State Court Docket Watch

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Florida

League of Women Voters of Florida v. Scott

By

Jordan E. Pratt*

Which Florida governor—the outgoing or the incoming one—will have the authority to appoint successors for appellate judges, including three Florida Supreme Court justices, whose terms are set to expire in January 2019? That is the question the petitioners asked the Florida Supreme Court to resolve in *League of Women Voters of Florida v. Scott*, SC17-1122. On December 14, 2017, the court dismissed the petition as unripe and refused, at least for now, to wade into a controversy that could make its composition a political issue in the 2018 gubernatorial election. This article describes the background of the case, summarizes the court's ruling, and assesses the case's significance.

Background

In December 2016, Governor Rick Scott, who is serving his second consecutive term, announced at a press conference his intention to appoint three justices to fill vacancies that will arise on the Florida Supreme Court due to mandatory retirements in January 2019. Under Florida law, it is possible these vacancies will arise at the moment the transition of gubernatorial power occurs.

Under the Florida Constitution, governors are limited to two consecutive four-year terms, and those terms begin "on the first Tuesday after the first Monday in January" following the statewide general election. Art. IV, § 5(a), Fla. Const. However, the outgoing governor must "continue in office until a successor qualifies" by taking the oath of office. Art. II, § 5(b), Fla. Const. If the Governor-elect pre-qualifies by executing the oath before his term begins, he will assume office at 12:00 a.m. on Tuesday, January 8, 2019.

Justices and appellate judges retained in office by the voters serve a six-year term that begins "on the first Tuesday after the first Monday in January following the general election." Art. V, § 10(a), Fla. Const. If a judge or justice is not eligible for retention, a vacancy will arise "upon the expiration of the term being served by the justice or judge," Art. V, § 10(a), Fla. Const., unless the vacancy arises sooner, whether by resignation or otherwise, *see* Art. V, § 11(a), Fla. Const.

Justices Barbara Pariente, Fred Lewis, and Peggy Quince were retained in office in November 2012. Therefore, should they serve the full remainder of their terms on the Florida Supreme Court, it appears that their terms will expire at the end of the day on Monday, January 7, 2019—the same moment at which Governor Scott's term will expire if his successor pre-qualifies.

Proceedings and Ruling

The League of Women Voters of Florida and several other parties brought a petition for a writ of *quo warranto* in the Florida Supreme Court, asking it "to prevent Governor Scott from appointing the successor to any justice or appellate judge whose final term expires in January 2019." Pet. at 3. The petitioners argued that the judicial terms at issue run through the whole day of Tuesday, January 8, 2019, Pet. at 14–16, and even assuming the vacancies would arise at the beginning of that day, Governor Scott still could not fill them because the incoming governor will have taken office by that time, Pet. 16–21.

In response, Governor Scott noted that "Florida's governors have a long history of cooperation regarding end-of-term vacancies on" the Florida Supreme Court, including the vacancy that Justice Quince filled, and "[e]arlier disputes . . . were likewise resolved without judicial intervention." Resp. at 7–8. The Governor then argued that the petition should be dismissed because *quo warranto* writs may be used only to test the lawfulness of an official's actions after they are taken; the petition raised a hypothetical and unripe controversy; and issuance of the writ would violate the separation of powers. Resp. at 8–19. In support of his contention that the petitioners had prematurely invoked the court's jurisdiction, the Governor asserted

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that they assumed various contingencies, including that any retiring justice or judge will serve the full remainder of his term. Resp. at 14–16. In the alternative, the Governor sought denial of the petition on the merits. Resp. at 19–30.

By a vote of six to one, the Florida Supreme Court agreed with the Governor that "the issue presented is not ripe for consideration," Op. at 1, and it dismissed the petition. In a per curiam opinion joined by the four non-retiring justices, the majority observed that "[q]uo warranto is used to determine whether a state officer or agency has improperly *exercised* a power or right derived from the State, and the history of the extraordinary writ reflects that petitions for relief in quo warranto are properly filed only after a public official has acted." Op. at 2 (quotation marks and citation omitted, emphasis in original). The court continued that "a threatened exercise of power which is allegedly outside that public official's authority may not ultimately occur," and deciding the merits of premature petitions "would amount to an impermissible advisory opinion based upon hypothetical facts." Op. at 3. Observing that "no appointments have been made," the court held that "[u]ntil some action is taken by the Governor, the matter the League seeks to have resolved is not ripe, and this Court lacks jurisdiction to determine whether quo warranto relief is warranted." Op. at 4.

The three retiring justices wrote separately. Justice Quince authored an opinion concurring in the result only, which Justice Pariente joined. While Justices Quince and Pariente agreed with the majority's conclusion that the controversy was not ripe, they opined that "this Court could properly review a petition for quo warranto prior to the actual appointment of a new justice." Op. at 4–5 (Quince, J., concurring in result only). Justice Lewis dissented, opining that a writ of *quo warranto* may issue before the complained-of action occurs. Op. at 9–17 (Lewis, J., dissenting).

Significance

The Florida Supreme Court's ruling is significant in at least two respects. First, it makes clear that petitions for writs of *quo warranto* "are properly filed only after a public official has acted," Op. at 2, and Florida courts should dismiss unripe petitions. Second, its non-merits disposition declined to address whether Governor Scott would have the authority to make the judicial appointments that the petitioners sought to place at issue. Media outlets in Florida have widely covered the case and the three justices' upcoming retirements more generally, predicting that the selection of their successors will profoundly impact the Florida Supreme Court's ideological composition and will, therefore, feature as a political issue in the 2018 gubernatorial election. For now, the court has declined to entangle itself in that debate.

West Virginia

State of West Virginia v. Steward Butler

By

Marc E. Williams*

In *State of West Virginia v. Steward Butler*, the Supreme Court of Appeals of West Virginia determined that "sex" as used in West Virginia Code § 61-6-21(b), a statute that criminalizes violence, threats of violence, and other pernicious conduct on the basis of sex, did not include "sexual orientation." Based on this determination, Chief Justice Allen H. Loughry II, writing for the 3-2 majority, affirmed the lower court's dismissal of two charges alleging that the defendant violated West Virginia Code § 61-6-21(b) by assaulting two men based on their sexual orientation.

On April 5, 2015, the defendant witnessed two men kissing on a street in Huntington, West Virginia. After witnessing the kiss, the defendant allegedly directed homophobic slurs toward the men, struck both men, and knocked one of the men to the ground. Following the assault, a grand jury returned a four-count indictment against the defendant. Two of the charges alleged that the defendant violated West Virginia Code § 61-6-21(b) because he assaulted the men based on their sexual orientation, and the remaining two charges alleged that the defendant committed battery.

The defendant challenged the applicability of West Virginia Code § 61-6-21(b), arguing that the statute as written criminalized conduct based on a person's sex—not a person's sexual orientation. The lower court certified a question to the Supreme Court of Appeals of West Virginia, seeking to clarify whether the term "sex" in West Virginia Code § 61-6-21(b) included sexual orientation. The court refused to docket the certified question, and the case returned to the lower court. Following briefing, the lower court determined that "sex" as used in West Virginia Code § 61-6-21(b) did not encompass sexual orientation because the West Virginia Legislature, unlike a number of other state legislatures, did not specifically prohibit conduct based on an individual's sexual orientation. The State appealed, asserting that the lower court erred by (1) determining that sex as used in § 61-6-21(b) did not include sexual orientation and (2) ruling on an issue for which the Supreme Court of Appeals of West Virginia refused to docket a certified question earlier in the case.

In an interesting twist, West Virginia Attorney General Patrick Morrisey, through the state's Solicitor General Elbert Lin, whose office routinely handles appeals before this court on behalf of local prosecutors, filed an *amicus curiae* brief supporting the defendant's position that the statute does not apply to sexual orientation.

As to the first issue, the state contended that sex could reasonably be defined as including sexual orientation and relied on federal Title VII precedent that interpreted the phrase "because of sex" to include sexual orientation. In response, the defendant argued that the statute unambiguously stated sex and not sexual orientation, that the common usage of the term sex did not include sexual orientation, and that a number of other state civil rights statutes specifically used the term sexual orientation while West Virginia's civil rights statute did not.

The court ultimately agreed with the defendant. First, it noted that "[t]he Legislature has power to create and define crimes." When the Legislature wrote West Virginia Code § 61-6-21(b), it used the term "sex"—not sexual orientation. After wrangling several dictionaries, the court determined that the plain meaning of the term sex was "being male or female" and did not include sexual orientation. The court further supported the notion that the definition of sex did not include sexual orientation by noting that sex and sexual orientation were treated as distinct protected categories in civil rights statutes throughout the states.

In addition to the plain language of § 61-6-21(b), the court also determined that the legislative history of the statute supported a reading of sex that excluded sexual orientation. Specifically, the court relied on the Legislature's failure on twenty-six occasions to adopt amendments to the statute to include "sexual orientation". Based on the Legislature's repeated refusal to

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amend the statute, the court determined, "[T]hese unsuccessful legislative efforts are not only indicative of intent, but they are germane to the Legislature's right to define crimes. In this regard, the Legislature has chosen—repeatedly—not to amend West Virginia Code § 61-6-21(b) so as to include any additional characteristics that trigger criminal responsibility under the statute."

Although the State argued that the reading ultimately adopted by the court would lead to absurd results and fundamental injustice, the court stated that that was not the case. First, the court noted that absurd results did not follow from a reading of sex that did not include sexual orientation because it was simply effecting the Legislature's intent that sex not include sexual orientation. Next, the court determined that fundamental injustice did not flow from its interpretation of the statute because the defendant was still potentially liable for the remaining battery charges.

The court then reiterated the central tenet upon which it based its decision: "It is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." Although the court's own rules prohibited discrimination on the basis of sexual orientation, the court repeatedly noted that the Legislature—not the court—was in charge of creating and delineating crimes. Based on that tenet, the court upheld the trial court's determination that sex as defined in West Virginia Code § 61-6-21(b) did not include sexual orientation.

The court also determined that the trial court did not err when it ruled on an issue for which the court earlier refused to docket a certified question. It ruled that the court's refusal to docket a certified question did not constitute a ruling on the issue and that lower courts may appropriately rule on issues that the court refused to docket. Therefore, the court also refused to overturn the lower court on the certified question issue.

Writing in dissent, Justice Margaret Workman, who was joined by Justice Robin Davis, repeatedly opined that the phrase "because of . . . sex" included sexual orientation. In support of her opinion, she argued that sexual orientation implicates sex because "the crime occurred because he was perceived to be acting outside the social expectations of how a man should behave with a man. But for his sex, he would not have been attacked." She determined that the majority concluded its analysis of the plain language too early and that the real issue in the case was not whether the statute included the term "sexual orientation" but whether the actions occurred because of the victim's sex. Because the victims in this case were attacked for acting in a way that many might perceive as outside the societal norms for males, Justice Workman determined that the actions at issue took place because of the victim's sex.

At first glance, the result of the *Butler* decision appears controversial; however, the tenets in which it is grounded are not—or at least should not be—controversial. In *Butler*, the court recognized that its goal was to interpret and apply the law as written by the Legislature. Although society or the court might disagree with the results of that application, to do more would upset separation of powers.

1 Cited as *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017).

2 *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718, 723 (2017) (quoting Syl. Pt. 2, in part, *State v. Woodward*, 68 W.Va. 66, 69 S.E. 385 (1910)).

3 *Id.* at 726.

4 *Id.* at 727 (quoting Syl. Pt. 11, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013)).

5 *Id.* at 732.

Louisiana

Louisiana Supreme Court Finds Sentence of Life Without Parole For Juvenile Unconstitutional

By

Ronald Joseph Lampard*

The United States Supreme Court held in *Graham v. Florida* that the Eighth Amendment prohibits juvenile offenders convicted of non-homicide offenses from being sentenced to life in prison without parole. Many states, however, have habitual offender laws that allow for life sentences without the possibility of parole. In these instances, defendants have multiple prior felony convictions. Thayer Green was one such defendant, who by the age of 17 had two prior felony convictions in addition to his conviction for home invasion, simple robbery, and second-degree battery. All are defined as crimes of violence under Louisiana law. Thayer Green challenged his life sentence, arguing that it was unconstitutional.

The Louisiana Supreme Court in *State of Louisiana v. Thayer Green* applied the holding and principles of *Graham* to the instant case and amended his sentence of life without parole by deleting the restriction on parole eligibility. In addition, the court found that under all the facts and circumstances of the case, which include the "defendant's youth, and the relative harshness of defendant's sentences as compared to other defendants convicted of harming their romantic partners in domestic disputes, . . . defendant has presented a substantial possibility that his complaints of an excessive sentence [have] merit." Therefore, the court remanded the matter to the trial court to "reconsider the corrected sentence after first conducting an evidentiary hearing to allow defendant the opportunity to establish mitigating circumstances . . . and to articulate reasons if consecutive terms are imposed."

The trend in states over the last decade has been to presumptively treat those under the age of 18 as juveniles in the criminal justice system. In fact, Louisiana passed a "Raise the Age" bill in 2016 that will change the minimum age to charge someone as an adult from 17 to 18. Essentially, it requires that 17-year-olds be treated presumptively as juveniles rather than adults. Crucially, the law did not affect a district attorney's option to charge 17-year-olds accused of certain crimes as adults. For example, if a 17-year-old committed a violent crime such as a homicide, rape, or armed robbery, he or she could still be charged as an adult and sent to an adult prison upon conviction. In addition, if they are convicted as adults, their conviction could be used in future cases for sentencing enhancement pursuant to Louisiana's Habitual Offender Law. However, for lesser crimes such as felony theft or simple drug possession, convicted 17-year-olds are now sent to a juvenile facility rather than an adult prison, a key change that advocates said would help rehabilitate the offender. A full list of crimes eligible for transfer to adult court is prescribed by Louisiana Children's Code Article 305.

Ultimately, this was a landmark Eighth Amendment case. Along with the "Raise the Age" bill, Louisiana will almost certainly see a drop in the number of those under the age of 18 being sentenced to life in prison. Unsurprisingly, the Louisiana Supreme Court applied the holding and principles of *Graham* to the instant case. Specifically, juveniles cannot be sentenced to life without parole in non-homicidal cases, even in instances where the offender has committed multiple prior felonies. In addition, the court strongly stated that even a sentence of life imprisonment with the possibility of parole may be unconstitutionally excessive under the totality of the circumstances of the case.

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Georgia

Gaddy v. Georgia Department of Revenue: The Constitutionality of School Choice Tax Credits

By

Jason Bedrick*

The Georgia Supreme Court's unanimous decision in *Gaddy v. Georgia Department of Revenue* continues the unbroken record of high courts rejecting constitutional challenges to tax-credit scholarship (TCS) programs.

In 2008, Georgia enacted the Qualified Educational Tax Credit Program in an effort to expand educational opportunities for schoolchildren. Similar to programs in 17 other states, individual and corporate donors in Georgia can receive a dollar-for-dollar credit against their state income tax liability in exchange for contributions to qualified, nonprofit Student Scholarship Organizations that aid families in paying tuition at qualified private schools of their choice.

Opponents of school choice challenged the program, claiming that it violates three provisions of the state constitution: one prohibiting public aid to religious institutions, another forbidding the public disbursement of "gratuities," and the third governing how public funds can be expended for scholarship programs. The Georgia Supreme Court rejected all three claims for the same reason: tax credits are not public funds.

More than a decade ago, the U.S. Supreme Court ruled that publicly funded K-12 school vouchers—even when used at a religious school—are constitutional under the First Amendment. In *Zelman v. Simmons-Harris*, petitioners argued that Cleveland's voucher program violated the Establishment Clause because students used public funds at religious schools. However, the Court ruled that the use of public funds at a religious institution was constitutional so long as the government program was neutral with respect to religion and the funds only reached a religious institution as a result of true private choices of the program's beneficiaries.

Nevertheless, most state constitutions contain a "Blaine Amendment" (or "No-Aid Clause") that is often more restrictive than the First Amendment when it comes to public dollars flowing to religious schools. In Georgia, the Blaine Amendment declares that "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." High courts in Arizona and Colorado have struck down school voucher programs under similar provisions, although voucher programs have also survived Blaine Amendment challenges in Indiana and Wisconsin. Moreover, the U.S. Supreme Court recently vacated the Colorado Supreme Court's decision and asked the court to reconsider the case in light of its ruling in *Trinity Lutheran v. Comer*.

By contrast, tax-credit scholarship programs have always survived Blaine Amendment challenges. Whereas vouchers are publicly funded, tax-credit scholarships rely on private funds that flow from private donors to private nonprofits to private families to private schools. Although the petitioners in Georgia and elsewhere have claimed that tax credits constitute an indirect public expenditure, courts have consistently found that monies belonging to private individuals or corporations do not become public funds until they have "come into the tax collector's hands." *ACSTO v. Winn*, 563 U.S. 125 (2011).

The Georgia Supreme Court is no exception. Relying on precedent from the U.S. Supreme Court and other state supreme courts, the Georgia Supreme Court ruled that the petitioners lacked standing because "the statutes that govern the Program demonstrate that only private funds, and not public revenue, are used." No money ever leaves or enters the public treasury and the state exercises no control over which scholarship organizations donors choose to support or at which schools parents choose to spend their scholarship funds. Rather, the court explained:

> Individuals and corporations chose the [scholarship organizations] to which they wish to direct contributions;

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> these private [scholarship organizations] select the student recipients of the scholarships they award; and the students and their parents decide whether to use their scholarships at religious or other private schools. The State controls none of these decisions. Nor does it control the contributed funds or the educational entities that ultimately receive the funds.

Petitioners' Gratuities Clause and Educational Assistance challenges failed for the same reason. The Gratuities Clause states that "the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public," but the state cannot donate nor give as a gratuity that which it does not own. Likewise, the Educational Assistance section of the Georgia Constitution governs how "public funds may be expended" for "grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes," but it does not govern how *private funds* may be expended for such purposes.

Although the petitioners alleged that they had standing because the tax credits increased their tax burden, the court dismissed their claim as "purely speculative." Indeed, there is evidence to suggest that the program actually reduces expenditures by more than it reduces revenue because it relieves the state of the duty to provide funding for scholarship students to attend public schools. A study of a similar program in neighboring Florida found that for every $1 in revenue reduced as a result of the tax credits, the state saved $1.44 in expenditures. Moreover, even if the tax credits had a net negative effect, the court held that "it requires pure speculation that lawmakers will make up any shortfalls in revenue by increasing the plaintiffs' tax liability" rather than, say, reducing the budget.

Likewise, the court refused to indulge the petitioners' desire that the court adopt "tax expenditure analysis," a theory that equates tax benefits with direct state appropriations. The petitioners pointed to the Budget Act, which defines a "tax expenditure" as "any statutory provision which exempts, in whole or in part, any specific class or classes of . . . income . . . from the impact of established state taxes, including but not limited to tax deductions, tax allowances, tax exclusions, tax credits, preferential tax rates, and tax exemptions." This might make sense from a budgetary perspective, but ruling that such tax benefits constituted "tax expenditures" from a constitutional perspective would implicate the state's longstanding tax deductions for donations to charitable organizations (including religious ones) as well as the state's property tax exemptions for houses of worship. Noting that even the petitioners "acknowledge they are not advocating this result," the court found that none of these tax benefits result in anyone's property becoming the property of the state. Instead, the court agreed with the Arizona Supreme Court, which rejected tax expenditure analysis because "under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature."

Gaddy may well signal the beginning of the end for Blaine Amendment challenges to tax-credit scholarship programs. In addition to Georgia, the U.S. Supreme Court and state supreme courts in Alabama, Arizona, Florida, and New Hampshire have rejected such challenges and the "tax expenditure analysis" upon which they rely. Moreover, a trial court in Montana recently sided with the Institute for Justice, which sued the state's Department of Revenue for unilaterally excluding religious schools from receiving tax-credit scholarships, claiming that the state constitution demanded it. Yet again, the court explicitly rejected tax expenditure analysis and ordered the department to allow families to use tax-credit scholarships at any qualifying school of their choice, religious or secular.

Those seeking to use the courts to curtail educational choice may have to find a new approach.

Kansas

Gannon v. Kansas: Carousel of Kansas Education Finance Lawsuits Continues

By

David Dorsey*

The citizens of the Sunflower State are holding their collective breaths, waiting for the Kansas Supreme Court to hand down its fifth—yes, fifth—opinion in *Gannon v. Kansas*. *Gannon* is only the latest in the unending legal-battles over education funding, a fight in perpetuity since the early 1990s. *Gannon* was originally filed in 2010 with the plaintiffs claiming state funding to education was inadequate to meet Legislature's duty under the state constitution's "make suitable provision" requirement. Kan. Const. Art. I, Sec. 6. *Gannon* is an undeniable artifact of *Montoy v. State*, a 1999 case that took seven years to conclude. In *Montoy*, the Kansas Supreme Court set an unsustainable bar by ordering the Legislature to increase funding to public schools by $853 million. Two years later the impact of the Great Recession on state revenues made it impossible for the Legislature to maintain that level of support.

The education establishment, smelling blood in the water, inevitably responded by suing the state for more money in the form of *Gannon*. After a lower court found in favor of the schools in 2013, on appeal the Supreme Court pivoted from *Montoy* by claiming that funding adequacy is not determined by total spending, but by being "reasonably calculated" to have students meet certain "*Rose*" standards from the Kentucky Supreme Court's decision in *Rose v. Council for Better Education*, 790 S.W.2d 186 (KY 1989). The Kansas Legislature responded in 2015 by throwing out the old finance formula and passing a short-term, "block grant" funding scheme against the promise of a new outcomes-based financing model. Such a radically different funding approach was a non-starter in the election year politics of 2016.

In March 2017, the Kansas Supreme Court in *Gannon IV* found the block grants law constitutionally inadequate because collectively the justices determined that about a quarter of Kansas students were not meeting acceptable performance standards. This surprised no one as the block grant funding was scheduled to sunset on June 30. The court acknowledged this expiration as their deadline to create a funding system, while withholding specific guidance on what would be acceptable.

Despite the court telling the Legislature that there are "literally hundreds of ways" they could create an approach that meets constitutional muster, a much different looking 2017 Legislature instead passed a redux of the law that was replaced in 2015, one rooted not in outcomes, but one that utilized a complicated weighted per-pupil formula. Funding was increased by an estimated $290 million over the next two years.

Oral arguments were heard in July and once again the justices seemed to pivot, hinting that the money might not be sufficient—the plaintiffs are seeking an increase of $893 million—and questioning the model that was used as the framework for the new law. While awaiting *Gannon V*, keep these points in mind:

- The court seems to be changing their priority with each decision.
- More likely than not, *Gannon V* will not be a conclusive decision. The court will maintain jurisdiction that will lead to *Gannon VI* and beyond.
- Regardless of the final disposition in *Gannon*, another lawsuit by the education community is not only predictable, it is inevitable.

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Florida

Bogorff v. Scott

By

Christina M. Martin*

In *Bogorff v. Scott*, the Florida Supreme Court revealed the difficulty many property owners face when it comes to enforcing the constitutional right to just compensation.

The case began over a decade ago, when the State of Florida tried to stop the spread of citrus canker, a plant disease that destroys crops with unsightly lesions. From 2000 to 2006, the Florida Department of Agriculture systematically destroyed hundreds of thousands of citrus trees within a 1900-foot radius of infected trees. The order included healthy trees in home gardens. After this program began, the Florida Legislature passed a law requiring the Department to pay owners $55-100 per healthy tree, significantly less than the value of many trees. As far as state officials were concerned, they owed nothing more when they ordered these healthy plants destroyed, as they saved the state's important citrus industry.

But the Takings Clause in the Fifth Amendment requires that the government pay *just* compensation when it takes private property for a public purpose, not just any old compensation the state thinks adequate. As the Supreme Court of the United States has said many times over, the purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Likewise, Florida's constitution has a similar compensation provision, which state courts have interpreted as offering identical protection. Both ensure that government cannot escape its duty to pay just compensation merely because the goal of the taking is to benefit the public as a whole. Thus in 2008 the trial court in the *Bogorff* case held that the state owed residents in Broward County who lost trees to this program more than $8 million as just compensation. The case, however, took an odd turn. In 2012, a state appellate court held that the plaintiffs would have to first lobby the state legislature for payment, pursuant to Section 11.006 of the Florida Statutes, before they could collect via a writ of execution. The court said the property owners' constitutional claim was not ripe until the state legislature had an opportunity (pursuant to the statute) to voluntarily pay the full amount. To takings lawyers, this sounds similar to the oft-criticized U.S. Supreme Court decision, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, which holds that federal takings claims against state and local governments are ordinarily not "ripe" until state courts have the opportunity to order the government to pay just compensation.

The *Bogorff* plaintiffs unsuccessfully lobbied the Legislature and then went back to court again for relief. The court again denied them relief. The appellate court this time decided that although the owners satisfied the requirement that they ask the Legislature for an appropriation, the right to collect just compensation was still not ripe because they had not yet filed for the writ of mandamus provided for by another subsection of Section 11.003 of the Florida Statutes. Thus they filed for a writ of mandamus in the trial court, which is still pending.

While the writ was pending, the Florida Legislature finally passed a budget which included an appropriation for the plaintiffs' losses. But Governor Rick Scott line-item vetoed the appropriation. At that point, the *Bogorff* plaintiffs turned to the Florida Supreme Court, asking it to hold unconstitutional the Governor's decision. All but one justice held that the veto was plainly within the Governor's powers in Florida, even as several lamented that it has taken much too long for the plaintiffs to get paid.

The Governor's decision was lawful, but its consequences further delay the compensation that everyone agrees the property owners deserve and are entitled to pursuant to our state and federal constitutions. This latest delay may be attributed to the veto, but the Florida courts deserve the lion's share of the blame for the delay.

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Wisconsin

Mayo v. Wisconsin Injured Patients & Families Compensation Fund: Wisconsin Court of Appeals Strikes Down Noneconomic Damages Cap

By

Andrew C. Cook*

Wisconsin's statutory cap on noneconomic damages for medical malpractice cases has taken many twists and turns over the past 30 years. A recent Wisconsin Court of Appeals decision in *Mayo v. Wisconsin Injured Patients & Families Compensation Fund* has added to this seemingly never-ending saga by striking down the legislatively enacted $750,000 cap on noneconomic damages. The Supreme Court of Wisconsin will likely have the final say.

The first Wisconsin statute limiting medical malpractice awards to $500,000 was enacted in 1975. The amount was later increased to $1 million in 1986, only to be reduced by the legislature to $350,000 in 1995. The $350,000 limit twice was legally challenged by opponents in 2000 and 2001 and upheld both times by the court of appeals.

The Supreme Court of Wisconsin struck down the statute in 2005, holding in *Ferdon ex. rel. Petrucelli v. Wisconsin Patients Comp. Fund* that the $350,000 limit on noneconomic damages violated the equal protection clause of the Wisconsin Constitution. According to the *Ferdon* court, the cap created two classifications of victims: (1) the most severely injured who are denied the full award for their injuries, i.e. non-economic damages in excess of the cap; and (2) the less severely injured victims who are fully compensated because their noneconomic damages are not reduced.

Shortly after the *Ferdon* decision in 2005, the Wisconsin Legislature enacted yet another statute limiting noneconomic damages at $450,000. This bill was vetoed by then-Governor Jim Doyle. A year later the Wisconsin Legislature enacted compromise legislation limiting noneconomic damages at $750,000, which was signed by Governor Doyle. That statute remained unscathed until the latest court of appeals decision.

The $750,000 cap was challenged by a patient who tragically lost all of her limbs when her physician failed to properly diagnosis a septic infection. The jury awarded the patient $15 million in noneconomic damages, which was to be reduced to $750,000 under the statutory limitation. However, the trial court struck down the statute as-applied to the plaintiff.

A three-judge panel of the Wisconsin Court of Appeals (Dist. I) upheld the lower court's decision. The court of appeals, however, determined the law was unconstitutional on its face, rather than as-applied.

Citing *Ferdon*, the court held that statutory caps must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation in order to satisfy State equal protection guarantees." The court further stated that not "all caps on noneconomic damages are unconstitutional," but that the current limit was "arbitrarily selected."

Many court watchers expect the case to be appealed to the Wisconsin Supreme Court, which will have the final say on the constitutionality of the law (at least for now).

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Pennsylvania

Pennsylvania Environmental Defense Foundation v. Commonwealth: Pennsylvania Supreme Court Reinvigorates State's 1971 Environmental Rights Amendment

By

Joel Burcat*

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, the Pennsylvania Supreme Court overturned the standard that had been applied by the courts since 1973 when reviewing governmental determinations under Pennsylvania's Environmental Rights Amendment (ERA). In so doing, the court effectively re-set and re-established the ERA which was ratified in 1971.

Imagine taking a relic of 1971, plucking it out of that time, and dropping it down in 2017. Would it seem out of place? Would it have any relationship to the current social and political climate? For most of its history, Pennsylvania's ERA had virtually no significant impact and was considered by the courts to be mostly aspirational. Until now.

The ERA provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

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In a 1973 decision, the Pennsylvania Commonwealth Court established a three-part test thereafter used by courts to determine whether a government action was consistent with the ERA. That test required courts to determine (1) whether there was compliance with applicable statutes and regulations; (2) whether the record demonstrates a reasonable effort to reduce environmental incursions to a minimum; and (3) does the environmental harm which will result from the challenged action so clearly outweigh the benefits to be derived therefrom that to proceed would be an abuse of discretion. In practice, this meant that most governmental determinations under the ERA were affirmed by the courts.

Signaling the coming change, in 2013 a plurality of the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth* interpreted the ERA as requiring a "balancing test" in which the government must, on balance, reasonably account for the effect of a proposed action on the environmental features of an affected locale.

However, in 2015, in response to a challenge filed by the Pennsylvania Environmental Defense Foundation (PEDF) regarding the Commonwealth's leasing of state lands for oil and gas development and the resulting allocation of funds, a unanimous Commonwealth Court ruled that the Supreme Court's balancing test established in *Robinson Township* was not binding, as it was backed by a plurality of only three justices. The lower court relied instead on the three-part *Payne* test. PEDF appealed to the Supreme Court.

On June 20, 2017, the Supreme Court reversed the Commonwealth Court, and held that "the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties." In so ruling, a 5-1 majority of the Supreme Court explicitly rejected the *Payne* test and held that the proper standard of judicial review lies in the text of the ERA itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.

This is a monumental decision that discards the almost 45-year-old *Payne* test and promotes environmental concerns to the forefront of governmental determinations having an impact on the environment. It is though the ERA was frozen in time in 1971 and

thawed out in 2017. While the language of the ERA is the same, the world around it has changed. Other than *Robinson Township* and *PEDF,* the language of the ERA is as pristine as a recently discovered Jimi Hendrix solo on reel-to-reel tape. Future cases will define the parameters of the ERA.

Here are some takeaways from the opinion, followed by questions:

• **The Environmental Rights Amendment is more than an aspirational statement:** It "formally and forcefully" recognizes the environmental rights of Pennsylvania citizens as "commensurate with their most sacred political and individual rights."

• **The Payne test is dead**: The Supreme Court rejected the *Payne* test, used for nearly 45 years, as the test to decide challenges under the ERA. It determined that the proper standard of judicial review lies in the text of the ERA itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.

• **Robinson Township is alive and well:** A 5-1 majority of the Supreme Court quoted numerous provisions from the December 2013 plurality decision in *Robinson Township*, and effectively made the provisions the law of Pennsylvania. Specifically, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of Pennsylvania's public natural resources, whether these harms might result from direct state action or from the actions of private parties. What this means in any particular instance will be subject to litigation.

• **The Environmental Rights Amendment is self-executing:** The ERA created an automatic right for individuals to seek to enforce its obligations in order to prevent the government from taking action that unduly harms environmental quality.

Questions raised:

• **Public vs. Private:** The ERA relates to the management public natural resources. To what extent does government permitting on private land relate to a public natural resource?

• **Impact Fee:** Pennsylvania's Oil and Gas Act (Act 13) established an impact fee. Generally, the fee is assessed on production which results from an agreement between a private land owner and private operator. However, the Supreme Court suggested that the ERA may apply to resources not owned by the Commonwealth but which involve a public interest. If that is the case, are impact fees "generated from the sale of trust assets"?

• **Unreasonable impairment:** The Supreme Court noted that the right to clean air and pure water and the preservation of natural, scenic, historic and esthetic values of the environment are "amenable to regulation," but "any laws that unreasonably impair the right are unconstitutional." What is an unreasonable impairment?

• **The ERA is applicable to all levels of Commonwealth government:** This decision applied the ERA to all levels of government. What this means exactly will have to be sorted out in litigation over the coming years.

[1] 161 A.3d 911 (Pa. 2017), *rev'g in part and vacating in part* 108 A.3d 140 (Pa. Cmwlth. 2015).

[2] *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

[3] *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

[4] *Pennsylvania Environmental Defense Foundation*, *supra*, 108 A.3d at 159.

California

Lynch v. California Coastal Commission

By

Larry Salzman*

In *Lynch v. California Coastal Commission*, the California Supreme Court raised a procedural hurdle for property owners pursuing challenges to unlawful permit conditions. Property owners who wish to contest a permit condition imposed by a state agency must delay any work on their project until final adjudication of the challenge.

In 2010, Barbara Lynch and Thomas Frick sought a permit to rebuild a seawall that protected their coastal homes from erosion and other natural hazards when a storm destroyed the original bluff protection. The Coastal Commission has a statutory duty to permit seawalls when necessary to protect homes and other existing structures on private property.

However, the agency imposed several conditions on its permit approval: the permit expires in 20 years; the homeowners waive the right to rely on the seawall for protection of future redevelopment on the property; and they are required to apply for a new permit before the end of the 20-year expiration to extend the life of the seawall. This latter condition was understood to provide the Commission an opportunity in twenty years to exact money or other property interests from the homeowners as a condition of maintaining the seawall.

The homeowners protested the conditions during the administrative hearings, began to rebuild their seawall after accepting the permit conditions in writing "under protest" as they believed was allowed under California law, and then sued to contest the restrictions as a violation of the Commission's statutory duty and the unconstitutional conditions doctrine.

The trial court ruled in favor of the homeowners, invalidating the conditions. The court rejected the government's motion to dismiss the case on the grounds that the homeowners waived any right to challenge the condition once they began building the seawall. In a split decision, the court of appeals reversed the trial court, holding that homeowners had waived their right to challenge by their nominal acceptance of the permit and that the conditions were lawful. The dissent disagreed with both conclusions.

The California Supreme Court accepted review, ruling that the homeowners "forfeited their right to challenge the permit's conditions by complying with all pre-issuance requirements, accepting the permit, and building the seawall." The "crucial point" stated the court, "is that they went forward with construction before obtaining a judicial determination on their objections." This holding is limited to challenges to conditions imposed by state agencies. A developer has an express right pursuant to California's Mitigation Fee Act to accept contested fees and other exactions of property interests imposed as permit conditions by *municipalities* "under protest" and build while litigation proceeds.

The decision effectively makes it more difficult for property owners to fight when state agencies impose new conditions on permits to use or build on one's property. The economic reality for many small developers is that they will be forced to accept these conditions simply because they can't afford to put their lives or projects on hold for years while litigation is pending.

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Michigan

Covenant v. State Farm

By

C. Thomas Ludden*

In 1972, the Michigan Legislature enacted the Michigan no-fault insurance act,[1] which became effective on October 1, 1973. One avowed purpose of the no-fault act was to reduce litigation related to automobile accidents. In 2016, the last year for which annual statistics are available, however, almost half of all civil cases pending in Michigan trial courts were related to automobile negligence claims. Therefore, it is not surprising that one of the most significant decisions by the Michigan Supreme Court in 2017 related to the interpretation of the Michigan no-fault insurance act: *Covenant Medical Center, Inc. v. State Farm*, 500 Mich. 191, 895 N.W.2d 490 (2017).

To try to achieve the Legislature's goal of reducing litigation, the no-fault act abolished all tort liability arising out of automobile accidents except as otherwise provided by the no-fault act.[2] The act also created statutory causes of action to allow persons injured in an accident to recover for medical benefits and wages loss from their insurance carriers and for non-economic damages from a driver who had caused the accident.[3] The question before the Michigan Supreme Court in *Covenant* was whether the no-fault statute also created a cause of action to allow healthcare providers to sue insurance carriers directly to recover for the value of the services performed by the providers. A series of published and unpublished decisions by the Michigan Court of Appeals had long recognized such a cause of action, but the Michigan Supreme Court had never considered the issue before *Covenant*.

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In a decision authored by Michigan Supreme Court Justice Brian K. Zahra, *Covenant* held that the Michigan no-fault act did not create a statutory cause of action for health care providers. In this decision, Justice Zahra restated the well-known legal principles that interpreting statutes begins with the text of the statute and that Michigan courts enforce clear and unambiguous statutes as written. The opinion then determined if the Michigan Court of Appeals had followed these guiding principles when recognizing the existence of a direct cause of action for healthcare providers. Justice Zahra concluded that the court of appeals decisions had not performed the required statutory analysis before finding that this cause of action existed.

As a result, the *Covenant* opinion then turned to the text of the no-fault act that had been cited by the plaintiff to justify a finding that healthcare providers had a direct cause of action. *Covenant* confirms that following statutory language is not always a simple task. Instead, being faithful to the law that exists may require a very careful parsing of the words that were chosen by the Legislature to determine what the statute requires. The *Covenant* decision exhaustively reviewed the text, sentence by sentence, before holding that the Michigan no-fault act does not create the direct cause of action that the healthcare provider believed existed. Therefore, it reversed the court of appeals and reinstated the trial court decision dismissing the provider's claims with prejudice.

Critics of the result in *Covenant* offer many reasons why healthcare providers should be able to pursue a direct cause of action against insurance carriers of persons they have treated. In reaching its decision, the Michigan Supreme Court followed the language of the no-fault act as it currently exists because "'it is to the words of the statute itself that a citizen first looks for guidance in directing his actions' because 'the essence of the rule of law' is 'to know in advance what the rules of society are'"[4] Courts that follow statutory language provide another enormous benefit for citizens. If the People of the State of Michigan disagree with the result in *Covenant*, then the Michigan Legislature can amend the no-fault act to change the result by expressly creating a statutory cause of action for healthcare providers.

[1] Mich. Comp. Laws § 500.3101, *et seq*.

[2] Mich. Comp. Laws § 500.3135(3).

[3] *See, e.g.*, Mich. Comp. Laws §§ 500.3105 and 500.3107.

[4] 500 N.W.2d at 496, n. 16 (citing *Robinson v. Detroit*, 462 Mich. 439, 467, 613 N.W.2d 307 (2000)).

Arizona

Biggs v. Betlach: Protecting Taxpayer Rights

By

Christina Sandefur*

The U.S. Supreme Court's 2012 decision *National Federation of Independent Business v. Sebelius* held that the federal government can't force states to expand their Medicaid rolls by threatening to withhold funding. The Court ruled 7-2 that the Affordable Care Act's provisions forcing states to transform Medicaid from "a program for the neediest among us"—the disabled, blind, elderly, and needy families with dependent children—into "an element of a comprehensive national plan to provide universal health insurance coverage," exceeded Congress's Spending Clause powers. Instead, states must remain free to choose whether or not to adopt Medicaid expansion.

Although 26 states battled in court to secure that ruling, many governors reversed their positions on Medicaid expansion shortly afterwards. One was Arizona Governor Jan Brewer, who promptly changed course and demanded that Arizona expand its Medicaid program. To pay for this, she insisted on a plan that included a mandatory "provider tax" on hospitals. Supporters suspended procedural rules to move the proposal through the Legislature without the usual review process.

But there was a catch: in 1992, Arizona voters enacted a constitutional provision that requires a two-thirds supermajority of both houses of the Legislature to approve any "act that provides for a net increase in state revenues," including new taxes, fees, and assessments. Governor Brewer and other proponents were unable to garner the support necessary to pass the program's new tax as required by the Arizona Constitution.

Proponents of Medicaid expansion saw an opportunity, however. Arizona's supermajority requirement includes an exception for "assessments that are authorized by statute." This provision was designed to allow administrative officials, once properly authorized to collect a levy, to adjust the amount without having to ask the Legislature for permission again. But Governor Brewer and her backers argued instead that it allowed the Legislature to pass any statute by a bare majority that imposed a tax, so long as it was called an "assessment" instead.

On that theory, the provider tax was approved by an ordinary majority, and—over the objections of lawmakers who insisted this process was violating the constitutional rule—Governor Brewer signed it into law.

Represented by my organization, the Goldwater Institute, 36 state legislators who voted "no" sued, arguing that their votes—which should have defeated the bill—had been effectively nullified by this semantic trick. After the Arizona Supreme Court unanimously ruled that the lawmakers had standing to sue, the case went before a trial court to decide whether the tax was a "tax" or just an administrative "assessment" exempt from the 2/3 requirement.

The trial court upheld the law, and earlier this year, the Arizona Court of Appeals agreed. It held that the supermajority requirement didn't apply because the assessment was "authorized" by the simple majority, and was therefore exempt from the 2/3 requirement. But that theory expands the exception so much that it swallows the rule. If allowed to stand, it will mean that a bare legislative majority can hand an unelected administrator virtually unlimited power to tax Arizonans—while, paradoxically, a *supermajority in both houses* is required whenever the Legislature seeks to impose a tax in the normal way. This interpretation creates a perverse incentive that encourages *less* responsible and *less* accountable lawmaking, the opposite of what the voters intended when they created the 2/3 vote requirement in the first place.

Now the case is pending before the Arizona Supreme Court. The justices must decide whether to give

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effect to the state constitution's taxpayer protections, or whether to allow the judge-created loophole for certain "assessments" to stand.

Defenders of Medicaid expansion lament that the supermajority requirement would make Medicaid expansion impossible, but it's precisely when politically and emotionally charged matters are at stake that taxpayer protections are most needed. There's always a temptation to disregard constitutional rules in such cases, but if they don't apply in hard cases, they will mean nothing. Voters in Arizona knew the supermajority requirement would impose serious limits: the ballot pamphlet accompanying supermajority proposition in 1992 made clear that it would "make it more difficult to raise taxes" and "restrain growth in state government," even for programs "for the poor," and even in "emergency situations."

Medicaid expansion might or might not be a good idea. But finding clever excuses for evading the constitution's rules never is.

Wisconsin

Milewski v. Town of Dover

By

Thomas C. Kamenick*

Government officials are prohibited from entering your home and searching it without your permission—that's a bedrock principle of the Fourth Amendment. As a corollary, the government cannot punish people who choose to exercise that constitutional right. Yet that's exactly what the Town of Dover, in Racine County, Wisconsin, did.

Vincent Milewski and Morganne MacDonald, husband and wife, own a home in Dover. In 2013, Dover officials decided to reassess local property values, hiring Gardiner Appraisal Service to do the reassessment. When Vincent and Morganne refused to allow a Gardiner employee—a complete stranger to them—to search the interior of their home, Gardiner arbitrarily assigned an increased assessment to their property without even bothering to ask them any questions about their home or check if any building permits had been pulled.

When Vincent and Morganne investigated the other assessments in their subdivision, they found something curious. While 39 of the parcels decreased in value—by an average of 5.81%—four parcels increased in value—by an average of 10.01%. What did those four homes have in common? None of their owners permitted Gardiner to come inside.

As if it weren't bad enough that the Town of Dover punished Vincent and Morganne for exercising their constitutional rights by raising their assessment, state law punished them further by denying them any opportunity to challenge their assessment. Furthermore, state law conditioned an appearance before the local board of review on allowing an interior search, and because court review of an assessment is conditioned on first challenging the assessment at the board of review, Vincent and Morganne had no legal recourse.

On behalf of Vincent and Morganne, the Wisconsin Institute for Law and Liberty (WILL) sued the Town of Dover and Gardiner raising Fourth Amendment (retaliation for exercising a constitutional right) and Fourteenth Amendment (lack of due process) claims. Both the trial court and the intermediate court of appeals ruled against them, concluding that they were merely exercising a choice between allowing the assessor in and challenging their assessment, and they were aware of the consequences of that choice.

The plaintiffs appealed, garnering significant interest. The Wisconsin Realtors Association, the Institute for Justice, and the Wisconsin Department of Justice filed amicus briefs in support of the plaintiffs. In a split decision, the Wisconsin Supreme Court reversed, with four justices agreeing that the plaintiffs' constitutional rights were violated, a fifth concluding that the statutes do not require an interior view, and two justices in dissent.

The lead opinion wrote that it was unacceptable for government to force citizens to choose between constitutional rights—to exercise privacy rights at the loss of due process rights or vice versa. The opinion spent significant time discussing the origins of the Fourth Amendment, particularly how the founders were appalled that British agents could enter private homes without consent to search for taxable goods. The decision made the front page of Wisconsin's largest newspaper and drew commentary from leaders across the state.

The case has been remanded to allow the plaintiffs to challenge their assessment.

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