



The Stakes for the Court

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Ask 100 Floridians to identify a major upcoming event that will have the most significant impact on our state for the next generation. You will get dozens of different answers. All of them will probably be wrong.

Change is coming to Florida in 2019, and it is not a change to be feared. This change will be profoundly good for our state. While

its significance may not be immediately appreciated by all, it will dwarf anything we could expect from the Legislature or even the Governor's Mansion. Over time, it will impact almost every aspect of the lives of Floridians for decades. It will happen on January 8, 2019 when three new Florida Supreme Court Justices take the bench on the same day.

Those who have had the good fortune of avoiding the Florida judicial system may believe the new justices will not affect them. Nothing could be further from reality. Every Floridian will be directly or indirectly impacted by the decisions made by the seven justices of Florida's highest court. Take, for example, two Florida Supreme Court cases in the last decade deciding the fate of Florida's workers' compensation system. In both cases, the current majority on the Court, which is widely considered by court analysts to be one of the most left-leaning in America, invalidated legislative reforms designed to reduce insurance premiums. The predictable result of these decisions was a dramatic increase in workers compensation insurance premiums paid by almost all businesses. Who ended up paying the increased costs that resulted from the Court's decisions? The answer: Florida consumers. Businesses pass on those costs in the form of higher prices for goods and services. There is no escaping the negative impact. Rich or poor, young or old, healthy or sick, every Floridian pays the cost for bad decisions that fail to faithfully adhere to the written law.

The same scenario has played out repeatedly. The current majority on the Court has invalidated legislative reforms governing school choice, streamlining the criminal justice system, reducing healthcare costs caused by lawsuit abuse, and the list goes on. These and other decisions led a national trade association to name the Florida Supreme Court the "#1 Judicial Hellhole in America" in 2017.

So how do we know that the three upcoming vacancies on the Court will bring positive change? While we don't

know with certainty what the new majority on the Court will look like, there are some encouraging indicators.

The majority on the Court responsible for the most criticized past decisions is comprised of only four of the seven justices currently serving. The other three justices, who typically write dissenting opinions on the losing side of the most important cases, include Justices Charles Canady and Ricky Polston, appointed by Governor Charlie Crist; and Justice Alan Lawson, appointed by Governor Rick Scott. Most court analysts compare the judicial philosophy of the three justices in the court's minority to the Textualist jurisprudence of the late U.S. Supreme Court Justice Antonin Scalia and the newest member, Justice Neil Gorsuch. If at least one of the three justices appointed in January 2019 follows a similar jurisprudence to that of Justices Canady, Polston and Lawson, Florida will for the first time in its history have a Textualist majority on its highest court. Those are good odds for Florida.

In 2008, the Wisconsin Supreme Court underwent a very similar transformation. A prominent Wisconsin lawyer was asked what he thought had changed in his state after the Court tipped. His response: "Everything." He recalled that nobody had foreseen all the positive impacts that resulted after the new majority was seated. In Wisconsin there was a renewed fidelity to the original meaning of the Constitution and the separation of powers, and that in turn led to predictability in the Court's decisions. Trial judges followed the lead of the high court and improved in many aspects of their decision-making. Some Wisconsin legislators had a newfound

reverence for Constitutionalism and, in some instances, that changed the debate over pending legislation for the better. Even local governments all the way down to school boards and special districts approached their responsibilities with a new appreciation for consistency in the application of the written law.

A shift toward Textualism at Florida's highest court may have its most immediate impact in the realm of job creation and economic development. An executive with payroll processing giant ADP recently explained the real-world consequences of the Court's past decisions. The economic development consulting division of ADP advises businesses on where they should open new operations or relocate existing facilities. When a company looks for the optimal location to start a new project, Florida starts with several advantages over other states. We benefit from fairly low regulatory barriers, low business taxes, no personal income taxes, and a relatively low cost of living for the work force. But in one recent example from ADP's work, another state beat Florida, and new jobs went elsewhere. Anecdotally speaking, when Florida loses one of these projects, the most common contributing factor is our Supreme Court. Businesses need economic certainty and predictability. Florida's civil justice system has a national reputation for unpredictability and judicial expansion of liability. When businesses have budgeted a specific amount for insurance premium payments and the premiums are unexpectedly increased by more than 20 percent because the Florida Supreme Court invalidated a workers' compensation law that has been on the books for several years,

Florida becomes significantly less attractive to job creators.

So how will the three new justices be appointed, and where will they come from? At the stroke of midnight on the morning of Tuesday, January 8, 2019 the terms of Florida Supreme Court Justices Fred Lewis, Barbara Pariente and Peggy Quince will expire. Under the Florida Constitution, these three justices are ineligible to serve an additional term because they have all attained the age of 70. The three new justices will be judges and lawyers, the names of whom the public will have likely never heard. Later this year, they will quietly submit applications to a nine-member judicial nominating commission. All nine commissioners were appointed by Governor Rick Scott, although the governor was required to select four of the nine from lists of nominees submitted by the Florida Bar.

If you are worried about who has been entrusted with the awesome responsibility of serving on the Supreme Court Judicial Nominating Commission, don't. The nine members are some of the most competent and ethical lawyers and leaders our State has to offer. They represent all parts of Florida and bring a diversity of experience in many areas of the law and government.

The Commission will have 60 days to accept applications, conduct background checks, speak with references, and finally conduct interviews. All meetings of the Commission are open to the public, except for final deliberations and selection of nominees. They will be charged with nominating at least three, but no more than six, individuals for each of the three vacancies. That means there may be as many as 18 nominees for the three vacancies.

Once the new governor receives the list of nominees from the Commission, he or she will have 60 days to make the appointments. The governor may not appoint individuals not nominated by the Commission, and he or she is prohibited from rejecting the nominee list and asking for a new list. Once the governor selects the three appointees, they will be given an official certificate of commission by the Secretary of State and immediately join the Court. No Senate confirmation is required.

Some have debated whether Governor Rick Scott or his successor will have authority to make the appointments. A lawsuit was filed last year by a left-wing special interest group over this question and the Supreme Court dismissed the case as premature. It is unclear whether the issue will ever end up back in court. When a similar issue occurred in the past, the outgoing and incoming governors reached agreement on the process, and they didn't need lawsuits from outside special interest groups in order to work it out.

Regardless of which governor makes the appointments, we can get a good sense of what to expect by looking back to the Judicial Nominating Commission's nominations in 2016 to replace retiring Justice Jim Perry. That year the Commission nominated Judges Wendy Berger and Alan Lawson from the Fifth District Court of Appeal, and attorney Dan Gerber. Governor

Scott ultimately chose Judge Lawson for the appointment, but all three were imminently qualified and shared a common Textualist judicial philosophy. All of this is to say that things are looking very good for Florida as we approach the 2019 appointments.

As we look forward to great improvements on the horizon in the composition of Florida's Supreme Court, we should not lose sight of the significance of the 2018 gubernatorial election in shaping the Florida judiciary for years to come. Even if the three appointments are made by outgoing Governor Rick Scott, the 2018 gubernatorial election will still have a major impact. In an average year, a governor appoints 37 judges to our county, circuit and district courts of appeal. A governor is likely to appoint 300 judges over the course of two terms. Those 300 judges will make up nearly a third of the entire Florida judiciary. It has taken three Republican governors nearly 20 years to bring the Florida judiciary to the present tipping point. Florida's next governor will have the opportunity to continue the positive progress of the past two decades or continue along the path of what others have mocked as a Judicial Hellhole. The 2018 gubernatorial election is not merely about the trajectory of the executive branch of Florida government. The future of the Florida judiciary will also be on the ballot.