South Carolina Law Review

Volume 33
Issue 1 *Annual Survey of South Carolina Law*

Article 4

8-1981

Constitutional Law

Belton T. Zeigler

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation
Zeigler, Belton T. (1981) "Constitutional Law," *South Carolina Law Review*: Vol. 33 : Iss. 1 , Article 4.
Available at: https://scholarcommons.sc.edu/sclr/vol33/iss1/4

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

CONSTITUTIONAL LAW

I. EQUAL PROTECTION—THE DOUBTFUL VITALITY OF THE RATIONAL RELATION STANDARD FOR REVIEWING STATUTES AFFECTING CIVIL LIABILITY IN SOUTH CAROLINA

The parental immunity doctrine in South Carolina traditionally prevented minors from bringing tort actions against their parents. That restriction lost much of its force in 1962 when the South Carolina Legislature passed a statute, now codified at section 15-5-210 of the South Carolina Code, permitting minors to sue their parents for injuries arising out of automobile accidents.[1] In *Elam v. Elam*,[2] the South Carolina Supreme Court ruled that section 15-5-210 violated the equal protection clauses of the South Carolina and United States Constitutions.[3] The court in *Elam* also abolished, on equal protection grounds, South Carolina's common-law doctrine of parental immunity.[4]

In *Elam*, unemancipated minors were injured while riding in automobiles driven by their parents. The minors brought negligence actions against their parents as permitted by section 15-5-210 of the South Carolina Code,[5] and the parents responded by challenging the statute on equal protection grounds.[6] The trial court found the statute unconstitutional,[7] and the minors appealed in order to preserve their right to recovery. Arguing for the constitutionality of the statute, the minors contended that it was rationally related to two legitimate state interests: "preserving family tranquility and . . . protecting the victims of automobile accidents."[8] The supreme court, apparently unpersuaded by

---

1. S.C. CODE ANN. § 15-5-210 provides that "[a]n unemancipated child may sue and be sued by his parents in an action for personal injuries arising out of a motor vehicle accident. In any such action there shall be appointed a guardian ad litem as provided by law for such child."

2. _ S.C. _, 268 S.E.2d 109 (1980).

3. *Id.* at _, 268 S.E.2d at 110.

4. *Id.* at _, 268 S.E.2d at 110-11. For a discussion of the tort law aspects of *Elam*, see *Torts, Annual Survey of South Carolina Law*, 33 S.C.L. REV. _ (1981).

5. See note 1 *supra* for the text of the statute.

6. Record at 1-2.

7. Order at 6-7.

8. Brief of Appellant at 5.

South Carolina Law Review, Vol. 33, Iss. 1 [1981], Art. 4

this argument, stated that "there is no valid reason to treat unemancipated minors differently from their peers tortiously injured in other ways," cited to its earlier decision in *Marley v. Kirby*, and affirmed the trial court's determination that section 15-5-210 was unconstitutional.[9]

In *Marley*, the court invalidated a statute that established comparative negligence only for actions concerning motor vehicle accidents and explained that "the requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be effected."[10] The court then reasoned that "the extension of [the state's police] power to alter a substantive rule of negligence law with respect to one class of persons [was] improper" and concluded that "there is no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."[11]

The court's summary treatment of the equal protection issue in *Elam* is troublesome because the court, in considering the constitutionality of section 15-5-210, failed to discuss the legislative purposes of the statute. Reliance on *Marley* cannot justify this omission because *Marley* considered the constitutionality of a different statute with presumably different legislative purposes. Moreover, the court in *Marley* also failed to discuss the legislative purposes for the statute under review.

Elam is the latest in a line of equal protection cases in which the court has examined the constitutionality of statutes affecting civil remedies. In the earliest of these cases, *Green v. Zimmerman*,[12] the court upheld a statute that imposed strict liability on the owners of aircraft but held nonowner pilots to only a negligence standard,[13] articulating the rational relation test as follows: "[A] statute . . . promulgated under state authority will be found to violate equal protection only when it results in discrimination against a certain class and the classification is not rationally related to any legitimate state policy or interest."[14]

9. 271 S.C. 121, 245 S.E.2d 604 (1978).
10. *Id.* at 124, 245 S.E.2d at 606.
11. *Id.* at 124, 245 S.E.2d at 606.
12. 269 S.C. 535, 238 S.E.2d 323 (1977).
13. S.C. CODE ANN. § 55-3-60 (1976).
14. 269 S.C. at 540, 238 S.E.2d at 325 (citing Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974)).

This formulation appears to dictate a two-prong test: the court must first determine the legitimacy of the state policy or interest on which a statute is based, and then the court must decide whether the classification created by the statute is rationally related to the state policy or interest. In *Green*, the court discussed the legislative purposes on which the statute under review was based, determined them valid, and concluded that the classification created by the statute was reasonable.[15]

Of the six equal protection decisions that followed *Green*, the court has discussed the legislative purposes of the statute under review in only two. *State v. Smith*[16] affirmed the constitutionality of a provision of the South Carolina Blue Laws that permitted only those grocery stores with fewer than three employees to remain open on Sunday.[17] Observing that the purpose of the statute was to provide for the health and welfare of the populace by making grocery items available while extending a day of rest to the maximum number of people, the court determined this purpose valid and concluded that the statute was consistent with it.[18] *Ramey v. Ramey*[19] invalidated South Carolina's guest passenger statute[20] because it was "limited to motor vehicles and [was] accordingly defective under *Marley*."[21] The court discussed two legislative goals for the statute: "the protection of host drivers from suits by ungrateful guests; and . . . the elimination of collusive lawsuits" and concluded that the statute served neither purpose.[22]

In the remaining decisions in the *Green-Elam* line, the court gave no indication that it had considered the legislative purposes for the statutes under review. *Broome v. Truluck*[23] invalidated a special statute of limitations that was applicable to architects, engineers, and contractors who construct defective buildings but not applicable to building owners.[24] Without dis-

---

15. *Id.* at 540, 238 S.E.2d at 325.
16. 271 S.C. 317, 247 S.E.2d 331 (1978).
17. S.C. CODE ANN. § 53-1-40 (1976).
18. 271 S.C. at 320-21, 247 S.E.2d at 332.
19. 273 S.C. 680, 258 S.E.2d 883 (1979).
20. S.C. CODE ANN. § 15-1-290 (1976).
21. 273 S.C. at 685-86, 258 S.E.2d at 886.
22. *Id.* at 683, 685, 258 S.E.2d at 884, 885.
23. 270 S.C. 227, 241 S.E.2d 739 (1978).
24. *Id.* at 229, 241 S.E.2d at 740.

cussing the legislative purposes for the statute, the court nevertheless found no apparent rational basis for distinguishing between the two groups,[25] despite acknowledgement by other jurisdictions of various purposes for similar statutes.[26] *Marley*,[27] cited by the court in *Elam*, failed to discuss the legislative purposes for the comparative negligence statute and ruled that the statute's effect, rather than its purpose, was invalid.[28] *Sapp v. State Farm Automobile Insurance Co.*[29] upheld a statute that denied unidentified motorist coverage for injuries caused by an unidentified vehicle in the absence of physical contact with that vehicle.[30] Without discussing the statute's legislative purposes, the court summarily concluded that "the distinction is one which the legislature was constitutionally privileged to make."[31]

Although the court purports to apply the rational relation test in its equal protection decisions, it has failed to identify and discuss legislative purposes for challenged statutes in the majority of its recent decisions reviewing the constitutionality of statutes challenged on equal protection grounds. Indeed, it has been observed that "[t]he standards applicable to the constitutional guarantee of equal protection have become little more than incantations, ritualistically preceding the court's determination of the merits of the particular case."[32]

Elam lends further credence to the conclusion that the South Carolina Supreme Court has retained the rational relation test as its equal protection standard in name only. In the portion of the *Elam* decision that abolished the parental immunity doctrine, the court noted that it was not "blind to the existence of universal automobile liability insurance" or unaware that a minor's suit against his automobile-driving parent is, in reality, a

25. *Id.* at 231, 241 S.E.2d at 740.

26. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 341 A.2d 184 (1975); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972). *See Constitutional Law, Annual Survey of South Carolina Law*, 31 S.C.L. Rev. 21 (1980).

27. See notes 10 & 11 and accompanying text *supra*.

28. 271 S.C. at 125, 245 S.E.2d at 606.

29. 272 S.C. 301, 251 S.E.2d 745 (1979).

30. S.C. Code Ann. § 56-9-850 (1976).

31. 272 S.C. at 303, 251 S.E.2d at 746.

32. *Constitutional Law*, *supra* note 26, at 32.

suit against that parent's insurer.[33] This implicit acknowledgement of a legislative purpose to which the statute might be rationally related, as well as the court's tacit repudiation of the state's interests in preserving family tranquility and protecting automobile accident victims, suggests that the court applied an unarticulated but stricter standard under which it invalidated the statutory classification by making a subjective evaluation of the effects of the statute.

A standard other than the rational relation test is not ordinarily applied by federal courts[34] and the courts of other states,[35] except to statutes restricting fundamental rights and classifications constituting invidious discrimination.[36] Indeed, Justice Littlejohn, in his dissent to *Ramey*,[37] called attention to the firmly established South Carolina rule that "a statute will, if possible, be construed so as to render it valid [and] will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt . . . ."[38] In view of the approach supported by the great weight of authority, the South Carolina Supreme Court should return to an orthodox application of the rational relation test when determining the constitutionality of statutes that do not restrict fundamental rights or create classifications that constitute invidious discrimination.

II. Separation of Powers

The separation of powers clause of the South Carolina Con-

---

33. _ S.C. at _, 268 S.E.2d at 111.

34. *See* Parham v. Hughes, 441 U.S. 347, 352 (1979); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).

35. *See* Everett v. Goldman, 359 So. 2d 1256 (La. 1978); Pendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977); Botsch v. Reisdorf, 226 N.W.2d 121 (Neb. 1975); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

36. An early but still authoritative exposition of the doctrine requiring strict scrutiny appears in Justice Stone's footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Suspect classifications include race, Korematsu v. United States, 323 U.S. 214 (1944); alienage, Graham v. Richardson, 403 U.S. 365 (1971); possibly illegitimacy *see* Levy v. Louisiana, 391 U.S. 68 (1968); *but see* Matthews v. Lucas, 427 U.S. 495 (1976); and possibly gender, *see* Frontiero v. Richardson, 411 U.S. 677 (1973), *but see* Craig v. Boren, 429 U.S. 190 (1976). Fundamental rights generally are those rights guaranteed by the Bill of Rights. *Carolene Products*, 304 U.S. at 152 n.4.

37. 273 S.C. at 686, 258 S.E.2d at 886 (Littlejohn, J., dissenting).

38. *Id.* at 688, 258 S.E.2d at 886-87 (citing University of S.C. v. Mehlman, 245 S.C. 180, 139 S.E.2d 771 (1964); Nolletti v. Nolletti, 243 S.C. 20, 132 S.E.2d 11 (1963); Clark v. South Carolina Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481 (1935).

Published by Scholar Commons, 1981

South Carolina Law Review, Vol. 33, Iss. 1 [1981], Art. 4

stitution provides that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."[39] In *State ex rel. McLeod v. Yonce*,[40] the South Carolina Supreme Court held that section 58-3-145 of the South Carolina Code,[41] which required the Chief Justice of the South Carolina Supreme Court to appoint circuit judges to preside over contested utility rate hearings, violated the separation of powers doctrine. The court implied, however, that some overlapping of authority among the branches of government might be permissible.[42] In *Williams v. Bordon's, Inc.*,[43] the court strictly construed the separation of powers clause and overturned section 2-1-150 of the South Carolina Code,[44] which required state courts to grant au-

39. S.C. CONST. art. I, § 8. Enacted shortly after federal occupation of the state following the Civil War, the separation of powers clause contained a provision, later dropped, stating that its purpose was "to the end that . . . [South Carolina Government] would be a government of laws and not of men." J. WOODRUFF, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 314 (1868). In the 1868 Constitution, the clause immediately followed provisions protecting individuals from suspension of law, S.C. CONST. of 1868, art. I, § 24, and from the imposition of martial law, S.C. CONST. of 1868, art. I, § 25. The historical record clearly establishes that the clause was enacted primarily to protect citizens from suspension of legal rights by legislative or executive usurpation of judicial functions. *Id.*

40. 274 S.C. 81, 261 S.E.2d 303 (1979).

41. S.C. CODE ANN. § 58-3-145 (Supp. 1980) provides in part:

> The Public Service Commission shall notify the Chief Justice of the South Carolina Supreme Court of all pending contested rate matters where the amount in controversy . . . [exceeds] one million dollars annually. The Chief Justice, when so notified or when otherwise requested to do so by the Chairman of the Commission, shall appoint a circuit judge to preside over the hearings in such cases. Such judge shall have full authority to rule on questions concerning the conduct of the case and the admission of evidence but shall not participate in the determination on the merits of any such case.

42. 274 S.C. at 88, 261 S.E.2d at 306.

43. 274 S.C. 275, 262 S.E.2d 881 (1980).

44. S.C. CODE ANN. § 2-1-150 (Supp. 1980) provides in part:

> Notwithstanding any other provisions of law or rule of court, no member of the General Assembly shall be required to appear in court . . . during any regular legislative day, on any day in which the General Assembly is in special session, or on any other day when any legislator is required to attend any official legislative committee meeting . . . .
>
> . . . The right to a continuance, where such continuance is based upon an attorney in such a case being a member of the legislature, shall be a matter of right except in the following situations and under the following circumstances,

tomatic continuances to lawyer-legislators under certain circumstances. The court's indication of flexibility in *Yonce* is difficult to reconcile with the strict construction set forth in *Williams*.

A. Delegation of Executive Functions to the Judiciary

In *Yonce,* the court determined that the use of a circuit judge as a presiding officer of the Public Service Commission infringed upon the authority of both the executive and legislative branches of state government in violation of the separation of powers clause. The court observed that the statute reposed in a member of the judiciary "tremendous potential for influencing the result of matters being considered" by an executive agency,[45] permitted the Chief Justice to appoint the presiding officer of an administrative body, and "limit[ed] the authority of the Chief Justice to use judges for judicial duties as required by Article V [of the South Carolina Constitution]."[46] The court recognized, however, that "some overlapping authority has been tolerated" and ruled only that "the degree of involvement here is such that the Constitution mandates that [the statute] be declared invalid."[47]

Yonce presents the first indication that the court may be willing to construe the separation of powers clause flexibly to permit limited overlap between the branches of state government. Just over two decades ago, in *Board of Bank Control v. Thomason,*[48] in which it was held that a county court had only limited power to review a decision by an administrative body,

---

and none other, to wit:

(1) where litigation involves emergency relief and irreparable damage;

(2) where such attorney has previously been granted continuances for the same case for a period greater than one hundred eighty days; or

(3) in a criminal case where the client is incarcerated unless the defendant shall give his written consent to the continuance.

45. 274 S.C. at 85, 261 S.E.2d at 305. One concern in delegating executive power to the judiciary is that it may involve the judiciary in conflicts which may be common to the executive and legislative branches but from which the judiciary should be isolated. *Yonce* appears unique in recognizing, as an element for consideration in separation of powers cases, the political dangers that may arise out of undue judicial involvement in executive decision making.

46. S.C. CONST. art. V, § 4, provides that the Chief Justice shall "have the power to assign any judge to sit in any court within the unified judicial system."

47. 274 S.C. 88, 261 S.E.2d 306.

48. 236 S.C. 158, 113 S.E.2d 544 (1960).

the supreme court observed that "[t]he basic proposition that a constitutional court should not be required to perform non-judicial duties is probably beyond challenge."[49] Since *Thomason*, the court has construed the separation of powers clause in a series of decisions addressing overlapping functions of the executive and legislative branches within the State Budget and Control Board, an administrative board on which two legislators serve as *ex officio* members. In *Elliott v. McNair*,[50] the court found no constitutional violation, but the court discussed only the issue of dual office-holding,[51] and passed over the separation of powers issue without discussion.[52] In *Mims v. McNair*,[53] the court summarily disposed of an asserted separation of powers violation on the strength of *Elliott*.[54] Soon after *Mims*, the South Carolina Constitution was revised,[55] and, in the most recent challenge to the constitutionality of the State Budget and Control Board, *State ex rel. McLeod v. Edwards*,[56] the court held that the reenactment of the separation of powers clause without change signified the General Assembly's contentment with the court's construction of the clause. The court further explained in dictum that overlapping functions might be permitted where there is a cooperative effort between branches and no effort by one branch to usurp the functions of another branch.[57] *Yonce* comports with the court's tacit flexible construction of the separation of powers clause in the Budget and Control Board cases but nevertheless represents its first suggestion that overlapping executive and judicial functions may be permissible.

The courts of other states have been willing to sanction limited overlap of executive and judicial functions. The Illinois Supreme Court, in *People v. Reiner*,[58] analyzed the constitutional-

---

49. *Id.* at 165, 113 S.E.2d at 547.

50. 250 S.C. 75, 156 S.E.2d 421 (1967).

51. When *Elliott* was decided, the dual office holding proscription was contained in S.C. CONST. art. II, § 2. Since that time, it has been transferred to S.C. CONST. art. XVII, § 1A. Act No. 277, 1970 S.C. Acts, 57 Stat. 319.

52. 250 S.C. at 94-95, 156 S.E.2d at 431.

53. 252 S.C. 64, 165 S.E.2d 355 (1969).

54. *Id.* at 81, 165 S.E.2d at 363-64.

55. Act No. 1268, 1971 S.C. Acts, 56 Stat. 2684, transferred S.C. CONST. art. I, § 14, to S.C. CONST. art. I, § 8.

56. 269 S.C. 75, 236 S.E.2d 406 (1977).

57. *Id.* at 83, 236 S.E.2d at 409.

58. 6 Ill. 2d 337, 129 N.E.2d 159 (1955)(statute requiring magistrate to forward re-

ity of a statute requiring overlapping functions of the state's executive and judicial branches and observed that the separation of powers clause of the Illinois Constitution "does not command that the judiciary be kept aloof from the general operation of government beyond the point necessary to preserve judicial independence and to avoid the dissipation of energy which should be conserved for judicial duties."[59] In *Hill v. Relyea*,[60] the Illinois court explained that delegation of a legislative function to the judiciary is permissible as long as the function delegated does not require judicial approval of administrative actions.[61] The Florida Supreme Court, in *State ex rel. Gerstein v. Schwartz*,[62] recognized that the legislature may constitutionally "confer on the judiciary reasonable duties designed to control law enforcement . . . ."[63] The Court of Appeals of New York, in *Rosenthal v. McGoldrick*,[64] acknowledged that "the rule that the judiciary may not be charged with administrative functions does not apply when such functions are 'reasonably incidental to the fulfillment of judicial duties.' "[65]

The court in *Yonce* did not adopt a dogmatic approach to the separation of powers guarantee but implicitly recognized that, under conditions of minimal involvement, the legislature may constitutionally delegate certain executive functions to judicial officers.[66] The court, in the spirit of Justice Holmes' observation that "we . . . cannot carry out the distinction between [branches of government] with mathematical precison and divide the branches into watertight compartments,"[67] indicated a measure of flexibility and deference to practicality in applying the separation of powers principle to state government. The degree of overlapping legislative and judicial functions that is permissible in South Carolina, however, remains to be defined.

---

ports of convictions of traffic offenses to Secretary of State constitutional).

59. *Id.* at 343-44, 129 N.E.2d at 162.

60. 34 Ill. 2d 552, 216 N.E.2d 795 (1966).

61. *Id.* at 557, 216 N.E.2d at 798.

62. 357 So. 2d 167 (Fla. 1978).

63. *Id.* at 168.

64. 280 N.Y. 11, 19 N.E.2d 660 (1939).

65. *Id.* at 14, 19 N.E.2d at 661.

66. 274 S.C. at 88, 261 S.E.2d at 306.

67. Springer v. Government of the Philippine Islands, 277 U.S. 189, 211 (1928)(Holmes, J., dissenting). *See* 1 F. COOPER, STATE ADMINISTRATIVE LAW 26-27 (1965).

B. Procedural Rulemaking Power

In *Williams v. Bordon's, Inc.*,[68] the South Carolina Supreme Court held that a statute requiring state courts to grant automatic continuances to legislators in certain circumstances,[69] "in so far as it attempts to exercise the ultimate authority to determine when, and under what circumstances, lawyer-legislators may be exempt from court appearances, is unconstitutional as violative of the principle of separation of powers."[70] The supreme court then examined the trial court's denial of a motion for continuance. It found that the trial court had abused its discretion and explained that "as a general rule, a request for a continuance in a civil case because of counsel's legislative duties should be granted, when timely requested and made in good faith, unless a substantial right of the parties to the litigation will be defeated or abridged by the delay."[71]

The supreme court reasoned that the authority to grant continuances has both historical and constitutional origins, and explained that "[i]t has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge."[72] The court then traced the authority to grant continuances to powers conferred on the state judiciary by the South Carolina Constitution.[73] Finally, relying on *Carolina Glass Co. v. State*,[74] the court ruled that the separation of powers clause of the South Carolina Constitution prohibited the legislature from exercising the judicial power to grant continuances.[75]

Although *Williams'* simultaneous abrogation of a procedural

---

68. 274 S.C. 275, 262 S.E.2d 881 (1980). See notes 43-44 and accompanying text *supra*.

69. S.C. CODE ANN. § 2-1-150 (Supp. 1980) is set forth in part in note 44 *supra*.

70. 274 S.C. at 280, 262 S.E.2d at 884.

71. *Id.* at 280, 262 S.E.2d at 884.

72. *Id.* at 279, 262 S.E.2d at 883 (citing South Carolina Pub. Serv. Auth. v. Carolina Power & Light Co., 244 S.C. 466, 137 S.E.2d 507 (1964); State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

73. S.C. CONST. art. V, § 1, provides: "The judicial power shall be vested in a unified judicial system which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."

74. 87 S.C. 270, 69 S.E. 391 (1910), *aff'd*, 240 U.S. 305 (1916).

75. 272 S.C. at 280, 262 S.E.2d at 884. The separation of powers clause is found at S.C. CONST. art. I, § 8. For the full text of the provision, see the text accompanying note 39 *supra*.

Zeigler: Constitutional Law

statute and announcement of a procedural rule made little difference in South Carolina procedural law regarding lawyer-legislators, the rationale used by the court is troublesome. The historical powers of the South Carolina judiciary may not be as broad as the court indicated. It has been observed that since colonial times, the power to make procedural rules in this state has resided in the legislature with the acquiescence of the courts.[76] Moreover, "[c]olonial and nineteenth-century American history does not provide any additional support for an inherent procedural rule-making power in the judiciary. Quite the contrary, the regulation of practice and procedure in the United States has consisted largely of the 'persistent use of legislation.'"[77] This impugns the court's rationale in *Williams* that the rulemaking power has historically resided in the judiciary.

The court's recognition of a constitutional basis for exclusive judicial authority to grant continuances can also be questioned. Although the court traced this authority to article V, section 1, of the state constitution,[78] it disregarded other arguably apposite constitutional provisions. Article V, section 4, expressly states that the supreme court's power to make rules governing practice and procedure is "[s]ubject to the statutory law . . . ."[79] The legislative history of this clause unequivocally establishes that the clause was intended to subordinate the rule-making power of the court to the higher authority of the General Assembly.[80] Further, article III, section 11, grants to the legislature the power to "compel the attendance of absent members."[81] Because these constitutional provisions arguably authorize the legislature to grant automatic continuances to lawyer-legislators, the court's limitation of its discussion to article V, section 4, appears incomplete.

Finally, the court in *Williams* cited *Carolina Glass*[82] to sup-

76. See 30 S.C.L. REV. 625, 628 (1979).

77. *Id.* at 637 (quoting Sunderland, *The Exercise of the Rule-Making Power*, 12 A.B.A.J. 548, 550 (1926).

78. For the text of S.C. CONST. art. V, § 1, see note 73 *supra*.

79. S.C. CONST. art. V, § 4 provides in pertinent part: "The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."

80. 30 S.C.L. REV. 625, 629-32 (1979).

81. S.C. CONST. art. III, § 11.

82. 87 S.C. 270, 69 S.E. 391 (1910), *aff'd*, 240 U.S. 305 (1916).

South Carolina Law Review, Vol. 33, Iss. 1 [1981], Art. 4
port the proposition that the separation of powers clause[83] "is as strong as it is simple and clear. The legislature therefore cannot assume to itself the exercise of judicial powers."[84] Yet in *Carolina Glass*, the court declined to set a clear boundary between the legislative and judicial powers, explaining that "[t]he lines of demarcation between the powers of the three departments are often shadowy and illusive . . . ."[85] The court in *Carolina Glass* also noted that "[t]he exercise of judicial functions, or *quasi* judicial functions, is often necessary, as an incident, to the exercise of the powers conferred by the Constitution upon the other co-ordinate branches of the government . . . ."[86] *Williams* thus seems to depart from the limited flexibility with which the court in *Carolina Glass* construed the separation of powers clause.

Williams' pronouncement that procedural rulemaking power is exclusively reserved to the judiciary constitutes a broad extension of the judicial power coupled with a strict interpretation of the separation of powers clause. The basis for the broad extension of the judicial power is tenuous, and the strict interpretation of the separation of powers clause is difficult to reconcile with the court's more flexible application of the clause in *State ex rel. McLeod v. Yonce.*

Belton T. Zeigler

83. See text accompanying note 39 *supra*.

84. 274 S.C. at 280, 262 S.E.2d at 884 (quoting *Carolina Glass*, 87 S.C. at 290, 69 S.E. at 399).

85. 87 S.C. at 291, 69 S.E. at 399.

86. *Id.* at 291, 69 S.E. at 399.