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Allowing the Tree to be Cut Down: Quo Warranto Writs in Florida

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ALLOWING THE TREE TO BE CUT DOWN: QUO WARRANTO WRITS IN FLORIDA

League of Women Voters of Florida v. Scott, 232 So. 3d 264 (Fla. 2017)

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INTRODUCTION

There is no sense in declaring that an action is outside someone's scope of power after the action has already occurred. In much the same way, it does not matter whether someone may chop down a tree after the tree is down. Yet, the Florida Supreme Court's interpretation of the quo warranto writ in *League of Women Voters of Florida v. Scott*[1] allows the figurative tree to be cut down and then later declares it should have been protected.

At the December 2016 press conference announcing then-Fifth District Court of Appeal Chief Judge C. Alan Lawson as his first pick for the Florida Supreme Court, Florida Governor Rick Scott told reporters, "I'll appoint three more justices the morning I finish my term."[2] To the uninitiated, this statement may seem innocuous, but it alluded to a potential constitutional clash decades in the making.

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* J.D. 2019, University of Florida Levin College of Law; B.A. 2016, University of South Florida. This Comment is dedicated to my best friend, Kristen Woodruff. I would like to thank Dean Jon L. Mills for the inspiration for this Comment. I would also like to thank my parents—Sheila and Wesley Wilcox—for their unending support in all areas of my life. Finally, I would like to express my admiration and appreciation for all my friends on the *Florida Law Review*, our staff editor Lisa Caldwell, and our faculty advisor Mark Fenster. If this Comment is good, know it is because I stand on the shoulders of giants.

1. 232 So. 3d 264 (Fla. 2017).

2. *12/16/16 Press Conference on Florida Supreme Court Appointment*, THE FLA. CHANNEL, http://thefloridachannel.org/videos/121616-press-conference-florida-supreme-court-appointment/ [https://perma.cc/JAL8-ZED5].

Unlike the federal system, justices on Florida's highest court are selected by an appointment process—a version of the Missouri Plan[3]—involving only a Judicial Nominating Commission (JNC) and the governor.[4] When a vacancy opens on the Florida Supreme Court, the Florida constitution tasks a JNC with nominating between three and six nominees for the open seat.[5] The governor selects the new justice from this list of nominees.[6] The new justice then takes her seat on the bench, with no involvement by the legislative branch.[7]

Also, unlike the federal judiciary, Florida imposes the limitation of mandatory retirement upon its members of the state's highest court.[8] At the time the Florida Supreme Court rendered its decision in *League of Women Voters*, the mandatory retirement age for a justice in Florida was seventy.[9] On the justice's seventieth birthday, the justice must retire or, if the justice's birthday falls in the second half of her term,[10] the justice may serve the remainder of her six-year term.[11] At the conclusion of the

3. *See* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 485–86 (2009).

4. *See* FLA. CONST. art. V, § 11(a).

5. *See id.* ("Whenever a vacancy occurs in a judicial office . . . the governor shall fill the vacancy by appointing . . . one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission."). A Judicial Nominating Commission consists of: (1) five members—who reside in the territorial jurisdiction of the affected court, with two who are actively practicing members of The Florida Bar—selected by the governor and (2) four members—who are actively practicing members of The Florida Bar and reside in the territorial jurisdiction of the affected court—selected by the governor from nominees submitted by the Board of Governors of The Florida Bar. FLA. STAT. § 43.291(1) (2018).

6. *See* FLA. CONST. art. V, § 11(a).

7. *Id.*

8. FLA. CONST. art. V, § 8 (2016).

9. *Id.* During the 2018 election, Florida voters approved Amendment Six, which—in addition to two other entirely unrelated constitutional changes—changed the mandatory retirement age to seventy-five. *See, e.g.*, *Florida Amendment 6, Marsy's Law Crime Victim Rights, Judicial Retirement Age, and Judicial Interpretation of Laws and Rules Amendment (2018)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_6,_Marsy%27s_Law_Crime_Victims_Rights,_Judicial_Retirement_Age,_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_(2018) [https://perma.cc/GQ83-5TEG].

10. In 1976, Florida moved to merit-retention elections for justices on the state supreme court. *See generally* Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1422–25 (2012) (providing a short history and explanation of merit retention in Florida). Justices serve terms of six years. FLA. CONST. art. V, § 10(a). In every sixth year of service on the state high court, a justice faces merit retention. *Id.* If the justice is not retained—meaning that less than 50% of voters voted to retain the justice—then the governor selects a new justice in the same way that he would have if the justice was forced to retire due to age. *Id.*

11. FLA. CONST. art. V, § 8 (2016). In addition to raising the mandatory retirement age, Amendment Six removed this language. *See* FLA. CONST. art. V, § 8 (2019).

retiring justice's term, the governor in office at the time of the vacancy must appoint a successor justice.[12]

An unintended consequence of this selection and retirement scheme is that, in some instances, the term of a governor leaving office and the term of a justice being forced to retire would occur at the same time.[13] In Florida, the governor's term runs for four years—from the first Tuesday after the first Monday in the year following his election to the first Monday of the year following the election of a new governor.[14] So, at the stroke of midnight on that Tuesday, the outgoing governor's term ends and the new governor's term begins.[15] Similarly, an outgoing justice's term ends at midnight on the first Tuesday after the first Monday of the year after the sixth year of the justice's final term.[16] Simply put, at the stroke of midnight, the outgoing governor's term ends, the incoming governor's term begins, and the term-limited justice's term ends. This raises the question: Could the outgoing governor select a justice to replace an outgoing justice when his term ends at the same time as the outgoing justice's term?

Governor Scott's statement to the press regarding his intention to "appoint three more justices the morning [he] finish[ed his] term" reflected his view that he did have the power to appoint justices to replace those whose terms ended at the same time as his—midnight on January 8, 2019.[17] Accordingly, in June 2017, the League of Women Voters (the "League") brought suit to challenge the Governor's view on his power to appoint replacements for the three outgoing justices—Justices Barbara Pariente, Fred Lewis, and Peggy Quince.[18] The League argued that, "[a]s

12. *Id.* § 11(a).

13. Following Amendment Six's passage in 2018, this would only happen if a justice was not retained in her merit-retention election. *See supra* text accompanying notes 98–109.

14. FLA. CONST. art. IV, § 5(a).

15. Governor Scott argued that a new governor's term would not begin until he took the oath of office—at a ceremony in the morning of the first day of his term. Governor's Response in Opposition to Petition for Writ of Quo Warranto at 21, League of Women Voters of Fla. v. Scott, 232 So. 3d 264 (Fla. 2017) (No. SC17-1122). However—as Justice Quince noted—all governors in the twenty-first century have taken the oath before their term actually began, ensuring that they assumed the office of governor at exactly midnight on the first day of their term. *League of Women Voters*, 232 So. 3d at 267–68 (Quince, J., concurring).

16. FLA. CONST. art. V, § 11(a).

17. *12/16/16 Press Conference on Florida Supreme Court Appointment*, *supra* note 2. Governor Scott's term ended at midnight on January 8, 2019, as he was ineligible to run for a third term as governor. *See* FLA. CONST. art. IV, § 5(b).

18. Petition for Writ of Quo Warranto at 3, *League of Women Voters*, 232 So. 3d 264 (No. SC17-1122). This question was of great importance in the lead-up to the 2018 gubernatorial election, as the three justices being forced to retire were the only three remaining justices appointed by a Democratic governor—the remainder being Republican appointees. *See Former Justices*, FLA. SUP. CT., https://www.floridasupremecourt.org/Justices/Former-Justices

a matter of constitutional law, [the three outgoing justices'] judicial terms do not expire to create vacancies until Governor Scott's successor will have taken office."[19] To resolve these long-standing conflicting views[20] on gubernatorial power, the League sought "a writ of quo warranto to prevent Governor Scott from appointing the successor to any justice . . . whose final term expires [o]n January [8,] 2019."[21]

I. QUO WARRANTO WRITS

A quo warranto writ is an extraordinary writ used to challenge a defendant's ability to exercise a power or right derived from the state.[22] "'[Q]uo warranto' means 'by what authority'" and serves as a way to challenge a state actor's usurpation or misuse of a certain power.[23] The Florida constitution explicitly places the power to issue quo warranto writs to "state officers and state agencies" with the state supreme court.[24] This power, however, is discretionary.[25] Accordingly, quo warranto writs provide an effective recourse to block state actions that are overbroad but have yet to cause any quantifiable harm.

[https://perma.cc/H5RP-GNR3]. In the end, Ron DeSantis, a Republican, defeated Andrew Gillum, a Democrat, to succeed Governor Scott. Jessica Taylor, *Democrat Andrew Gillum Concedes Florida Governor's Race to Ron DeSantis*, NPR (Nov. 17, 2018, 5:39 PM), https://www.npr.org/2018/11/17/668321180/andrew-gillum-concedes-floridas-governor-s-race-to-ron-desantis [https://perma.cc/AA6K-4CXH]. However, the margin between the candidates was less than half of a percentage point—the tightest in state history. *Id.* Since the chance for a Democrat to be elected governor and, in turn, appoint three new justices to maintain the ideological makeup of the court was seen as good, ensuring that the newly elected governor—and not Governor Scott—was able to make the appointments was a high priority for state Democrats. *See* Mary Ellen Klas, *Who Gets to Appoint 3 New Florida Justices, Rick Scott or the Next Governor?*, TAMPA BAY TIMES (Nov. 1, 2017), https://www.tampabay.com/news/courts/Who-gets-to-appoint-3-new-Florida-justices-Rick-Scott-or-the-next-governor-_162229946 [perma.cc/8X3N-FQ7S].

19. Petition for Writ of Quo Warranto, *supra* note 18, at 2.

20. In 1998, Governor Lawton Chiles—a Democrat whose term was ending—faced a similar dilemma. Linda Kleindienst, *Bush, Chiles Agree to Put Black Woman on Supreme Court*, ORLANDO SENTINEL (Dec. 9, 1998), http://articles.orlandosentinel.com/1998-12-09/news/9812090161_1_quince-lawton-chiles-supreme-court [https://perma.cc/5X3N-YAZ9]. Justice Ben Overton's term was set to expire on the night of Governor Chiles's last day in office. *Id.* To avoid a constitutional clash, Governor Chiles reached an agreement with his successor, Governor-elect Jeb Bush—a Republican—to jointly appoint Justice Peggy Quince. *Id.* A similar situation occurred when Governor Chiles took office. James C. Clark, *Past Inaugurals Have Been Time for Dirty Deals*, ORLANDO SENTINEL (Jan. 6, 1991), http://articles.orlandosentinel.com/1991-01-06/news/9101040758_1_florida-governors-oath-bob-martinez [https://perma.cc/4BMA-PKJ9].

21. Petition for Writ of Quo Warranto, *supra* note 18, at 3.

22. *Ex parte* Smith, 118 So. 306, 307 (Fla. 1928).

23. Fla. House of Representatives v. Crist, 999 So. 2d 601, 607 (Fla. 2008).

24. FLA. CONST. art. V, § 3(b)(8).

25. *See id.* (noting that the Court "*[m]ay* issue writs of quo warranto" (emphasis added)).

The origin of the quo warranto writ—a common law writ of inquiry—is relatively obscured by its age.[26] However, eighteenth-century legal scholar William Blackstone, in his influential treatise *Commentaries on the Law of England*, described the writ as a "writ of right for the king, against [someone] who . . . usurps any office, franchise or liberty" of the Crown.[27] Over time, however, the writ has turned into a remedy designed to oust the usurper of a power from the state and to punish him with a criminal fine.[28]

As with many old English legal concepts, the quo warranto writ was made part of the law of several states when the United States came into existence.[29] In 1894, the Florida Supreme Court observed that "for some time before the revolution the writ was regarded in England, though criminal in form, as a civil proceeding to test the right of a party to exercise a franchise, and of ousting a wrongful possessor."[30] Since then, the writ of quo warranto in Florida has served as the legal remedy available to constrain a state official or agency acting outside of constitutional bounds.[31]

Generally, absent an alternate statutory framework, the writ is the only remedy for a usurpation of state power.[32] Likewise, if there is another sufficient remedy, the writ is not available.[33] In this regard, the writ often serves as the sole method for testing the political power of a state official. It is a powerful—and effective—way for citizens to constrain the state government to the limits of power established by the state constitution.[34]

II. *LEAGUE OF WOMEN VOTERS* AND THE QUO WARRANTO WRIT

Under article V, § 3(b)(8) of the Florida constitution, the Florida Supreme Court has discretionary original jurisdiction over quo warranto

26. For a more extensive history of the quo warranto writ in Florida, see generally Richard W. Ervin & Roy T. Rhodes, *Quo Warranto in Florida*, 4 U. FLA. L. REV. 559 (1951).

27. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *263.

28. Buckman v. State *ex rel.* Spencer, 15 So. 697, 699 (Fla. 1894).

29. *See* Territory v. Lockwood, 70 U.S. (3 Wall.) 236, 238–39 (1866).

30. *Buckman*, 15 So. at 699.

31. Winter v. Mack, 194 So. 225, 228 (Fla. 1940) ("Quo warranto is the proper remedy to test the right of a person to hold an office or franchise or exercise some right of privilege, the peculiar powers of which are derived from the State.").

32. Swoope v. City of New Smyrna, 125 So. 371, 372 (Fla. 1929).

33. *Id.*

34. In Florida—as in all states—the constitution serves as a limiting document, placing boundaries around near unlimited power vested in the state government and reserving power to the people of the state. *See* FLA. CONST. art. I, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people."); *see also infra* note 107 (citing similar constitutional provisions in other states).

writs.[35] The court accepted jurisdiction over the League's challenge to the Governor and heard arguments in November 2017—almost a year after the Governor's initial comment and a year before the election for the next governor.[36] In a per curiam decision, the court found that it did not have jurisdiction to issue a quo warranto writ related to Governor Scott's intention to appoint replacements for the three retiring justices because the Governor had not yet exercised a power beyond his authority.[37]

The League's challenge to Governor Scott's assertion that he could appoint the replacements for Justices Pariente, Lewis, and Quince centered around two issues: Could the Governor appoint the replacements and could the court issue a writ of quo warranto to answer the first question?[38]

With regard to the first question, there was general consensus that Governor Scott did not have the power to appoint the replacement justices.[39] While the per curiam majority opinion does not hint at this, Justice Quince's concurrence points out that, under any reasonable reading of the Florida constitution, Governor Scott would be unable to appoint replacements for justices whose terms ended concurrently with his.[40] And, as evidenced by the eventual issuance of the quo warranto writ, Justice Quince's view was correct.[41]

However, the more significant issue of the challenge was the appropriateness of a quo warranto writ before Governor Scott actually appointed replacement justices. The Governor argued that, irrespective of the determination regarding his ability to make the appointments, the League could not raise a quo warranto challenge for a power that he had not yet exercised.[42] Further, the Governor argued that until he actually appointed the replacement justices, the League could not seek a quo warranto writ to challenge his power to appoint the replacement justices.[43]

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35. FLA. CONST. art. V, § 3(b)(8).

36. League of Women Voters of Fla. v. Scott, 232 So. 3d 264, 264 (Fla. 2017).

37. *Id.* at 264, 266.

38. *Id.* at 264–65.

39. Even counsel for the Governor seemed to agree. *See* Transcript of Oral Argument, *League of Women Voters*, 232 So. 3d 264 (No. SC17-1122), https://wfsu.org/gavel2gavel/transcript/pdfs/17-1122.pdf [https://perma.cc/U6Y2-YF3A].

40. *League of Women Voters*, 232 So. 3d at 267–68 (Quince, J., concurring).

41. *See* Order Granting Writ of Quo Warranto, League of Women Voters of Fla. v. Scott, 257 So. 3d 900 (Fla. 2018) (No. SC18-1573).

42. Governor's Response in Opposition to Petition for Writ of Quo Warranto, *supra* note 15, at 9–11.

43. *Id.*

The per curiam majority opinion rested its decision solely on this portion of the argument.[44] The majority opinion avoided any ruling on the substantive grounds for the quo warranto writ and instead focused on its timeliness.[45] The court reasoned that both the purpose of quo warranto writs and their historical usage showed that this remedy was unavailable to the League at that time.[46]

In its analysis, the majority first turned to the purpose of quo warranto writs, as established in *Swoope v. City of New Smyrna*.[47] In *Swoope*, decided in 1929, the court noted that a challenge to an individual's exercise of authority "appropriately fall[s] within the jurisdiction of the common law courts by proceedings in quo warranto."[48] Further, it stated that quo warranto is available the moment that a power is usurped.[49] As established by this precedent, the purpose of quo warranto writs is to determine whether a state actor has "improperly exercised a right or power from the State."[50] So, in the view of the majority, to grant or deny a quo warranto writ for a "threatened exercise of power"—what Governor Scott's pronouncement of his intention to appoint new justices was—would be "an impermissible advisory opinion based upon hypothetical facts."[51]

Subsequently, the majority noted that Florida courts have typically constrained the use of the writ to actions by officials that have already taken place. The majority cited three cases where the state actor had already acted and the court then held that a quo warranto writ was the "appropriate vehicle" to challenge the completed action.[52] Accordingly,

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44. *League of Women Voters*, 232 So. 3d at 266 ("Until 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.").

45. *Id.*

46. *Id.* at 265.

47. 125 So. 371 (Fla. 1929).

48. *Id.* at 372.

49. *Id.*

50. *League of Women Voters*, 232 So. 3d at 265.

51. *Id.* Under the Florida constitution, the governor—though only for questions "affecting the governor's executive powers and duties"—may ask for and receive advisory opinions from the Florida Supreme Court. FLA. CONST. art. IV, § 1(c).

52. *League of Women Voters*, 232 So. 3d at 265–66 (first citing Whiley v. Scott, 79 So. 3d 702, 705 (Fla. 2011) (reviewing the Governor's authority to issue an executive order suspending the rulemaking procedures of state agencies—after the order was issued); then citing State *ex rel.* Butterworth v. Kenny, 714 So. 2d 404, 406 (Fla. 1998), *abrogated in part by* Darling v. State, 45 So. 3d 444 (Fla. 2010) (reviewing the authority of the Office of the Capital Collateral Regional Counsel for the Northern and Southern Regions to represent death row inmates—after the Office began filling suits on the inmates' behalf); and then citing Ayala v. Scott, 224 So. 3d 755, 756–57 (Fla. 2017) (reviewing the Governor's authority to issue executive orders reassigning the prosecution of certain cases from one state attorney to another—after the orders were issued)).

the majority concluded that the use of a "[writ of] quo warranto to review an action which is merely contemplated but not consummated . . . would require this Court to depart from the historical application of the writ."[53]

Additionally, addressing a point by the League, the majority dismissed the argument that the court's previous decision in *Florida House of Representatives v. Crist*[54] suggested that quo warranto writs could be used to prohibit future conduct.[55] Rather, the court in *Crist* said that, while "[t]he Governor contends that this Court lacks jurisdiction because the House does not seek . . . to enjoin the future exercise of his authority[,] . . . these are not the only grounds for issuing such a writ."[56] This language suggests that "enjoin[ing] the future exercise of . . . authority" is one—though not the only—ground to issue a quo warranto writ.[57] The *League of Women Voters* majority summarily rejected this reading of *Crist* but never addressed alternative interpretations.[58]

In the end, the majority opinion—while rejecting the League's challenge at that time—left the door open for a quo warranto writ before the Governor actually made appointments to the court.[59] So, when the Governor finally made a concrete action toward appointing the replacement justices—directing the Florida Supreme Court JNC to begin soliciting applications for the positions—the League again filed for a quo warranto writ.[60] Yet, in an unsigned order, the court this time issued the writ of quo warranto against the Governor, declaring in no uncertain terms that "[t]he governor who is elected in the November 2018 general election has the sole authority to fill the vacancies . . . ."[61]

However, was the court's decision to wait for the Governor to affirmatively act the proper interpretation of the use of the writ? Justice Lewis's dissent in *League of Women Voters* argued it was not.[62]

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53. *Id.* at 266.

54. 999 So. 2d 601 (Fla. 2008).

55. *League of Women Voters*, 232 So. 3d at 265 n.1.

56. *Crist*, 999 So. 2d at 607.

57. *Id.*

58. *See League of Women Voters*, 232 So. 3d at 265 n.1.

59. *Id.* at 266 ("Until 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.").

60. Emergency Petition for Writ of Quo Warranto at 10–11, League of Women Voters of Fla. v. Scott, 257 So. 3d 900 (Fla. 2018) (No. SC18-1573).

61. Order Granting Writ of Quo Warranto, *supra* note 41.

62. *League of Women Voters*, 232 So. 3d at 268 (Lewis, J., dissenting).

III. JUSTICE LEWIS'S VIEW ON QUO WARRANTO WRITS

Justice Lewis's dissent provides an alternative view on the use of the quo warranto writ to prevent imminent usurpation of power. Justice Lewis argued that the court should have granted the quo warranto writ in this instance because Governor Scott's intention to appoint the replacement justices—despite having taken no actions—was "concrete and unequivocal" enough to not be an advisory opinion.[63] Justice Lewis's argument discussed the history of quo warranto writs in the state, the purpose of quo warranto writs, the use of quo warranto writs in similar situations but in different states, and the practical considerations behind the use of this extraordinary writ.[64]

First, Justice Lewis looked to Florida precedent, including a recent case that also involved an attempted judicial appointment by Governor Scott. In *Lerman v. Scott*,[65] decided in 2016, Governor Scott's ability to fill a vacancy for a county court judge, created by Florida's Resign to Run statute,[66] was challenged with a petition for a writ of quo warranto by Gregg Lerman, a candidate in the election to replace the retiring judge.[67] Governor Scott had announced his intention to appoint a successor to the outgoing judge, yet under Florida Statutes section 99.012, the resignation of a judge creates a vacancy that should be filled by an election, preventing the governor from appointing a replacement.[68] The Florida Supreme Court found that section 99.012 restricted a governor's appointment powers and, accordingly, granted the writ of quo warranto—finding that the appointment was outside the bounds of the Governor's powers.[69] Justice Lewis pointed out that this recent opinion shows the faulty logic of the majority in requiring the appointment to be "consummated" before quo warranto is appropriate.[70]

Further, Justice Lewis pointed to a myriad of cases that clearly state that quo warranto writs are "appropriate in cases of threatened or attempted action by a state official."[71] In each of these cases, the Florida Supreme Court explicitly used the words "threatened" or "attempted"

63. *Id.* at 269.

64. *See id.* at 268 (explaining Justice Lewis's take on quo warranto writs in the state as a whole).

65. No. SC16-783, 2016 WL 3127708 (Fla. June 3, 2016).

66. FLA. STAT. § 99.012 (2018).

67. *Lerman*, 2016 WL 3127708, at *1.

68. FLA. STAT. § 99.012(3)(f)(1) ("[T]he resignation creates a vacancy in office to be filled by election.").

69. *Lerman*, 2016 WL 3127708, at *1.

70. League of Women Voters of Fla. v. Scott, 232 So. 3d 264, 269 (Fla. 2017) (Lewis, J., dissenting).

71. *Id.* at 269–70.

action.[72] Moreover, the court has never limited the writ to acts that have already occurred or to acts that are ongoing.[73]

Second, Justice Lewis pointed to the very purpose of quo warranto writs as evidence that the majority's interpretation was illogically limited.[74] It is a generally recognized principle—both in Florida law[75] and in the old English common law origins of the writ[76]—that the quo warranto writ is "available to prevent significant impacts on the operation of government."[77] If the writ is only available after "illegal and unconstitutional conduct which produces disarray" occurs, Justice Lewis argued, then the writ can no longer prevent significant impacts—it would allow only for post hoc cleanup of those impacts.[78]

Justice Lewis also examined how other states interpret the quo warranto writ. In 2017, Vermont faced a situation similar to the one in Florida.[79] The outgoing governor, Governor Peter Shumlin, announced his intention to appoint the replacement for Justice John Dooley—who was in his last term.[80] Yet, Justice Dooley's term would not expire until April—months after Governor Shumlin had left office.[81] After Governor Shumlin announced his intention to appoint a successor, Vermont House of Representatives Minority Leader Don Turner filed a petition for a writ

72. State *ex rel.* Bruce v. Kiesling, 632 So. 2d 601, 603 (Fla. 1994) ("[W]e note that the common law remedy of quo warranto is employed . . . to challenge a public officer's *attempt to exercise* some right or privilege derived from the State." (emphasis added)); State *ex rel.* Ervin v. Jacksonville Expressway Auth., 139 So.2d 135, 137 (Fla. 1962) ("It is a proper function of the Attorney General, in the interest of the public, to test the exercise, or *threatened exercise*, of power . . . through the process of a quo warranto proceeding." (emphasis added)); Adm'r, Retreat Hosp. v. Johnson, 660 So. 2d 333, 339 (Fla. Dist. Ct. App. 1995) ("[T]he remedy of quo warranto . . . is designed to challenge a public officer's *attempt to exercise* some right or privilege derived from the state . . . ." (emphasis added)).

73. *See* Fla. House of Representatives v. Crist, 999 So. 2d 601, 607 (Fla. 2008) (dismissing Governor Charlie Crist's argument that, since he had already completed the disputed action, a quo warranto writ would not be available); State *ex rel.* Butterworth v. Kenny, 714 So. 2d 404, 406 (Fla. 1998) (using quo warranto to determine the ability of the Office of Capital Collateral Regional Counsel for Southern and Northern Regions to represent death row inmates in civil rights lawsuits after the representation had concluded and the cases had been dismissed), *abrogated in part by* Darling v. State, 45 So. 3d 444 (Fla. 2010).

74. *League of Women Voters*, 232 So. 3d at 271 (Lewis, J., dissenting).

75. Whiley v. Scott, 79 So. 3d 702, 708 (Fla. 2011).

76. *See* JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 591 (Chicago, 2d ed., Callaghan & Co. 1884).

77. *League of Women Voters*, 232 So. 3d at 268 (Lewis, J., dissenting).

78. *Id.*

79. Turner v. Shumlin, 163 A.3d 1173, 1175–76 (Vt. 2017).

80. *Id.* at 1176.

81. *Id.*

of quo warranto to declare appointment outside of the Governor's power.[82]

Governor Shumlin—like Governor Scott—argued that his action could only be challenged by quo warranto after he made the appointment.[83] In the end, however, the Vermont Supreme Court granted the writ and extoled the value of ensuring the "integrity of our governing institutions and the people's confidence in them."[84] Justice Lewis argued that, by ignoring this interpretation of the quo warranto writ, the majority adopted a wrongheaded approach to this old English extraordinary writ and failed to maintain the "integrity of our governing institutions."[85]

Finally, Justice Lewis presented the majority's limits to the quo warranto writ as impractical.[86] Oftentimes the government—and the fallible humans who compose it—will stretch the bounds of its power, hoping to expand beyond its limits before it can be preemptively stopped.[87] This is particularly damaging if the action is long-lasting or permanent—as was Governor Scott's direction to the JNC to begin interviewing candidates for the new justices and to prepare short lists.[88] The majority, by limiting the use of quo warranto in this situation, allows harmful and illegal conduct to occur without practical remedies.[89] "Magnificent trees cut, pristine waters fouled, and unthinkable harm inflicted upon our citizens, which may not be prevented when the actor

82. *Id.*

83. *Id.* at 1177.

84. *Id.* at 1188.

85. League of Women Voters of Fla. v. Scott, 232 So. 3d 264, 268–69 (Fla. 2017) (Lewis, J., dissenting) (quoting *Turner*, 163 A.3d at 1188). Ironically, just like in Florida, the court allowed the then-composed Judicial Nominating Board—with members chosen by Governor Shumlin—to begin interviewing candidates and to select the short list for Governor Shumlin's successor to choose from. *See* Peter Hirschfeld, *Vermont Supreme Court Rules Shumlin Can't Appoint Justice's Replacement*, VPR (Jan. 4, 2017), http://digital.vpr.net/post/vermont-supreme-court-rules-shumlin-cant-appoint-justices-replacement#stream/0 [https://perma.cc/6GF7-YUZ2].

86. *League of Women Voters*, 232 So. 3d at 270 (Lewis, J., dissenting).

87. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974) (explaining how Robert Moses, the New York City chief city planner and "master builder," planned construction projects). Despite dubious, at best, claims to and ongoing litigation over a piece of land, Mr. Moses began building a city park on the piece of land. *Id.* at 216–17. By the time appellate proceedings over the ownership of the land began, Mr. Moses had completed the park and it received hundreds of thousands of patrons. *Id.* Mr. Moses stepped over the limits of his power, but what was a court to do—Destroy the park and waste hundreds of thousands of taxpayer dollars? *Id.*

88. Pleus v. Crist, 14 So. 3d 941, 946 (Fla. 2009) ("We conclude that the Governor is bound by the Florida Constitution to appoint a nominee from the JNC's certified list, within sixty days of that certification. [W]e hold that . . . the Governor lacks authority under the constitution to seek a new list of nominees from the JNC and has a mandatory duty to fill the vacancy . . . with an appointment from the [original] list . . . .").

89. *League of Women Voters*, 232 So. 3d at 269 (Lewis, J., dissenting).

plans and even announces his intentions."[90] In his dissent, Justice Lewis argued that limiting this extraordinary writ in this way damages the constitutional order of the state.[91]

And, in the end, even if the majority opinion is correct that Florida has a more limited approach to quo warranto writs, Justice Lewis argued that this approach should be abandoned.[92] Justice Lewis noted that the majority's reluctance to look to a full picture of the writ's historical use overlooked precedent that gives the court significant leeway to use the writ.[93] Justice Lewis cited *State ex rel. Watkins v. Fernandez*,[94] which discussed how the court has, when necessary, allowed the writ to expand to circumstances beyond those originally intended.[95] In short, the law should be allowed to evolve with the varying needs of society.[96]

Quo warranto writs are remedial and extraordinary writs.[97] By limiting the writ to actions that have occurred or are ongoing, the majority fails to allow the writ to fulfill its function—to prevent usurpation of power and to allow the people to constrain the government to its constitutional limits in the absence of other remedies.[98] Justice Lewis argued that the purpose of the writ of quo warranto alone should allow the court to grant the writ to prevent Governor Scott from overstepping his constitutional authority.[99]

CONCLUSION

Quo warranto writs provide the people of the state of Florida with a tool to challenge the usurpation of power by state actors. As Justices Pariente, Quince, and Lewis; counsel for the Governor; and an eventual majority of the court all agreed, the Governor would have usurped power by appointing replacement justices for the three justices who were constitutionally required to retire concurrently with the expiration of Governor Scott's term in office. The only thing that remained contested was when the Supreme Court of Florida has the power to prevent this

90. *Id.*
91. *Id.*
92. *Id.* at 271.
93. *Id.*
94. 143 So. 638 (1932).
95. *Id.* at 641 ("In a changing world marked by the ebb and flow of social and economic shifts, new conditions constantly arise which make it necessary, that no right be without a remedy, to extend the old and tried remedies. It is the function of courts to do this. It may be done by working old fields, but, when it becomes necessary, they should not hesitate to 'break new ground' to do so.").
96. *League of Women Voters*, 232 So. 3d at 271 (Lewis, J., dissenting).
97. *Id.*
98. *Id.*
99. *Id.*

usurpation. The Governor argued that it would only be appropriate to challenge the usurpation after the Governor had appointed the three new justices to the Florida Supreme Court—leaving the court to determine its own membership and setting off a constitutional crisis.[100] Justices Quince and Pariente—and an eventual majority of the court—thought that it would be appropriate only when the Governor actually began the process of nominating the replacement justices, though at some point before the appointment of the justices.[101] Yet, these limits to the use of the quo warranto writ make it insufficient to prevent usurpation.

The consequences of this case highlight the insufficiency of the majority's view, which prevents the court from fashioning a remedy to stop irreversible action before it occurs. Following the court's eventual issuance of the writ, most media outlets portrayed the decision as a defeat for Governor Scott.[102] Yet, a more nuanced view of the decision shows that the Governor had already essentially exercised a power that the court said he did not possess.

The Governor had already impaneled the JNC at the time of the writ and this JNC selected the list of nominees that the newly elected governor chose justices from.[103] And, despite the Florida Bar selecting the Commissioners as an independent check on the governor's power, modern governors have essentially picked these Commission members.[104] In short, a JNC composed entirely of Governor Scott

100. Governor's Response in Opposition to Petition for Writ of Quo Warranto, *supra* note 15, at 9–11.

101. *League of Women Voters*, 232 So. 3d at 267 (Quince, J., concurring).

102. *See, e.g.*, Lorelei Laird, *Florida Supreme Court Rules That Current Governor Can't Replace 3 Retiring Justices*, A.B.A. J. (Oct. 16, 2018, 1:30 PM), http://www.abajournal.com/news/article/florida_supreme_court_rules_next_governor_should_pick_three_new_justices [https://perma.cc/8BQ9-V767]; Mark J. Stern, *The Florida Supreme Court Just Stopped Rick Scott From Packing It After His Term Ends*, SLATE (Oct. 15, 2018, 5:28 PM), https://slate.com/news-and-politics/2018/10/florida-supreme-court-rick-scott.html [https://perma.cc/C35T-CBJ9].

103. Emergency Petition for Writ of Quo Warranto, *supra* note 60, at 10–11.

104. While the Board of Governors of The Florida Bar selects nominees for the four members of the Commission, the governor ultimately nominates them to the Commission. FLA. STAT. § 43.291(1)(a) (2018). In turn, the governor may reject the nominees. *Id.* Governor Scott has used this discretion to ensure that the JNC was entirely composed of members of his choosing—as have all governors in the twenty-first century. Diana L. Martin & Donna M. Krusbe, *An Overview of the Selection of Florida's Judiciary*, 16 J. FLA. B. APP. PRAC. SEC., June 1, 2009, at 24. Some have argued that this has effectively neutralized the principles of nonpartisanship behind the judicial nominating scheme implemented in 1972 by Governor Reubin Askew. *See, e.g.*, *The Politicization of Florida's Courts is a Crisis*, S. FLA. SUN SENTINEL (Nov. 30, 2018, 6:00 PM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20181130-story.html [https://perma.cc/P5KL-U2K2] ("Under Republican governors since 2001, and particularly under Scott, many of Florida's 26 judicial nominating commissions have come to

appointees created the list of people from which Governor DeSantis was required to pick new justices.[105] Allowing this exercise of power by the outgoing Governor Scott stands in contrast to the Florida constitution's organization of power.[106] State constitutions stand as limiting documents, limiting the already substantial power of a state government.[107] To allow a state actor to create a *fait accompli* situation, using powers clearly beyond the scope of the actor's office, is antithetical to the system of power established by the Florida constitution.

And, while Governor Scott was succeeded by a member of his own party, unlike in previous gubernatorial transitions, Governor Scott did not seek compromises with his successor.[108] In appointing controversial picks for agencies and new appellate judges in the final days of his term, Governor Scott showed that he likely intended to keep to his word to replace the three outgoing justices with justices of his own selection—no matter his successor's party affiliation.[109] Governor Scott, despite being constitutionally precluded from selecting three new justices, exercised

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resemble Republican patronage committees. In other words, to be considered, you have to be a Republican.").

105. *See* Carolina Bolado, *11 Names Sent to Fla. Gov.-Elect for 3 High Court Seats*, LAW360 (Nov. 27, 2018, 9:20 PM), https://www.law360.com/articles/1105437/11-names-sent-to-fla-gov-elect-for-3-high-court-seats [https://perma.cc/Z36D-RGHL].

106. *See* FLA. CONST. art. I, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.").

107. The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. State governments are free to grant freedoms, rights, and privileges above the floor of the federal Constitution and each serve as laboratories for innovation in this regard. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). The state constitution also serves as the limit on the scope of state governmental power, ensuring that the people retain the remaining power. *See, e.g.*, FLA. CONST. art. I, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people."); HAW. CONST. art. 1 § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people."); TEX. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit."); WYO. CONST. art. 1, § 1 ("All power is inherent in the people, and all free governments are founded on their authority. . . .").

108. *See* Marc Caputo & Matt Dixon, *Rick Scott Blindsides DeSantis on His Way Out*, POLITICO (Jan. 10, 2019, 5:00 AM), https://www.politico.com/story/2019/01/10/rick-scott-florida-governor-ron-desantis-1093598 [https://perma.cc/77UZ-Z5CB] (detailing a number of slights by Governor Scott—including throwing an inaugural party for Scott's Senate swearing in at the Governor's Mansion after Governor DeSantis had already moved in—leading to a "contentious handoff").

109. Governor Scott appointed five judges the afternoon of his last day in office and appointed Carlos Beruff, a controversial Florida developer and friend of Governor Scott, to the Florida Wildlife Commission. *Id.*

significant power—potentially in conflict with his successor—in picking the new justices. Just like a tree that is already cut down, the power had already been exercised and the damage done.

Instead, Justice Lewis's dissent provides the clearest—and the only pragmatic—approach to the use of quo warranto writs: When the state actor's "pronouncement of his intent to [act beyond the limits of his power] is unequivocal, not conjectural or hypothetical," the writ is available as a remedy.[110] This interpretation of the use of quo warranto writs is in line with historical usage, Florida precedent, and practical use of this extraordinary writ.

110. Turner v. Shumlin, 163 A.3d 1173, 1177 (Vt. 2017); *see* League of Women Voters v. Scott, 232 So. 3d 264, 268–71 (Fla. 2017) (Lewis, J., dissenting).