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The State Constitutional Right to Privacy Conflicts with Tax Reporting Requirements: The Florida Model

*Daniel R. Gordon**

I. INTRODUCTION

The State of Florida's urgent need to improve the effectiveness of its state tax collection system¹ conflicts with the Florida state constitutional right to privacy.² Like many "sunbelt states," Florida is experiencing strong population growth.³ Current projections indicate that the recent population explosion will continue over the next twenty years.⁴ The Florida state government is faced with the challenge of expanding services in order to keep pace.⁵ To do so, Florida must raise more tax revenues.⁶ One readily available way to increase tax revenues is to improve the efficiency of collecting already existing taxes. In 1985⁷ and

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1. The urgent need to improve tax collection arises not only from population growth creating strains on government services (*See infra* notes 2-5 and accompanying text) but also from legal and political constraints on the state authority to tax. Florida restricts the use of income and inheritance taxes. *See* FLA. CONST. art. VII, § 5. The citizens of Florida politically resist new taxes even in the face of a growing awareness of the need to improve services. *See* THE JOURNAL OF THE SENATE, Number 2 - Special Session B, September 22, 1987 (recording the start of a special session of the Florida Legislature devoted to repealing or weakening the newly enacted sales tax on services).

2. FLA. CONST. art. I, § 23.

3. *See* BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, PUB. NO. PC80-1-A1, 1980 CENSUS OF POPULATION, NUMBER OF INHABITANTS, UNITED STATES SUMMARY, at 1-43 (1983). Florida grew from 4,951,560 people in 1960 to 9,746,324 in 1980.

4. *See* BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-25, NO. 937 PROVISIONAL PROJECTIONS OF THE POPULATION OF STATES, BY AGE AND SEX: 1980 TO 2000, at 11, (1983). Florida will grow to 13,316,000 inhabitants by 1990 and 17,438,000 inhabitants by 2000.

5. A recent example of the state's struggle to keep pace with population growth is the 1987 special session of the Florida Legislature which was devoted to overcoming prison overcrowding. *See* FLORIDA STATE SENATE JOURNAL, Number 1 - Special Session A (Wed. Feb. 4, 1987). Prison overcrowding arises from a number of sources, but certainly the growth in population plays a role.

6. A dramatic example of the State's commitment to raise more tax revenues are the amendments to the State sales tax abolishing large numbers of exemptions. *See* 1987 Florida Laws, Chapter 87-72.

7. *See* 1985 Fla. Laws 85-342, § 4.

1986,⁸ the Florida Legislature amended the state intangible personal property tax in order to assure that more Floridians pay that tax.

The Legislature enhanced financial data reporting requirements,⁹ enabling the State of Florida to learn more about the finances and assets of individuals and corporations.¹⁰ The expanding capabilities of the state government to gain more personal information means less privacy protection for personal financial information.¹¹ This expansion of state power to discover personal information collides with the state constitutional protection of individual privacy.¹² Following is a short overview of the intangible property tax,¹³ an examination of the enhanced data reporting requirements,¹⁴ an overview of the Florida constitutional provision protecting privacy,¹⁵ and an analysis of how the enhanced reporting requirements violate the state constitutional privacy provision.¹⁶

II. THE FLORIDA INTANGIBLE PERSONAL PROPERTY TAX

The Florida intangible personal property tax¹⁷ raises over \$250,000,000 in revenues for state government.¹⁸ The Florida Department of Revenue¹⁹ administers the tax, making collections and taking enforcement steps when the tax is not paid.²⁰ The tax is paid either on an annual basis²¹ or a non-recurring basis.²² Subject to taxation is all personal property "which is not itself intrinsically valuable, but which derives its chief value from that which it represents. . . ."²³ This is a tax on negotiable paper and other "symbols" of equity, debt, and certain real property obligations.

8. See 1986 Fla. Laws 86-152.

9. *Id.*

10. See *infra* notes 43-48 and accompanying text.

11. See *infra* notes 49-73 and accompanying text.

12. FLA. CONST. art. I, § 23.

13. See *infra* notes 17-42 and accompanying text.

14. See *infra* notes 43-73 and accompanying text.

15. See *infra* notes 74-161 and accompanying text.

16. See *infra* notes 162-227 and accompanying text.

17. FLA. STAT., § 199 (1987). Chapter 199 is known as the "Intangible Personal Property Tax Act". FLA. STAT. § 199.012 (1987).

18. See BUREAU OF ECONOMIC AND BUSINESS RESEARCH, COLLEGE OF BUSINESS ADMINISTRATION, UNIVERSITY OF FLORIDA, 1986 FLORIDA STATISTICAL ABSTRACT, at 561. The revenues from the intangible property tax are deposited in a separate trust fund, and are disbursed for a variety of government services including the collection of a number of taxes by the Department of Revenue, revenue sharing with the counties, and services paid for by the State's General Revenue Fund.

19. FLA. STAT. § 199.023(5) (Supp. 1988).

20. FLA. STAT. § 199.202 (1987).

21. FLA. STAT. § 199.052 (1987).

22. FLA. STAT. § 199.133 (1987).

23. FLA. STAT. § 199.023 (Supp. 1988).

The taxable property includes stocks,²⁴ business trusts,²⁵ mutual funds,²⁶ notes,²⁷ bonds,²⁸ accounts receivable,²⁹ and a restricted class of real property leaseholds.³⁰ Excluded from taxation are cash, franchises, partnership interests, certain government obligations, certain retirement assets, and restricted classes of other notes, assets, and obligations.³¹ An annual tax of one mill³² is imposed on each dollar of intangible personal property owned, controlled, or managed³³ by individuals, corporations, partnerships, and others³⁴ who are legal residents of Florida on January 1³⁵ or who on January 1, regardless of domicile, have an intangible property interest with a business situs in Florida.³⁶ The due date for the annual tax is June 30.³⁷

The annual tax is based on the value of intangible property as of January 1.³⁸ Exempt from the annual tax are "notes, bonds, and other obligations for the payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state."³⁹ Such intangible property is subject to a two mill non-recurring tax.⁴⁰

This taxation scheme requires that the Department of Revenue learn of the existence and location of intangible personal property and certain real property interests.⁴¹ Such data collection is an onerous and complex task, and the Florida Legislature has granted the Department of Revenue the means to collect and enforce the intangible personal property tax.⁴²

24. FLA. STAT. § 199.023(1)(a) (Supp. 1988).

25. *Id.*

26. *Id.*

27. FLA. STAT. § 199.023(1)(b) (Supp. 1988).

28. *Id.*

29. *Id.*

30. "All condominium and cooperative apartment leases of recreation facilities, land leases, and leases of other commonly used facilities." FLA. STAT. § 199.023(1)(c) (Supp. 1988).

31. FLA. STAT. § 199.185 (1987).

32. FLA. STAT. § 199.032 (1987).

33. FLA. STAT. § 199.052(1) (1987).

34. *Id.* and FLA. STAT. § 199.023(3) (Supp. 1988).

35. FLA. STAT. § 199.052(1) (1987).

36. *Id.*

37. FLA. STAT. § 199.042(1) (1987).

38. FLA. STAT. § 199.103 (Supp. 1988).

39. FLA. STAT. § 199.032 (1987).

40. FLA. STAT. §§ 199.133 and 199.135 (1987).

41. The Department of Revenue needs data on real property in Florida because the non-recurring tax involves notes, bonds and other obligations secured by instruments like mortgages. *See supra* notes 39 and 40 and accompanying text. Hence, the Department of Revenue must be cognizant of real property transactions involving debt instruments in order to enforce Chapter 199.

42. *See supra* notes 7 and 8 and accompanying text.

III. INTANGIBLE PERSONAL PROPERTY TAX INFORMATION REPORTING REQUIREMENTS

The Department of Revenue depends on individual and corporate taxpayers to supply information concerning the ownership and control of intangible property interests. For the annual intangible tax, the Department of Revenue requires the filing of an annual return by June 30.⁴³ The return requires the listing of the character, description, just valuation⁴⁴ and location⁴⁵ of all intangible personal property. However, the Florida Legislature deems it insufficient to rely solely on self-reporting by taxpayers.⁴⁶ A number of third-party reporting techniques have been created to aid in the collection of the intangible tax. Corporations doing business in Florida must file with the Department of Revenue a list of stockholders and information about the valuation of their stock.⁴⁷ Fiduciaries must file a copy of inventories required to be prepared for or filed in circuit court.⁴⁸ However, the two third-party reporting procedures that are most intrusive involve stockbrokers and foreign taxing authorities. The balance of this article examines both third party reporting procedures and the state constitutional right to privacy.

A. *Stockbrokers Must File Annual Reports Concerning Their Clients*

Stockbrokers registered in compliance with Florida Statutes⁴⁹ must file with the Department of Revenue by June 30 a "position statement" detailing customers' assets held by the stockbroker.⁵⁰ Such a filing is made for each customer who has a Florida mailing address,⁵¹ and the statement provides information about a customer's financial position as of December 31 of the preceding year.⁵² Information about the customer includes name, address, and social security or federal identification number.⁵³ The enhanced reporting requirements involve a description of the assets. As of 1987, stockbrokers are required to provide more

43. FLA. STAT. § 199.052(1) (1987).

44. *Id.*

45. FLA. ADMIN. CODE ANN. r. 12C-2.008(1)(a) (1987).

46. *See supra* notes 7 and 8 and accompanying text.

47. FLA. STAT. §§ 199.062(1) and (2) (1987) and FLA. ADMIN. CODE ANN. r. 12C-2.008(1)(a) (1987).

48. FLA. STAT. § 199.062(4) (1987).

49. FLA. STAT. § 517.12 (1987).

50. FLA. STAT. § 199.062(3) (1987). However, FLA. ADMIN. CODE ANN. r. 12C-2.008(1)(b) provides that stockbrokers furnish the position statement by April 1.

51. FLA. STAT. § 199.062(3) (1987).

52. *Id.*

53. *Id.*

than just "the number and description of all securities held for the customer."⁵⁴ Stockbrokers must now provide "the number of units, value, and description, including the Committee on Uniform Security Identification Procedures (CUSIP) number, if any, of all securities held for the customer. . . ."⁵⁵ There is not only an increase in the amount of data to be reported by securities dealers but also an improvement in reporting technology. Brokers are required to report on magnetic media, unless they can demonstrate undue hardship.⁵⁶ The Department of Revenue is authorized to promulgate specifications and instructions for magnetic media reports.⁵⁷ The Department of Revenue is also authorized to require stockbrokers to include in the position statements "such other information as the department may reasonably require."⁵⁸

The brokerage reporting requirements should not be taken lightly. If a security broker does not file a position statement in a timely fashion, the broker is subject to a \$100 late filing penalty.⁵⁹ If general penalty provisions of the Intangible Personal Property Tax Act are read broadly, brokers face even stiffer penalties for noncompliance. A broker who willfully fails to comply with the reporting provision may be guilty of a third degree felony,⁶⁰ resulting in a prison term not exceeding five years⁶¹ and a fine not exceeding \$5,000.⁶² Also, the Department of Revenue may examine at reasonable hours brokers' books, records, and documents pertinent to position statements.⁶³ If a broker refuses to permit such an examination, the Department of Revenue may apply to a circuit court for appropriate relief.⁶⁴

The Florida Legislature and Department of Revenue have made stockbrokers important sources of private financial information about their customers.

54. FLA. STAT. § 199.062(3) (1987).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. FLA. STAT. § 199.282(6)(b) (1987).

60. FLA. STAT. § 199.282(1) (1987). The criminal penalty provisions are written particularly broadly. The penalties apply to "any person," and noncompliance involves "any of the provisions of this chapter." The chapter referred to is 199, the intangible tax chapter. Hence, arguably, the criminal penalties apply to brokers who willfully disobey.

61. FLA. STAT. § 775.082(3)(d) (1987).

62. FLA. STAT. § 775.083(1)(c) (1987).

63. FLA. ADMIN. CODE ANN. r. 12C-2.008(5)(a) (1987).

64. FLA. ADMIN. CODE ANN. r. 12C-2.008(5)(c) (1987).

B. *Authorization to Collect Information from Foreign Tax Sources*

One of the strongest information collection devices that the Department of Revenue has at its disposal is the legislative authorization to share and collect information from government tax sources outside the State of Florida.⁶⁵ The Department of Revenue is authorized to make tax information available to a variety of non-Florida government agencies, including the United States Treasury Department, the Internal Revenue Service, and tax collectors of other states.⁶⁶ Such data may be provided in compliance with "any formal agreement for the mutual exchange of state information,"⁶⁷ and may only be provided for official purposes.⁶⁸ Hence, the Department of Revenue may exchange state collected information (presumably including data concerning taxpayers of the intangible tax)⁶⁹ for information from the Internal Revenue Service or non-Florida state taxing authorities to aid *inter alia* in the collection of the intangible property tax. The Department of Revenue has a strong arsenal of data collection devices at its disposal to collect and enforce the intangible personal property tax.

Ironically, taxpayer information is protected once it is collected by the Department of Revenue.⁷⁰ Taxpayer information may be shared by the Department of Revenue only under limited circumstances,⁷¹ though one such circumstance involves information sharing between jurisdictions.⁷² Even when taxpayer data stored by the Department of Revenue are required for criminal investigation purposes, a subpoena *duces tecum* is necessary.⁷³ Despite these limits, the Department of Revenue is still capable of collecting information on taxpayers from a variety of sources, and the privacy of individuals in Florida is compromised by the Department of Revenue, even though the Florida Constitution provides individuals with protection from some of the information gathering techniques of the Department of Revenue.

65. FLA. STAT. § 213.053(5) (Supp. 1988). Phone conversations with the Department of Revenue confirm that the Department of Revenue has an information sharing contract with the Internal Revenue Service.

66. *Id.* The Internal Revenue Service is required to open for inspection certain federal tax returns. 26 U.S.C. § 6103(d) (1982). Inspection may be made by state taxing authorities for the purpose of administering state tax laws. *Id.* State officers who inspect federal tax returns must protect the confidentiality of any information gathered from federal returns. *See* 26 U.S.C. § 7213 (1982).

67. 26 U.S.C. § 6103(d)(1982).

68. *Id.*

69. FLA. STAT. §§ 199.222 and 213.053(6) (Supp. 1988).

70. *Id.*

71. *See generally* FLA. STAT. § 213.053(6) (Supp. 1988).

72. *See supra* notes 65-69 and accompanying text.

73. FLA. STAT. § 213.05(1) (Supp. 1988).

IV. THE FLORIDA CONSTITUTION PROTECTS PRIVACY

Information gathering by agencies of the State of Florida, including the Department of Revenue, must be carefully scrutinized because the Florida Constitution in Article I, Section 23 provides: "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."⁷⁴

Art. I, § 23 was passed by a vote of the people of Florida on November 4, 1980,⁷⁵ having been placed on the ballot by the Florida Legislature.⁷⁶ The provision became effective in January 1981.⁷⁷ A provision with almost the same wording was one part of a major overhaul of the Florida Constitution⁷⁸ that was defeated in November 1978.⁷⁹ The differences between the version defeated in 1978 and the version passed in 1980 are minimal.⁸⁰ The fact of the similarity between the two versions is important to an interpretation of the 1980 version. Either the drafters of the 1978 version are also the drafters of the 1980 provision that is now law⁸¹ or the drafters of the 1980 version share the same motivations and intentions as the drafters of the 1978 version.⁸² That the intentions of the authors of the 1978 and 1980 versions are the same is important to an interpretation because there is

74. FLA. CONST. art. I, § 23 is part of the Declaration of Rights and is entitled "Right of Privacy."

75. Cope, *A Quick Look at Florida's New Right of Privacy*, 55 FLORIDA B.J. 12, 12 (1981).

76. FLA. CONST. art. XI, § 1 provides that constitutional revisions "may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature." For legislative action on Art. I, § 23. See 1980 FLA. LAWS HOUSE JOINT RESOLUTION 387.

77. See FLA. CONST. art. XI, § 5(c).

78. See *appendix, Revised Constitution of the State of Florida as Proposed by the Constitution Revision Commission*, Appendix, 6 FLA. ST. U.L. REV. 1173, 1176 (1978).

79. Cope, *A Quick Look at Florida's New Right of Privacy*, *supra* note 75, at 12.

80. The wording of the first sentence which constitutes the substance of the provision is the same in both versions. The 1980 version added a second sentence preserving certain public records and open meetings statutes.

81. See *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So. 2d 533 (Fla. 1987). Justice Rosemary Barkett discusses the concerns of the drafters of the 1980 provision. Barkett's discussion can be read as identifying the 1980 drafters as the same as the 1978 drafters because the Justice reviews the proceedings of the 1977-78 Constitutional Revision Commission. According to this view, the 1980 Legislature simply placed the 1978 version on the ballot with an additional sentence. *Id.* at 536.

82. See *South Florida Blood Serv., Inc.*, 500 So. 2d at 536. Justice Barkett refers to the proceedings of the 1977-78 Constitution Revision Commission as revealing the concerns of the drafters of art. I, § 23. According to this view, the 1980 Legislature accepted the 1978 version, and the 1980 Legislature can be seen as the drafter of the provision. Hence, even though the Legislature can be viewed as the independent drafter who just depended on the work of others, Justice Barkett envisions the Legislature as responding to and incorporating the concerns and intent of those who drafted the original version that was defeated in 1978.

good source material from the drafting of the 1978 version that aids in understanding the 1980 provision.⁸³

A. *The Right of Privacy is a Limited Right*

Florida's constitutional right of privacy provides narrow protections.⁸⁴ Art. I, § 23 protects only natural persons, and, therefore, does not protect corporations or associations.⁸⁵ It is not clear whether a partnership or joint venture is protected.⁸⁶ What is clear is that security brokers⁸⁷ as corporate entities⁸⁸ are not protected by Art. I, § 23 from

83. Two such sources have proved invaluable. Both are written by the same author, who worked with the 1977-78 Constitution Revision Commission. These are: Notes, *Toward A Right of Privacy as A Matter State Constitutional Law*, 5 FLA. ST. U.L. REV. 633 (1977) and Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 673 (1978). The later article is particularly helpful in interpreting Art. I, § 23, and this author depends on Cope's fundamental analyses throughout this article. However, the author disagrees with Cope on a number of crucial points, and one such point provides a basic disagreement critical to this article. Cope argues that the 1978 version of the right of privacy should have little or no impact on the State of Florida's taxing power:

One critic of the right of privacy suggested that it could undermine the ability of the state to govern through the police power and the taxing power. There is no basis at all for this concern since the taxing power of the State exists through express constitutional provision which would not be undercut by a coequal right of privacy.

Cope, *To Be Let Alone*, *supra* note 85, at 770. Cope does not support his assertion, which is inconsistent with the basic thesis of his article. Cope proposes that the Florida courts adopt a compelling state interest standard in interpreting the right of privacy provision in order to prevent constitutional grants of power to state entities from negating the right to privacy. *See id.* at 749. Why the power to tax is more important than another state power is unclear. This author finds nothing to support Cope's assertion and wonders whether Cope was attempting to calm opponents of the 1978 proposal. Cope reveals his own ideological commitment to the adoption in Florida of a constitutionally protected right of privacy in the biographical footnote, *To Be Let Alone*, *supra* note 83, when Cope states: "The author testified before the 1978 Constitution Revision Commission, urging it to place a freestanding right of privacy in the revision proposal."

84. For excellent overviews of Art. I, § 23 as a newly enacted provision, *See* Cope, *To Be Let Alone*, *supra* note 83 and Note, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565 (1981). Both articles provide suggestions to the Florida courts on how to interpret the new privacy right.

85. *See Interpreting Florida's New Constitutional Right of Privacy*, *supra* note 84, at 572.

86. *See* Cope, *To Be Let Alone*, *supra* note 83, at n.411, where Prof. Kurland is quoted as writing, "When the affairs regulated are not those of individuals but those of groups, the concern is not privacy." Kurland, *The Private I*, U. CHI. MAGAZINE, Autumn 1976, at 34.

By quoting Kurland, Cope is arguing that the right of privacy is restricted or non-existent when applied to economic organizations. Kurland seems to be applying his thesis to "corporations, classes, organizations, and associations." *Id.*

It is not clear that Kurland applies his thesis to partnerships and joint ventures, which are much more personal than corporations or associations. Partnership and joint venture privacy interests would seem to be a sum of all the privacy interests of the individuals involved, while the privacy interests of corporations or associations would seem to relate to an entity separate from the corporation's owners or workers.

87. FLA. STAT. § 517.021 (1987).

88. FLA. STAT. §§ 517.021(9)(a)(1) and 517.021(16) (1987). Under the Florida Securities

disclosing a customer position statement to the Department of Revenue.⁸⁹ Security brokers as individuals⁹⁰ are protected by the constitutional right of privacy, but it is doubtful whether they have a protected privacy interest in their customers' position statements, although individual and corporate brokers may have standing to protect their customers' individual rights of privacy.⁹¹ In any event, it is clear that Art. I, § 23 applies to individual customers of brokers. Individual people have a right to be let alone, which means a right to privacy.⁹² What constitutes privacy is not apparent in the words of the constitutional provision, but there is a reference to "private life." Though there is no easy definition of "private life," this indefinite concept rests on an individual's expectation of privacy⁹³ or intention to keep information private.⁹⁴ An expectation of privacy is divorced from whether a physical setting is considered a private one,⁹⁵ and depends on whether the overall circumstances allow the individual to reasonably foresee, predict, or believe that private circumstances exist.⁹⁶ The test is at least partially a subjective one as the limits of individual privacy can be determined only

and Investor Protection Act, a dealer may be a natural person, corporation, partnership, association joint-stock company, or unincorporated organization.

89. FLA. STAT. § 199.062(3) (1987).

90. See *supra* note 88 and accompanying text.

91. See *City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985). The *Del Percio* Court holds that the owner of a bar does not have standing to assert on behalf of bar patrons that a city ordinance violates the First Amendment, because the patron behavior that the bar owner seeks to protect from prosecution is not protected by the First Amendment over-breadth cases. 476 So. 2d at 202-3. *Del Percio* does not apply to an Art. I, § 23 case, because the individual brokerage customer is protected by Art. I, § 23. *Florida Medical Association v. Dep't of Professional Regulation*, 426 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 1983), holds that an optometrist's patient does not have standing to challenge a regulation permitting optometrists to issue prescriptions because the patient could avoid optometrists and patronize ophthalmologists. 426 So. 2d at 1114 n.4. Hence, the patient was not injured by the new regulation, because he could choose to obtain eye care from another source that also had the authority to issue prescriptions. *Florida Medical Association* does not apply to stock brokers challenging Art. I, § 23 on behalf of customers because the brokers will be out of business without customers. The relation is very different from that of patient-optometrist. There is no way for a brokerage customer to avoid the intangible property tax or obtain brokerage services from alternate sources. Hence, unlike in *Florida Medical Association* a broker's challenge to Art. I, § 23 would not be "speculative, nonspecific, and hypothetical." *Id.*

92. See, e.g., *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71 (Fla. 1983), where C. J. Alderman, for the Court, discusses the interest protected by Art. I, § 23 as the "constitutional right of privacy."

93. See *State v. Calhoun*, 479 So. 2d 241 (Fla. Dist. Ct. App. 1985), where the Court attempts to define whether an individual has a right to privacy while he discusses criminal activity with a family member in an interrogation room being monitored and videotaped by law enforcement officers. The individual had asserted his Miranda rights. J. Barkett, for the Court, bases her analysis on both Art. I, §§ 12 and 23. Art. I, § 12 protections against unreasonable searches and seizures.

94. *Shaktman v. State of Florida*, 14 FLA. L. WEEKLY 522, 523 (Fla. 1989).

95. 479 So. 2d at 244.

96. *Id.*

by the individual. The Florida courts appear to be combining subjective and objective tests by focusing on individual intentions and whether "in most instances the individual has no intention of communicating to a third party."⁹⁷

The Florida Constitution does not protect against every violation of privacy, but only those that are governmental intrusions.⁹⁸ Moreover, there must be governmental action.⁹⁹ What constitutes a governmental intrusion is another question. A request to an individual by a state agency or court for health data is considered at least "a limited intrusion."¹⁰⁰ The Department of Revenue's requirement that securities brokers provide financial data on individual customers constitutes at least a minimal intrusion into the private lives of individual customers.¹⁰¹

The constitutional right to privacy is limited by other provisions of the Florida Constitution because Art. I, § 23 includes the limitation "except as otherwise provided herein." This exception could be read as swallowing up or completely negating the privacy right. All grants of power in the Florida Constitution to Florida government could be viewed as providing agencies the authority to gain whatever data are needed to fulfill their missions.¹⁰² In other words, a general grant of authority could imply that an agency has the power to collect appropriate data to aid that agency in meeting its duties. Therefore, a general constitutional grant of authority to collect necessary data is implied. There are two problems with this view. First, such a view negates the intent of the drafters of the privacy provision because "there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."¹⁰³ The provision is intended "to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life."¹⁰⁴ The restric-

97. *Shaktman*, *supra* note 94.

98. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* note 83, at 742.

99. *See* Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 74 (Fla. 1983).

100. *Id.*

101. *See infra* notes 162-227 and accompanying text.

102. Cope expresses this concern when he writes:

The privacy section ends with the phrase 'except as otherwise provide herein.' This phrase could be taken to have another meaning, apart from its intended purpose of sustaining open government. The phrase could be read to indicate that the right to be let alone is absolute - except when governmental action is authorized by some other constitutional section. Under this approach, one seeks to justify governmental activity by ransacking the constitution for the controlling section.

Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* note 83, at 749.

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

104. *Id.*

tion of the privacy right to only those areas of government to which the Florida Constitution does not make an explicit grant of governmental authority means that the drafters proposed a weak and meaningless constitutional protection.

Second, such a view undermines the privacy right as a "fundamental right,"¹⁰⁶ relegating it to no more than a personal right to be balanced against equally weighted governmental authority.¹⁰⁶ An individual right that is easily outweighed by a general grant of governmental authority is not much of a right and certainly not a fundamental right. The drafters of the privacy provision rejected such an equal weighing when they "rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase governmental intrusion."¹⁰⁷ In fact, this right of privacy is intended to be a right which is "as strong as possible."¹⁰⁸

The words "except as otherwise provided herein" must mean something. They were added for a reason. If these words do not refer to general constitutional grants of authority,¹⁰⁹ then they refer to constitutional provisions that specifically require that individual data or information be reported to the State of Florida or be made public.¹¹⁰ If Art. I, § 23 does not provide for such an exception, any constitutional provision in existence in 1980 which specifically provides for data collection implicitly is repealed or at least curtailed by the new right of privacy. Such a result undercuts guarantees of responsive and responsible government such as financial disclosures required of public officers and candidates,¹¹¹ disclosure of campaign financing,¹¹² publication of legislative journals,¹¹³ reports of judicial discipline,¹¹⁴ and information about judicial appointments.¹¹⁵ When the privacy provision originally was proposed in 1978, the language "except as otherwise provided herein" was "inserted to make clear that the right of privacy does not undercut the constitutional provisions relating to financial disclosure, public records, and open meetings."¹¹⁶ However, the public records and open meetings provisions were defeated in 1978 along with all the pro-

105. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985). See *In Re T.W.*, 551 So. 2d 1186, 1191-92 (Fla. 1989).

106. See Cope, *To Be Let Alone: Florida's Right of Privacy*, *supra* note 83, at 749-50.

107. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

108. *Id.*

109. See *supra* notes 103-06 and accompanying text.

110. A number of such sections exist. See notes *infra* 111-15 and accompanying text.

111. FLA. CONST. art. II, § 8(a) (1987).

112. FLA. CONST. art. II, § 8(b) (1987).

113. FLA. CONST. art. III, § 4(c) (1987).

114. FLA. CONST. art. V, § 12(d) (1987).

115. FLA. CONST. art. V, § 11(d) (1987).

116. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* note 83, at 743.

posed amendments to the Florida Constitution.¹¹⁷

The Florida Constitution does not include a specific requirement or grant of authority to the Department of Revenue to force individuals or brokers serving individuals to report financial data on a blanket or automatic basis to the State of Florida.¹¹⁸ The tax provisions of the Constitution do not read like a grant of power to tax,¹¹⁹ but read like limitations on the power of the State and its local governments to tax.¹²⁰ Implicitly, only the State is provided the exclusive authority to raise an intangible personal property tax,¹²¹ though the State of Florida has inherent sovereign power to tax¹²² "subject only to controlling constitutional limitations."¹²³ This inherent taxing power is legislative power.¹²⁴ The Constitution specifically grants the Florida Legislature its power to legislate.¹²⁵ That broad grant of legislative power cannot be what Art. I, § 23 is referring to "as otherwise provided herein." If Art. I, § 23 refers to such a broad grant of power, the Legislature can override the constitutional right of privacy simply by legislating. The right of privacy no longer would be "fundamental" but would be defined solely by the Legislature. At the same time, the constitutional limitations on taxing authority cannot serve as grants of authority referred to as "otherwise provided herein," because such a reading is illogical. A limitation on authority runs counter to a grant of authority, and a limitation of the authority of the sovereign can not be read as weakening a fundamental right such as the right of privacy.

B. The Right of Privacy is Applied to Limited Circumstances

The Florida courts apply or refuse to apply the state constitutional right to privacy in two contexts: public disclosure of personal matters and personal decision-making.¹²⁶ The personal decision category involves two distinct types of cases. First, soon after the constitutional

117. Art. I, § 23 includes a final sentence providing, "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Hence, the right of privacy does not restrict open government statutes such as FLA. STAT. Ch. 119.

118. See FLA. CONST. art. VII (1987) which authorizes finance and taxation for the state and local governments in Florida.

119. FLA. CONST. art. VII, § 1(a) (1985).

120. *Id.* Art. VII begins, "[n]o tax shall be levied except in pursuance of law."

121. *Id.*

122. Department of Revenue v. Markham, 381 So. 2d 1101, 1110 (Fla. Dist. Ct. App. 1979). See also Belcher Oil Co. v. Dade County, 271 So. 2d 118 (Fla. 1972).

123. 381 So. 2d at 1110.

124. *Id.*

125. FLA. CONST. art. III, § I (1987) provides: "[t]he legislative power of the state shall be vested in a legislature of the State of Florida. . . ."

126. *In Re T.W.*, 14 FLA. LAW WEEKLY 531, 532 (Fla. 1989).

amendment became effective,¹²⁷ criminal defendants asserted that activities which could be characterized as victimless crimes such as drug possession or trafficking were protected from state interference, specifically criminal prosecution.¹²⁸ Florida declined to recognize such a privacy protection unlike at least one other state with a state constitutional right of privacy.¹²⁹ The Florida courts dismissed the criminal appellants privacy arguments without explanation although in one case stating, "no compelling argument has been made in support . . ."¹³⁰ Second, actions involving personal health are protected by Art. I, § 23. These actions involve decision-making about refusal¹³¹ or discontinuation of medical procedures.¹³² The Florida courts are especially protective of the right of individuals to refuse medical treatment or order treatment discontinued even to the point of holding "that right extends to incompetent persons who are unable to exercise the right in their own behalf."¹³³ Hence, a person has the right to order the discontinuation of the nasogastric feeding of his or her terminally ill spouse,¹³⁴ and a woman has the right to abort a fetus.¹³⁵

The public disclosure of personal matters category includes three types of information or data. First, personal knowledge about or observations of criminal activity are not protected by Art. I, § 23 from investigation or interrogation by state investigative officers.¹³⁶ Second, personal information concerning health or emotional problems is protected from disclosure,¹³⁷ though an individual waives that protection when he or she seeks an office of public trust.¹³⁸ Last, data related to personal finances¹³⁹ and day-to-day transactions¹⁴⁰ are protected, though there are circumstances that require that such data be disclosed to state inves-

127. Two cases involving controlled substances reached the appellate stage in 1982.

128. See *Maisler v. State*, 425 So. 2d 107 (Fla. Dist. Ct. App. 1982) *petition for rev. den.* 434 So. 2d 888 (Fla. 1983); *State v. Ralston*, 422 So. 2d 1093 (Fla. Dist. Ct. App. 1982).

129. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

130. *Maisler v. State*, 425 So. 2d at 108.

131. See *Wons v. The Public Health Trust of Dade*, 541 So. 2d 96 (Fla. 1989); *St. Mary's Hospital v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985).

132. See *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984), *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986), *rev. denied* 492 So. 2d 1331 (Fla. 1986).

133. 487 So. 2d at 370.

134. *Id.*

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

136. *In re Getty*, 427 So. 2d 380 (Fla. Dist. Ct. App. 1983).

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

138. See *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 77 (Fla. 1983).

139. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

140. See *Shaktman v. State of Florida*, 14 FLA. LAW WEEKLY 522 (Fla. 1989).

tigators.¹⁴¹ Overall, the public disclosure category applies to personal information that people normally and understandably want to keep private. Disclosure of such information could create professional or employment problems,¹⁴² impact an individual's private property interests,¹⁴³ or open a person's private habits to public review.¹⁴⁴

The public disclosure category cases have created conceptual problems for the Florida courts.¹⁴⁵ The courts have been forced to focus to some extent on the location where the communication occurs. Communication that occurs in a location that is considered public, such as a store, is not protected from surveillance.¹⁴⁶ However, under certain circumstances, a conversation between relatives that occurs in an interrogation room is protected.¹⁴⁷ In these cases individual expectations about privacy are especially critical.¹⁴⁸

C. *The Reluctance to Define a Standard of Review*

For almost five years the Florida courts refused to determine what standard of review to apply to the new constitutional right of privacy. The standard of review was among the first issues debated by the drafters of the original 1978 version.¹⁴⁹ There was fear that the Florida courts might dilute the right of privacy by "deciding cases on their particular facts or in an unarticulated process of balancing."¹⁵⁰ Some privacy provision supporters even believed that a compelling interest test was too weak.¹⁵¹ Other states that have adopted a state constitutional right of privacy have used either a compelling state interest test¹⁵² or a weaker means-ends test.¹⁵³

141. *Winfield*, 477 So. 2d 544.

142. *See Bar Examiners*, 443 So. 2d 71, where an applicant to the Florida Bar refused to answer questions about health and emotional problems. The Florida Bar, in turn, refused to process the applicant's application creating a delay for the applicant in obtaining employment as a licensed attorney.

143. *See Winfield*, 477 So. 2d at 545, where a state regulatory agency questioned the ownership of racehorses.

144. *See Shaktman*, 14 FLA. L. WEEKLY at 522, where criminal investigators utilized a pen register at a residence.

145. *See Adams v. State*, 436 So. 2d 1132 (Fla. Dist. Ct. App. 1985).

146. *Id.* at 1133.

147. *See State v. Calhoun*, 479 So. 2d 241 (Fla. Dist. Ct. App. 1985).

148. *Id.* at 244. *See Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

149. *See Cope, To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* note 83, at 724.

150. *Id.* at 725.

151. *Id.*

152. *Id.* at 745. Montana includes a compelling interest standard in the words of the privacy provision. MONT. CONST. Art. II, § 10.

153. *Id.* at 746. Alaska has opted for the means-ends test. *See Ravin v. State*, 537 P.2d 494

After Florida enacted Art. I, § 23, the Florida courts used a variety of means to avoid developing a standard of review. One court found in the context of marijuana possession that an individual asserting his or her privacy right has to make a compelling argument in support of that right being applied.¹⁵⁴ Other courts dismissed the assertion of a privacy right either by finding no reasonable expectation of privacy under the circumstances¹⁵⁵ or by interpreting the intent of the Florida voters when they passed the right of privacy provision.¹⁵⁶ Even when posed with an opportunity to decide what standard to apply, the Florida Supreme Court declined to do so by finding “[w]e need not make that decision . . . since . . . we find that the Board’s action meets even the highest standard of the compelling state interest test.”¹⁵⁷

Finally, at the end of 1985, the Florida Supreme Court applied a compelling state interest test,¹⁵⁸ finding that “[t]his test shifts the burden of proof to the state to justify an intrusion on privacy.”¹⁵⁹ However, even a year after deciding to apply a strict scrutiny standard, the Florida Supreme Court remained diffident in applying the test,¹⁶⁰ though the court reaffirmed that the compelling state interest standard is appropriate for “. . . a review of state action that infringes privacy rights under Article I, § 23.”¹⁶¹

V. THE TAX REPORTING AND DATA COLLECTION PROVISIONS ARE UNCONSTITUTIONAL

The stockbroker reporting¹⁶² and the foreign taxing authority information sharing provisions¹⁶³ are unconstitutional as violations of the

(Alaska. 1975).

154. *Maisler v. State*, 425 So. 2d 107, 108 (Fla. Dist. Ct. App. 1982).

155. *Adams v. State*, 436 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 1985).

156. *In re Getty*, 427 So. 2d 380, 383 (Fla. Dist. Ct. App. 1983).

157. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 74 (Fla. 1983).

158. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

159. *Id.* at 547.

160. *See Rasmussen v. South Florida Blood Serv. Inc.*, 500 So. 2d 533, 535 (Fla 1987), where the court finds that a court “need not engage in the stricter scrutiny mandated by constitutional analysis. We find that the interests involved here adequately protected under our discovery rules. . . .” The court’s desire not to reach a constitutional issue where there are grounds for a decision based on rules is respectable. However, it is peculiar that the Court then incorporates very weighty federal and state constitutional policy considerations in its analysis. In fact, *Rasmussen* is one of the best discussions of Art. I, § 23. The court easily could have decided *Rasmussen* on state constitutional privacy right grounds, but for some reason masked its constitutional decision by a procedural decision.

161. *Rasmussen*, 500 So. 2d at 535.

162. FLA. STAT. § 199.062(3) (1987). *See supra* notes 49-64 and accompanying text.

163. FLA. STAT. § 213.053(5) (Supp. 1988). *See supra* notes 65-73 and accompanying text. An argument could be made that Art. I, § 23 does not apply to any information gathered from the Internal Revenue Service because Congress authorized such information gathering by state govern-

Florida State constitutional right of privacy.¹⁶⁴ The second category of state constitutional privacy cases¹⁶⁵ decided by the Florida courts, the public disclosure of private information cases,¹⁶⁶ applies most directly to the tax reporting and foreign data sharing provisions. The Florida courts hold that the state has to make a strong showing to justify requiring an individual to provide information to a state agency.

In *Winfield v. Division of Pari-Mutuel Wagering*¹⁶⁷ the Florida Supreme Court found that the state constitutional privacy provision "recognizes an individual's legitimate expectation of privacy in financial institution records."¹⁶⁸ *Winfield* involved an investigation by the Florida Division of Pari-Mutuel Wagering which believed that a "private citizen did not actually own the racehorses as he had reported and that his ownership was really a front for other members of his family and/or closely held family corporations."¹⁶⁹ The Division of Pari-Mutuel Wagering, as part of its investigation, subpoenaed the individual's bank records without providing notice to the individual.¹⁷⁰

First, it is remarkable that the supreme court characterizes the privacy expectations as extending to "financial institution records." The court characterizes the bank records this way at least twice,¹⁷¹ and opts not to view *Winfield* in narrow terms as applying only to bank records. The court could view *Winfield* narrowly because the *Winfield* privacy analysis begins with *United States v. Miller*,¹⁷² a bank record subpoena case. The court also discusses the inapplicability of another bank record case, *Meholnick v. First National Bank*.¹⁷³ The court could easily focus only on the bank record aspect of the case and how *Meholnick* and *Miller* does or does not apply to the *Winfield* circumstances. Instead,

ments by enacting 26 U.S.C. § 6103 (1982). The supremacy clause, Article VI of the United States Constitution, would require that effect be given to the mandate that the I.R.S. share information with the states. Such an argument fails because the words of 26 U.S.C. 6103 limit the state authority to inspect to the extent that state law allows such inspections. "Returns . . . shall be open to inspection by, or disclosure to, any state agency . . . which is charged under the laws of such State with the responsibility for the administration of State tax laws for the purpose of . . . the administration of such laws. . ." 26 U.S.C. § 6103(d) (1982). The Florida Department of Revenue is charged with the collection of taxes. See FLA. STAT. § 20.21, (1985). But that charge or authorization is limited by the Florida Constitution, See, e.g. FLA. CONST. art. VII.

164. FLA. CONST. art. I, § 23, See *supra* notes 74-159 and accompanying text.

165. See *supra* notes 136-148 and accompanying text.

166. See *supra* note 126 and accompanying text.

167. 477 So. 2d 544 (Fla. 1985).

168. *Id.* at 548.

169. *Division of Pari-Mutuel Wagering v. Winfield*, 443 So. 2d 455, 456 (Fla. Dist. Ct. App. 1984).

170. *Id.*

171. 477 So. 2d at 547, 548.

172. 425 U.S. 435 (1976) *discussed in Winfield*, 477 So. 2d at 547.

173. 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) *discussed in Winfield*, 477 So. 2d at 546-47.

the court paints a broader picture, applying broad historical privacy considerations¹⁷⁴ along with Art. I, § 23 to a wide class of financial records. *Winfield* is applicable to stock brokerage records, as brokerage houses are financial institutions or, at least, act in that capacity.¹⁷⁵

Second, the *Winfield* court requires that the Division of Pari-Mutuel Wagering bear the burden of proof to "justify an intrusion of privacy" under the compelling state interest standard.¹⁷⁶ The Division of Pari-Mutuel Wagering succeeded at bearing that burden by showing that the state has a compelling interest in conducting effective investigations in the pari-mutuel industry.¹⁷⁷ The court characterizes the work of the Pari-Mutuel Wagering agency as "regulation."¹⁷⁸ Though the court does not focus on the general circumstances of the case in its analysis, it does mention that the trial court found that there was probable cause to institute the investigation.¹⁷⁹ The court also discusses the existence of the subpoena.¹⁸⁰ The *Winfield* court finds that the privacy provision does not apply where a state agency is carrying out a regulatory function, the agency has probable cause to believe that an individual who falls under the agency's regulatory powers has violated statutes and regulations, and the agency uses a subpoena. As to financial records protected by the privacy provision, the *Winfield* court holds broadly, but as to what state actions are permissible under the privacy provision, the *Winfield* court holds narrowly.

In *Florida Board of Bar Examiners Re: Applicant*,¹⁸¹ the supreme court found that the right of privacy protects information about "private life."¹⁸² In *Bar Examiners*, an applicant to the Florida Bar refused to answer a question relating to treatment for mental health

174. The court starts its overall analysis in *Winfield* with a quote from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438 (1928). The court then reviews the federal privacy cases such as *Roe v. Wade*, 410 U.S. 118 (1973) concluding that the federal cases are not applicable to *Winfield* and that "... [i]n formulating privacy interests, the Supreme Court has given much of the responsibility to the individual states." 477 So. 2d at 547.

175. See, e.g., *Rudd v. State*, 386 So. 2d 1216 (Fla. Dist. Ct. App. 1980) where the Court distinguishes between a loan and a security. In distinguishing the two transactions, the Court concedes "[T]he term 'loan' and 'investment' are often used when referring to the same type of transaction." *Id.* at 1219. *Rudd* revolves around defining differences between similar financial activities. The court is posed with actions that could be viewed either as a loan, an activity primarily carried out by banks or individuals, or as a sale of a security, an activity primarily carried out by a stock dealer.

176. 477 So. 2d at 547.

177. *Id.* at 548.

178. *Id.* at 547.

179. *Id.* at 546.

180. *Id.* at 546, 548.

181. 443 So. 2d 71 (Fla. 1983).

182. *Id.*

problems in the Bar Examiner's application.¹⁸³ The court found that the Bar Examiner's request for information met "the highest standard of the compelling state interest test,"¹⁸⁴ though the court declined in the 1983 case to state whether the strict scrutiny standard is applicable to Art. I, § 23.¹⁸⁵ The Bar Examiners fulfilled their heavy burden under strict scrutiny by showing "an important societal need."¹⁸⁶ In this case the societal need involves ensuring the fitness of those who apply to practice law.¹⁸⁷ Further, the Bar Examiners, as a state agency,¹⁸⁸ protect the public by assuring that those whom the Bar Examiners allow to assume positions of public trust and responsibility are capable of coping with the mental and emotional pressures inherent in legal practice.¹⁸⁹ To fulfill their obligation to the public, the Bar Examiners require a wide range of candidate data.¹⁹⁰ The court found that personal information about mental health is not protected by the state constitutional right to privacy in the general context where "the state has a compelling state interest in regulating the legal profession. . . ."¹⁹¹ The court also recognized that a candidate to the Bar volunteers to apply for a privilege from the State,¹⁹² therefore, the candidate holds himself or herself open to intimate, though focused, inquiry.¹⁹³

Bar Examiners is decided similarly to *Winfield*. First, the court applies the protection of the right of privacy to a wide category activity, "private life," avoiding a narrow view of the case as impacting only psychological or health information. Second, the court requires that a state agency have a specialized, regulatory reason for requiring the disclosure of information. However, the court in *Bar Examiners* focuses on societal needs and impacts in assessing whether a compelling state purpose exists. The court does not use such an analysis in *Winfield*, possibly because the societal needs are implied in the nature of the pari-mutuel statutory and regulatory scheme that requires "effective investigations."¹⁹⁴

183. *Id.* at 72-3.

184. *Id.* at 74.

185. *Id.*

186. *Id.*

187. *Id.* at 75.

188. *Id.* at 74.

189. *Id.* at 75.

190. *Id.*

191. *Id.* The Court discusses how the United States Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) recognizes the states' compelling interest in regulating the Bar.

192. 443 So. 2d 71, 74 (Fla. 1983).

193. *Id.*

194. 477 So. 2d at 548.

Rasmussen v. South Florida Blood Serv., Inc.,¹⁹⁵ decided in 1987, adds a new element to the state constitutional right of privacy analysis. In *Rasmussen*, the court reviewed the impact of disclosure of personal information on an individual's life.¹⁹⁶ This is unlike *Winfield* and *Bar Examiners* where the court focuses on the state's justifications for requiring the disclosure of data. In *Rasmussen*, a victim contracted AIDS from blood transfusions required as a result of an automobile accident. While suing the driver of the automobile that injured him, Rasmussen sought blood donor records from a local blood bank.¹⁹⁷ The court found through its analyses of the privacy interests involved that "[d]isclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the individual donor."¹⁹⁸

By reviewing the impact of disclosure on the individual, the court is not receding from the requirements of *Winfield* and *Bar Examiners* that the State carry the burden of justifying the need for disclosure. The court states, "[t]his opinion in no way changes or dilutes the compelling state interest standard appropriate to a review of state action. . . ."¹⁹⁹ The court does not use a compelling state interest standard because "the interests involved here are adequately protected under our discovery rules. . . ."²⁰⁰

It would be easy to dismiss *Rasmussen* as a discovery rule case not relevant to a constitutional right of privacy analysis. However, the supreme court places great emphasis on Art. I, § 23 in deciding *Rasmussen*,²⁰¹ and extensively reviews the history and policy underlying the constitutional right to privacy.²⁰² The impact of disclosure on an individual's life appears to be the crux of the court's privacy interest analysis. Though the court reviews the impact of the discovery rules on the case, that review focuses narrowly in breadth on the discovery request in *Rasmussen*.²⁰³ The court finds "the subpoena in question gives petitioner access to the names and addresses of the blood donors with no restrictions on their use."²⁰⁴ The impact of disclosure involves the risk that friends and employers may learn about the information,²⁰⁵ and the court does not limit its sensitivity to the impact of disclosure to the

195. 500 So. 2d 533 (Fla. 1987).

196. *Id.* at 537.

197. *Id.* at 534.

198. *Id.* at 537.

199. *Id.* at 535.

200. *Id.*

201. *Id.* at 536-37.

202. *Id.*

203. *Id.* at 537.

204. *Id.*

205. *Id.*

context of AIDS. "[T]he importance of protecting the privacy of donor information does not depend on the stigma associated with AIDS. . . ." ²⁰⁶

*Shaktman v. State of Florida*²⁰⁷ is a criminal case involving book-making, conspiracy, and racketeering. Police used a pen register after court approval to record phone numbers at the home of a suspect.²⁰⁸ The Florida Supreme Court in *Shaktman* clarified the underlying philosophy of Art. I, § 23. A goal of the privacy provision is to encourage independence and individualism by creating a zone of privacy into which government may not enter without consent. What is assured is the inviolability of thought, action, and the person. The right to privacy protected by Art. I, § 23 is so strong that its inviolability is preeminent "over 'majoritarian sentiment' and thus can not be universally defined by consensus."²⁰⁹ Personal intention and expectation are essential to defining what is included in the zone of privacy because the limits of an individual's privacy is dictated both by the individual and what is reasonable.²¹⁰ As a result, pen register data are still protected even though the telephone company maintains similar records. What is critical is the expectation that the government will receive the information and not just that other people or a corporation in the course of its business will receive the information.

The *Shaktman* court found that Art. I, § 23 protects telephonic communications made from a residence.²¹¹ At the same time, the court failed to apply the protections of Art. I, § 23 to the criminal defendants in *Shaktman*. The court found that a compelling state interest existed where the state demonstrates a clear connection between illegal activity and a person whose privacy is being invaded. A legitimate, ongoing criminal investigation creates a compelling state interest so long as a reasonable founded suspicion that the communication or private information is being used for a criminal purpose exists.²¹² Also, the state must use the least intrusive method to obtain the information,²¹³ and must observe procedural safeguards such as judicial approval prior to an intrusion into a person's privacy.²¹⁴

The public disclosure of personal information category of privacy

206. *Id.*

207. 14 FLA. L. WEEKLY 522 (Fla. 1989).

208. *Id.* at 522.

209. *Id.* at 523.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 524.

214. *Id.*

right cases limits the privacy right protection where a state agency needs to investigate the activities of individuals. However, this need to investigate overcomes the privacy right only in prescribed circumstances. First, the agency must be involved in critical regulatory functions that safeguard the public from harm. The Bar Examiners assure that prospective attorneys will not injure the public interest, while the Division of Pari-Mutuel Wagering guards against abuses in an industry that involves not only sport but also gambling and animals. Dishonest attorneys could injure individual lives and property while dishonest racehorse owners could foster cheating, corruption and cruelty to animals.

Second, the need to investigate is based on statutory or regulatory provisions aimed at regulating specific behavior such as lawyer conduct, horse racing, and criminal activity. In order for a state agency to collect data, there must be either a violation of a statute or regulation or an individual applying for or receiving a privilege under a statute or regulation that protects the public trust and confidence. In fact, the public disclosure cases involve either criminal conduct or voluntary acquiescence to state regulation as in horse racing and the practice of law. In a sense, a criminal violation is a voluntary acquiescence to state regulation because those who commit crimes take the risk that they will be prosecuted by a state agency. The public disclosure cases also involve the existence of reasonable founded suspicion and at least two cases involve subpoenae.²¹⁵

The right of privacy is not limited by the Department of Revenue's general need for information about a taxpayer because the Department's data collection needs do not fit within the exception to the right of privacy protection carved by the public disclosure cases. The Department of Revenue is involved in tax collection,²¹⁶ and that is not a critical regulatory function safeguarding the public from harm. There is no industry oversight involved in tax collection functions. Taxpayers cannot be likened to racehorse owners or candidates to the Bar. Though taxpayers may have a generalized duty to pay the intangible property tax,²¹⁷ such a duty does not involve the same public trust and confidence expected of an attorney. The taxpayer is closer to "the tradesman and businessmen"²¹⁸ against whom attorneys are contrasted by the *Bar Examiners* court.

215. *In re Getty*, 427 So. 2d 380, 380 (Fla. Dist. Ct. App. 1983); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 546 (Fla. 1985).

216. FLA. STAT. § 20.21 (1987).

217. See FLA. STAT. § 199.052 (1987).

218. 443 So. 2d at 75.

An argument can be made that taxpaying is a regulated activity to which all people who own intangible property voluntarily submit and which involves tax evasion. It can be argued that the Department of Revenue has a compelling need to catch evaders, and that all intangible property owners must submit themselves to scrutiny to assure that they are not evaders. But such an argument undercuts the whole idea of the state constitutional right of privacy as a basic right.²¹⁹ All the state must show, under that argument, is that tax collection is a compelling state purpose. However, such a showing means that any important state function is a compelling state purpose that can overcome the right of privacy, and the fears of the framers of the privacy provision concerning a watered down standard of review are realized.²²⁰ This basic right is transformed into an individual interest that can be outweighed easily by a countervailing state interest.²²¹ Taxpaying is not an industry like horse racing or the practice of law. That taxpaying is regulated by a set of laws and rules does not convert the activity into a highly regulated one any more than laws and rules convert the use of highways, sidewalks, public water supplies, or household garbage pickup into highly regulated activities. If all that the state must demonstrate under Art. I, § 23 is that laws and rules exist in an area of human activity, then most activities would not be accorded protection under Art. I, § 23. Such an approach would undermine the distinction between highly regulated attorneys and less regulated "tradesmen and businessmen" made by the *Florida Bar Examiners*²²² court. The court allowed the Florida Bar Examiners to probe the medical history of an attorney candidate because such a person is entering an occupation with special responsibilities, different from most other service workers.

The closest the Department of Revenue regulatory activity can be compared to that of the Florida Board of Bar Examiners or the Division of Pari-Mutuel Wagering would be the discovery of tax evasion. However, tax evaders do not have the same effect as dishonest attorneys or racehorse owners. The public suffers when people evade taxes, but tax evasion is not the same as corruption or dishonesty in a highly regulated activity or service industry. Taxpayers are not required to undergo the rigorous scrutiny of licensing or a permit process before they are allowed to pay their taxes. Taxpayers do not share the special role in society assigned to professionals such as attorneys who "are es-

219. See *Winfield v. Division of Pari-Mutual Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

220. See *supra* notes 149-151 and accompanying text.

221. See *Cope, To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* note 83, at 479. See also *supra* notes 103-106 and accompanying text.

222. 443 So. 2d 71, 74 (Fla. 1983).

sential to the primary governmental function of administering justice and have historically been 'officers of the courts.'"²²³ The search for tax evaders may protect society in a general sense, but can not be said to protect against the potential dangers in a regulated business such as the pari-mutuel industry. The Florida pari-mutuel regulatory scheme works *inter alia* to "preserve the integrity of the sport of racing from corruption, to keep the wagering public from being misled, to reduce the risk of injury and to protect the animals from cruel and inhumane treatment."²²⁴

The Department of Revenue may collect data on taxpayers from stockbrokers or the IRS only if there is reasonable founded suspicion to believe that a particular taxpayer is cheating. Such activity is criminal conduct,²²⁵ therefore, the taxpayer is not shielded by the right of privacy from the data collection procedures of the Department of Revenue. To allow the Department of Revenue to collect data on every taxpayer as a matter of standard procedure violates the privacy right requirement that an agency "accomplishes its goals through the use of the least intrusive means."²²⁶ Not every taxpayer cheats and the Department of Revenue cannot violate a basic constitutional right on vague and generalized suspicions about widespread cheating. The Department of Revenue may be hampered in its investigatory procedures, and probably will find it difficult to assure individual compliance with the Intangible Personal Property Tax Act without routine reports from stockbrokers and the IRS. However, the price of making it easy for the Department of Revenue to do its job is to disregard a constitutional provision "providing an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions."²²⁷

VI. FLORIDA PRIVACY PROTECTION AS A MODEL FOR OTHER STATES

This article has examined how Florida's state constitutional privacy provision applies to a routine government function, the collection of taxes. Florida's constitutional provision is a model that could prove useful to other states. The federal constitution is weakening as a protec-

223. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) *quoted in* Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71, 75 (Fla. 1983).

224. *Simmons v. Division of Pari-Mutuel*, 407 So. 2d 269, 271 (Fla. Dist. Ct. App. 1982), *aff'd*, 412 So. 2d 357 (Fla. 1982).

225. *See supra* notes 127-129 and accompanying text.

226. 477 So. 2d at 547; *Shaktman v. State of Florida*, 14 FLA. L. WEEKLY 522, 523 (Fla. 1989).

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

tion of privacy as the United States Supreme Court retreats from *Roe v. Wade*²²⁸ in *Bowers v. Hardwick*²²⁹ and *Webster v. Reproductive Health Services*.²³⁰ At the same time, state constitutions are being revitalized as sources of individual rights and protections.²³¹ Privacy is a prime area in which state constitutions have a critical role providing protection from government interference.²³² A few states join Florida in including express privacy provisions in their state constitutions.²³³ On the other hand, a few state courts have implied a privacy right in state constitutional provisions that fail explicitly to protect privacy.²³⁴ As the state constitutional law movement expands and the U.S. Supreme Court becomes less protective of privacy interests, more states may want to consider adopting constitutional provisions like Art. I, § 23.

Florida is in the forefront of protecting privacy based on its state constitution. Even the emotionally charged and highly debated right to choose an abortion is protected by Art. I, § 23.²³⁵ If the right to choose an abortion and to withdraw medical treatment²³⁶ are protected under Art. I, § 23, then a variety of human activity including paying taxes is covered by the Florida constitutional privacy rights. As a result, Florida provides a state constitutional laboratory for the nation. The rationale of the Florida courts should be helpful in aiding scholars, practitioners and jurists in other states in developing law under their state constitutions. The challenge will be to develop state constitutional privacy law that is meaningful in the everyday lives of people. Paying taxes, driving and using public services are the means by which people relate to their state and local governments. Placing limits on the powers of state and local governments in obtaining personal information will secure individual liberty. The Florida constitution provides a model by which all

228. 410 U.S. 113 (1973).

229. 478 U.S. 186 (1986).

230. 109 S.Ct. 3040 (1989).

231. See, e.g., Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 1 (1988); Collins, *Reliance on State Constitutions—Beyond the "New Federalism"*, 8 U. PUGET SOUND L. REV. vi (1984); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984).

232. See Kempic, *The Right to Refuse Medical Treatment Under the State Constitutions*, 5 COOLEY L. REV. 313 (1988).

233. See ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 5; and MONT. CONST. art. II, § 10.

234. See *In re Brown*, 478 So. 2d 1033 (Miss. 1985); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1977); *In re Farrell*, 529 A.2d 404 (N.J. 1987); *Moe v. Sec'y of Administration*, 417 N.E.2d 387 (Mass. 1981).

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

236. *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989).

state governments can ensure that the liberty of their residents is protected.

VII. CONCLUSION

Art. I, § 23, Florida's state constitutional right of privacy, prohibits the Department of Revenue from requiring stockbrokers to report client financial information and from using information received about individual taxpayers from the IRS unless the Department of Revenue has probable cause to believe that a taxpayer is violating the Intangible Personal Property Tax Act. The right of privacy yields only when a state agency needs to collect data in order to regulate specific activity for which individuals volunteer or when there is criminal activity. Tax-paying is not the kind of regulatory activity for which the state can show a compelling need to regulate and require disclosure of data. Taxpaying is not criminal activity unless a taxpayer disobeys the tax act. For the right of privacy to yield when the Department of Revenue must do no more than demonstrate its job will be made more difficult means that the state constitutional right of privacy is no longer a basic right that requires the state to meet the burden of a strict scrutiny test.