South Carolina Law Review

Volume 46
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 3

Fall 1994

Constitutional Law

Seann G. Hazzard

Joshua M. Henderson

Alicia A. Richardson

Michael R. Sullivan

SOUTH CAROLINA
LAW REVIEW

VOLUME 46 AUTUMN 1994 NUMBER 1

CONSTITUTIONAL LAW

I. COURT FINDS DIVERSION OF GAS TAX REVENUES CONSTITUTIONALLY ACCEPTABLE

In *Myers v. Patterson*[1] the South Carolina Supreme Court held that sections of the 1992 Appropriations Act that diverted tax revenues to the state's general fund from a specially created separate fund were constitutional.[2] In doing so, the court interpreted Article X, Section 5 of the South Carolina Constitution, thus superseding previous cases.

The legislature created the separate fund in 1987 for the benefit of the Strategic Highway Plan for Improving Mobility and Safety (SHIMS).[3] This same legislation increased the gasoline tax by three cents per gallon to provide revenues for the fund.[4] The revenues derived from this tax must be remitted to the State Treasurer, who then credits them to the SHIMS fund.[5] The purpose of SHIMS was to finance certain highway projects described in the act.[6]

In 1992, the General Assembly moved $25 million from the SHIMS fund to the state's general fund to pay the state's indebtedness resulting from damages caused by Hurricane Hugo.[7] More specifically, it provided that money accruing to SHIMS between July 1, 1992 and August 31, 1992 would go into the state's general fund up to $25 million. If contributions made to the fund did not total $25 million by August 31, 1992, the Act allowed the state

1. ___ S.C. ___, 433 S.E.2d 841 (1993).

2. *Id.* at ___, 433 S.E.2d at 843.

3. S.C. CODE ANN. §§ 12-27-1210 to -1320 (Law. Co-op. Supp. 1993).

4. *Id.* §§ 12-27-1210 to -1240.

5. *Id.* § 12-27-1260.

6. *Id.* § 12-27-1280 (repealed 1993). Under this section, the Department of Highways and Public Transportation was required to submit a list of 50 priority projects to be funded from SHIMS to the Select Oversight Committee (created by S.C. CODE ANN. § 12-27-1300 (repealed 1993)). The list would be updated annually thereafter. In choosing the specific projects, the Department was directed to consider certain socioeconomic factors, including per capita employment, farm acres per square mile, per capita income, population per square mile, and existing interstate and primary road mileage per square mile.

7. 1992 S.C. Acts 3249, Part I, § 129.65.

to borrow the difference from SHIMS money collected before July 1, 1992. The state would pay back the borrowed money from future revenues accruing to SHIMS.[8]

The General Assembly provided also that all interest accruing to the SHIMS fund during the 1992-93 fiscal year would be credited to the general fund rather than the SHIMS fund.[9] There was no pay-back provision for the interest.

As taxpayers, William C. Myers, Edward T. McMullen, Jr., and the South Carolina Policy Council Education Foundation brought suit against State Treasurer Grady L. Patterson, Jr., the members of the South Carolina Highways and Public Transportation Commission, and Walker P. Ragin, the Executive Director of the Commission. Plaintiffs prayed for an injunction to prevent the transfer of funds. A circuit judge issued a temporary restraining order to prevent the transfer but dissolved it the next day upon request by the State Treasurer.[10]

A few days later, the circuit court denied the plaintiffs' motion for a temporary injunction, finding that the plaintiffs failed to show that they would suffer irreparable injury if an injunction did not issue.[11] After the transfer, the supreme court granted plaintiffs' petition to hear the case in the court's original jurisdiction.

The plaintiffs alleged violation of two sections of the South Carolina Constitution. First, they contended that Article X, Section 5 was violated because it requires the spending of public funds only for the purpose stated when levying the tax. This section reads in part: "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied."[12] Plaintiffs argued that this provision prevents the legislature from levying a tax for one purpose and then diverting the resulting revenues to another.[13]

The SHIMS legislation clearly described the purpose of the levy in several places. For example, the code provided that the additional tax money

---

8. *Id.*

9. 1992 S.C. Acts 3216, Part I, § 124.27 (amending S.C. CODE ANN. § 12-27-1260 by deleting the sentence "[a]ll earnings on investments from this fund must accrue to and be deposited in this separate fund," for the fiscal year 1992-93).

10. *Myers*, ___ S.C. at ___, 433 S.E.2d at 842. According to the State Treasurer, the state's AAA bond rating was at risk if the injunction was not dissolved. The state needed to address the deficit to maintain the AAA bond rating, which is the highest bond rating and is shared only by five other states. This bond rating has saved taxpayers millions of dollars in financing certain projects, including schools, prison facilities, and road and park facilities. Affidavit of Grady L. Patterson, Jr., in Addendum to Consent Petition for Original Jurisdiction of Defendant Treasurer at 33.

11. *Myers*, ___ S.C. at ___, 433 S.E.2d at 842-43.

12. S.C. CONST. art. X, § 5.

13. Brief of Plaintiffs at 8.

generated "must be used to fund the provisions of [SHIMS]."[14] Additionally, it provided that "[a]ll unappropriated money in this fund must remain part of the separate fund" and that "[n]o funds may be expended from this account for any purpose other than for payment of engineering and planning, right-of-way acquisition, and construction of projects on the list submitted . . . ."[15]

The plaintiffs argued that this specific language evidenced the General Assembly's intent that this fund be "dedicated funds, collected and held in trust, to be used only for their stated purpose."[16] The specific purpose of SHIMS, the highway projects, was unaccomplished when the diversion occurred.[17] The plaintiffs argued that because amendment of the purpose of a tax levy is unconstitutional until its purpose has been accomplished, the legislature wrongfully diverted the money.[18]

Second, plaintiffs claimed that Article X, Section 7, requiring that South Carolina maintain a balanced budget, had been violated. This section reads in part: "The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue."[19] The plaintiffs contended that the 1992 Appropriations Act ran a deficit while taking the difference needed from the SHIMS account. They contended also that the diversion constituted a breach of fiduciary duty by the defendants, who were charged with the maintenance of the SHIMS funds.[20]

The defendant South Carolina Highways and Public Transportation Commission agreed with the plaintiffs that the revenue diversion violated Article X, Section 5.[21] Specifically, it argued that Article X, Section 5 was violated for two reasons. First, the General Assembly was applying the proceeds from SHIMS to a purpose other than that for which they were levied. Second, the General Assembly diverted the interest accruing to SHIMS funds to its general fund. This violated Article X, Section 5 because interest earned

---

14. S.C. CODE ANN. § 12-27-1260 (Law. Co-op. Supp. 1991).

15. *Id.* § 12-27-1260 (Law. Co-op. Supp. 1991).

16. Brief of Plaintiffs at 9 (citing Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13 (1939)). In their brief, plaintiffs quoted from an opinion of the Attorney General dated March 19, 1992 which stated that "[t]he 'SHIMS' funds are in the nature of a trust and . . . may not be diverted until the accomplishment of the purpose for which the funds was [sic] established." *Id.* at 10. This opinion was supposedly given while the legislature debated the General Appropriations bill. *Id.* at 13.

17. *Id.* at 7-8.

18. *Id.* at 13-14.

19. S.C. CONST. art. X, § 7.

20. Brief of Plaintiffs at 1. Plaintiffs never addressed directly this breach of fiduciary duty; instead it blended in with the alleged constitutional violations.

21. Brief of Defendant South Carolina Highways and Public Transportation Commission at 2-4.

on a special fund does not differ from the fund and, thus, already has a designated purpose.[22]

However, the Commission declared that it had no power to control the transfer of the funds from the SHIMS account. All of the SHIMS revenue was remitted directly to the State Treasurer, as directed by South Carolina Code Section 12-27-1260, who then transferred the money to the General Fund.[23]

The State Treasurer argued first that the plaintiffs, as taxpayers, had no standing to bring the lawsuit. The Treasurer argued also that the transfer of funds was constitutional (under both allegedly violated provisions) because it affected only prospective revenues. The Treasurer could make this argument because any money taken from the SHIMS account raised before July 1, 1992 was only borrowed and would be replenished during the 1992-93 fiscal year. Thus, the General Assembly attempted to use a cash flow management device. The Treasurer argued that because the revenues were collected after notice of the diversion, amendment of the original purpose was possible because public policy allowed amendment before all SHIMS purposes were accomplished.[24]

The court first addressed whether the plaintiffs had standing to bring the action. In finding standing, the court noted the rule that private citizens cannot restrain official acts unless they allege and prove damage to themselves that differs in character from damage sustained by the public generally.[25] However, an exception exists when the statute authorizes an unlawful diversion of funds; a taxpayer who must pay the tax or who already has contributed to the diverted fund has a sufficient interest to try to enjoin the act.[26] In *Shillito v. City of Spartanburg*[27] the court stated that "[a] citizen and taxpayer has standing as such to contest the expenditure of public funds under an alleged unconstitutional statute."[28] The court also referred to *Kirk v. Clark*,[29] which states that "a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law."[30]

The court never addressed directly the other issues argued by the parties because of the court's decision that an amendment to former Article X, Section 3 of the South Carolina Constitution of 1895 (becoming Article X, Section 5 in the South Carolina Constitution of 1976) changed the Constitutio-

22. *Id.* at 10.

23. *Id.* at 1.

24. Brief of Defendant State Treasurer at 10-17.

25. *Myers*, ___ S.C. at ___, 433 S.E.2d at 843.

26. *Id.* at ___, 433 S.E.2d at 843 (citing Shillito v. City of Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948)).

27. 214 S.C. 11, 51 S.E.2d 95 (1948).

28. *Id.* at 22, 51 S.E.2d at 99 (citing 52 AM. JUR. § 3).

29. 191 S.C. 205, 4 S.E.2d 13 (1939).

30. *Id.* at 210, 4 S.E.2d at 15.

n's meaning, rendering all other points moot. Former Article X, Section 3 stated: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied."[31] The court did not overrule prior decisions holding diversions similar to the present one unconstitutional under this provision; it recognized that these decisions were based on a construction of the former constitutional provision that was supported by precedent.[32] For example, two cases relied on by the plaintiffs, *State ex rel. Edwards v. Osborne*[33] (*Edwards I*) and *State ex rel. Edwards v. Osborne*[34] (*Edwards II*) held that former Article X, Section 3 prohibited the diversion of tax revenues to purposes other than those given for levying the tax.

According to the court, Article X, Section 5 effectively eradicated this prohibition. The court held that the amended provision "only requires the Legislature to state the public purpose for which taxes are levied."[35] Thus, it concluded that a legislature can subsequently amend the public purpose of tax proceeds: "In our view, the effect of the 1977 amendment was to remove the constitution's limitation of the Legislature's power to appropriate revenues as needed among legitimate government objectives."[36]

Applying this new rule, the court found that because the statute directing the diversion was not a tax levy but an appropriation, Article X, Section 5 would not apply.[37] Article X, Section 5 applies only to tax levies, and the court held that because Sections 129.65 and 124.27 of the 1992 Appropriations Act[38] did not create any new tax or fix "the amount or rate [of a tax] to be imposed,"[39] it was not a tax levy.

Having found no violation of Article X, Section 5, the court found that it did not need to decide the constitutionality of the diversion under Article X, Section 7.[40]

In making its decision, the court gave no indication of relying on legislative intent as affecting the impact of the 1977 amendment to Article X, Section 3. The plaintiffs and the South Carolina Highways and Public Transportation Commission contended in their petitions for rehearing that the court should have considered the legislative history of the 1977 amendment before it changed the provision's substantive meaning.[41] The plaintiffs noted

31. S.C. CONST. art. X, § 3 (amended 1977).
32. *Myers*, ___ S.C. at ___, 433 S.E.2d at 843.
33. 193 S.C. 158, 7 S.E.2d 526 (1940).
34. 195 S.C. 295, 11 S.E.2d 260 (1940).
35. *Myers*, ___ S.C. at ___, 433 S.E.2d at 843.
36. *Id.* at ___, 433 S.E.2d at 843.
37. *Id.* at ___, 433 S.E.2d at 843.
38. 1992 S.C. Acts 501.
39. *Myers*, ___ S.C. at ___, 433 S.E.2d at 843.
40. *Id.* at ___, 433 S.E.2d at 844.
41. *See* Memorandum Supporting Petition for Rehearing of Defendant South Carolina

that case law favored reliance on both the former provision and the legislative history.[42]

The language of the new provision and the legislative history suggested that the legislature did not intend to make anything more than a stylistic change to former Article X, Section 3. First, the plaintiffs noted that the legislature left the language "to which object the tax *shall* be applied"[43] in the text of the article. This mandatory language indicated legislative intent to continue the prohibition against diversion of revenues already levied for a particular purpose.[44]

Additionally, plaintiffs cited the legislative history of the amendment. The Committee to Make a Study of the South Carolina Constitution of 1895 created the text of the amendment. This committee stated that, regarding Article X, § 5, "[m]inor revisions have been made. . . ."[45] Both houses of the legislature accepted the wording of the Committee and passed the amendment with no further revisions.

The supreme court effectively deleted a constitutional provision effective in the South Carolina Constitution for more than one hundred years. Although under the new meaning of Article X, Section 5 a public purpose still must be stated, this purpose is formal at best because at any time the legislature can change it. This change brings into question the true role of the requirement for stating a public purpose in the context of a tax levy. Arguably, such a requirement no longer has any force, especially because the court held that appropriations changing the purpose of a tax levy come under no Article X, Section 5 scrutiny.[46]

Highways and Public Transportation Commission at 3. The Commission quotes from the case of Miller v. Farr, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963), which stated that a constitutional amendment must be interpreted by examining legislative intent: "[W]hen construing a constitutional amendment, the Court applies rules similar to those relating to the construction of statutes, in its effort to determine the intent of its framers and of the people who adopted it."

42. *See* Memorandum in Support of Petition for Rehearing of Plaintiff at 10 (arguing that "[t]his court has previously explained that amendments should not be interpreted to signal a departure from precedent unless their language plainly requires a change in construction."). *See also* Abell v. Bell, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956) (stating that a statute must be interpreted by the evidenced legislative intent, and that where the language of the statute raises uncertainty, intent must be discerned from reading the statute "in the light of the circumstances and conditions existing at the time of its enactment"); Town of Forest Acres v. Seigler, 224 S.C. 166, 173, 77 S.E.2d 900, 903 (1953) (stating that when a code section's meaning is ambiguous, "resort may be had to the act from which the provision was derived").

43. S.C. CONST. art. X, § 3 (amended 1977) (emphasis added).

44. Petition for Rehearing of Plaintiff at 9.

45. *Id.* at 12.

46. *See* Myers, ___ S.C. at ___, 433 S.E.2d at 843.

The court may have relied implicitly on public policy favoring the amendment of laws in making its decision. As a general rule, a legislature should be allowed to amend or repeal statutes enacted in previous years unless doing so would violate constitutional limitations.[47] In this case the State Treasurer argued that disallowing the SHIMS diversion would allow the legislature to set up a tax levy that would bind the legislature in perpetuity to appropriate revenues to those purposes.[48] With limited tax revenue available, it would be unfair to forbid the legislature from shifting funds as it sees necessary to respond to the state's changing needs.

Although this rationale always has applied to general state funds, exceptions exist. One example of allowing one legislature to bind a subsequent one is bond indebtedness. Once a tax levy is created to repay obligations incurred by the state, a subsequent legislature cannot amend or repeal it because it would effectuate an impairment of contracts in violation of South Carolina Constitution Article I, Section 4. The court did not exclude the area of bond indebtedness from its holding, leaving an apparent conflict between Article I, Section 4 and Article X, Section 5.

Perhaps overlapping with the first, another exception is legislative attempts to amend the purpose of a special fund before the accomplishment of the original purpose. However, the court interpreted the 1977 amendment as intending to reverse this exception in favor of deference to the legislature. The court's statement that the legislature should have the power to "appropriate revenues as needed among legitimate government objectives" evidences this.[49]

Thus the court has limited the concept of a continuing appropriation. The parties argued extensively about the definition of a continuing appropriation and whether it applied in this case. The Treasurer argued that the language of the statute levying the tax determined whether there was a continuing appropriation.[50] Because the language of the statutes in the *Edwards* cases expressly appropriated the funds, they were inapposite to the present case.[51]

The plaintiffs argued that when determining whether there is a continuing appropriation, the court should focus on the nature of the purpose for which the tax levy and appropriation were enacted.[52] While the SHIMS statute may not have stated expressly that an appropriation would be made every year, it

---

47. *See* Manigault v. Springs, 199 U.S. 473 (1905); Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716 (1966).

48. Brief of Defendant State Treasurer at 13.

49. *Myers*, ___ S.C. at ___, 433 S.E.2d at 843.

50. Brief of Defendant State Treasurer at 11.

51. *See Edwards II*, 195 S.C. at 315, 11 S.E.2d 260 at 268 (defining a continuing appropriation as "running on from year to year without further legislative action until the *purpose* for which the levy and appropriation were made has been accomplished").

52. Brief of Plaintiffs at 12 (citing *Edwards II*, 195 S.C. at 315, 11 S.E.2d at 268).

specifically provided for a separate fund to carry out certain purposes determined annually.

Implicit in the parties' arguments was that if SHIMS created a continuing appropriation, the legislature could not amend its purpose until accomplished. After the court's holding in *Myers*, the concept of changing the purpose of a continuing appropriation would be germane only if another constitutional limitation (other than Article X, Section 5) were violated. If no other section of the constitution were violated, the legislature could amend or repeal prior statutes. Thus, the issue becomes whether this broad holding may possibly be limited by future threats to other constitutional provisions.

A possible competing policy argument is that citizens should know where their tax money goes when collected. Article X, Section 5 evidences this consideration by providing that "[n]o tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled."[53] The court showed some deference to this policy by recognizing that the part of Article X, Section 5 in controversy still required a statement of a specific public purpose. Seemingly, then, when an amendment of a tax levy's purpose is made, the legislature should afford the public the same notice. Because the decision in *Myers* may allow diversion of revenues collected prior to the amendment, the people or their representatives could not consent when the tax revenues are collected.

The parties' discussion of whether the statute authorizing diversion applied retroactively to revenues collected prior to the amendment evidences this notice policy. The distinction was the crux of the Treasurer's argument. Allowing an amendment of the tax levy's purpose to retroactively apply, ostensibly for one purpose, seems to violate the constitutional mandate that the people consent to the tax. The Treasurer recognized this because it was argued that the diversion in question affected prospective revenues only.

However, the court was silent on this issue, indicating one of two things. First, the court agreed with the Treasurer's argument that only prospective revenues were diverted from the SHIMS account (perhaps implicitly opening the door for future cases to limit its holding on this ground). Even the cases under old Article X, Section 3 seemed to distinguish between prior and prospective revenues. In *Edwards I* the diversion was from prior revenues, as was obvious by the wording of the appropriation bill.[54] In *Edwards II* the court found specifically that the case involved only prior revenues.[55] Case law decided under old Article X, Section 3 suggested that amendment of the

53. S.C. CONST. art. X, § 5.

54. *Edwards I*, 193 S.C. at 163, 7 S.E.2d at 528.

55. *Edwards II*, 195 S.C. at 316, 11 S.E.2d at 268.

public purpose of a tax levy affecting prospective revenues would be allowed unless a legal obligation of the state were involved.[56]

Second, it does not matter now whether a diversion of funds pursuant to an amendment of a tax levy's purpose dips into revenues already collected under the assumption that they would be spent for the original purpose. If this is the opinion's actual meaning, perhaps courts can limit future holdings to the facts of this case, where the appropriation bill provided also for replenishing of the depleted funds to carry out the original purpose. However, the opinion does not attempt to distinguish one-time-only diversions and permanent amendments forever diverting revenues.

In conclusion, the meaning of the public purpose requirement in Article X, Section 5 of the South Carolina Constitution is subject to much speculation after *Myers*. Future cases in this area will have the task of limiting the present holding.

Seann Gray Hazzard

II. DUE PROCESS RIGHTS NOT VIOLATED BY MANDATORY LICENSE SUSPENSION

In *Yeargin v. South Carolina Department of Highways & Public Transportation*[1] the South Carolina Supreme Court addressed the constitutional issues surrounding driver's license suspension procedures under South Carolina statutes. The court held that due process does not require a hearing before the state suspends an individual's license under the mandatory suspension statutes.[2] Furthermore, the court held that adding together successive suspension periods does not constitute cruel and unusual punishment.[3]

Yeargin received three convictions for driving under the influence (DUI) and five for driving under suspension (DUS). As a result, the Department[4]

---

56. *See, e.g.*, State *ex rel.* Branch v. Leaphart, 11 S.C. 458, 471 (1878) (discussing the holding in Morton, Bliss & Co. v. Comptroller General, 4 S.C. 430 (1873), and explaining that

> [T]he provisions of acts intended to borrow money should operate as legislative contracts, so that the authority for the levy of a tax to pay the interest on any such loan, which is required to be given in such acts, could not be taken away by any subsequent act of repeal. Furthermore, "[w]here . . . the legislature retains its ordinary power over appropriations, not having assumed to bind itself by a legislative contract, there can be no doubt but that it can repeal the authority for the disbursement of public money, whether raised under general or special levy.").

1. ___ S.C.___, 438 S.E.2d 234 (1993) (per curiam).
2. *Id.* at ___, 438 S.E.2d at 235.
3. *Id.* at ___, 438 S.E.2d at 235-36.
4. The South Carolina Department of Public Safety replaced the South Carolina Department

suspended his driver's license for several consecutive periods extending to February 15, 1995. Yeargin brought an action seeking to have his license reinstated. The circuit court found that the suspensions violated Yeargin's due process rights because he had no effective means of appealing the suspensions. The judge consequently ordered reinstatement of Yeargin's license. The Department appealed the decision, and the supreme court reversed.[5]

The supreme court found that the Department need not provide a hearing for a license suspension if the licensee has been convicted of a traffic offense for which suspension is mandatory.[6] The statutes cited by the court provide that license suspension is mandatory upon a conviction of DUI or DUS.[7] Referring to earlier cases, the court asserted "that such suspensions are mandatory and are not decisions within the Department's discretion."[8] Therefore, applicable statutes required that the Department refuse Yeargin a hearing.

The circuit court concluded erroneously that the Administrative Procedures Act (APA) was not in effect at the time of Yeargin's first suspension and that Yeargin consequently had no effective means of challenging the suspension.[9] The supreme court recognized, however, that although the APA was in effect, the APA afforded no hearing in license suspension cases.[10] Under the APA, a "contested case" is "a proceeding, including . . . licensing, in which the legal rights, duties or privileges of a party are required by law

---

of Highways and Public Transportation on July 1, 1993.

5. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235-36.

6. *Id.* at ___, 438 S.E.2d at 235. The court quoted from section 56-1-300 which provides in part:

> In addition to other authority of law, the Department of Public Safety may suspend or revoke the license of a driver without preliminary hearing upon a showing by its records or other sufficient evidence that licensee: (1) Has been convicted of an offense for which mandatory revocation or suspension is required upon conviction . . . .

S.C. CODE ANN. § 56-1-300 (Law. Co-op. Supp. 1993).

7. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235. The court relied on sections 56-1-280, 56-1-460, and 56-5-2990. Section 56-1-280 provides that the Department shall "revoke or suspend the license of any driver upon receiving a record of such driver's conviction of any offense for which revocation or suspension is required by law." Under section 56-1-460, the Department must extend an individual's suspension period upon receipt of conviction record for driving under suspension. Section 56-5-2990 provides that the Department shall suspend the license of an individual convicted of driving under the influence. S.C. CODE ANN. §§ 56-1-280, 56-1-460, 56-5-2990 (Law. Co-op. Supp. 1993).

8. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235 (citing Cummings v. South Carolina State Highway Dep't, 271 S.C. 89, 245 S.E.2d 127 (1978); Brewer v. South Carolina State Highway Dep't, 261 S.C. 52, 198 S.E.2d 256 (1973); and Parker v. State Highway Dep't, 224 S.C. 263, 78 S.E.2d 382 (1953)).

9. *Id.* at ___, 438 S.E.2d at 235.

10. *Id.* at ___, 438 S.E.2d at 235.

to be determined by an agency after an opportunity for hearing . . . ."[11] The court found that driver's license suspensions did not meet this definition of contested case, presumably because the mandatory license suspension statutes do not call for hearings before imposition of suspensions. Therefore, the court held that the APA did not entitle Yeargin to a hearing.[12]

Ultimately the court concluded that due process does not require a hearing for a license suspension.[13] The court explained that procedures in the underlying criminal convictions that provided the grounds for the suspensions protected Yeargin's due process.[14] Therefore, although Yeargin received no hearing before his suspensions, his right to due process was not violated. Conviction procedures satisfied due process without need for further hearings at the license suspension stage.[15]

The supreme court held further that the circuit court erred in finding that Yeargin's consecutive suspensions constituted cruel and unusual punishment.[16] Driver's license suspension is not part of the punishment for a traffic offense;[17] therefore, the court concluded that the Cruel and Unusual Punishment Clause does not apply in a license suspension setting.[18]

The court added that even if the clause were relevant, the suspension would not violate the clause because it only "prohibits sentences which are grossly out of proportion to the severity of the crime."[19] Yeargin's suspensions were proportionate to his individual DUI and DUS infractions, and the resulting continuous suspension until February 1995 resulted merely from Yeargin's "repeated violations of the law."[20] The court cited with approval an earlier case[21] permitting the Department to add suspension periods consecutively instead of allowing the suspensions to overlap, reducing the total suspension period. The court held that Yeargin's lengthy suspension did not constitute cruel and unusual punishment.[22]

---

11. S.C. CODE ANN. § 1-23-310(2) (Law. Co-op. Supp. 1993) (quoted in *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235).

12. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235.

13. *Id.* at ___, 438 S.E.2d at 235.

14. *Id.* at ___, 438 S.E.2d at 235.

15. *Id.* at ___, 438 S.E.2d at 235 (citing Arizona v. Jennings, 722 P.2d 258 (Ariz. 1986) and Wells v. Roberts, 280 S.E.2d 266 (W. Va. 1981)).

16. *Id.* at ___, 438 S.E.2d at 235-36.

17. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 235 (citing *Brewer*).

18. *Id.* at ___, 438 S.E.2d at 236.

19. *Id.* at ___, 438 S.E.2d at 236 (citing State v. Kiser, 288 S.C. 441, 343 S.E.2d 292 (1986) (per curiam), *cert. denied*, 479 U.S. 823 (1986)).

20. *Id.* at ___, 438 S.E.2d at 236 (citing Whitney Stores, Inc. v. Summerford, 280 F. Supp. 406 (D.S.C. 1968), *aff'd*, 393 U.S. 9 (1968)).

21. Bay v. South Carolina Highway Dep't, 266 S.C. 9, 221 S.E.2d 106 (1975).

22. *Yeargin*, ___ S.C. at ___, 438 S.E.2d at 236. *See also* Pennsylvania v. Ryan, 556 A.2d 1377, 1379 (Pa. Super. Ct. 1989) (citing Pennsylvania v. Hoover, 494 A.2d 1131 (Pa. Super.

In reaching its conclusions, the *Yeargin* court relied upon precedent. In *Parker v. State Highway Department*,[23] the court addressed whether the Department could suspend an individual's license during the pendency of a DUI conviction appeal.[24] The relevant statute provided for mandatory license suspension upon the Department's receipt of a DUI conviction report. The court noted that "[n]o discretion is allowed in the matter."[25] The court continued:

> The suspension follows as a consequence and effect of committing the offense. It is a forfeiture of the privilege to drive, due to the failure of the licensee to observe certain conditions under which the license was issued. The suspension constitutes no part of the punishment fixed by the court, nor is it an added punishment for the offense committed. It is civil and not criminal in its nature.[26]

The court pointed out "that the purpose of the revocation is to protect the public and not to punish the licensee."[27] Because the suspension did not constitute punishment, an appeal did not prevent immediate imposition of the suspension.[28]

Although the Department can suspend an individual's license during appeal, in *Brewer v. South Carolina State Highway Department*[29] the court held that the Department cannot suspend a license if the licensee is granted a new trial after conviction for a DUI offense.[30] In *Brewer*, the State charged the respondent with DUI. Apparently due to an administrative error, the respondent subsequently was convicted on the charge even though he was absent from the hearing and had not received notice. After respondent's motion, the magistrate granted a new trial.[31] The supreme court found such relief appropriate in these circumstances and held that a new trial "places the party accused in the same position as if no trial had ever been had."[32]

Ct. 1985), *appeal denied*, 565 A.2d 1166 (1989), for the principle that "the imposition of mandatory license suspensions did not constitute cruel and unusual punishment because such a penalty is neither disproportionate to the gravity of the offense nor repugnant to societal standards of justice").

23. 224 S.C. 263, 78 S.E.2d 382 (1953).

24. *Id.* at 266-67, 78 S.E.2d at 383.

25. *Id.* at 271, 78 S.E.2d at 385 (citing Emmertson v. State Tax Comm'n, 72 P.2d 467 (Utah 1937)).

26. *Id.* at 271, 78 S.E.2d at 385 (citations omitted).

27. *Id.* at 271, 78 S.E.2d at 386 (quoting Prichard v. Battle, 17 S.E.2d 393, 396 (Va. 1941)).

28. *Parker*, 224 S.C. at 272, 78 S.E.2d at 386.

29. 261 S.C. 52, 198 S.E.2d 256 (1973).

30. *Id.* at 57, 198 S.E.2d at 258.

31. *Id.* at 54-55, 198 S.E.2d at 256-57.

32. *Id.* at 57, 198 S.E.2d at 258 (citing State v. Squires, 248 S.C. 239, 149 S.E.2d 601

Therefore, the court concluded that "there [was] no basis upon which the suspension of [the respondent's] driver's license [could] be sustained."[33]

In *Cummings v. South Carolina State Highway Department*,[34] the court reiterated the mandatory nature of license suspensions under the statutes. Citing *Parker* and *Brewer*, the court recognized that the Department is required to suspend a license upon a DUI conviction and that the trial court has no discretion to alter such suspensions.[35] Therefore, the court held that the trial court had erred in reducing a mandatory two-year suspension to one year.[36]

The supreme court relied on two cases from other jurisdictions to find that due process does not require a hearing for a driver's license suspension. In *Arizona v. Jennings*,[37] the defendant's license was revoked under a statute providing for mandatory revocation upon conviction of certain offenses. Relying on the United States Supreme Court's decision in *Bell v. Burson*,[38] the defendant contended that his failure to receive a hearing to review the revocation violated his due process rights. The Arizona Supreme Court responded:

> Revocation, pursuant to this section [of the Arizona statute],[39] occurs only after a conviction has become final for one of the enumerated offenses. The driver then has already had the opportunity for a full trial before the mandatory provision of [the statute] applies. . . . We, therefore, agree with the court of appeals that "[d]ue process is already afforded violators under [the statute] within the process of conviction."[40]

Thus, the court rejected the defendant's argument and found the statutory procedure constitutionally adequate.

In *Wells v. Roberts*,[41] the West Virginia Supreme Court examined the differences between two West Virginia license suspension statutes.[42] One statute provided for discretionary suspension when no previous adjudication of guilt existed on the underlying criminal charges; the statute required "a

---

(1966)).

33. *Id.* at 57, 198 S.E.2d at 258.

34. 271 S.C. 89, 245 S.E.2d 127 (1978).

35. *Id.* at 91, 245 S.E.2d at 128.

36. *Id.* at 90-91, 245 S.E.2d at 128.

37. 722 P.2d 258 (Ariz. 1986) (en banc).

38. 402 U.S. 535 (1971).

39. ARIZ. REV. STAT. ANN. § 28-445 (1976).

40. *Jennings*, 722 P.2d at 261 (quoting Arizona v. Jennings, 722 P.2d 334, 336 (Ariz. Ct. App. 1985).

41. 280 S.E.2d 266 (W. Va. 1981).

42. W. VA. CODE §§ 17B-3-6, 17B-3-5 (1974).

prompt administrative hearing" in these instances.[43] The other statute provided, however, for mandatory revocation without an opportunity for a hearing, following a conviction for certain offenses. The court held that this mandatory revocation procedure did not violate due process because the underlying criminal conviction afforded all of the constitutionally necessary process.[44] The court stated, "A determination of the facts by a [trial court] provided all the necessary elements of due process prior to revocation . . . because the criminal proceeding decided the very issue which triggered the possibility of revocation — the licensee's liability for driving while intoxicated."[45]

The United States Supreme Court has not addressed directly the constitutionality of mandatory license suspension statutes. The Court has confronted the license suspension issue in other contexts, however. In *Bell v. Burson* the Court discussed the constitutionality of a Georgia statute[46] calling for suspension of the "vehicle registration and driver's license of an uninsured motorist involved in an accident . . . unless he posts security to cover the amount of damages claimed by aggrieved parties in reports of the accident."[47] In that case, a child drove her bicycle into the petitioner's car. Subsequently, the State notified petitioner about the bond requirement and the possibility of license suspension. The petitioner requested an administrative hearing at which he contested liability for the child's injuries. The Director refused to accept the petitioner's evidence on the liability issue because the hearing's purpose was only to consider whether an accident had occurred and whether the petitioner had complied with the statutory requirements. On appeal, the court found that the petitioner was not at fault and ordered that the petitioner's license not be suspended until suit was filed against him. The Georgia Court of Appeals subsequently reversed.[48]

As a preliminary matter, the Supreme Court stated:

> In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."[49]

---

43. *Wells*, 280 S.E.2d at 269.

44. *Id.*

45. *Id.* (alterations in original) (quoting Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, 416 N.E.2d 1373, 1379 (Mass. 1981)).

46. GA. CODE ANN. §§ 92A-601 to -621 (1958 & Supp. 1970).

47. *Bell*, 402 U.S. at 535-36 (citing GA. CODE ANN. §§ 92A-601 to -621 (1958 & Supp. 1970).

48. *Id.* at 537-38.

49. *Id.* at 539 (citations omitted).

The Court held that due process did not require a "full adjudication of the question of liability" in these presuspension hearings;[50] rather, "procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."[51] The Court stated that the Georgia statutory scheme violated due process because it made liability an important factor in the license suspension decision but did not allow a consideration of this factor in presuspension hearings.[52]

The *Yeargin* decision comports with the constitutional standards of *Bell* even though South Carolina statutes do not provide for pre- or postsuspension hearings. *Bell* requires some form of a hearing on the "important factors" in a license suspension decision; however, under the South Carolina statutes, the criminal trial on the DUI or DUS charges affords the process demanded by *Bell*. Under the South Carolina scheme, the important factor in the state's decision to suspend is whether the individual drove under the influence of alcohol or drove under suspension. The licensee has an opportunity to prove innocence, and thereby to avoid license suspension, during the criminal trial on the DUI or DUS charges. After conviction, the critical issue has been decided and the license suspension follows automatically. Because the statutes make suspension mandatory in such cases, a hearing on the suspension would serve no further purpose.

Joshua M. Henderson

III. AMENDMENT TO FURLOUGH LAW DOES NOT IMPLICATE EX POST FACTO CLAUSE

In *Plyler v. Evatt*[1] (*Plyler II*) the South Carolina Supreme Court interpreted section 24-13-720[2] (section 720) of the Supervised Furlough

---

50. *Id.* at 540.
51. *Id.*
52. *Bell*, 402 U.S. at 541.

1. ___ S.C. ___, 438 S.E.2d 244 (1993).
2. The court interpreted the statute before its 1993 amendment. The preamendment statute provided:

> Unless sentenced to life inprisonment [sic], an inmate under the jurisdiction or control of the Department of Corrections shall, within six months of the expiration of his sentence, be placed with the program provided for in § 24-13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate otherwise eligible under the provisions of this section for placement with the program under § 24-13-710 may be so placed unless he has maintained a clear disciplinary record for at least six months prior to eligibility for placement with such program.

S.C. CODE ANN. § 24-13-720 (Law. Co-op. 1989) (amended 1993).

Program for prisoners, deciding the constitutional impact of the 1993 amendment[3] to that statute under the Ex Post Facto Clause.[4] The court held that the preamendment version of section 720 mandated the release of all prisoners who had only six months of their sentences left except those prisoners with life sentences or recent disciplinary infractions. The court held that section 720 did not incorporate the stricter eligibility requirements of section 24-13-710[5] (section 710), which excluded violent offenders from a similar program. The 1993 amendment to section 720 added the eligibility requirements of section 710. The court found that the Amendment changed the law and did not merely clarify it.[6] The court held further that the only prisoners entitled to release under the preamendment version of section 720 were those already eligible for release before the amendment's effective date.[7] The court held that the Supervised Furlough Program was not part of the inmates' sentences, and thus there is no ex post facto violation in applying the amended statute to those who committed offenses before the amendment.[8] The court treated alike the programs under sections 710 and 720 for ex post facto analysis, allowing only a narrow class of inmates immediate release.

The statutes establish Supervised Furlough Programs where certain prisoners can gain early release from prison. State probation and parole agents supervise the released inmates until the inmates become eligible for parole or until their sentences expire.[9] The agencies refer to the program under section 710 as Supervised Furlough I (SFI) and the program under section 720 as Supervised Furlough II (SFII).[10] The requirements for

---

3. The amended statute provides:

> Unless sentenced to life imprisonment, an inmate under the jurisdiction or control of the Department of Corrections who has not been convicted of a violent crime under the provisions of Section 16-1-60 may, within six months of the expiration of his sentence, be placed with the program provided for in Section 24-13-710 and is subject to every rule, regulation, and condition of the program. No inmate otherwise eligible under the provisions of this section for placement with the program may be so placed unless he has qualified under the selection criteria and process authorized by the provisions of Section 24-13-710. He must also have maintained a clear disciplinary record for at least six months prior to eligibility for placement with the program.

S.C. CODE ANN. § 24-13-720 (Law. Co-op. Supp. 1993).

4. "No . . . ex post facto law . . . shall be passed . . . ." S.C. CONST. art. I, § 4. "No State shall . . . pass any . . . ex post facto Law . . . ." U.S. CONST. art. I, § 10, cl. 1.

5. S.C. CODE ANN. § 24-13-710 (Law. Co-op. 1989) (amended 1993).

6. *Plyler II*, ___ S.C. at ___, 438 S.E.2d at 246 (citing North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964)).

7. *Id.* at ___ n.1, 438 S.E.2d at 245 n.1.

8. *Id.* at ___ n.1, 438 S.E.2d at 245 n.1 (citing Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), *overruled in part*, Griffin v. State, ___ S.C. ___, 433 S.E.2d 862 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 924 (1994)).

9. S.C. CODE ANN. § 24-13-710 (Law. Co-op. 1989) (amended 1993).

10. Record at 29.

participation are different for the two programs. Participation in SFI section 710 requires:

> carefully screened and selected inmates who have served the mandatory minimum sentence as required by law or have not committed a violent crime as defined in § 16-1-60 nor committed the crime of criminal sexual conduct in the third degree as defined in § 16-3-654 or the crime of committing or attempting a lewd act upon a child under the age of fourteen as defined in § 16-15-140 to be released on furlough . . . . Eligibility criteria for the program include, but are not limited to, all of the following requirements:
>
> (1) maintain a clear disciplinary record for at least six months prior to consideration for placement on the program;
> (2) demonstrate to Department of Corrections' officials a general desire to become a law-abiding member of society;
> (3) satisfy any other reasonable requirements imposed upon him by the Department of Corrections;
> (4) have an identifiable need for and willingness to participate in authorized community-based programs and rehabilitative services;
> (5) have been committed to the State Department of Corrections with a total sentence of five years or less as the first or second adult commitment for a criminal offense for which the inmate received a sentence of one year or more.[11]

Section 720 provides:

> Unless sentenced to life inprisonment [sic], an inmate. . . shall, within six months of the expiration of his sentence, be placed with the program provided for in § 24-13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate . . . may be so placed unless he has maintained a clear disciplinary record for at least six months prior to eligibility . . . .[12]

Since section 720's adoption in 1983, state agencies interpreted section 720 as incorporating the stricter eligibility requirements of section 710. In *Plyler v. Evatt*[13] (*Plyler I*) the inmates brought a declaratory judgment action seeking

11. S.C. CODE ANN. § 24-13-710 (Law. Co-op. 1989) (amended 1993).
12. S.C. CODE ANN. § 24-13-720 (Law. Co-op. 1989) (amended 1993).
13. 305 S.C. 488, 409 S.E.2d 416 (1991).

interpretation of section 710 and section 720. The inmates challenged the agencies' interpretation of section 720 as restricting the program in section 710 to inmates within six months of the expiration of their sentences. On expedited appeal, the supreme court affirmed the circuit court's holding that the statutes referred to two different classes of inmates and that restrictions under section 710 are not implied in section 720.[14] However, the court upheld the agencies' practice of allowing releases under section 710 only when inmates were six months from their sentences' expiration.[15] The court relied on section 710's giving the department discretion to add other eligibility requirements.[16]

In May 1992 the inmates brought a new declaratory judgment action based on *Plyler I* challenging the agencies' discretionary incorporation of the eligibility requirements of section 710 into the section 720 program. The circuit court found for the inmates.[17] The supreme court granted expedited appeal and heard the case on June 8, 1993. Six days later the governor signed an amendment to section 24-13-720 that incorporated the stricter requirements of section 710 into section 720.[18] The supreme court requested supplemental briefs on whether the passage of the amendment rendered the litigation moot.[19] The court held that section 720 did not incorporate section 710 and that the 1993 amendment constituted a change in the law.[20] The appellant agencies petitioned for rehearing, requesting clarification of which classes of inmates were to be released under the court's decision and to decide the ex post facto issue. The court granted the petition and refiled *Plyler II*.[21]

In *Plyler II* the court addressed three issues: (1) the interpretation of section 710 and section 720; (2) the 1993 amendment's effect; and (3) the designation of the class of inmates entitled to release under the court's interpretation of the preamendment statute, the 1993 amendment, and the Ex Post Facto Clauses of the South Carolina and United States Constitutions.

Affirming the circuit court, the court held that the conditions for participation created by section 710 are not implied in section 720.[22] The court relied on *Gilstrap v. South Carolina Budget & Control Board*[23] to find that the agencies' longtime construction of section 720 was not dispositive and

---

14. *Id.* at 491, 409 S.E.2d at 417.

15. *Id.* at 491, 409 S.E.2d at 417-18.

16. *Id.*

17. *Plyler II*, ___ S.C. at ___, 438 S.E.2d at 245; Record at 6-7.

18. H. Res. 3975 (1993).

19. Order of the Supreme Court of South Carolina (June 30, 1993).

20. Plyler v. Evatt, No. 23928, 1993 WL 335152 (S.C. Aug. 26, 1993), *withdrawn and superseded*, *Plyler II*, ___ S.C. ___, 438 S.E.2d 444 (1993).

21. Order of the Supreme Court of South Carolina (Nov. 8, 1993).

22. *Plyler II*, ___ S.C. at ___, 438 S.E.2d at 246.

23. ___ S.C. ___, 423 S.E.2d 101 (1992) (per curiam).

that the court should interpret the statute to follow the legislative intent.[24] The court agreed with the circuit court's finding that the legislative intent of section 720 was "to ensure a supervised transition period for inmates returning to society after an extended period of incarceration."[25]

The court held that the 1993 amendment expressly incorporating section 710's eligibility requirements into section 720 did not clarify but changed the law and, therefore, did not show the legislative intent of the original statute.[26] Instead, the court held that the amendment materially changed the law.

Given *Plyler II*'s holding and the 1993 amendment to section 720, the court had to identify the class of inmates who had to meet the more stringent 1993 requirements.

Applying the new requirements to all inmates raised ex post facto concerns. "The *ex post facto* clause protects against retroactive legislative provisions which are disadvantageous to the offender."[27] The critical date for ex post facto analysis is the date the inmate committed the offense.[28] However, the Ex Post Facto Clause does not protect people from every law passed after their offense date. Instead, the Constitution prevents a new law from adversely affecting a person if that law involves changes in matters of substance altering substantial personal rights, such as increasing punishment or changing elements of the offense.[29] Ex post facto analysis focuses on whether the change is substantive or procedural.[30] The United States Supreme Court established the test for ex post facto violations as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[31]

---

24. *Plyler II*, ___ S.C. at ___, 438 S.E.2d at 246.

25. *Id.* at ___, 438 S.E.2d at 246.

26. *Id.* at ___, 438 S.E.2d at 246 (citing North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964) ("An amendment which materially changes the terminology of a statute under some circumstances indicates persuasively and raises a presumption that a departure from the original law was intended.")).

27. Elmore v. State, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991) (citing Miller v. Florida, 482 U.S. 423 (1987)).

28. *Id.* at 459, 409 S.E.2d at 399.

29. *See id.* at 459, 409 S.E.2d at 399; State v. Huiett, 302 S.C. 169, 171, 394 S.E.2d 486, 487 (1990) (quoting *Miller*, 482 U.S. at 430).

30. *See Elmore*, 305 S.C. at 459, 409 S.E.2d at 399 (citing *Miller*, 482 U.S. at 430); *Huiett*, 302 S.C. at 171, 394 S.E.2d at 487 (quoting *Miller*, 482 U.S. at 430).

31. Calder v. Bull, 3 U.S. 386, 390 (1798) (quoted in *Huiett*, 302 S.C. at 171, 394 S.E.2d

In *Plyler II* the court found no ex post facto violation in applying the 1993 amendment to inmates who committed their offenses before its effective date.[32] The court held that all prisoners who met the requirements of section 720 before the 1993 amendment could participate in the SFII program.[33] Those who had not must meet the amended statute's additional requirements. In a footnote, the court addresses the ex post facto issue.[34] The court explained: "There is no *ex post facto* violation in applying the amended statute's criteria to individuals who committed offenses before its effective date because the Program is not part of the defendant's sentence."[35]

In *Gunter* petitioner argued that the application of eligibility criteria for participation in SFI added by amendment after his offense date constituted an ex post facto violation. The court rejected the argument because "the furlough program is not part of the sentencing process."[36]

The *Gunter* court relied on *Milhouse v. Levi*.[37] In *Milhouse* the court rejected the inmates' argument that the addition of requirements to the furlough statute curtailed their furlough privileges, inflicting greater punishment upon them than was possible when they committed their offenses.[38] The *Gunter* court emphasized *Milhouse*, which distinguished parole from furlough programs. The latter are "internal rehabilitation procedures that are not an integral part of the sentencing process."[39] The *Gunter* court also found that the legislative purpose of section 710 was to alleviate prison overcrowding and not to confer substantial rights on the affected prisoners.[40]

However, *Gunter* is factually distinguishable from *Plyler II*; in *Gunter* the ex post facto analysis involved section 710, whereas *Plyler II* involved section 720. In finding that the eligibility requirements of one section did not apply to the other, the *Plyler II* court noted that the two statutes involved different programs. However, the court did not consider the differences in the two statutes in its ex post facto analysis.

The critical distinction in the two statutes is that section 710 is discretionary whereas, before the 1993 amendment, section 720 was mandatory,

---

at 487).

32. *Plyler II*, ___ S.C. at ___ n.1, 438 S.E.2d at 245 n.1.

33. *Id.* at ___, 438 S.E.2d at 245.

34. *Id.* at ___ n.1, 438 S.E.2d at 245 n.1.

35. *Id.* at ___ n.1, 438 S.E.2d at 245 n.1 (citing Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989) (per curiam), *overruled in part*, Griffin v. State, ___ S.C. ___, 433 S.E.2d 862 (1993), *cert. denied*, ___ U.S.___, 114 S. Ct. 924 (1994)).

36. *Gunter*, 298 S.C. at 117, 378 S.E.2d at 445.

37. 548 F.2d 357 (D.C. Cir. 1976).

38. *Id.* at 363-64.

39. *Gunter*, 298 S.C. at 117, 378 S.E.2d at 445 (discussing *Milhouse*, 548 F.2d 357 (1976)).

40. *Id.* (citing Anders v. South Carolina Parole & Community Corrections Bd., 279 S.C. 206, 305 S.E.2d 229 (1983) (per curiam)).

requiring the Department of Corrections to release all inmates, with certain exceptions, who were within six months of their sentences' expiration.[41] The inmates argued that because of the statute's mandatory language, early release into SFII became a part of their sentences,[42] and thus any disadvantageous change in the program would deprive them of a substantial right. The mandatory language of section 720 provides the inmates with a stronger argument than they would have had under section 710's discretionary language. Thus, under *Calder v. Bull*, the inmates could argue that the amendment's retroactive application violated the Ex Post Facto Clause because it inflicted a greater punishment than existing at the time of offense.

The court has recognized this argument before. In analyzing a different issue in *Gunter*, the court noted a difference in ex post facto analysis of discretionary and mandatory statutes.[43] The court found: "The Board of Corrections has discretion whether to allow an inmate even to participate in a work release program. Therefore, participation in a work release program is a privilege, giving rise to no vested rights cognizable under the ex post facto doctrine."[44] In *Plyler II* the inmates arguably had a vested right to participate in the program, which was mandatory upon the fulfillment of three eligibility requirements. This right would not be available to inmates under the discretionary provisions of section 710.

Furthermore, even if the court correctly relied on *Gunter* by treating sections 710 and 720 equally for ex post facto analysis, the *Gunter* decision itself is questionable. In *Gunter* the court held that the Ex Post Facto Clause does not apply to furlough programs.[45] The court relied on *Milhouse*, which is factually distinguishable from *Gunter*. The *Milhouse* furlough program was fundamentally different from South Carolina's supervised furlough programs. Unlike the programs in South Carolina, the *Milhouse* program permitted inmates to leave prison for certain time periods, after which they had to return to the correctional facility.[46] In *Anders* the South Carolina Supreme Court recognized that "[i]t was obviously not the intent of the legislature to use the word 'furlough' in a technical sense."[47] The *Anders* court grouped section 710 with other statutes providing for leniency and "for the service of less time in prison than that specified in the judge's sentence."[48] Because of the way the SFI and SFII programs operate, the programs are arguably more akin to

41. *See Plyler II*, ___ S.C. at ___, 438 S.E.2d at 245.

42. Respondent's Supplemental Brief at 3-4.

43. *See Gunter*, 298 S.C. at 116, 378 S.E.2d at 444.

44. *Id.* (citation omitted) (citing S.C. CODE ANN. § 24-3-20 (Law. Co-op. 1976) and People v. Miller, 434 N.Y.S.2d 36 (N.Y. App. Div. 1980)).

45. *Id.* at 117, 378 S.E.2d at 445.

46. *Milhouse*, 548 F.2d at 361 n.9 (involving 18 U.S.C. § 4082(c) (1).

47. *Anders*, 279 S.C. at 209, 305 S.E.2d at 230.

48. *Id.*

work release programs, parole, or good behavior credits, all of which might afford a different result under ex post facto analysis.[49]

The court could have avoided the constitutional issue by finding that section 720 incorporated section 710. Finding an incorporation also would have avoided contradicting *Plyler I*. The court could have found that although sections 710 and 720 provided two distinct programs, section 720 incorporated section 710's conditions. The court made no mention of unambiguous language and stated that the court's duty is to effectuate the legislative intent.[50] The court held that the legislative intent in creating SFII was to help prisoners integrate into society.[51]

In conclusion, in *Plyler II* the South Carolina Supreme Court interpreted the 1989 version of section 720 as not incorporating the eligibility requirements of section 710. The court found that legislative intent dictated the result. Given the agencies' construction of the statute, the court's conclusion is questionable. Also, the court interpreted the 1993 amendment to section 720 as changing the law and applied the amendment's requirements to all inmates who had not yet qualified for the program. The court relied on factually distinguishable cases to find that this application did not violate Ex Post Facto Clause.

Alicia Allsbrook Richardson

IV. COURT FINDS NO FIRST AMENDMENT CONFLICT IN BAN ON 'LOUD AND UNSEEMLY' SPEECH

In the split decision of *City of Beaufort v. Baker*[1] the South Carolina Supreme Court upheld the constitutionality of a municipal ordinance prohibiting "'loud and unseemly noises.'"[2] Finding the ordinance sufficiently definite to survive vagueness allegations[3] and content-neutral,[4] the court

---

49. *See, e.g., Gunter*, 298 S.C. at 116, 378 S.E.2d at 444 (noting in dicta that a mandatory work release program might give rise to a vested right that could not be disadvantaged by an ex post facto law); Roller v. Cavanaugh, 984 F.2d 120, 124 (4th Cir. 1993), *cert. granted*, ___ U.S.___, 113 S. Ct. 2412, *cert. dismissed*, ___ U.S. ___, 114 S. Ct. 593 (1993) (holding that amended statute altering the conditions of pre-existing parole eligibility violated the Ex Post Facto Clause).

50. *Plyler II*, ___ S.C. at ___, 438 S.E.2d at 246 (citing *Gilstrap*, ___ S.C. ___, 423 S.E.2d 101).

51. *Id.* at ___, 438 S.E.2d at 246.

1. ___S.C.___, 432 S.E.2d 470 (1993).

2. *Id.* at ___, 432 S.E.2d at 472, 474 (quoting BEAUFORT, S.C., CODE OF ORDINANCES § 9-1008 (a) (1991)).

3. *Id.* at ___, 432 S.E.2d at 474.

4. *Id.* at ___, 432 S.E.2d at 472.

relied heavily upon the Maryland Court of Appeals' decision in *Eanes v. Maryland*.[5] There, the Maryland court upheld as a valid time, place, and manner restriction on free speech the Maryland statute upon which Beaufort based its ordinance.[6] Unlike the *Eanes* court, however, the South Carolina court summarily addressed the constitutional issues surrounding the Beaufort ordinance and possibly failed to consider critical differences between the *Eanes* and *Baker* situations.

Baker involved a situation typical in many towns and cities across the United States. For almost seventeen years, Karl Baker and members of his church went to downtown Beaufort to preach on Saturdays. Starting at noon and continuing for thirty to sixty minutes, each would speak for several moments from the sidewalks of the downtown business district.[7] This area was occupied exclusively by merchants and customers.

Baker and others were charged on November 2, 1991, November 16, 1991, November 23, 1991, December 14, 1991, and January 4, 1992 with violating section 9-1008(a) of the Beaufort city code, a recently amended noise ordinance.[8] They were convicted on all charges. Baker and the other preachers appealed contending that the ordinance was not a valid time, place, and manner restriction on their freedom of speech rights under the First Amendment of the United States Constitution and under Article I, section two of the South Carolina Constitution.[9]

Citing only one United States Supreme Court case, *Ward v. Rock Against Racism*,[10] and relying almost exclusively upon *Eanes*,[11] the South Carolina court upheld the ordinance. The majority found that the ordinance was a valid, content-neutral regulation of speech based "solely upon the noise generated, rather than the message conveyed."[12] The court found the ordinance narrowly tailored to serve Beaufort's significant interest in protecting the downtown business area, stating that "government 'ha[s] a

---

5. 569 A.2d 604 (Md. 1990), *cert. denied*, 496 U.S. 938 (1990).

6. *See Baker*, ___ S.C. at ___, 432 S.E.2d at 472.

7. Brief of Appellant at 1-2, 7.

8. *Baker*, ___ S.C. at ___, 432 S.E.2d at 472. The Beaufort ordinance was amended October 22, 1991, and reads: "It shall be unlawful for any person to willfully disturb any neighborhood or business in the City by making or continuing loud and unseemly noises, or by profanely cursing and swearing, or using obscene language." BEAUFORT, S.C., CODE OF ORDINANCES § 9-1008(a) (1991). Notably, the ordinance also prohibits the use of horns, amplification equipment, radios, and other sound equipment that "cause loud or irritating noises." *Id.* § 9-1008(b). In these cases, however, the ordinance defines the standard to determine a violation as noises "which are plainly audible from a distance of fifty (50) feet from [their] source." *Id.*

9. *Baker*, ___ S.C. at ___, 432 S.E.2d at 472.

10. 491 U.S. 781 (1989).

11. *See Baker*, ___ S.C. at ___, 432 S.E.2d at 471-72.

12. *Id.* at ___, 432 S.E.2d at 472.

substantial interest in protecting its citizens from unwelcome noise.'"[13] The court also found that the ordinance properly regulated speech because merchants could not "'escape the bombardment of their sensibilities'" as a captive audience[14] and because "alternative avenues of communication" remained open.[15] The court noted, "Appellants' opportunity to convey their religious message is not proscribed by the Ordinance. Numerous alternative avenues of communication are available, including passing out leaflets or preaching at a lower volume."[16]

The court's analysis correctly reflects current First Amendment jurisprudence. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[17] the United States Supreme Court outlined the test applicable to restrictions of speech in traditional public forums such as the sidewalks involved here:

> In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[18]

So long as a governmental regulation "is '*justified* without reference to the content of the regulated speech,'" the restriction is content-neutral.[19] Indeed, reference to the religious content of the speech does not seem necessary.[20]

---

13. *Id.* at ___, 432 S.E.2d at 473 (alteration in original) (quoting *Ward*, 491 U.S. at 796).

14. *Id.* at ___, 432 S.E.2d at 473 (quoting *Eanes*, 569 A.2d 604, 612 (Md. 1990).

15. *Id.* at ___, 432 S.E.2d at 473.

16. *Baker*, ___ S.C. at ___, 432 S.E.2d at 473.

17. 460 U.S. 37 (1983).

18. *Id.* at 45 (citations omitted); *see Ward*, 491 U.S. at 791; Frisby v. Schultz, 487 U.S. 474 (1988) (applying public fora test to residential neighborhood streets).

19. *Ward*, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

20. Quoting Forsyth County v. Nationalist Movement, 505 U.S. ___, ___, 112 S. Ct. 2395, 2403 (1992), the Appellant argued that a "'[l]istener's reaction to speech is not a content-neutral basis for regulation.'" Brief of Appellant at 2. In *Forsyth County*, the Court struck down an ordinance that allowed a county administrator to set a license fee for any parade, assembly, or demonstration on public property on the basis of anticipated security costs to control the public reaction to the speech. Although the county argued that the ordinance was constitutionally valid because it was aimed at the secondary effects of the speech and not its content, the Court held that the fee's justification could not be characterized as "'ha[ving] nothing to do with content.'" *Forsyth County*, 505 U.S. at ___, 112 S.Ct. at 2403 (citing *Ward*, 491 U.S. at 792); *cf.* City of Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986) (holding that time, place, and manner regulation of adult theaters as part of a zoning scheme aimed at reducing crime and other secondary effects associated with such establishments was content-neutral because it was

The South Carolina court readily accepted the "loud and unseemly" definition of *Eanes* in deciding that the ordinance was content-neutral and narrowly tailored.[21] Applying the terms' common definitions, the Maryland court noted, "loud" "is 'characterized by high volume and intensity of sound . . . clamorous and insistent.' 'Unseemly' and its synonyms such as 'improper,' 'indecorous,' 'indelicate,' mean 'in violation of accepted standards of what is right or proper.'"[22] Finding that unseemly modified loud, the Maryland court reasoned that the phrase regulated loud and unseemly noises under a reasonableness standard "informed by the circumstances."[23]

Whether this content-neutral definition is narrowly tailored hinges upon the government's significant interest in protecting citizens from noise. While also citing business interests of merchants, the *Baker* majority seemed to rely upon a captive audience theory in holding that the Beaufort ordinance serves a significant governmental interest. In so holding, the court cites *Eanes* again.[24]

Although *Eanes* also involved street preachers,[25] the *Baker* court failed to recognize an important distinction between the two situations in relation to the captive-audience concern. *Eanes* involved not only a business district but several residential apartments and homes. The Maryland court noted that the preaching "awaken[ed] adults sleeping in their homes, prevent[ed] children from taking their naps, and ma[de] it impossible for workers to concentrate on their work."[26] As such, the Maryland court's captive audience concern focused on the speech's invasion into the residential areas.[27]

While the Supreme Court recognizes that the captive-audience doctrine can extend beyond the home,[28] generally the Court limits such application to

---

"'*justified* without reference to the content of the regulated speech'") (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Unlike in *Forsyth County*, no reference to the speech itself would be necessary here.

21. *See* City of Beaufort v. Baker, ___ S.C. ___, ___, 432 S.E.2d 470, 474 (1993).

22. Eanes v. Maryland, 569 A.2d 604, 610 (Md. 1990) (alteration in original) (quoting *In re* Nawrocki, 289 A.2d 846, 849 (Md. Ct. Spec. App. 1972)).

23. *Id.*

24. *See Baker*, ___ S.C. at ___, 432 S.E.2d at 473.

25. *See Eanes*, 569 A.2d at 606.

26. *Id.* at 613.

27. *See id.*

28. As the plurality in *Ward* stated: "[I]t can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise.'" Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (quoting Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)). The Court further explained:

> This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquility, and privacy of the home," but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise.

rare, specific, well-defined circumstances. The Justices have disagreed on even limited application beyond the home, causing numerous concurring and dissenting opinions.

For example, in the plurality opinion of *Lehman v. City of Shaker Heights*,[29] the Supreme Court extended the captive audience principle to the interior of a municipal rapid transit system.[30] Finding that the city was engaged in commerce, the Court upheld an ordinance prohibiting political advertisements in the city's rapid transit system. The Court noted that the city need not accept all advertisements sought for the interior billboards, just as radio and television operators need not accept every offer of advertisement.[31] Seemingly important to the designation of the bus interior as a captive audience environment, the Court pointed out that "[h]ere, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare . . . [The city] must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights."[32]

In *Eanes* the Maryland court cited *Lehman* as extending the captive audience principle beyond the home.[33] However, clearly the *Lehman* Court, at least the plurality, did not find that a purely traditional public forum operates as a possible captive audience environment.[34] The other case cited by the *Eanes* court to support its proposition,[35] *Grayned v. City of Rockford*,[36] involved a city ordinance that limited picketing outside of school buildings to times when school was not in session. The Supreme Court concluded that although "we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public[,] . . . expressive activity may be prohibited if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'"[37] Notably, *Grayned* does not discuss a captive audience concern.[38]

Id. (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)) (citing Kovacs v. Cooper, 336 U.S. 77 (1948)). There the Court dealt with amplified sound affecting public fora and residential areas. *See id.* at 784.

29. 418 U.S. 298 (1974).

30. *Id.* at 302-04.

31. *Id.* at 303-04.

32. *Id.* at 303.

33. *See* Eanes v. Maryland, 569 A.2d 604, 612 (Md. 1990).

34. *See Lehman*, 418 U.S. at 302-03.

35. *See Eanes*, 569 A.2d at 612.

36. 408 U.S. 104 (1972).

37. *Id.* at 118 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969)).

38. Cited in the *Eanes* discussion of captive audiences in traditional public forums, *see* 569 A.2d at 612, Kovacs v. Cooper, 336 U.S. 77 (1949), also is distinguishable because it involved a sound truck and not an unamplified voice. *See* 336 U.S. at 79.

Cohen v. California[39] contains one of the Supreme Court's few majority discussions of the captive audience principle. There, the Court struck down the conviction of Cohen under California's breach of the peace statute and refused to extend the captive audience doctrine to a public courthouse.[40] Cohen was arrested in a county courthouse for "wearing a jacket bearing the words "Fuck the Draft.'"[41] Although the state argued that the jacket forced others unwillingly to endure the distasteful expression, the Court held that no captive audience concern prevailed.

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that *substantial* privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.
>
> In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. . . .[The statute here] indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."[42]

While sound may indeed be "one of the most intrusive means of communication,"[43] the *Baker* court's approach to the captive audience principle in the traditional public forum appears misplaced.[44] Clearly a restriction need not use the least restrictive means available to succeed under the time, place, and manner analysis.[45] But, if the *Baker* court's analysis

---

39. 403 U.S. 15 (1971).

40. *See id.* at 21-22.

41. *Id.* at 16 (quoting California v. Cohen, 81 Cal. Rptr. 503, 505 (Cal. Ct. App. 1969), *rev'd*, 404 U.S. 876 (1971)).

42. *Id.* at 21-22 (emphasis added).

43. *Eanes*, 569 A.2d at 612.

44. Notably, all of the cases cited in *Eanes* and accepted by the *Baker* court for the proposition that pure, unamplified speech can be regulated in the traditional public forum involved amplified sound. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (concluding that limitations upon amplified concerts in Central Park are valid under a time, place, and manner analysis coupled with a captive audience concern); Kovacs v. Cooper, 336 U.S. 77, at 87-89 (1949) (upholding an ordinance that banned loud and raucous amplified sound trucks from city streets); Saia v. New York, 334 U.S. 558, 562 (1948) (finding unconstitutional a city ordinance prohibiting use of amplified sound equipment except with permission of police); Reeves v. McConn, 631 F.2d 377, 386-87 (5th Cir. 1980) (concluding that limitations of amplification under a wattage standard are not inherently overbroad).

45. *See Ward*, 491 U.S. at 797.

rests upon captive audience concerns, the South Carolina court's application of the doctrine beyond the home is highly questionable. Again, unlike *Eanes*, the record does not indicate that the noise disturbed people in their homes. Conceding a captive audience concern, the speech probably did not violate such a substantial right that it would be intolerable under the *Cohen* standard.

Whether the ordinance leaves alternatives open to the preachers is questionable. The court stated, "Numerous alternative avenues of communication are available, including passing out leaflets or preaching at a lower volume."[46] However, in upholding narrowly tailored regulations of speech, the Supreme Court historically has not required individuals to sacrifice pure speech in favor of other methods. Holding that the ban on sound trucks was constitutional in *Kovacs*, the Court stated that "no restriction upon the communication of ideas or discussion of issues by the human voice" was involved.[47]

The *Baker* holding also should be balanced against the instructive words of Justice Harlan in *Cohen*:

> [W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[48]

Although not addressing pure speech, Justice Harlan's words are equally pertinent when considering alternative avenues of communication. Here, the evangelistic preacher expressed the group's message in a unique style and manner. It is doubtful that reducing their message to soft-spoken conversation or leaflets would carry the emotive impact that the preachers sought to convey.

Content-neutral on its face, the ordinance nevertheless has the ultimate effect of banning the speech of these street preachers for what it is: evangelistic preaching. The police admitted that they did not determine independently whether the preaching violated the statute, relying instead upon the complaints of area merchants; "[T]he police department acknowledges that the ordinance places in the hands of the complainant the determination of the sound level required for enforcement."[49] If the speech's emotive force is as

46. *Baker*, ___ S.C. at ___, 432 S.E.2d at 473.
47. *Kovacs*, 336 U.S. at 89.
48. Cohen v. California, 403 U.S. 15, 25-26 (1971).
49. *Baker*, ___ S.C. at ___, 432 S.E.2d at 476 (Toal, J., dissenting).

important as the actual words used, there seems to be little distinction between the words conveyed and the loud, evangelistic style in which they were presented. Each one depends upon the other.

Justice Eldridge's dissenting opinion in *Eanes* highlights the content-neutrality problems associated with this determination. Eldridge suggested that if two individuals were to speak in similar areas, reaching the same volume, the standard adopted under the statute would naturally favor the speech that people were less likely to find offensive. He also noted that more popular speakers might be favored. Similarly, he noted that one contemplating a speech in the downtown area could not determine the level of speech allowed under the statute.[50]

Thus, the *Baker* decision appears to deprive an evangelistic preacher of the ability to communicate his message in the manner unique to the genre. Any merchant can determine whether a preacher's manner is loud and unseemly under the circumstances without reference to a reasonable person standard.[51] Even the Appellant acknowledged that an explicit reasonable person standard might be valid.[52]

Clearly, the Beaufort city ordinance inadequately informed the street preachers of the prohibited speech. Notably, the street preachers made several requests to the Beaufort police for clarification of the ordinance. However, as Justice Toal's dissent noted:

---

50. *See* Eanes v. Maryland, 569 A.2d 604, 631-32 (Md. 1990) (Eldridge, J., dissenting). Also, suppose, for example, an evangelical congregation rents space in the downtown business district and holds a revival in its storefront church. With the windows raised, the minister begins to deliver his sermon. A neighboring businessman calls and complains. Would the Beaufort ordinance be applicable in this situation under the *Baker* standard?

51. Discussing the narrowly tailored requirement, the *Baker* court "reject[ed] Appellants' contentions that the Ordinance is not narrowly tailored because it does not provide for a decibel level standard but, rather, is dependent upon complaints from the citizens." *Baker*, ___ S.C. at ___, 432 S.E.2d at 473. However, the appellant did not argue that only a decibel level would be appropriate. Instead, the appellant argued that:

> It is clear there are less restrictive methods available to accomplish the City's objective of limiting excessive noise. And these alternatives do not depend on listeners' reactions to justify enforcement. . . .
>
> The Beaufort ordinance has no standards telling how the terms 'loud and unseemly' [sic] are to be interpreted or enforced.

Brief of Appellant at 3-4.

52. Brief of Appellant at 5. Several states have upheld ordinances and statutes that contain an express reasonableness standard. *See, e.g.*, New York v. Bakolas, 449 N.E.2d 738 (N.Y. 1983) (per curiam); Boling v. Parrett, 536 P.2d 1272 (Or. Ct. App. 1975); City of Madison v. Baumann, 470 N.W.2d 296 (Wis. 1991). Such regulations appear to define sufficiently the prohibited speech and fall clearly within time, place, and manner jurisprudence without reference to a captive audience concern. An explicit reasonableness standard also raises fewer content-neutrality concerns because the ordinance would not be enforced by reference to a single listener's reaction.

> Unfortunately, the only answers Baker received were vague suggestions that it was either for "the court to decide," or that "it's based on a merchant's complaint." The mere fact that the police department [was] unable to describe what conduct or noise level [was] offensive is stark testimony to the vagueness of the ordinance.[53]

Not mentioned by the *Baker* court, interestingly *Eanes* requires police officers to issue a warning under the Maryland statute before arresting an individual for violating the statute.[54] If the statute's meaning were clear and unambiguous, providing a reasonableness standard when considering the ordinary meaning of loud and unseemly, why would a warning be necessary each time before an arrest?

Certainly, municipalities can impose valid time, place, and manner restrictions upon the exercise of pure speech. Ordinances that are content-neutral and narrowly tailored to serve a significant interest are valid if ample opportunities for alternative communication remain. Those that are not content-neutral are valid if narrowly drawn to a compelling state interest. Captive audience concerns can enter into either of these situations. But by overlooking the differences between *Baker* and *Eanes*, the South Carolina court opened the door to content discrimination based not upon the exact words used, but upon the uniquely historical manner necessary to deliver them. The *Baker* court should have required a more carefully drawn ordinance, not necessarily including a decibel level or even a range-of-hearing measurement, but at least an explicit reasonableness standard. Then, the court's decision would fit squarely within current First Amendment jurisprudence without raising disturbing questions about content-neutrality and captive audience concerns.

Michael R. Sullivan

53. *Baker*, ___ S.C. at ___, 432 S.E.2d at 476 (Toal, J., dissenting).
54. *Eanes*, 569 A.2d at 617.