

1978

Constitutional Law - Separation of Powers - Retroactivity - Finality of Judgements [Note]

Vicki C. Thompson

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Vicki C. Thompson, *Constitutional Law - Separation of Powers - Retroactivity - Finality of Judgements [Note]*, 16 Duq. L. Rev. 649 (1978).

Available at: <https://dsc.duq.edu/dlr/vol16/iss4/9>

This Symposium Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—RETROACTIVITY—FINALITY OF JUDGMENTS—The Pennsylvania Supreme Court has held statutory provisions requiring the resentencing of finalized marijuana convictions to be unconstitutional interferences with final judicial judgments.

Commonwealth v. Sutley, 378 A.2d 780 (Pa. 1977).

James W. Sutley and James D. Parker were convicted in the Court of Common Pleas of Mercer County, Pennsylvania, on unrelated felony charges for the possession of marijuana.¹ After entering guilty pleas,² Sutley was sentenced on July 2, 1971, to a term of not less than one nor more than three years; Parker was sentenced March 3, 1972, to a term of one and one-half to four years in a state correctional institution.³ Neither party directly appealed judgment of sentence.⁴

On April 14, 1972, the Pennsylvania General Assembly reduced the crime of possession of marijuana from a felony to a misdemeanor, making the new provisions applicable to nonfinal convictions for offenses committed prior to the enactment date.⁵ The benefit of these reduced penalties was further extended by a July 25,

1. *Commonwealth v. Sutley*, 378 A.2d 780, 781 (Pa. 1977).

2. It is interesting to note that if appellants had gone to trial instead of pleading guilty, it is likely that the convictions would not have become final until after the effective date of the 1972 Act. See note 5 *infra*. Thus it is likely that they would have received the benefit of the lesser penalties provided by the 1972 Act. 378 A.2d at 790 n.5 (Roberts, J., dissenting).

3. *Id.* at 781. Justice Nix, in writing for the majority, noted that in the case of Sutley, the sentencing judge was convinced the offense actually involved sale rather than mere possession, but accepted a plea to the lesser offense since it offered a wider range of possible sentences. *Id.* at 787.

4. *Id.* at 781.

5. Prior to the change, the law in effect was the Drug, Device, and Cosmetic Act of 1961, No. 693, 1961 Pa. Laws 1664, § 4, PA. STAT. ANN. tit. 35, § 780-1 (Purdon 1964) (repealed 1972). Under this law, possession of marijuana was a felony resulting in a \$2,000 fine and a prison term of two to five years. There were many changes and considerable penalty reductions in the 1972 Act. Under the new law, the maximum sentence for possession of more than 30 grams of marijuana is a misdemeanor punishable by up to one year imprisonment and/or a \$5,000 fine, while possession of 30 grams or less results in no more than 30 days imprisonment and/or a \$500 fine. PA. STAT. ANN. tit. 35, § 780-113 (Purdon 1977).

The Pennsylvania Controlled Substances Act, PA. STAT. ANN. tit. 35, § 780-101 (Purdon 1977), is modeled after the Uniform Controlled Substances Act; although the Uniform Act establishes a coordinated and codified system of drug control and classification, the specific fines and sentences are left to the discretion of the states. The Pennsylvania Act is a substantial adoption of the Uniform Act, which provides that the lesser penalties shall apply to pending convictions if the offense being prosecuted is similar to an offense under the new Act, even if the violation occurred prior to the effective date of the Act. *Id.*

1973 amendment which provided for mandatory resentencing of convictions finalized prior to April 14, 1972.⁶

The Court of Common Pleas of Mercer County denied Sutley's and Parker's petitions for resentencing,⁷ stating that the Resentencing Amendment infringed upon the power of the governor to commute sentences and operated as a legislative impairment of a final judicial judgment.⁸ Appellants made a timely appeal to the superior court which certified the matter to the Pennsylvania Supreme Court.⁹

Justice Nix, writing for the majority, initially noted that in dealing with questions involving the validity of legislative enactments, courts may not inquire into the wisdom or reasons underlying the enactment.¹⁰ It is presumed to be constitutional,¹¹ and the one alleging the unconstitutionality has the heavy burden of showing a clear violation.¹² In finding that the burden was satisfied in this case, the majority focused on the plain language of the statute and concluded that its effect was a legislative command to alter a final judgment. The majority thought this was repugnant to the concept of separation of powers.¹³

The decision was premised on the nature and function of the separation of powers doctrine. Justice Nix, in tracing its history, concluded that although there may be areas when the dividing line between the branches is difficult to define, there is no serious question that the legislature is not permitted to interfere with final judg-

6. The 1973 Amendment to the new enactment of 1972 provides in pertinent part that "in any case *final* on or before June 12, 1972, in which a defendant was sentenced . . . such defendant shall be resentenced under this act upon his petition if the penalties . . . are less than those under prior law . . ." PA. STAT. ANN. tit. 35, § 780-138 (Purdon 1977) (emphasis added) [hereinafter referred to as the Resentencing Amendment].

The legislature provided that the Resentencing Amendment should apply to possession of a small amount of a controlled substance or possession of a small amount of marijuana for personal use, but not to manufacture or delivery of a controlled substance. Additionally, for the Amendment to apply the offense under the prior statute is required to be substantially similar to the offense as defined in the 1972 Act. *Id.*

7. 378 A.2d at 781. The Resentencing Amendment does not expressly promulgate time or procedural requirements for resentencing.

8. *Id.* at 782.

9. *Id.* at 781.

10. See *Commonwealth v. Moir*, 199 Pa. 534, 49 A. 351 (1901); *Commonwealth v. Keary*, 198 Pa. 500, 48 A. 472 (1901).

11. See *School Dists. of Deer Lakes and Allegheny Valley v. Kane*, 463 Pa. 554, 562, 345 A.2d 658, 662 (1975).

12. See *Lighton v. Abington Township*, 366 Pa. 345, 9 A.2d 605 (1939).

13. 378 A.2d at 782.

ments of the judicial branch.¹⁴ Final judgments have been held inviolable in all cases, civil as well as criminal. In support of this position, the majority relied on language in *Commonwealth ex rel. Johnson v. Holloway*,¹⁵ an early Pennsylvania case, which held that the legislature may not retroactively interfere with a final judgment.¹⁶

In response to the appellant's contention that the power over the penology system was vested in the legislature and that consequently there was no judicial power to usurp,¹⁷ the majority felt that *Commonwealth ex rel. Banks v. Cain*¹⁸ effectively refuted this position. The court in *Banks* permitted a parole statute to be retroactively applied to sentences that were final at the time of its enactment. However, Nix felt that the crucial thrust of *Banks* was that the power of parole did not interfere with traditional judicial functions involved in the sentencing process because the court's sentence still determined the total time that the prisoner would be subject to the state's control. Thus, the *Sutley* majority justified the rule of inviolability of judgments as being required by separation of powers and as being necessary to protect the judicial discretion of the court in determining the period for which an offender should be sentenced.¹⁹ Nix found this highly persuasive since in the instant case the sentencing judge was convinced that *Sutley* was involved in the sale of a controlled substance rather than mere possession.²⁰ Nix reasoned that to apply the Resentencing Amendment in this case would be to distort the judicial discretion involved in permitting a plea to a lesser offense, as well as the legislative intent which

14. *Id.* at 784.

15. 42 Pa. 446 (1862).

16. 378 A.2d at 784. Justice Nix quoted the following passage from *Johnson*:

It is to be observed, that these questions have no reference to the power of the legislature to prescribe a general rule of law that shall be inconsistent with a previous judicial decree. Such a rule, when it operates on future cases and not retrospectively, is quite legitimate. Their power to legislate in that manner is not to be doubted. But under the act in question the good conduct of a particular individual, under judicial sentence, is to work out for him an abatement of a part of his sentence. In respect to one of the relators who was convicted and sentenced before the law was passed, it is considered very clear that it is a legislative impairing of an existing legal judgment.

42 Pa. at 448.

17. 378 A.2d at 785.

18. 345 Pa. 581, 28 A.2d 897 (1942).

19. 378 A.2d at 786.

20. *Id.* at 787.

was to benefit those persons involved in mere possession rather than sale.

Although the litigants themselves did not raise the issue of whether the amendment could be justified on the basis of the pardoning power, it was addressed by both the majority and dissent.²¹ The majority refused to recognize that the Pennsylvania Constitution conferred the power to pardon on the legislature; the specificity with which the constitution confers this power on the executive was the basis for their conclusion.²² Even assuming that the power did exist, the majority felt that the Resentencing Amendment would not be a proper exercise of the power since the Resentencing Amendment still required the individual to serve a sentence and did not totally expunge his record.²³

In separate dissents, Justice Roberts viewed the Resentencing Amendment as a proper exercise of legislative power reflecting a decision that equal conduct should receive equal treatment,²⁴ while Justice Manderino viewed it as a legitimate exercise of the legislature's absolute right to pardon.²⁵

The starting point for Justice Roberts was the recognition that the purpose of the doctrine of separation of powers is not to promote governmental efficiency, but to protect individuals from the arbitrary control that results when the same person is both legislator and judge.²⁶ He noted that this occurs when the legislature interferes with essential judicial functions,²⁷ and when the legislature judges individual cases.²⁸ Since he recognized the Resentencing Amendment as a statute of general application, he concluded that it did not detract from the power of the judiciary to impose sentences in individual cases and was well within the constitutionally defined power of the legislature to determine punishments for a class of offenders.²⁹

21. *Id.* at 793 (Roberts, J., dissenting); *id.* at 798 (Manderino, J., dissenting).

22. *Id.* at 788.

23. *Id.* at 789.

24. *Id.* at 792 (Roberts, J., dissenting).

25. *Id.* at 798 (Manderino, J., dissenting).

26. *Id.* at 791 (Roberts, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Brown*, 381 U.S. 437 (1965)).

27. See *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852); *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (plurality opinion); *Stander v. Kelley*, 433 Pa. 406, 427-28, 250 A.2d 474, 486 (1969) (Roberts, J., concurring).

28. This is prohibited by the bill of attainder clause, U.S. CONST. art. I, § 10; PA. CONST. art. I, § 18.

29. 378 A.2d at 792 (Roberts, J., dissenting).

Justice Roberts was also very critical of the assertion by the majority that the general rule in Pennsylvania is that final judgments are inviolable.³⁰ He observed that the Resentencing Amendment did not violate express constitutional prohibitions against passing a special law or an *ex post facto* law, impairing contracts, or taking property without just compensation. The majority, by creating a general prohibition on interferences with judgments, in fact, was making an unwarranted intrusion into the province of the legislature.³¹

Justice Manderino believed that the legislative power to pardon is inherent in the very nature of the legislature's function to make, alter, and repeal laws.³² Since the legislature possesses an absolute power to pardon, it could exercise it partially by the Resentencing Amendment. He was also critical of the cases of the majority claimed supported the propositions that the legislature may not interfere with judicial judgments of sentence; the cases either upheld statutes which affected judicial decisions,³³ or involved civil actions where due process considerations required a different result.³⁴

It is difficult to rationalize the majority's decision on the basis of separation of powers. The purpose of the doctrine of separation of powers is to prevent one governmental branch from encroaching on another, thus insuring that the integrity of each branch is preserved.³⁵ It is not, however, applicable to individual litigants.

Although the majority correctly noted the concept underlying the doctrine of separation of powers, it misapplied the doctrine and erroneously concluded that the Resentencing Amendment encroached on the discretion of the judiciary. In holding that the retro-

30. *Id.* at 784.

31. *Id.* at 797 (Roberts, J., dissenting).

32. *Id.* (Manderino, J., dissenting).

33. *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949) (upheld legislation regulating salaries of court employees); *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942) (upheld legislative creation of parole board); *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446 (1862) (penitentiary inspectors entitled to use discretion in determining whether prisoner is entitled to discharge).

34. *Pennsylvania Co. v. Scott*, 346 Pa. 13, 29 A.2d 328 (1942) (judgment is property of which creditor cannot be deprived without due process of law); *De Chastellux v. Fairchild*, 15 Pa. 18 (1850) (legislative grant of new trial deprived plaintiff of a judgment which was his property); *Greenough v. Greenough*, 11 Pa. 489 (1849) (legislative attempt to overrule judicial decision concerning disputed claim under will violated due process).

35. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976); *United States v. Brown*, 381 U.S. 437, 443 (1965).

active application of the amendment would distort the exercise of judicial discretion which permitted a plea to a lesser offense,³⁶ Justice Nix focused on the effect of the amendment in a particular case. An anomalous result in an individual case, however, goes to the wisdom of the legislature in passing the amendment, which is not a proper subject for judicial inquiry when assessing the constitutionality of a statute.³⁷

The Resentencing Amendment simply changes the range within which an individual may be sentenced. This does not interfere with the discretion of the judiciary in determining the appropriate sentence for a particular case since the courts must always work within the limits prescribed by the legislature.³⁸ Since the legislature is not dictating the outcome of a particular case or directing that the law be applied in a particular manner, the independence and discretion of the judicial branch are preserved. Thus, there is little basis for invoking the doctrine of separation of powers.

It is also difficult to justify the decision on the basis of finality of judgments. While the doctrine of separation of powers functions to preserve the independence of the judiciary as a branch of the government, the rule of inviolability of judgments is not designed to protect the court, but to protect individual litigants who are parties to the action.³⁹ Invoking the final judgment rule in this case frustrates the interests of the only parties who are involved: the state no longer maintains an interest in severely punishing this type of behavior, and the defendants have no desire to retain the more restrictive penalties.

The court protected itself against an imagined intrusion into its powers at the expense of the litigants, and ironically, with the very rule designed to protect litigants. The Resentencing Amendment "reduces" final judgments, but in doing so the legislature is not reviewing a finding of guilt, nor finding an abuse of discretion in the

36. 378 A.2d at 787.

37. See note 10 *supra*.

38. Indeterminate sentencing grants broad discretion to the trial judge who must determine the proper sentence after considering the alternatives and range of permissible penalties. *Commonwealth v. Martin*, 466 Pa. 118, 130-31, 351 A.2d 650, 656-57 (1976).

39. *Pennsylvania Co. v. Scott*, 346 Pa. 13, 16-17, 29 A.2d 328, 329-30 (1942), stated that a prime reason for the prohibition against impairing judgments is that "a judgment is property of which, under state and federal constitutional prohibitions, the judgment creditor cannot be deprived without due process of law." See generally Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. L. REV. 540 (1976); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

court's original sentencing, but is simply changing its own determination of the appropriate sentence range. Since the statute reduces penalties, the constitutional provision against *ex post facto* laws is not violated.

The majority attempted to support the contention that legislative attempts to alter the effect of a judicial decree are unconstitutional by citing numerous Pennsylvania cases striking down legislative interference.⁴⁰ However, those decisions were civil cases dealing with express constitutional prohibitions against the taking of property without due process or impairing vested rights and are therefore inappropriate. Additionally, the majority's strong reliance on *Commonwealth ex rel. Banks v. Cain*⁴¹ for the proposition that a final judgment of sentence may not be disturbed by a subsequent legislative change is misplaced. *Banks* upheld the legislative power to create a parole board and permitted the retroactive application of this legislation to cases where sentence was imposed before the effective date of the act. The dictum in *Banks*, that the legislature may not interfere with the duration of a sentence, was true to the extent that the legislature could not permit a parole board, an executive agency, to interfere with the range of sentence imposed by the court. It is still within the province of the legislature, however, to determine the range within which the court may impose sentence.⁴²

That the inviolability of final judgments is an ancient rule which is widely recognized and universally applied is undisputed. However, since the rule is based on the need to protect property rights of private litigants,⁴³ its automatic application to a case involving a criminal statute which operates to reduce penalties is not justifiable.

The problems inherent in a separation of powers and finality of judgments analysis could have been avoided if the majority had based its decision on an analysis of the legislative power to pardon. This approach, which is better suited to the issues presented by

40. See notes 33 and 34 *supra*.

41. 345 Pa. 581, 28 A.2d 897 (1942).

42. Justice Roberts felt the dictum in *Banks*, that legislation may not affect the duration of sentence, was an effort to avoid overruling *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446 (1862), where the decision was reached independently of constitutional grounds. Roberts reasoned that *Johnson* was unsound since it was based on common law offenses and not statutory offenses where the judicial discretion to sentence is granted by the legislature, as in the instant matter. 378 A.2d at 795-96 (Roberts, J., dissenting).

43. See note 39 *supra*.

Sutley, requires a determination of whether the legislature may partially pardon by reducing the punishment for a class of offenders.⁴⁴ The majority considered this only superficially, and a careful consideration of this issue compels a contrary result to that reached by the majority.⁴⁵

The legislature possesses the authority to make, alter, and repeal laws, and absent an express constitutional provision, its authority is basically unlimited and probably encompasses the inherent power to pardon.⁴⁶ Executive authority, however, is expressly provided for, as illustrated by the constitutional provision which grants the executive the power to pardon in specific cases.⁴⁷ In determining whether the legislature retains a general power to pardon in light of the express grant to the executive, the controversy necessarily focuses on whether the express and specific language granting the power to the executive denies the implied power in the legislature. The majority felt that the specificity in defining the limitations in the express grant to the executive negated an inference that an implied power exists in the legislative.⁴⁸

44. The majority declined to accept the pardoning power argument and also stated that even if the power were implicated, the Resentencing Amendment would not be a valid exercise of it since it still required the individual to serve a sentence and did not totally expunge the record of conviction. 378 A.2d at 789.

45. *Ex parte Giles*, 502 S.W.2d 774 (Tex. 1974), and *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97 (Tex. 1973), dealt with a controlled substances law similar to the Pennsylvania Resentencing Amendment. The law, which attempted to reduce sentences of those whose convictions were final, was held unconstitutional not on the basis of interference with judicial judgments, but as an intrusion into the executive power to commute sentences. The Texas Constitution, however, expressly provides that a power given to one branch may not be exercised by any other branch. TEX. CONST. art. II, § 1. Additionally, TEX. CONST. art. IV, § 11A gives the courts original jurisdiction after a conviction to suspend execution of sentence.

46. The Pennsylvania legislature's power to grant pardons is limited only by the Pennsylvania Constitution. The general rule is that all powers not expressly withheld from the legislature inhere in it. *Commonwealth ex rel. Kelley v. Keiser*, 340 Pa. 59, 66, 16 A.2d 307, 310 (1940). The majority, however, apparently misread *Kelley* and cited it as standing for the proposition that a power does not inhere to the legislature if it has specifically been withheld or entrusted to another branch of government. 378 A.2d at 788.

47. PA. CONST. art. 4, § 9(a): "In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons"

48. Justice Manderino, 378 A.2d at 798, answered the majority's argument by quoting from *United States v. Hughes*, 175 F. 238, 242 (W.D. Pa. 1892): "In Pennsylvania the power of pardon was vested in the legislative branch by the inherent power . . . and in the executive by constitutional provision. The grant of this power to the executive was no limitation on the right of the power granting it"

Although a recent federal case, *Singleton v. Shafer*,⁴⁹ indicated that in Pennsylvania the exclusive jurisdiction to pardon in individual cases lies in the executive, an argument may still be made, based upon a line of older federal cases,⁵⁰ that the legislature retains a general power to pardon a class of offenders. *United States v. Hughes*,⁵¹ an 1892 decision, noted that while in Pennsylvania pardons are usually granted by the executive, the pardoning power is not specifically confined to that branch but is vested in the legislature. According to *Hughes*, the grant to the executive in all criminal cases except impeachment applies to situations in which the executive power is directed to individuals, but the fact that power is delegated by name to the executive does not preclude the legislature from granting amnesty to a general class of offenders.⁵²

In *Brown v. Walker*,⁵³ the Supreme Court upheld the validity of a federal statute which gave witnesses immunity from prosecution. The Court noted that although the Constitution vests in the executive the power to grant reprieves and pardons in all cases except impeachment, this power is generally exercised only in individual cases. The *Brown* Court found no practical distinction between amnesty and pardon, and interpreted amnesty as the act of granting a pardon on behalf of a class of persons rather than individuals.⁵⁴ Thus *Brown*, which construed a legislative grant of power similar to that in the Pennsylvania Constitution, may be considered a recognition of the power of the legislature to grant general pardons.⁵⁵

In Pennsylvania, the only express restriction against the legislative power is that no local or special law may be passed which can be provided for by general law.⁵⁶ While specific legislation directed

49. 313 F. Supp. 1094 (E.D. Pa. 1970) (commutation under "good-time" statute is matter of executive discretion and there is no vested right in having sentence reduced).

50. See, e.g., *United States v. Hughes*, 175 F. 238 (W.D. Pa. 1892) (grant of power to executive is no limit on legislative right to exercise pardoning power); *United States ex rel. Malesevic v. Perkins*, 17 F. Supp. 851 (W.D. Pa. 1936) (pardon conferred by statute had same effect as if governor granted free and unconditional pardon).

51. 175 F. 238 (W.D. Pa. 1892).

52. *Id.* at 242.

53. 161 U.S. 591 (1896).

54. *Id.* at 601-02.

55. In *Brown*, the defendant had been found guilty of contempt for refusing to testify. The Court held that a federal statute which prohibited further criminal prosecution based on an individual's testimony in effect conferred a legislative pardon on that individual. If the Resentencing Amendment is viewed as general legislation exercising the inherent pardoning power of the legislature, inviolability of judgments is not an issue.

56. PA. CONST. art. 3, § 32.

to an individual may be construed as a conflict with the executive power, no express constitutional provision is violated by legislation which is applicable to a general class of offenders. Once it is established that the legislature may pardon absolutely, it is logical to conclude that it may also exercise this power partially, as illustrated by the reduced sentences of the Resentencing Amendment.⁵⁷ If the reasoning of *Brown v. Walker*⁵⁸ is to be followed, it is contingent upon the finding that the power to provide amnesty or pardons is concurrent between the two branches. Of all the branches, the legislature is best suited to make the determination that punishment for a class of offenders should be reduced. A judicial finding that the legislature possesses this power would not threaten the supremacy of the judiciary, but would require consideration of the effect of potential erosions to the executive power.

Unquestionably, the legislature may provide for reduced sentences for marijuana convictions, but the Pennsylvania Supreme Court has indicated that regardless of the legislative intent, the benefit of these lesser penalties will not be extended to those defendants whose judgments are final. In holding the Resentencing Amendment unconstitutional, the court protected its own power, which was never really threatened, at the expense of the legislature and the defendants.

It is not clear whether the majority's failure to find a legislative pardoning power, although recognized by the dissents, will become mere dicta, or whether the older cases which recognize a general legislative pardoning power will remain viable. If future cases specifically addressed to the legislative pardoning power do arise, it will be interesting to see if the Pennsylvania judiciary will guard the executive power as jealously as it guards its own powers.

Vicki C. Thompson

57. See note 44 *supra*.

58. 161 U.S. 591 (1896).