Judicial review and governmental bad faith

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A beautiful reminder of graduations past

I have been retired from teaching and coaching since 2008. Every one of my children graduated from Concord High School while I was there as a teacher and coach. I was so proud of their accomplishments and bound to miss them. I have not returned to a graduation since. However, I also remember the feeling of seeing many of my students and former students as well. I had taught and coached them and knew them for many years. So I can relate to Heidi Crumrine’s column (“Monitor front page,” June 12).

Workers negatively affected by the law challenged it as unconstitutional. They argued in favor of broad benefits, but those who were in the negatively affected class, the court held that this merely conceivable discrimination was not enough to sustain the law even if it was not the actual purpose.

This is the default, presumptively applicable approach. But in cases like Prieto involving allegations that governmental bad faith masks an intent to infringe a fundamental right or to engage in presumptively unconstitutional discrimination, the court does not stop the inquiry upon a showing of some conceivable, legitimate purpose: Instead, recognition that a deferential approach would not sufficiently safeguard essential constitutional guarantees, the court must give a searching review of the actual purpose(s) of the law or action.

In such cases, the justices of the Supreme Court are expected to have a degree about the enforceability of laws or other practices challenged by a constitutional purpose. But they are quite likely to disagree about how easily courts should find that the law or action has been tainted by an unconstitutional purpose. In recent cases involving claims of government bad faith, the liberal justices have shown a greater willingness to find bad faith, while the more conservative justices have tended to avoid any decision to politically accountable authorities.

Consider, in this respect, Trump v. Hawaii. Justice Anthony Kennedy has recently held that the government action prompted by an unconstitutional religious discrimination against Muslims. In the latter case, however, he sided with the liberals to find that the government action was constitutional. In such cases, courts are asked to assess the constitutionality of laws alleged to have been enacted, or if the action alleged to have been taken, in bad faith — that is, for reasons other than those suggested on the face of the law or provided to justify the action. As discussed below, June Medical Services is not the only recent Supreme Court case to have grappled with this issue.

Let us assume for a moment that the alleged bad faith so obvious in the Prieto case is not the point, but the doctors who performed abortions must have admitting privileges at a nearby hospital. Yet they cannot obtain or maintain such privileges because the need to hospitalize abortion patients arises so rarely. Thus, the effect of the law would likely be to reduce the number of physicians permitted to perform abortions.

There is strong evidence that the authors of the law knew and intended this result. Consequently there is strong evidence that the law’s actual purpose was to reduce the number of abortions performed in the state, and not to preserve maternal health.

So does this legislative “bad faith” make the law unconstitutional? The courts have recognized many potential limitations in constitutional law, so it depends. Justices from the conservative and liberal branches are likely to agree about the extent to which it is appropriate for judges to question the motives of other governmental branches and actors in making policy.

Bad faith does not make governmental conduct unconstitutional in and of itself. A litigant challenging the constitutionality of a law does not prevail merely by showing bad faith. Rather, the litigant must show that the bad-faith explanation masks an unconstitutional purpose behind the law or governmental action.

In cases that do not involve fundamental rights or allegations that the law was not intended to harm the negatively affected class, the court held that this merely conceivable discrimination was not enough to sustain the law even if it was not the actual purpose.

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