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Insights: A Sea Change at the Florida Supreme Court

The Florida Supreme Court has recently issued two blockbuster opinions about its methodology for deciding cases. First, the Court adopted the "supremacy-of-the-text principle"—or textualism—as its governing methodology for construing legal texts. Second, the Court announced a new test for *stare decisis*: when the Court is "convinced that a precedent clearly conflicts with the law [it is] sworn to uphold, precedent normally must yield." Both holdings signal major shifts in approach, and lawyers and litigants appearing before the Court should take note.

Textualism

On January 16, 2020, the Court handed down *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, holding that a newly adopted amendment to the Florida Constitution requires felons to satisfy all financial obligations ordered by a sentencing court before their voting rights are restored. The underlying substantive issue—the process for restoring voting rights to felons—has been the subject of political debate and legal wrangling in Florida for the past two years. With the state litigation now resolved, the focus will move to a pending federal lawsuit.

But the Court's opinion will reverberate far beyond the particular context of voting rights because it firmly adopted textualism as the Court's approach to "construing a constitutional provision." The Court eschewed "suggest[ions]" in its prior opinions "that the first step in construing a constitutional provision may involve something other than determining the objective meaning of the text," such as "seek[ing] to ascertain the intent of the framers and voters." The Court called such considerations "extraneous" and pronounced that it would henceforth "adhere to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" As support for this methodology, the Court cited to *Reading Law: The Interpretation of Legal Texts*, a book coauthored by late U.S. Supreme Court Justice Antonin Scalia, who espoused the interpretative theory known as textualism.

Notably, then, the Florida Supreme Court has firmly adopted Justice Scalia's textualist approach as the appropriate methodology for constitutional interpretation. In taking this approach, the Court will adhere to the "plain, obvious, and common sense" of the words in a given text, often looking to dictionaries for the "the popular and common-sense meaning of terms." And this approach will likely extend to statutory interpretation, too, because the Court noted in its opinion that in "interpreting constitutional language, [it] follows principles parallel to those of statutory interpretation."

For many years, the Florida Supreme Court was somewhat famous (or infamous, depending on your point of view) for considering and adopting positions that could not be justified on the plain meaning of text alone—often looking to legislative intent divined from legislative history or policy considerations. This latest opinion, and several others the Court has issued since the appointment of new justices in 2017, signal quite clearly that those days are over. In relation to civil litigation matters:

Stare Decisis

On January 23, 2020, the Florida Supreme Court handed down *Florida v. Poole*, a case in which it receded from its 2016 holding that a jury's advisory sentence of death must be unanimous. As with the Amendment 4 opinion, the underlying substantive issue in *Poole* has been the subject of much debate in Florida over the past few years. But also like the Amendment 4 case, the Court's holding in *Poole* about its methodology will reverberate beyond its specific context.

In a section of the *Poole* opinion labeled "Stare Decisis," the Court went beyond explaining why it was overruling the particular case at issue and expounded its general view of the "straightforward" and "proper approach" to stare decisis. The Court explained that it "is no small matter for one Court to conclude that a predecessor Court has clearly erred," and any such conclusion must be based on a "searching inquiry." That inquiry looks at "higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court" of the United States—and requires the Florida Supreme Court "to apply that law correctly to the case before" it. Thus, when its searching inquiry has "convinced [the Court] that a precedent clearly conflicts with the law [it is] sworn to uphold, precedent normally must yield."

The Court also explained that it would not adhere to "any invocation of multi-factor *stare decisis* tests." In particular, the Court disclaimed any adherence to a framework it had once endorsed—namely that the Court will ask "several questions" before overruling a precedent, including whether the precedent had proved unworkable, whether overruling it would cause serious injustice to those who have relied on it, and whether there have been drastic changes in the factual premises of the decision. The Court explained that such an approach is "malleable" and does not promote "objective, consistent, and predictable application." The Court warned that such an approach encourages it "to think more like a legislature than a court and "can lead [it to] decide cases on the basis of guesses about the consequences of our decisions."

What Now? Practice Pointers for Appearing in the Florida Supreme Court

The Florida Supreme Court's makeup has shifted dramatically in the last several years. Justices James Perry, Barbara Pariente, Peggy Quince, and Fred Lewis all faced mandatory retirement, the latter three after serving on the Court for the better part of two decades. They were replaced by Justices Alan Lawson, Barbara Lagoa, Robert Luck, and Carlos Muniz. Justices Lagoa and Luck served less than a year before President Trump appointed them to the U.S. Court of Appeals for the Eleventh Circuit. Governor DeSantis will select their replacements in the near future. All of this means that the Florida Supreme Court's makeup today is markedly different from just four years ago.

This major shift in personnel means that lawyers and litigants need to be attentive to the kinds of arguments to which the Court is now receptive. The Court's recent opinions suggest that those appearing before the Court would do well to advance arguments firmly rooted in textual analysis and canons of construction, rather than arguments rooted in legislative history or policy. Moreover, litigants need to think strategically about how to argue from precedent. Those facing adverse precedent should carefully evaluate whether there is an opportunity to ask the Court to reconsider—especially if the prior opinion was not rooted in supremacy-of-the-text principles. Those seeking to rely on precedent need to be ready to defend why it was rightly decided as a matter of first principles derived from the straightforward meaning of constitutional provisions, statutes, or U.S. Supreme Court precedent. Those seeking to rely on precedent might also consider arguments rooted in the one factor the Court acknowledged could lead it to reaffirm a precedent it thinks was wrongly decided—"reliance interests," which will be most persuasive in "cases involving property and contract rights" and least persuasive in cases "involving procedural and evidentiary rules."

CONTACT

Jesse Panuccio
Partner, Fort Lauderdale
954 356 0011
jpanuccio@bsfllp.com