven rather than a premise to be assumed. This is a point of more than "mere" methodological significance. One of the most common sources of misunderstanding and anachronism in constitutional history stems from the desire to identify a common set of ideas and arguments shared by groups labeled "the founders," "framers," "traditional"

constitutional lawyers,” or similar appellations. This desire easily leads one to find more agreement and intelligibility in the **past** than **was** in fact there. We must take seriously the possibilities of radical disagreement among judges interpreting a state constitution **as well as** of internal contradictions within the thinking of particular individuals.

H. Jefferson Powell, “The Uses of State Constitutional History: A Case Note,” *Albany Law Review* 53 (Winter, 1989): 283-84.

## Page 210, Discussion Notes:

### Discussion Notes:

3. In connection with the question of whether a state constitutional provision is self-executing, reread *Figueroa v. State*, pp. 171-72.

## Robert F. Williams, “State Constitutional Limits on Legislative Procedure . . .”

### Page 217, Discussion Notes:

### Discussion Notes:

4. See also Barbara Kritchevsky, “Justiciability in Tennessee, Part One: Principles and Limits,” *Memphis State University Law Review* 15 (Fall 1984): 1; “Justiciability in Tennessee, Part Two: Standing,” *Memphis State University Law Review* 15 (Winter 1985): 179; “Justiciability in Tennessee, Part Three: Timing,” *Memphis State University Law Review* 16 (Winter 1986): 177.

## Ammerman v. Markham

### Page 234, Discussion Notes:

### Discussion Notes:

4. In *Junkins v. Branstad*, 421 N.W.2d 130, 135 (Iowa 1988) the Iowa Supreme Court dealt with a legislative attempt to define in a statute the term “appropriation bill” as it was used in the constitutional item veto provision. The court stated:

Whatever purposes the legislative definition of “appropriation bill” may serve, it does not settle the constitutional question. In this case, determination of the

scope of the governor’s authority granted by Article III, section 16, **as** amended, will require a decision whether the bill involved here was **an** “appropriation bill” as that term is used in our constitution. **This** determination, notwithstanding the legislative definition, is for the courts.

## Page 236, add the following paragraph:

With respect to separation of powers issues under state constitutions, see John V. Orth, “‘Forever Separate and Distinct’: Separation of Powers in North Carolina,” *North Carolina Law Review* 62 (Oct. 1983): 1; Comment, “Treatment of the Separation of Powers Doctrine in Kansas,” *University of Kansas Law Review* 29 (1981): 243.

## Page 265, at the end of the first full paragraph, right column:

See also H. Jefferson Powell, “The Uses of State Constitutional History: A Case Note,” *Albany Law Review* 53 (Winter 1989): 283.

## Page 281, at end of Discussion Note 1:

### Discussion Notes:

See also Jeffrey A. Parness and Bruce Elliott Keller, “Increased and Accessible Illinois Judicial Rulemaking,” *Northern Illinois University Law Review* 8 (Summer 1988): 817.

## American Trial Lawyers Association v. New Jersey Supreme Court

### Page 284, Discussion Notes:

### Discussion Notes:

3. See also Thomas M. Alpert, “The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis,” *Buffalo Law Review* 32 (Spring 1983): 525.

## Commonwealth v. Pennsylvania Labor Relations Board

### Page 289, Discussion Notes:

### Discussion Notes:

3. For a view contrary to Pennsylvania’s, see *Chief Administrative Justice v. Labor Relations Commission*, 404 Mass. 533 N.E.2d 1313 (1989).

Page 292, following Discussion Notes:

### G. Certified Questions

Certified questions, where federal courts ask state supreme courts to **clarify** questions of state law, also involve the exercise of state judicial power. See Larry M. Roth, "Certified Questions from the Federal Courts: Review and Re-proposal," *University of Miami Law Review* 34 (Nov. 1979): 1.

### Lehman Brothers v. Schein 416 U.S.386 (1974)

Mister Justice Douglas delivered the opinion of the Court.

\* \* \* \* \*

The Court of Appeals by a divided vote reversed the District Court. 478 F.2d 817 (CA2 1973). While the Court of Appeals held that Florida law was controlling, it found none that was decisive. So it then turned to the law of other jurisdictions, particularly that of New York, to see if Florida "would probably" interpret *Diamond* to make it applicable here.

\* \* \* \* \*

The dissenter on the Court of Appeals urged that that court certify the state-law question to the Florida Supreme Court as is provided in Fla. Stat. Ann. sec. 25.031 and its Appellate Rule 4.61. 478 F.2d. at 828. That path is open to this Court and to any court of appeals of the United States. We have, indeed, used it before as have courts of appeals.

Moreover when state law does not make the certification procedure available,<sup>7</sup> a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S.593 (1968). Numerous applications of that practice are reviewed in *Meredith v. WinterHaven*, 320 U.S. 228 (1943), which teaches that the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the

<sup>7</sup> Certification procedures are available in several States, including Colorado, Colo. Appellate Rule 21.1 (1970); Hawaii, Haw. Rev. Stat. sec. 602 36 (1969); Louisiana, La. Rev. Stat. Ann. sec. 13:72.1 (Supp. 1973); Maine, Me. Rev. Stat. Ann., Tit. 4, sec. 57 (1964); Maryland, Md. Ann. Code, Art. 26, sec. 161 (Supp. 1973); Massachusetts, Mass. Sup. Jud. Ct. Rule 3:21 (1973); Montana, Mont. Sup. Ct. Rule 1 (1973); New Hampshire, N.H. Rev. Stat. Ann. sec. 490 App. R. 20 (Supp. 1973); and Washington, Wash. Rev. Code Ann. secs. 2.60.010 2.60.030 (Supp. 1972).

certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial **federalism**.<sup>8</sup> Its use in a given case rests in the sound discretion of the federal court.

### State, ex rel., Kleczka v. Conta Page 311, Discussion Notes:

Discussion Notes:

6. In 1988 the Wisconsin Supreme Court upheld the governor's veto of phrases, digits, letters and word fragments so as to create new numbers, words and sentences in the general appropriation bill. *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis.2d 429, 424 N.W.2d 385 (1988). In 1990 the people of Wisconsin adopted an amendment to the item veto provision, Article V, Section 10(1) (c):

(c) In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill.

This is a very rare *reduction* in gubernatorial power by constitutional amendment.

See generally Richard Briffault, "The Item Veto: A Problem in State Separation of Powers," *Emerging Issues in State Constitutional Law* 2 (1989): 85.

### Florida Department of Natural Resources v. Florida Game and Fresh Water Fish Commission Page 314, Discussion Notes:

Discussion Notes:

6. For a discussion of Arizona's constitutionally created Corporation Commission, see Comment, "The Corporation Commission: Preserving Its Independence," *Arizona State Law Journal* 20 (Spring 1988): 241.

<sup>8</sup> See Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967); Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Note, *Inter Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344 (1963); Note, *Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 U. Fla. L. Rev. 21 (1969).

**Benderson Development Co., Inc. v. Sciortino**  
**372 S.E.2d 751 (Va. 1988)**

Russell, Justice.

This appeal challenges Virginia’s Sunday-closing laws. The challenge is based upon the prohibitions against “special laws” contained in the Constitution of Virginia. Eight corporations doing business in Virginia Beach (six retail merchants and two real estate development companies operating shopping centers) (the plaintiffs), filed a motion for declaratory judgment in the circuit court. They alleged that they are compelled to close their retail stores in the City of Virginia Beach every Sunday due to the Sunday-closing laws, with which they comply. **At the same time**, they say, a number of their competitors selling identical products are exempt from the operation of those laws and therefore do business in Virginia Beach on Sundays, to the plaintiffs’ great competitive disadvantage.

Although they raise additional federal constitutional questions, the plaintiffs’ primary contention is that the Sunday-closing laws, as applied to them, constitute special legislation violating Article IV, sections 14 and 15, of the Constitution of Virginia.

\* \* \* \* \*

Virginia has had a Sunday observance law since at least 1610, *Mandell v. Haddon*, 202 Va. 979, 988, 121 S.E.2d 516, 523 (1961), and during the Colonial period, probably was subject to English Sunday laws dating from the thirteenth century. *Bonnie BeLo v. Commonwealth*, 217 Va. 84, 85, 225 S.E.2d 395, 3% (1976). During the Colonial period, these laws had a religious purpose, requiring every man and woman to “repair in the morning to the divine service.” *Mandell*, 202 Va. at 988, 121 S.E.2d at 523 (citation omitted). During the Revolutionary War, in 1779, a Sunday-closing law was substituted which had an entirely secular purpose. It simply prohibited all Sunday labor or business except for “work of necessity or charity.” 12 Hen. Stat. 336, 337 (1779). The purpose of the law was merely to provide a common day of rest “to prevent the physical and moral debasement which comes from uninterrupted labor.” *Mandell*, 202 Va. at 988, 121 S.E.2d at 524 (citations omitted).

The 1779 law survived with only minimal change until 1960. Code of 1950, sec. 18-329 (repealed, *Acts* 1960, c. 358). While it was in force, the courts were confronted with numerous questions requiring interpretation of the phrase “works of necessity or charity.”

In 1960, the General Assembly substantially revised the former law. The 1960 version continued a

general prohibition against Sunday “work, labor, or business . . . except in household or other work of necessity or charity.” A list of some 30 items, the sale of which was expressly deemed *not* to be a work of necessity or charity, was appended, thus proscribing Sunday sales of those items. The statute also included specific exemptions for certain items expressly deemed to be works of necessity, such as the operation of furnaces and plants, the sale of newspapers and motor fuels, and the operation of recreational facilities.

In *Mandell v. Haddon*, we upheld the 1960 law against constitutional challenges which invoked both the special legislation prohibition of the Virginia Constitution and the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution. In *Mandell*, we reviewed the principles governing our review of a statute attacked as special legislation. We noted that the constitutional provisions against special legislation do not prohibit legislative classification, but do require that classifications be “natural and reasonable, and appropriate to the occasion.” 202 Va. at 989, 121 S.E.2d at 524. When a statute is challenged under the special legislation prohibition, we must determine whether the act makes an “arbitrary separation,” and for this we must look to the purpose of the act, as well as the circumstances and conditions existing at the time of its passage. *Id.* There is a strong presumption in favor of the reasonableness of legislative classifications, and if any state of facts can be reasonably conceived which would support them, the existence of that state of facts at the time of passage must be assumed. *Id.*

Reviewing the 1960 law under the foregoing principles, we upheld it because we found that its classifications bore a “reasonable and substantial relationship to the object sought to be accomplished by the legislation.” Specifically, we observed that the act “affects all persons similarly situated or engaged in the same business throughout the State without discrimination.” *Id.* at 991, 121 S.E.2d at 525. **Although** the act contained exceptions, we observed that the exceptions related to “works of necessity under the modern day conception of things.” Significantly, we noted that the prohibition on the sale of specified items was sufficiently comprehensive “to close a great majority of stores” throughout the Commonwealth. *Id.* at 990, 121 S.E.2d at 525. Thus, the statutory scheme **was** reasonably related to the attainment of the legislative goal: providing the people of Virginia a common day of rest.

In 1974, the General Assembly completely rewrote the Sunday-closing law. The 1974 law, which has been frequently amended, forms the basis of present Code sec. 18.2-341. It contains a general prohibition against Sunday labor but grants blanket exemptions to all transactions conducted by over 60 “industries or businesses” now grouped in 22 categories.

ries of exemptions. In addition to exemptions of the basic industries of agriculture, mining, and manufacturing, exemptions also cover retail stores which may engage in the sale of every conceivable kind of merchandise. The General Assembly has, on numerous occasions, added additional, and frequently broader, exemptions to those contained in the original 1974 enactment. One of these, covering “festival market places,” permits a local governing body to designate, on a case-by-case basis, any privately-owned shopping center as exempt from the Sunday-closing law if it is the site of a public “gathering” and more than 50% of its sales area “is used for otherwise exempt activities.” If the property is publicly-owned, even though leased for commercial use, the 50% requirement does not apply.

In 1974, the legislature enacted Code sec. 15.1-29.5, which permitted cities and counties, upon a favorable referendum vote, to remove themselves entirely from the operation of the Sunday-closing law. By employing this local option provision, the counties of Albemarle, Arlington, Buchanan, Chesterfield, Culpeper, Fairfax, Fauquier, Frederick, Gloucester, Grayson, Henrico, James City, King George, Loudoun, Mecklenburg, Orange, Page, Prince George, Prince William, Pulaski, Smyth, Spotsylvania, Stafford, Tazewell, Warren, and York, as well as the cities of Alexandria, Bristol, Charlottesville, Falls Church, Fredericksburg, Hopewell, Petersburg, Radford, Richmond, Waynesboro, Williamsburg, and Winchester, have chosen to remove themselves from the operation of the Sunday-closing law.

According to the undisputed facts, approximately 50% of all employed persons in Virginia work in counties and cities in which the Sunday laws are not in force. Nearly 57% of all employed persons in Virginia work in statutorily exempt businesses and industries. The parties agree that approximately 80% of Virginia workers are exempt from the operation of the law for one reason or the other.

Further, the General Assembly, as a part of the 1974 revision of the Sunday laws, enacted Code Secs. 40.1-28.1 through 40.1-28.5. These provisions require employers to allow each nonmanagerial employee at least 24 consecutive hours of rest in each week. Sec. 40.1-28.1. Such employees may choose Sunday as a day of rest as a matter of right, Sec. 40.1-28.2, and sabbatarians may choose Saturday, Sec. 40.1-28.3.

Code Sec. 40.1-28.5, however, provides that the foregoing laws “shall not apply to persons engaged in any of the industries or businesses enumerated in Sec. 18.2-341(a)(1) through (19), except (15) [‘sale of food, ice and beverages’].” Thus, employees in any of the other 60 or more businesses and industries exempted by the referenced subsections may be denied a day of rest by their employers.

We were first called upon to construe the 1974 statutory scheme in *Bonnie BeLo v. Commonwealth*,

217 Va. 84, 225 S.E.2d 395 (1976). There, the owners of two food stores were prosecuted for misdemeanors under the Sunday-closing laws because of the purchases, by law enforcement officers, of paper plates and cups from one store and a paperback novel from the other. The store owners challenged the constitutionality of the law on several grounds but, applying familiar principles, we did not reach the constitutional questions because of the construction we placed upon the statute.

Noting that businesses engaged in the “sale of food” were exempt from the Sunday-closing law entirely, we held that a food store was permitted, incidental to the operation of its business on Sunday, “to sell such non-food items as are sold in the ordinary and normal course of [its] business.” Id. at 87, 225 S.E.2d at 398. We noted that while the older Sunday laws had exempted specified commodities, the purpose of the 1974 law was to regulate “industries and businesses” rather than commodities. Thus, the food stores, being in an exempt category, might sell whatever merchandise constituted their normal stock in trade. Accordingly, they had not violated the Sunday-closing law. Id.

The construction we gave to the Sunday law in *Bonnie BeLo* was the natural and inevitable result of the manifest purpose and clear language of the statute. Nevertheless, the plaintiffs contend that the consequences have been far-reaching, and adverse to them. They point out that any retail store which can successfully contend that it fits into one of the exempt categories may sell on Sunday any merchandise it wishes, including the same items the plaintiffs are forbidden to sell on Sunday. Thus, they say, the present law, unlike its predecessors, draws distinctions between merchants based on the character of the seller, rather than the nature of the items sold. They argue that the present law permits virtually any commodity to be sold on Sunday, but designates those merchants who may sell them and those who may not.

The plaintiffs further complain that the many exemptions contained in the law make it impossible to enforce fairly. The defendant commonwealth’s attorney admits in his pleadings that he enforces the Sunday-closing law only when called upon to do so by “private complaint.” Plaintiffs contend that this state of affairs results in the law being used as a weapon by those who are privileged to do business on Sunday, to prevent would-be competitors from opening on Sunday.

We upheld the 1974 Sunday-closing law against a constitutional challenge based upon the Equal Protection clause of the Fourteenth Amendment to the Federal constitution in *Malibu Auto Parts v. Commonwealth*, 218 Va. 467, 237 S.E.2d 782 (1977). There, citing similar holdings by the Supreme Court of the United States in *McGowan v. Maryland*, 366 U.S. 420,

81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Maryland’s Sunday-closing law not violation of Equal Protection clause), and *Gallagher v. Crown Kosher Market*, 366 U.S.617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961) (Massachusetts’ Sunday-closing law not violation of Equal Protection clause), we noted that the statute applies, within the areas subject to it, “to all who are similarly situated or engaged in the same kind of business.” *Malibu Auto Parts*, 218 Va. at 471, 237 S.E.2d at 785 (quoting *Mandell*, 202 Va. at 922, 121 S.E.2d at 526). With regard to the lack of uniformity of application or enforcement of the law in different jurisdictions, we relied on the holding in *McGowan* that “territorial uniformity is not a constitutional prerequisite.” *Malibu Auto Parts*, 218 Va. at 471, 237 S.E.2d at 785 (quoting *McGowan*, 366 U.S. at 427).

Although the plaintiffs here argue that the Sunday-closing law, as applied to them, denies them the “equal protection of the law,” we adhere to our decision in *Malibu Auto Parts* and hold that the statutory scheme successfully withstands scrutiny under equal-protection analysis.

*Amici curiae*, on brief, argue that the foregoing holding should end our inquiry because this Court, in some of its earlier decisions, has sometimes analyzed statutes under both the special-laws prohibitions of the Virginia Constitution and the Equal Protection clause of the Federal Constitution as though the two were substantially the same. *See, e.g., Standard Drug v. General Electric*, 202 Va. 367, 117 S.E.2d 289 (1960); *Public Finance Corp. v. Londeree*, 200 Va. 607, 106 S.E.2d 760 (1959); *Avery v. Beale*, 195 Va. 690, 80 S.E.2d 584 (1954).

It is true that for a long period of our history, the Equal Protection clause was interpreted by both federal and state courts in language that bore marked similarities to the analysis we made of statutes under the special-laws prohibition contained in the Virginia Constitution. But the two are not the same. The Fourteenth Amendment to the Federal Constitution, of which the Equal Protection clause is a part, was declared ratified in 1868, during the period of Reconstruction. Its purpose was the prevention of racial discrimination by state legislatures. Although it was, in later years, extended to apply to other kinds of state legislation, the Supreme Court of the United States has, based upon considerations of federalism, been markedly deferential to state laws which make economic classifications, when those laws have been challenged on Equal Protection grounds. . . . *McGowan v. Maryland*, for instance, held that Maryland’s Sunday-closing law would offend the Equal Protection clause “only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.” 366 U.S. at 425, 81 S.Ct. at 1105 (emphasis added). On the other hand, federal equal-protection analysis as applied to “suspect classifications,” has

become far more stringent than analysis of economic legislation. *See, e.g., Paltmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed. 421 (1984); *Rogers v. Lodge*, 458 U.S.613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

By contrast, the special-laws prohibitions contained in the Virginia Constitution are aimed squarely at economic favoritism, and have been so since their inception. Article IV, Sec. 14, of the Virginia Constitution, provides, in pertinent part:

“The General Assembly shall not enact any local, special, or private law in the following cases:

...

(12) Regulating labor, trade, mining, or manufacturing. . . .

(18) Granting to any private corporation . . . any special . . . right, privilege or immunity.”

Article IV, Sec. 15, Va. Const., provides, in pertinent part:

In all cases enumerated in the preceding section, . . . the General Assembly shall enact general laws. Any general law shall be subject to ‘amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of enactment of, a special, private, or local law.

....

No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law’s operation be suspended for the benefit of any private corporation, association, or individual.

The foregoing provisions were first adopted as part of Secs. 63 and 64 of the Constitution of 1902. They were carried forward into the present Constitution with no substantial change. Their purpose was to correct the perception that the General Assembly, in the nineteenth century, devoted an excessive amount of its time to the furtherance of private interests, *see I A. Howard, Commentaries on the Constitution of Virginia*, 536-37 (1974), and to counter the “sway that moneyed interests were seen to hold over state legislatures at the turn of the century.” *Id.* at 543 (relating specifically to Va. Const. art. IV, Sec. 14 (12), quoted above). “Taken together, the pervading philosophy of Article IV, sections 14 and 15 reflects an effort to avoid favoritism, discrimination, and inequalities in the application of the laws.” *Id.* at 549. *See also Martin’s Ex’rs. v. Commonwealth*, 126 Va. 603, 611-12, 102 S.E. 77, 81 (1920); *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 722-75 S.E. 309, 311 (1912).

As noted above, under the Equal Protection clause, both state and federal courts will uphold state laws which make economic classifications “unless the

classification rest on grounds *wholly* irrelevant to the achievement of the State's objective,' " *McGowan*, 366 U.S. at 425, 81 S.Ct. at 1105, or unless the law "is so unrelated to the achievement of a legitimate purpose that it appears irrational," *Ballard v. Commonwealth*, 228 Va. 213, 217, 321 S.E.2d 284, 286 (1984), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1848, 85 L.Ed.2d 146 (1985). On the other hand, the test for statutes challenged under the special-laws prohibitions in the Virginia Constitution is that they must bear "a reasonable and substantial relation to the object sought to be accomplished by the legislation." *Mandell*, 202 Va. at 991, 121 S.E.2d at 525.

Although all legislative enactments are entitled to a presumption of constitutionality, we have not hesitated to invalidate laws found, upon careful consideration, to violate the prohibitions against special laws. . . .

Accordingly, we do not think that the equal-protection analysis which we made of the Sunday-closing law in *Malibu Auto Parts* is dispositive of the present case. Because of the deference due to acts of the General Assembly, we do not seek out constitutional challenges to statutes and decide them *sua sponte*. See *MacLellan v. Throckmorton*, 235 Va. 341, 345, 367 S.E.2d 720, 722 (1988). We will consider such challenges only when they have been properly raised and preserved in the court below, appropriately assigned as error, and briefed and argued on appeal. *Id.* The present case requires us to analyze the Sunday-closing law, in light of the constitutional prohibitions against special laws, for the first time.

In proceeding to a special-laws analysis of the Sunday-closing statutory scheme as it is now applied, we return to the tests by which we analyzed its statutory predecessor in *Mandell v. Haddon*. According to the law the presumption of constitutionality to which it is entitled, we first inquire whether it "affects all persons similarly situated or engaged in the same business throughout the State without discrimination," *Mandell*, 202 Va. at 991, 121 S.E.2d at 525. The answer is obviously no. The law affects only those businesses, in those localities which remain subject to it, which cannot fit themselves within some 60 exemptions. Do the exempt categories confine themselves to "works of necessity under the modern day conception of things"? *Id.* at 990, 121 S.E.2d at 525. An inspection of the statutory exemptions makes plain that their aim was far broader. Is its scope sufficient to "close a great majority of stores" throughout the Commonwealth? *Id.* Its present scope is sufficient to close only a small minority of stores in Virginia. Merchandise of every kind can be purchased in every county and city on Sunday.

Finally and crucially, we must inquire: does the statutory scheme, as applied, bear "a reasonable and substantial relationship to the object sought to be accomplished by the legislation"? *Id.* at 991, 121

S.E.2d at 525. That object is the same as the object of all Sunday-closing laws since 1779: to provide the people of Virginia a common day of rest "to prevent the physical and moral debasement which comes from uninterrupted labor." *Id.* at 988, 121 S.E.2d at 524. Plainly, the answer is no. The statute covers only about 20% of the employed persons in the Commonwealth. Further, in those jurisdictions currently covered by the law, employers engaged in the approximately 60 businesses or industries exempted by the act's provisions may deny their employees a weekly day of rest. Most employees in jurisdictions subject to the Sunday-closing law are exposed to such a requirement, if their employers should see fit to impose it. Ironically, employees in jurisdictions *not* subject to the Sunday-closing law may not be compelled to work on Sunday. We conclude that the present statutory scheme, as presently applied, fails to pass each of the tests we articulated in *Mandell* to distinguish general laws from special laws.

The plaintiffs make no contention that the General Assembly, in enacting the present Sunday-closing laws in 1974, or in repeatedly amending them thereafter, had any intent to practice invidious discrimination against them, or against anyone. The laws appear facially to be reasonably related to the attainment of the legislative goal. Further, a set of facts can be conceived which would reasonably justify each of the exemptions appended to the statute. Indeed, we cannot say that the entire statutory scheme, or any of its component parts considered alone, creates a classification which rests *wholly* on grounds unrelated to the attainment of the legislative goal. This is the principal reason we upheld the law against an equal-protection challenge in *Malibu Auto Parts*, and now reaffirm that holding.

But the plaintiffs do not make a facial attack on the Sunday-closing law. Rather, they argue that it is a special law *as applied*. They contend that a statutory scheme, which began its life as a general law, has become, by application, a special law by attrition: through subsequent piecemeal steps, each proper in itself, which reduced the ambit of the law to a very few businesses. Among these steps, they point to the local-option feature and the fact that over half of the population of the Commonwealth has utilized it to escape the law's effects entirely; to the construction we necessarily gave the law in *Bonnie BeLo*; to the repeated acts of the General Assembly creating additional and broader exemptions culminating in an exemption for nearly any shopping center a local governing body might decide to favor; and finally, to the difficulty of enforcement resulting in prosecutions only on "private complaint." We agree that none of these steps was in itself improper in any respect, but we further agree that their combined effects have reduced the application of a general law to the kind of

special legislation prohibited by Article IV, sections 14 and 15 of the Virginia Constitution.

The framers of Section 64 of the Constitution of 1902 (now art. IV, sec. 15, quoted above) were well aware of the danger that a general law might be converted into a special law by subsequent events, and to that end provided specific protections against such changes, whether accomplished by amendment, partial repeal, exemption, or suspension of a general law “for the benefit of any private corporation, association, or individual.” *Id.* In *Martin’s Ex’s v. Commonwealth*, 126Va. at 612, 102 S.E. at 80, we said: “Though an act be general in form, if it be special in purpose and effect, it violates the spirit of the constitutional prohibition.” (Emphasis added). We also observed: “an arbitrary separation of persons, places, or things of the same general class, so that some of them will and others of them will not be affected by the law, is of the essence of special legislation.” *Id.* at 610, 102 S.E. at 79.

In earlier decisions, we have held unconstitutional laws which were general when first enacted, but were rendered special by subsequent amendment. *County Bd. of Sup’rs v. Am. Trailer Co.*, 193Va. 72, 68 S.E.2d 115 (1951); *Quesinberry v. Hull*, 159Va. 270, 165 S.E. 382 (1932). As demonstrated by the present case, general laws may be rendered special in their application by a combination of several factors, of which legislative amendment may be but one. Because the power of judicial review is the only protection which exists against legislation which has become unconstitutional as applied, our role is not limited to examining the effect of legislative amendments. When the application of a law is fairly challenged under the Constitution, it is our duty to examine its actual effect upon those subject to it, regardless of the origin of the factors which combine to produce that effect. Having thus examined the Sunday-closing laws as applied to the plaintiffs in this case, we conclude that they are special laws, and are therefore unconstitutional and void.

### **State, ex rel. Barker v. Manchin** Page 343, Discussion Notes:

#### **Discussion Notes:**

6. In 1984, the voters in Iowa added Article III, Sec. 40 to their constitution:

The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly.

Could there be any state or federal constitutional challenge to such a provision?

**Following page 359:**

### **Richard Briffault, “Our Localism: Part I— The Structure of Local Government Law**

**Columbia Law Review  
90 (January 1990): 1**

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#### **INTRODUCTION**

Two themes dominate the jurisprudence of American local government law: the descriptive assertion that American localities lack power and the normative call for greater local autonomy. The positive claim of local legal powerlessness dates back to the middle of the nineteenth century and continues to be affirmed by treatises and commentators as a central element of state-local relations. The argument for local self-determination has a comparably historic pedigree and broad contemporary support. The scholarly proponents of greater local power—what I will call “localism”—make their case in terms of economic efficiency, education for public life and popular political empowerment—a striking harmonization of the otherwise divergent values of the free market, civic republicanism and critical legal studies.

The law of state-local relations, however, is more complex than the dominant account suggests. The insistence on local legal powerlessness reflects a lack of understanding of the scope of local legal authority. Most local governments in this country are far from legally powerless. Many enjoy considerable autonomy over matters of local concern. State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities. State courts, usually characterized as hostile to localities and condemned for failing to vindicate local rights against the states, have repeatedly embraced the concept of strong local government and have affirmed local regulatory power and local control of basic services. Localism as a value is deeply embedded in the American legal and political culture.

Much as the extent of local legal power is usually understated, the virtues of enhancing local autonomy tend to be greatly exaggerated. Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole. Moreover, localism is primarily centered on the affirmation of private values. Localist ideology and local political action tend not to build up public life, but rather contribute to the

pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment.

The flaws in the dominant positive and normative critiques of American local government law are interconnected and proceed from a common methodology. Local governments and their powers are considered in relatively abstract, ideal terms. Legal analysis tends to focus on the formal legal category of local government. As a result, the enormous variety of local governments—their differences in size, wealth and function; the degree to which economic considerations enable them to benefit fully from the legal powers they enjoy; the intense political and economic conflicts among them—is often missed. So, too, the issue of local power is usually conceived of as the abstract question of who wins—state or locality—in a head-to-head conflict. Such an approach commonly fails to consider how infrequently such conflicts actually occur, where the balance of power lies in the absence of conflict and the importance of interlocal, as distinguished from state-local, conflicts. The values of local autonomy are ascribed to a thinly described set of idealized local units, while the policies and programs of actual local governments and the impacts localities have on each other are seldom examined. Localism in practice is significantly different from localism in theory.

This Article presents a study of “Our Localism”<sup>1</sup>—of the legal powers of contemporary American local governments, the practical social and political ramifications of local legal power in a system characterized by wide divergences in local fiscal capabilities and needs and the ideological commitment to localism that sustains and legitimates local autonomy.

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Despite the standard contention that a crabbed judicial interpretation of the “municipal affairs” language in home rule provisions has limited local power to initiate measures, the most comprehensive study of the first decades of home rule found that the courts generally permitted “a fairly wide latitude of action on the part of the city in its so-called capacity as an organization for the satisfaction of local needs,” and that under home rule the courts “extended the concept of the city’s local capacity far beyond its limits”

<sup>1</sup>The reference to “Our Federalism” is intended. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federalism and localism are both a part of the American constitutional order. “Our Localism,” like “Our Federalism,” emphasizes that local autonomy is not simply a question of the structure of intergovernmental relations but also includes the ideology that structure has generated, an ideology which continues to provide support for the devolution of power to local governments.

under Dillon’s Rule.<sup>47</sup> A more recent analysis agrees, finding that “[j]udicially imposed limitations on the initiative power. . . in the absence of conflicting state legislation have been relatively infrequent and of minor importance in undermining local autonomy.”<sup>48</sup> Indeed, the postwar era has witnessed a steady broadening of the discretionary authority of local government. Today, most home rule governments possess broad regulatory and spending powers.

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## Richard Briffault, “Our Localism: Part II— Localism and Legal Theory”

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“City” usually implies “big city” or “central city” or “inner city”—a large center of population and production, commerce, communications and culture, distinguished not simply from the “state” and the countryside, but also from small towns and suburbs. “City,” according to Bernard Frieden, “suggests bustling streets with a mixture of factories, offices, apartments and homes crowded together amidst heavy traffic, noise, dirt and excitement.”<sup>49</sup> Lewis Mumford defined the city “as a complex of inter-related and constantly interacting functions” that large size and density make possible.<sup>12</sup> For Jane Jacobs, similarly, the hallmark of “great American cities” is diversity—of people, functions, land uses and activities.<sup>13</sup>

<sup>47</sup>H. McBain, supra note 16, at 671; see H. McBain, supra note 46, at 30-123 (noting willingness of state courts to sustain municipal power to own and operate public utilities, and to sanction wide discretion to regulate height and bulk of buildings under police power before states authorized zoning).

<sup>48</sup>Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643, 652 (1964).

<sup>49</sup>J. Zimmerman, *State-Local Relations: A Partnership Approach* 160 (1983); see, e.g., *State ex rel. Swart v. Molitor*, 621 p. 2d 1100, 1102 (Mont. 1981) (Montana’s 1972 constitution, by allowing localities to adopt self government charters, “opened to local governmental units new vistas of shared sovereignty with the state”). For an important case in a state whose constitution does not provide for home rule, see *Ingram v. Borough of Fort Lee*, 62 N.J. 521, 536-38, 303 A.2d 298, 306-07 (1973) (sustaining municipal rent control as matter of local power even though state had repealed statute authorizing municipal rent control).

<sup>11</sup>B. Frieden, *Metropolitan America: Challenge to Federalism* 17 (1966).

<sup>12</sup>L. Mumford, *The City in History: Its Origins. Its Transformations, and Its Prospects* 85 (1961).

<sup>13</sup>J. Jacobs, *The Death and Life of Great American Cities* 141-51 (1961).

**As** a social and a political concept, the city is a heterogeneous place, combining residence, work, recreation and cultural life, and mixing people of different racial and ethnic groups, socioeconomic classes and levels of educational and occupational attainment. “City,” in short, signifies a complex microcosm of the state or nation and a socially, economically and culturally dynamic part of the larger polity. Such a “city” seems a fitting place for legal and political autonomy, which is no doubt why many advocates of local autonomy make their case in terms of **cities**.<sup>14</sup>

But once the term “city” is used in the sense of municipal corporation, used, that is, “as a legal concept,” in Frug’s phrase—then many “cities” are neither large nor complex nor heterogeneous. Most cities are small. Half of all municipal corporations have populations of 1,000 or fewer, and three-quarters of all municipalities have 5,000 people or fewer. Nearly one half of urban Americans live in municipalities of fewer than 50,000 people. Many “cities” are primarily residential, composed of homes and politically responsive to homeowner interests; others are primarily industrial or commercial, functioning as centers of employment but with relatively few residents. Many municipal corporations are not demographic microcosms of the state but are instead composed predominantly of people of one race or class.

Simply put, in most metropolitan areas many of the entities the law defines as cities are—in social science parlance and lay understanding—suburbs. More Americans reside in suburbs than in either central cities or rural areas, and sixty percent of the residents of metropolitan areas live in suburbs. In virtually every large metropolitan area, the suburbs outnumber the central city in both population and employment. The suburb, not the city, is the principal form of urban settlement in the United States today.

Cities and suburbs differ from each other politically, economically and socially. Notwithstanding these differences, local government law does not distinguish within the category of municipal corporation between city and suburb, and legal theory generally has not taken the differences between cities and suburbs into account. Law and legal theory both treat most suburbs as cities, and this critically affects any attempt to measure the scope of local power.

Incorporated suburbs usually have the same legal status as central cities. Even those suburbs not accorded the full panoply of big city powers generally enjoy the fundamental elements of local autonomy: the authority to tax property, spend on local services

and regulate land use, and the right to come into governmental existence and protect local autonomy from nonconsensual absorption into another locality. Indeed, local legal powers may be more adequately matched to local economic and social needs in the suburbs than in the cities.

The logic of local legal autonomy assumes local solutions to local problems, with local programs funded by taxes on local property. Many big cities, however, have relatively large social welfare and infrastructure demands. Local political existence, zoning autonomy and taxable property provide neither the regulatory authority nor the revenues necessary to meet these problems. To cope successfully with local needs, these cities must look beyond the city limits to outside public and private actions: intergovernmental aid, additional revenue-raising authority from the state and private investment.

Many big cities are heavily dependent on intergovernmental aid to balance their budgets, pay their employees and satisfy local demands for basic public services. In terms of local political independence, it is an open question whether big cities are better off with intergovernmental aid, which often comes with strings attached, or without it. But there should be no question that the **fiscal** dependency of many big cities means that local legal authority alone is not sufficient to create real local **autonomy**.<sup>29</sup>

By contrast, for affluent or middle-class suburbs, local legal powers are more likely to be sufficient for the satisfaction of local wants. Less burdened by poverty, crime, congestion and physical deterioration than big cities, these localities tend to have lower per capita spending needs, while their tax bases are, per taxpayers, more substantial. In addition, local autonomy insulates suburban tax bases from the fiscal needs of city residents. To the extent that local resources are inadequate and further growth is required, suburbs find it easier than cities to compete for that growth.

Moreover, for many suburbs, particularly the more affluent ones, the principal local regulatory goals often are controlling growth and preserving the status quo. Local legal autonomy significantly empowers them in this quest. These suburbs can retain local revenues and use them to maintain local schools, utilize their land-use authority to prevent unwanted local development and resist merger or absorption into poorer central cities or regional governments. **As** a rule, local legal powers will be more effective in attaining the suburban goals of limiting growth and preserving formal autonomy than in attaining the central cities’ goals of intergovernmental assistance and private investment.

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<sup>14</sup>See, e.g., Frug, *City as Legal Concept*, supra note 6, at 1119, 1120 nn. 267-70. Frug’s citations to Arthur Schlesinger’s *The Rise of the City 1878-1898* (1933) and the work of the Chicago School of urban sociology indicate his association of “city” with “big city.”

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<sup>29</sup>Robert Dahl has observed, “the greatest inroads on the autonomy of the city result from its lack of financial resources.” R. Dahl, supra note 10, at 164.

Cities, as just defined, tend to fare relatively poorly under this system, not because of a lack of legal autonomy, as the argument about city legal powerlessness suggests, but because the scarcity of local resources relative to local needs forces them to turn to external sources for financial support. More generally, the localist values in the system militate against the interests of cities. Legal localism presumes local fiscal self-sufficiency; it provides neither a legal basis for compelling state responsibility to help satisfy local needs when local resources prove inadequate nor a political basis for persuading state legislatures to assume a greater degree of responsibility for local fiscal inadequacy. Furthermore, localism legitimates state inaction, making it more difficult for needy localities to obtain financial support from the state or from more prosperous localities.

Suburbs, by contrast, often do better under this system. The core of local legal autonomy is defensive and preservative, enabling residents of more affluent localities to devote local taxable resources to local ends, exclude unwanted land uses and users and protect the autonomous local political structure that allows them to pursue local policies.<sup>48</sup> These are precisely the goals of more affluent localities. Local autonomy enables these suburbs to protect their resources from the fiscal needs of nearby cities while securing their independence from involvement in the resolution of urban or metropolitan economic or social problems. Suburbs benefit from the localist values of courts and legislatures that discourage modifications of this highly satisfactory status quo and protect them from outside interference.

Moreover, although most discussions of local authority are limited to the legal relationship between states and local governments, this traditional focus on state-local bipolar conflict is too simplistic a model for analyzing local government law. Local government law must deal not just with disputes between states and localities, but also with conflicts among localities.<sup>49</sup> Strengthening local autonomy from the states

<sup>48</sup>Swanstrom notes,

Having a tax base more than ample to meet the service demands of a largely middle class population, many suburban governments practice the politics of exclusion, not the politics of growth. They are more concerned with excluding the poor and minorities, as well as dirty industry, than with attracting new investment and residents. Ironically, it is precisely in those cities where growth is least possible that growth politics. . . has its most tenacious hold. T. Swanstrom, supra note 32, at 26.

<sup>49</sup>As Elazar points out, most smaller localities, "really do not develop a 'city' outlook in the political arena. As a rule, they align themselves with the so-called 'rural' areas (really a misnomer in the demographicsense today) against the 'big city' in urban rural conflict situations." D. Elazar, supra note 20, at 152-53.

does not benefit all localities, but instead benefits those with the greatest local resources or the fewest public service needs, to the detriment of poorer places. Local power thus can lead to city powerlessness.

Greater local autonomy would not substantially advance participation. There already is a great deal of local legal power, and the principal constraint on local power is often not legal but economic: the limits of local resources and the structure of interlocal competition. So, too, mobility and the spread of daily activities across a metropolitan area are far greater impediments to a revitalized sense of local community than any nominal limits on local legal power. As long as the social trends that have eroded the connection between locality and community ties continue unabated, it is difficult to believe that augmenting local governments' already substantial legal powers will have any significant effect on either the sense of community or the extent of political participation at the local level. At the same time, the cost of local legal autonomy, the burden it places on poorer localities and the crippling effect it has on efforts to remedy local economic and social problems, are far greater than participationists acknowledge.

Page 412, after Discussion Notes:

**Edgewood Independent School District v. Kirby**  
**777 S.W. 2d 391 (Tex. 1989)**

MAUZY, Justice.

At issue is the constitutionality of the Texas system for financing the education of public school children. Edgewood Independent School District, sixty-seven other school districts, and numerous individual school children and parents filed suit seeking a declaration that the Texas school financing system violates the Texas Constitution. The trial court rendered judgment to that effect and declared that the system violates the Texas Constitution, article I, section 3, article I, section 19, and article W, section 1. By a 2-1 vote, the court of appeals reversed that judgment and declared the system constitutional. 761 S.W.2d 859 (1988). We reverse the judgment of the court of appeals and, with modification, affirm that of the trial court.

The basic facts of this cause are not in dispute. The only question is whether those facts describe a public school financing system that meets the requirements of the constitution. As summarized and excerpted, the facts are as follows.

<sup>1</sup>By agreement of the parties, the 1985-86 school year was used as the test year for purposes of constitutional review.

There are approximately three million public school children in Texas. The legislature finances the education of these children through a combination of revenues supplied by the state itself and revenues supplied by local school districts which are governmental subdivisions of the state. Of total education costs, the state provides about forty-two percent, school districts provide about fifty percent, and the remainder comes from various other sources including federal funds. School districts derive revenues from local ad valorem property taxes, and the state raises funds from a variety of sources including the sales tax and various severance and excise taxes.

There are glaring disparities in the abilities of the various school districts to raise revenues from property taxes because taxable property wealth varies greatly from district to district. The wealthiest district has over **\$14,000,000** of property wealth per student, while the poorest has approximately **\$20,000**; this disparity reflects a 700 to 1 ratio. The **300,000** students in the lowest-wealth schools have less than **3%** of the state's property wealth to support their education while the **300,000** students in the highest-wealth schools have over **25%** of the state's property wealth; thus the **300,000** students in the wealthiest districts have more than eight times the property value to support their education as the **300,000** students in the poorest districts. The average property wealth in the **100** wealthiest districts is more than twenty times greater than the average property wealth in the **100** poorest districts. Edgewood **I.S.D.** has **\$38,854** in property wealth per student; Alamo Heights **I.S.D.**, in the same county, has **\$570,109** in property wealth per student.

The state had tried for many years to lessen the disparities through various efforts to supplement the poorer districts. Through the Foundation School Program, the state currently attempts to ensure that each district has sufficient funds to provide its students with at least a basic education. See Tex. Educ. Code Sec. **16.002**. Under this program, state aid is distributed to the various districts according to a complex formula such that property-poor districts receive more state aid than do property-rich districts. However, the Foundation School Program does not cover even the cost of meeting the state-mandated **minimum** requirements. Most importantly, there are no Foundation School Program allotments for school facilities or for debt service. The basic allotment and the transportation allotment understate actual costs, and the career ladder salary supplement for teachers is underfunded. For these reasons and more, almost all school districts spend additional local funds. Low-wealth districts use a significantly greater proportion of their local funds to pay the debt service on construction bonds while high-wealth districts are able to use their funds to pay for a wide array of enrichment programs.

Because of the disparities in district property wealth, spending per student varies widely, ranging from **\$2,112** to **\$19,333**. Under the existing system, an average of **\$2,000** more per year is spent on each of the **150,000** students in the wealthiest districts than is spent on the **150,000** students in the poorest districts.

The lower expenditures in the property-poor districts are not the result of lack of tax effort. Generally, the property-rich districts can tax low and spend high while the property-poor districts must tax high merely to spend low. In 1985-86, local tax rates ranged from **\$.09** to **\$1.55** per \$100 valuation. The **100** poorest districts had an average tax rate of 74.5 cents and spent an average of **\$2,978** per student. The **100** wealthiest districts had an average tax rate of 47 cents and spent an average of **\$7,233** per student. In Dallas County, Highland Park **I.S.D.** taxed at 35.16 cents and spent **\$4,836** per student while Wilmer-Hutchins **I.S.D.** taxed at **\$1.05** and spent **\$3,513** per student. In Harris County, Deer Park **I.S.D.** taxed at **64.37** cents and spent **\$4,846** per student while its neighbor North Forest **I.S.D.** taxed at **\$1.05** and yet spent only **\$3,182** per student. A person owning an **\$80,000** home with no homestead exemption would pay **\$1,206** in taxes in the east Texas low-wealth district of Leveretts Chapel, but would pay only **\$59** in the west Texas high-wealth district of Iraan-Sheffield. Many districts have become tax havens. The existing funding system permits "budget balanced districts" which, at minimal tax rates, can still spend above the statewide average; if forced to tax at just average tax rates, these districts would generate additional revenues of more than **\$200,000,000** annually for public education.

Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.

The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student. High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators.

The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offers virtually no **extracurricular** activities such as band, debate, or football. **At** the time of trial, one-third of Texas school districts **did** not even meet the state-mandated standards for maximum class size. The great majority of these are low-wealth districts. In many instances, wealthy and poor districts are found contiguous to one another within the same county.

Based on these facts, the trial court concluded that the school financing system violates the Texas Constitution's equal rights guarantee of article I, section 3, the due course of law guarantee of article I, section 19, and the "efficiency" mandate of article VII, section 1. The court of appeals reversed. We reverse the judgment of the court of appeals and, with modification, affirm the judgment of the trial court.

Article VII, section 1 of the Texas Constitution provides:

**A** general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

The court of appeals declined to address petitioners' challenge under this provision and concluded instead that its interpretation was a "political question." Said the court:

That provision does, of course, require that the school system be "efficient," but the provision provides no guidance as to how this or any other court may arrive at a determination of what is efficient or inefficient. Given the enormous complexity of a school system educating three million children, this Court concludes that which is, or is not, "efficient" is essentially a political question not suitable for judicial review.

**761. S.W.2d at 867.** We disagree. This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly

not precise terms, they do provide a standard by which **this** court must, when called upon to do **so**, measure the constitutionality of the legislature's actions. **See Williams v. Taylor, 83 Tex. 667, 19 S.W. 156 (1892).** We do not undertake this responsibility lightly and we begin with a presumption of constitutionality. **See Tam Public Bldg. Authority v. Mattox, 686 S.W.2d 924, 927 (Tex. 1985).** Nevertheless, what this court said in only its second term, when first summoned to strike down an act of the Republic of Texas Congress, is still true:

[W]e have not been unmindful of the magnitude of the principles involved, and the respect due to the popular branch of the government. . . . Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline. . . . [We] cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it **by** because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [we] must decide it, when it arises in judgment.

Morton v. Gordon, Dallam **396, 397-398 (Tex. 1841).** If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional duty and it is our duty to **say so**.

The Texas Constitution derives its force from the people of **Texas**. **This** is the fundamental law under which the people of this state have consented to be governed. In construing the language of article VII, section 1, we consider "the intent of the people who adopted it." *Director of Dep't of Agriculture and Env't v. Printing Indus. Ass'n, 600 S.W.2d 264, 267 (Tex. 1980)*; see also *Smissen v. State, 71 Tex. 222, 9 S.W. 112, 116 (1888)*. In determining that intent, "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the **evils** intended to be remedied and the good to be accomplished, are proper subjects of inquiry." *Marks v. Newman, 134 Tex. 440, 136 S.W.2d 808, 813 (1940)*. However, because of the difficulties inherent in determining the intent of voters over a century ago, we rely heavily on the literal text. We seek its meaning with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time. See generally *Printing Indus., 600 S.W.2d at 268-269*.

The State argues that, as used in article VII, section 1, the word "efficient" was intended to suggest a simple and inexpensive system. Under the Reconstruction Constitution of **1869**, the people had been subjected to a militaristic school system with the state exercising absolute authority over the training **of** children. **See Tex. Const. art. VII sec. 1, interp. commentary (Vernon 1955).** Thus, the State contends that delegates to the **1875** Constitutional Convention delib-

erately inserted into this provision the word “efficient” in order to prevent the establishment of another Reconstruction-style, highly centralized school system.

While there is some evidence that many delegates wanted an economical school system, there is no persuasive evidence that the delegates used the term “efficient” to achieve that end. *See Journal of the Constitutional Convention of the State of Texas 136* (Oct. 8, 1875); S. McKay, *Debates in the Texas Constitutional Convention of 1875* 107, 217, 350-351 (1930). It must be recognized that the Constitution requires an “efficient,” not an “economical,” “inexpensive,” or “cheap” system. The language of the Constitution must be presumed to have been carefully selected. *Leander Indep. School Dist. v. Cedar Park Water Supply Corp.*, 479 S.W.2d 908 (Tex. 1972); *Cramer v. Sheppard*, 140 Tex. 271, 167 S.W.2d 147 (Tex. 1943). The framers used the term “economical” elsewhere<sup>2</sup> and could have done so here had they so intended.

There is no reason to think that “efficient” meant anything different in 1875 from what it now means. “Efficient” conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time.<sup>3</sup> *E.g.*, *IV Oxford English Dictionary* 52 (1971); *Webster’s Third New International Dictionary* 725 (1976). One dictionary used by the framers defined efficient as follows:

Causing effects; producing results; actively operative; not inactive, slack or incapable; characterized by energetic and useful activity. . . .

*N. Webster, An American Dictionary of the English Language* 430 (1864). In 1890, this court described “efficient” machinery as being “such as is capable of well producing the effect intended to be secured by the use of it for the purpose for which it was made.” *Maxwell v. Bastrop Mfg. Co.*, 77 Tex. 233, 14 S.W.35, 36 (1890).

Considering “the general spirit of the times and the prevailing sentiments of the people,” it is apparent from the historical record that those who drafted and ratified article VII, section 1 never contemplated the possibility that such gross inequalities could exist

within an “efficient” system.<sup>4</sup> *See Mumme v. Marrs*, 120 Tex. 383, 40 S.W.2d 31, 35 (1931). At the Constitutional Convention of 1875, delegates spoke at length on the importance of education for *all* the people of this state, rich and poor alike. The chair of the education committee, speaking on behalf of the majority of the committee, declared:

[Education] must be classed among the abstract rights, based on apparent natural justice, which we individually concede to the State, for the general welfare, when we enter into a great compact as a commonwealth. I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State.

S. McKay, *Debates in the Texas Constitutional Convention of 1875* 198 (1930). Other delegates recognized the importance of a diffusion of knowledge among the masses not only for the preservation of democracy, but for the prevention of crime and for the growth of the economy. *See, e.g., id.* at 199-200, 216-217, 335.

In addition to specific comments in the constitutional debates, the structure of school finance at the time indicates that such gross disparities were not contemplated. Apart from cities, there was no district structure for schools nor any authority to tax locally for school purposes under the Constitution of 1876. B. Walker and W. Kirby, *The Basics of Texas Public School Finance* 5, 86 (1986). The 1876 Constitution provided a structure whereby the burdens of school taxation fell equally and uniformly<sup>5</sup> across the state, and each student in the state was entitled to exactly the same distribution of funds. *See* Tex. Const. art. VII, sec. 5 (1876). The state’s school fund was initially apportioned strictly on a per capita basis. B. Walker and W. Kirby at 21. Also, a poll tax of one dollar per voter was levied across the state for school purposes. *Id.* These per capita methods of taxation and of reve-

<sup>2</sup> “The legislature shall not have the right to levy taxes or impose burdens upon the people, except to raise revenue sufficient for the economical administration of the government. . . .” Tex. Const. art. III, sec. 48 (1876, repealed 1969).

<sup>3</sup> This usage is seen in text as well. *E.g.*, H. Fawcett, *Manual of Political Economy* 193 (1863) (“That nothing more powerfully promotes the efficiency of labour than an abundance of fertile land.”); G.D. Argyll, *The Reign of Law* 321 (1871) (“This change in mind is the efficient cause of a whole cycle of other changes.”); H.B. Stowe, *Uncle Tom’s Cabin* 297 (1850) (“He was an expert and efficient workman.”).

<sup>4</sup> Delegate Henry Cline, who first proposed the term “efficient,” urged the convention to ensure that sufficient funds would be provided to those districts most in need. S. McKay, *Debates in the Constitutional Convention of 1875* 217 (1930). He noted that those with some wealth were already making extravagant provisions for the schooling of their own children and described a public school system in which those funds that had selfishly been used by the wealthy would be made available for the education of all the children of the state. *Id.* at 217-18.

<sup>5</sup> Article VIII, section 1’s requirement of “equal and uniform” taxation was also the subject of much debate at the Constitutional Convention of 1875. There were clearly strong feelings against exemptions from taxation and special privileges. *See generally* 2 G. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 564-565 (1977). The framers opposed any schemes that would allow any classes of people to avoid an equal burden of taxation. *See* S. McKay at 296, 303, 306.

nue distribution seem simplistic compared to today's system; however they do indicate that the people were contemplating that the tax burden would be shared uniformly and that the state's resources would be distributed on an even, equitable basis.

If our state's population had grown at the same rate in each district and if the taxable wealth in each district had also grown at the same rate, efficiency could probably have been maintained within the structure of the present system. That did not happen. Wealth, in its many forms, has not appeared with geographic symmetry. The economic development of the state has not been uniform. Some cities have grown dramatically, while their sister communities have remained static or have shrunk. Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live.

We conclude that, in mandating "efficiency," the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a "*general* diffusion of knowledge." (Emphasis added.) The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.

The State argues that the 1883 constitutional amendment of article VII, section 3 expressly authorizes the present financing system. However, we conclude that this provision was intended *not* to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system. James E. Hill, a legislator and supporter of the 1883 amendment argued:

**I**f [article VII, section 1] means anything, and is to be enforced, then additional power must be granted to obtain the means "to support and maintain" an efficient system of public free schools. What is such a system, then? is the question. I have examined the laws of the older States of this Union, especially those noted for efficient free schools, and not one is supported alone by State aid, but that aid is supplemented always by local taxation. . . . When a man tells me he favors an efficient system of free schools, but is opposed to local taxation by districts or communities to supplement State aid, he shows that he ignores the successful systems of other States, or he is misleading in what he says.

Galveston Daily News, August 10, 1883, at 3, col. 9 (interview with Hon. James E. Hill). Governor O.M. Roberts also gave strong support to the 1883

amendment. In his address to the 18th Legislature, Governor Roberts directed the legislature's attention to the efficiency standard set by article VII, section 1 and said: "The standard fixed in law is certainly high enough to enable the masses of people generally, who receive the benefit of it, to have that general diffusion of knowledge. . . ." Speech of Gov. O.M. Roberts, S.J. of Tex., 18th Leg., Reg. Sess. 15 (1883). He then explained the need for the amendment by stating that the practical remedy for the attainment of the objective of efficiency was the formation of school districts with the power of taxation. Thus, article VII, section 3 was an effort to make schools more efficient and cannot be used as an excuse to avoid efficiency. *See also* 761 S.W.2d at 874 (further discussing the historical context of the amendment).

In the context of article VII, section 1, the legislature has expressed its understanding of the term "efficient" for a long time even though it has never given the term full effect. Sixty years ago, the legislature enacted the Rural Aid Appropriations Act with the express purpose of "equalizing the educational opportunities afforded by the State. . . ." 1929 Tex. Gen. Laws, ch. 14 at 252 (3rd called session). Again, in creating the Gilmer-Aikin Committee to study school finance, the legislature indicated an awareness of this obligation when it spoke of "the foresight and evident intention of the founders of our State and the framers of our State Constitution to provide equal educational advantages for all." Tex. H. Con. Res. 48, 50th Leg. (1948). Moreover, section 16.001 of the legislatively enacted Education Code expresses the state's policy that "a thorough and efficient system be provided . . . so that each student. . . shall have access to programs and services. . . that are substantially equal to those available to any similar student, notwithstanding varying economic factors." Not only the legislature, but also this court has previously recognized the implicit link that the Texas Constitution establishes between efficiency and equality. In *Mumme v. Marrs*, 40 S.W.2d at 37, we stated that rural aid appropriations "have a real relationship to the subject of equalizing educational opportunities in the state, and tend to make our system more efficient. . . ."

**B**y statutory directives, the legislature has attempted through the years to reduce disparities and improve the system. There have been good faith efforts on the part of many public officials, and some progress has been made. However, as the undisputed facts of this case make painfully clear, the reality is that the constitutional mandate has not been met.

The legislature's recent efforts have focused primarily on increasing the state's contributions. More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient. A band-aid will not suffice; the system itself must be changed.

We hold that the state's school financing system is neither financially efficient nor efficient in the sense of providing for a "general diffusion of knowledge" statewide, and therefore that it violates article VII, section 1 of the Texas Constitution. Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide.

Under article VII, section 1, the obligation is the legislature's to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an "if funds are left over" basis. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed. Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands—i.e., an efficient system of public free schools throughout the state. See *Leev. Leonard Xndep. School Dist.*, 24 S.W.2d 449, 450 (Tex. Civ. App.—Texarkana 1930, writ ref'd). This does not mean that the state may not recognize differences in area costs or in costs associated with providing an equalized educational opportunity to atypical students or disadvantaged students. Nor does it mean that local communities would be precluded from supplementing an efficient system established by the legislature; however any local enrichment must derive solely from local tax effort.

Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.

Our decision today is not without precedent. Courts in nine other states with similar school financ-

ing systems have ruled those systems to be unconstitutional for varying reasons. . . .

Because we have decided that the school financing system violates the Texas Constitution's "efficiency" provision, we need not consider petitioners' other constitutional arguments. The Texas school financing system as set forth in the Texas Education Code, sections 16.001, *et seq.*, and as implemented in conjunction with local school districts containing unequal taxable property wealth, is unconstitutional under article VII, section 1 of the Texas Constitution.

\* \* \* \* \*

Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature of the constitutional mandate and whether that mandate has been met. Because we hold that the mandate of efficiency has not been met, we reverse the judgment of the court of appeals. The legislature is duty-bound to provide for an efficient system of education, and only if the legislature fulfills that duty can we launch this great state into a strong economic future with educational opportunity for all.

Because of the enormity of the task now facing the legislature and because we want to avoid any sudden disruption in the educational processes, we modify the trial court's judgment so as to stay the effect of its injunction until May 1, 1990.<sup>6</sup> However, let there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action. We reverse the judgment of the court of appeals and affirm the trial court's judgment as modified.

#### Discussion Notes:

1. For a thorough discussion of the school finance litigation, including the Texas case, see Note, "To Render Them Safe: The Analysis of State Constitutional Provisions in School Finance Reform," *Virginia Law Review* 75 (1989): 1639.

See Also William E. Tho, "The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on Public School Finance Reform Litigation," *Journal of Law and Education* 19 (Spring 1990): 219.

2. Compare this opinion with the other school finance cases you have read. What are the differences and similarities.

<sup>6</sup>We note that the Governor has already called a special session of the legislature to begin November 14, 1989; the school finance problem could be resolved in that session.

**Discussion Notes:**

8. On the general right to education under state constitutions, see Allen W. Hubsch, "Education and Self-Government: The Right to Education Under State Constitutional Law," *Journal of Law and Education* 18 (Winter 1989): 93; Gershon M. Ratner, "A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills," *Texas Law Review* 63 (1985): 777.

**Following page 451:**

**Grose v. Firestone  
422 So.2d 303 (Fla. 1982)**

ALDERMAN, Chief Justice.

This cause has been certified to us by the District Court of Appeal, First District, pursuant to article V, section 3(b)(5), Florida Constitution. Since this is a matter of great public importance requiring immediate resolution, we accept jurisdiction to review the judgment of the circuit court which holds that there is no constitutional or statutory impairment which would warrant interference with the submission to the voters of Amendment 2 on the ballot of the November 2, 1982, election. We agree with the trial court and affirm its judgment.

Amendment 2 is a proposed amendment to article I, section 12, Florida Constitution, relating to the right to be free from unreasonable searches and seizures. On June 24, 1982, House Joint Resolution No. 31-H was filed in the office of the Secretary of State. This Resolution provides:

A joint resolution proposing an amendment to Section 12, Article I of the State Constitution, relating to searches and seizures, to provide a rule of construction and to limit the exclusion of evidence.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 12 of Article I of the State Constitution is hereby agreed to and shall be submitted to the electors of this state for approval or rejection at the general election to be held in November 1982.

**ARTICLE I**

**DECLARATION OF RIGHTS**

**SECTION 12.** Searches and seizures.— The right of the people to be secure

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

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

**CONSTITUTIONAL AMENDMENT**

**ARTICLE I, SECTION 12**

**SEARCHES AND SEIZURES.**— Proposing an amendment to the State Constitution to provide that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States Constitution and to provide that illegally seized articles or information are inadmissible if decisions of the United States Supreme Court make such evidence inadmissible.

Appellants initiated this challenge to Amendment 2 on October 22, 1982, by the filing of a petition for injunctive relief seeking to enjoin George Firestone, as the Secretary of State, and Dorothy Glisson, as Deputy Secretary for Elections, from placing the proposed amendment on the November 2, 1982, ballot. On October 26, 1982, an amended petition was filed requesting injunctive and declaratory relief.

After hearing arguments for appellants and appellees and arguments of amicus curiae on behalf of the Florida Prosecuting Attorneys Association, the Florida Police Chiefs Association, the Fraternal Order of Police and Independent Minded People Against Crime Today, and the Florida Sheriffs Association, the trial court, in a succinct order, denied the petition for preliminary injunction and dismissed the amended petition with prejudice.

Appellants appealed to the District Court of Appeal, First District, but requested that the district court certify the judgment to us for immediate resolution.

Appellants initially contend that the trial court erred in not granting their request for preliminary injunction since the ballot summary of the proposed

amendment is misleading and does not fully advise the electors of the effect of the amendment. Appellants submit that although the chief purpose of the joint resolution proposing the amendment is to provide a rule of construction and to limit the exclusion of evidence in criminal cases, the ballot summary only discloses that the state constitution is to be amended to provide that article I, section 12, is to be construed in Conformity with the fourth amendment to the United States Constitution as interpreted by the Supreme Court of the United States. Appellants suggest that the ballot summary fails to disclose or put voters on notice of the total effect of this amendment. We disagree with appellants and hold that the ballot summary clearly and unambiguously gives voters notice of the effect of this amendment.

Section 101.161, Florida Statutes (1981), which sets out the prerequisites for submission of a constitutional amendment or other public measure to the vote of the people, states in pertinent part:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot. . . . The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution. . . . The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. . . .

Recently in *Askew v. Firestone*, 421 So.2d 151 (Fla.1982), we said that the purpose of section 101.161 is to assure that the electorate is advised of the meaning and ramifications of the amendment. We said:

The requirement for proposed constitutional amendment ballots is the same as for all ballots, i.e.,

that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote. . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. . . . *What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.*

*Hill v. Milander*, 72 So.2d 796,798 (Fla. 1954) (emphasis supplied).

Simply put, the ballot must give the voter fair notice of the decision he must make. *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981 (Fla. 1981). . . .

*Id.*, at p. 155.

The wording of the ballot summary of proposed Amendment 2 is unambiguous and clearly states the amendment's chief purpose. The purpose of the amendment is to assure that article I, section 12 of the Florida Constitution, is read in conformity with the fourth amendment to the United States Constitution as interpreted by the Supreme Court of the United States and that any evidence found inadmissible by that Court would be inadmissible in this state. There are no hidden meanings and no deceptive phrases. The summary says just what the amendment purports to do. It gives the public fair notice of the meaning and effect of the proposed amendment.

Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis of the law of search and seizure and the exclusionary rule. Inclusion of all possible effects, however, is not required in the ballot summary. *Smathers v. Smith*, 338 So.2d 825 (Fla.1976). The ballot summary of Amendment 2 clearly states the chief purpose of this amendment and provides the electorate with fair notice of the intent of the amendment. This ballot summary complies with all the requirements of the law.

On several occasions this Court has removed an amendment from the ballot because the measure was clearly and conclusively defective. Examples are *Askew v. Firestone*, ballot summary misleading; *Adams v. Gunter*, 238 So.2d 824 (Fla.1970), proposed amendment would improperly alter more than one section of the constitution; *Rivera-Cruz v. Gray*, 104 So.2d 501 (Fla.1958), "daisy chain" method of amendment improper; *Coral Gables v. Gray*, 154 Fla. 881. 19 So.2d 318 (1944), proposed amendment improperly related to more than one subject; *Gray v. Moss*, 115 Fla. 701, 156 So. 262 (1934), proposed amendment not properly passed by both houses of the legislature; *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963 (1912), amendment not proposed by the requisite vote of each house of the legislature. None of these factual situations exist in this case.

#### Discussion Notes:

1. Should the "enrolled bill rule" (see p. 211-217) apply to legislatively proposed state constitutional amendments? See *Roeschlein v. Thomas*, 273 N.E.2d 554 (Ind. App. 1971).

2. Would the enrolled bill rule apply to any of the cases listed at the end of the Florida opinion?

**James Willard Hurst,**  
**“The Growth of American Law”**  
Page 425, Discussion Notes:

**Discussion Notes:**

3. Delaware is the only state that provides for legislative amendment to the state constitution *without a vote of the people*. See generally *Opinion of the Justices*, 264 A.2d 342 (Del. 1970).

**Meyer v. Grant**  
Page 464, Discussion Notes:

**Discussion Notes:**

3. For a discussion of the U.S. Supreme Court’s decision in *Meyer v. Grant*, see Daniel Hays Lowenstein and Robert M. Stern, “The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal,” *Hastings Constitutional Law Quarterly* 17 (Fall 1989): 175.



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