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Takings: County's Retention of Surplus Proceeds in Property Tax Foreclosure Sale Violates Michigan Constitution

Rafaeli, LLC v. Oakland County, no. 156849 (Mi. July 17, 2020).

Reversing two lower courts, the Michigan Supreme Court holds that county tax authorities could not retain surplus proceeds of a foreclosure sale in the case of two real estate owners whose properties had been forfeited due to unpaid property taxes.

Rafaeli LLC (Rafaeli) purchased a rental property in Southfield, Michigan for $60,000 but failed to pay 2011 property taxes of $536.24. Oakland County and its Treasurer, Andrew Meisner (collectively, Defendants) mailed two delinquency notices to Rafaeli, which made two payments but still owed a deficiency of $8.41, plus $2.26 in interest, penalties, and fees. When Rafaeli did not respond to a third notice in early 2013, its property was forfeited. Rafaeli failed to attend a foreclosure hearing in February 2014, and the court entered a notice of foreclosure; by that time the deficiency was $285.81. In August 2014, Defendants sold Rafaeli's property at auction for $24,500, and retained all the proceeds.

Andre Ohanessian had purchased property in Oakland County in 2004. He paid $2,510.05 to satisfy 2010 delinquent property taxes but failed to pay his 2011 property taxes; he claimed that, due to moving to California, he did not receive the later delinquency notices. Ohanessian's property was included in the same judgment of foreclosure as Rafaeli's and was sold at auction by Defendants in September 2014 for $82,000. At that time, Ohanessian owed approximately $6,000 in unpaid taxes, interest, penalties, and fees. Again, Defendants retained all the surplus proceeds.

Rafaeli and Ohanessian (collectively, Plaintiffs) sued, alleging that Defendants' retention of the surplus proceeds violated the Takings Clauses of the United States and Michigan Constitutions. The circuit court granted summary disposition to Defendants, finding that they did not "take" Plaintiffs' properties because Plaintiffs forfeited all interests they held in their properties when they failed to pay the taxes due. The court determined that property properly forfeited under the General Property Tax Act (GPTA), MCL 211.1 et seq., and in accordance with due process is not a "taking" barred by either the United States or Michigan Constitution; because under the GPTA "forfeiture" divests all interest in subject properties, Plaintiffs did not have a property interest in the surplus tax sale proceeds.

The Michigan Court of Appeals affirmed, per curiam, in October 2017. Drawing on *Bennis v Michigan*, 516 US 442 (1996), a United States Supreme Court case regarding civil-asset forfeiture resulting from criminal activity, the court of appeals held that Defendants acquired plaintiffs' properties by way of a statutory scheme that did not violate due process and no compensation to plaintiffs was required.

The Michigan Supreme Court reversed. Seminal was the supreme court's finding that the trial court's reliance on the term "forfeiture" in the GPTA was incorrect. "Forfeiture" simply permits tax authorities to seek a judgment of foreclosure; it does not affect title, nor does it give the county treasurer (or the state if the state is the foreclosing governmental unit) any rights, titles, or interests to the forfeited property. Plaintiffs did not "forfeit" all rights in their properties by failing to pay their real-property taxes.

The supreme court also found that the court of appeals' reliance on *Bennis* was misplaced. *Bennis* was distinguishable, because the purpose of civil-asset forfeiture differs from the purpose of the GPTA provisions at issue; as *Bennis* recognized, civil-asset forfeiture serves, at least in part, to punish the owner of property. In contrast, the GPTA is not punitive in nature but is intended to encourage timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes. In *Bennis,* the forfeited property had been used for criminal activity.

The court distinguished a claim of unconstitutional taking from a claim of property deprivation without due process of law. The remedy for a taking is compensation, whereas the remedy for being deprived of property without due process of law is the return of the property. In this case, Plaintiffs did not dispute the legitimacy of Defendants' authority to foreclose on their properties, nor did they contest the adequacy of Defendants' efforts to notify them. In other words, Plaintiffs claim was for a taking (of excess proceeds) without just compensation, not a deprivation of property without due process of law. Defendants' compliance with the GPTA's notice provisions may have satisfied due process but did not justify retention of the surplus proceeds.

Michigan's statutory scheme under the GPTA did not clearly indicate a former property owner's right to collect surplus proceeds; therefore, the supreme court reviewed

Michigan common law, which in turn devolved from England. The Magna Carta protected property owners from uncompensated takings and recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess. Similarly, Blackstone explained in the context of bailments that whenever the government seized property for delinquent taxes, it did so subject to an implied contract in law to either return the property if the tax debt was paid or to render back the surplus if the property was sold to satisfy the delinquent taxes.

The court delineated numerous cases requiring repayment of property tax foreclosure surplusages, exemplified by *Dean v. Dep't of Natural Resources*, 399 Mich 84 (1976), which recognized a right to collect those proceeds under the common-law claim of unjust enrichment.

> We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. Having originated as far back as the Magna Carta, having ingratiated itself into English common law, and having been recognized both early in our state's jurisprudence and as late as our decision in *Dean* in 1976, a property owner's right to collect the surplus proceeds from the tax-foreclosure sale of his or her property has deep roots in Michigan common law.

Retaining such surplus under the GPTA could not be reconciled with fundamental takings principles. "To the extent the GPTA permits Defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed."

LINK

Voting: South Carolina's Winner-Take-All Electoral Process Does Not Violate the First or Fourteenth Amendments or the Voting Rights Act

Baten v. McMaster, no. 19-1297 (4th Cir. July 21, 2020).

Following a number of decisions which have upheld the ubiquitous "winner-take-all" system of appointed presidential Electors, the Fourth Circuit affirms a lower court's dismissal of a challenge by Democratic voters—but a dissent raises provocative issues including an implicit questioning of the Electoral College itself.

The U.S. Constitution provides that the President and Vice President are elected by a College of "Electors" allocated to the states in numbers equal to their Senators and Representatives and appointed by the states "in such Manner as the Legislature[s] thereof may direct." U.S. Const. art. II, § 1, cl. 2. Although states initially utilized a variety of methodologies in appointing Electors, including a proportionate allocation based on popular vote, they soon became aware that a unified slate of Electors would give them the greatest influence. By 1836, all states had adopted a "winner take all" process except South Carolina, which followed suit after the Civil War. Today, all states but Maine and Nebraska award all of their electoral votes to the presidential ticket that receives a plurality of votes statewide.

Six South Carolina plaintiffs sued the state's Governor, Secretary of State, and Election Commission, including its members — all in their official capacity (collectively South Carolina), alleging that "the political party of the leading candidate among South Carolina's voters selects every Elector, with a vote of every other South Carolina citizen rendered meaningless by receiving no Elector directly or through a political party." In the 2016 election, for example, Donald Trump received 55% of South Carolina's popular vote but all nine of the state's electoral votes; Hillary Clinton received 41% of the vote but no South Carolina Electors.

The plaintiffs asserted violations of the Fourteenth Amendment, the First Amendment, and the Voting Rights Act (VRA). The Fourteenth Amendment was violated because the winner-take-all mechanism denies "one person, one vote"—votes of the plurality are magnified, while votes of all others are given no effect. The system violated the First Amendment by burdening "the right of association and . . . the right to have a voice in presidential elections through casting a vote." And the VRA violation arose because the winner-take-all system "allows white voters to usually — if not always — defeat all Electors slated for African-American preferred candidates."

The district court granted South Carolina's motion to dismiss, concluding that the winner-take-all system complied with Equal Protection "because it does not inherently favor or disfavor a particular group of voters." The First Amendment claim failed because it had not "sufficiently alleged that the rights of voters to associate in any manner or to engage in any political activity or association ha[d] actually been

burdened." And the court dismissed the plaintiffs' VRA claim, noting that the winner-take-all system "does not mean that the political process is not equally open to participation by Democratic voters, whether they be African-American or of another race."

The Fourth Circuit affirmed. It first had to address South Carolina's motion to dismiss for lack of subject matter jurisdiction. The state contended that the plaintiffs' claims presented non-justiciable political questions, as "the state legislatures' power to choose the manner of appointing presidential electors is plenary," and "partisan proportionality claims" are non-justiciable under the Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). It also argued that the plaintiffs' claims are simply "generalized partisan grievances" lacking the gravamen for Article III standing.

Neither of these arguments was sustainable. While Article II of the Constitution gives state legislatures the power to appoint Electors in the manner they see fit, it is well settled that states have unreviewable authority. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (recognizing that although "the state legislature's power to select the manner for appointing electors is plenary," "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental"); see also *Chiafalo*, __ S. Ct. at __ [slip op., at 9 & n.4].

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Rucho did not help South Carolina's argument. *Rucho* held that partisan gerrymandering claims present

nonjusticiable political questions, but it recognized that partisan gerrymandering claims were distinct from other similar claims, noting that "[p]artisan gerrymandering claims have proved far more difficult to adjudicate" than other challenges to the electoral system, such as those alleging racial gerrymandering or violations of the one-person, one-vote principle. *Rucho*, 139 S. Ct. at 2497. Other courts have held that challenges to winner-take-all systems are indeed justiciable, and the Fourth Circuit agreed. Similarly, it found that plaintiffs had Article III standing, having satisfactorily alleged that (1) they suffered a concrete and particularized "injury in fact" that was more than merely conjectural; (2) the injury was "fairly traceable to the challenged action"; and (3) it was likely "that the injury will be redressed by a favorable decision."

Turning to the Equal Protection challenge, the Circuit reviewed the origins of the Electoral College:

> The Electoral College system established in Article II and the Twelfth Amendment of the Constitution for the election of the President and Vice President manifests a complex and carefully balanced division of power and interests between the national government and state governments; between the large States and the smaller States; and between representational democracy and direct democracy. . . . Among the various methods considered by the delegates at that Convention were a nationwide popular vote and an election by Congress. Ultimately, however, they settled on a hybrid method involving nation-

> based and state-based aspects. Article II thus provides that the President and Vice President are to be elected by Electors appointed by the States; that the number of Electors to be appointed from each State is to equal the number of Senators and House members representing the State in the Congress; and that the States' legislatures are to determine the manner of appointing the Electors. The subtlety of this structure was eloquently described by James Madison in *The Federalist*. He explained that the House of Representatives derives its power directly from the people; that the Senate derives its powers from the States as "political and coequal societies" and therefore indirectly from the people; and the presidency derives its power from a "compound source," through the Electoral College.

Against this backdrop, "it cannot be disputed that each State has plenary authority to determine through its legislature how to appoint Electors." As far back as *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), aff'd, 393 U.S. 320 (1969), and as recently as discussed in ***Chiafolo's*** faithless Elector context, that power includes the authority to require Electors to vote for the presidential ticket that received the plurality of votes in the State. The plaintiffs' argument, said the Circuit, ran headlong into the fundamental democratic principle that the one who receives the most votes wins, and the others lose, thus leaving them with no voice. "This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone."

Plaintiffs had cited *Gray v. Sanders*, 372 U.S. 368 (1963). There, the Supreme Court struck down the "county unit" method used by Georgia's Democratic Party to determine primary winners in statewide elections. Similar to the national Electoral College methodology, the Georgia Democratic Party process used a dual system for tabulating primary votes. It allocated to each county a certain minimum number of "units," all of which were awarded to the popular vote winner of that county. Because of the way county units were allocated, small rural counties had disproportionate influence: "counties having population of one-third of the total in the state [had] a clear majority of county units." And if the tabulation of the popular vote and the county unit vote were split, the candidate with the greatest number of county unit votes in a runoff election would prevail. The Court held that Georgia's system involved impermissible differential weighing of votes based on voter location.

The Fourth Circuit distinguished *Gray.* There, the winner-take-all county unit system had the potential to change the outcome of a statewide election by discarding minority votes in each county, with the candidate having fewer popular votes winning. South Carolina's system did not allow for such a result. The court expressly addressed the national consequences of the state level winner-take-all methodology: "While using winner-take-all at the State level leaves open the possibility that a President could, on a nationwide basis, be elected despite losing the national popular vote, this very possibility is baked into the Constitution." In addressing how a tie vote in the Electoral College is to be

resolved, the Constitution provides that the election of the President is then committed to the House, and in carrying out the election, "the votes [in the House] shall be taken by states, the representation from each state having one vote." U.S. Const. amend. XII

Of course, the constitutionally prescribed method of tie-breaking "dilutes" or "discards" the vote of the minority House members from each State, in effect silencing the minority to allow each State to speak with one voice — the very process that the plaintiffs decry on the state level. But "absent some invidious discrimination that infects the process, it is difficult to comprehend a challenge to the various roles exercised in the selection of a President that does not also challenge the Constitution itself."

The Circuit affirmed the lower courts conclusion that plaintiffs did not state a claim for relief under the Equal Protection Clause.

The plaintiffs posed two First Amendment arguments. First, the South Carolina winner-take-all system burdened their ability to associate with like-minded voters —"all of whom know that any such association, fundraising, or activities would be functionally useless." This assertion failed: Although the First Amendment protects the right to associate for the purposes of advocacy, it "provides no guarantee that a speech will persuade or that advocacy will be effective." Second, plaintiffs suggested that the winner-take-all system disincentivized political candidates to campaign in South Carolina, thereby impeding their ability to participate in the political process. This argument also lost. "The right of association does not guarantee to the residents of South Carolina attention from candidates for nationwide office."

Plaintiffs' VRA argument was quickly dispatched. While the winner-take-all system has resulted in Republican Electors despite black (and overwhelmingly Democratic) voters constituting one quarter of South Carolina's electorate, that does not mean, that black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" as required to establish a violation of the VRA (52 U.S.C. § 10301(b)).

DISSENT: While the majority opinion comprised 28 pages, Judge James Wynn's dissent was nearly 40 pages in length. He clearly supported the plaintiffs' posture:

> This matter arises from one simple yet remarkable fact: In every presidential election since 1980, the votes by South Carolinians for Democratic presidential candidates have been counted only for the purpose of being discarded because, despite representing a significant share of the state's total votes, South Carolinians' votes for Democratic candidates have translated into no votes in the Electoral College. Incredibly, South Carolina's state-wide, winner-take-all method of selecting presidential electors has rendered more than 4 million votes for Democratic candidates over the last five presidential elections worthless.

The flaws plaintiffs cited in the South Carolina outcome would implicitly be more pronounced at the national level, and Judge Wynn did not hesitate to challenge the

Electoral College system writ large: “At best, the majority opinion reflects a limited view of the judiciary’s role in addressing fairness in elections. **Yet, the Electoral College itself is an undemocratic process.** And states like South Carolina exacerbate its undemocratic aspects by allocating all of their presidential electors to the state-wide popular vote winner.”

He took issue with the majority’s reliance on *Williams*. That decision had upheld a lower court decision allowing for majority-take-all, but it was a summary affirmance by the Supreme Court, without an opinion explaining its reasoning. “A summary affirmance resolves the issues for the parties,” he noted, but “a summary affirmance is an affirmance of the judgment only, not the rationale of the lower court.” He urged the Circuit to address the larger issue, referencing a seminal decision (argued by IMLA founder Charles Rhyne): ”When courts—like the district court and like our sister circuits who have heard and rejected related cases—fail to seriously consider claims like those raised by Plaintiffs, they risk . . . turning a blind eye to constitutional wrongs out of fear of a political thicket. By stepping away from our responsibility to resolve the questions presented to us, we ignore that *Baker v. Carr* rejected that very approach and ushered in an era of more democratic governance.”

Judge Wynn also took issue with the majority’s reliance on the national Electoral College system as presumptively sanctifying South Carolina’s process The Fourteenth Amendment’s Equal Protection mandate should not be construed as simply an endorsement of the preexisting national constitutional rubric and application thereof to the states; it infused an evolved philosophy, reflecting the passage of 80 years, and a state could not merely mirror the federal electoral mechanism:

> South Carolina argues that states have used the winner-take-all system since the first presidential election and that today, 47 other states and the District of Columbia use a similar system. But the first presidential elections in this country were not governed by the Fourteenth Amendment and its Equal Protection Clause, which was not ratified until 1868. And as was demonstrated in *Baker v. Carr*, longstanding or widespread use of a particular election practice does not mean the practice complies with constitutional demand. *See also McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *20 (U.S. July 9, 2020) (rejecting an argument that an adverse ruling would be transformative because “the magnitude of a legal wrong is no reason to perpetuate it.”)

Judge Wynn would allow the Equal Protection claim to be litigated.

He would also allow the First Amendment associational claim to be heard. While South Carolina argued that, even if Plaintiffs alleged cognizable First Amendment burdens, the state’s interest in exerting the greatest possible influence in the Electoral College justified those burdens, Wynn questioned the basis for this assertion: “South Carolina has offered little explanation for how this is a legitimate state interest. Burdening some South Carolinians’ First Amendment rights so that other South Carolinians—those who voted for the presidential candidate garnering a plurality of votes—may speak with more

force on a national stage is not, on its face, a legitimate state interest. Accordingly, if Plaintiffs were allowed to pursue their claims, there would be little to weigh their burden against."

Wynn noted that South Carolina had attached much authority to the fact that Thomas Jefferson advocated for Virginia to adopt a winner-take-all system for selecting its electors. Jefferson's "advice" to Virginia also gave him a better chance to win the next presidential election, by directing all of Virginia's Electoral College votes to the state's winner—likely to be Jefferson himself. "But preservation of political power for the people who currently hold power is not a legitimate state interest. And, of course, Jefferson's advocacy for a particular practice does not mean the practice does not offend the Constitution."

Finally, Judge Wynn would permit argument on the VRA issue. Plaintiffs had established all three of the *Gingles* prerequisites to advance their claim. South Carolina's African American population was "sufficiently large and geographically compact to constitute a majority in a single-member district." (African Americans are a majority in the state's Sixth Congressional District and eight South Carolina Counties). African American voters are "politically cohesive," voting for the Democratic presidential candidate at rates of 96% and 94%, in the past two elections. And white voters in South Carolina vote sufficiently as a bloc to usually defeat the minority-preferred candidate.

Judge Wynn alluded to South Carolina's history of judicially recognized discriminatory voting practices; only one African American has been elected to a state-wide office. Given the totality of the circumstances, "it is plausible that South Carolina's state-wide, winner-take-all system violates § 2 of the Voting Rights Act."

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