

No. 25143 - City of Clarksburg, a municipal corporation v. Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio dba Highrise Associates; Kathryn Folio; Joseph Folio.

No. 25401 - The City of Huntington, a West Virginia municipal corporation v. Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston.

No. 25402 - Wheeling College, Inc., a West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston v. The City of Wheeling, a municipal corporation AND The City of Wheeling, a municipal corporation v. The Ohio County Board of Education.

Maynard, Justice, dissenting:

I dissent because I believe the Catholic Church, as well as all churches, and all public and other schools are exempt under W.Va. Code § 11-3-9 (1998) from paying this wolfish tax which is cloaked in the garb of a sheepish fee.¹

¹I dissent specifically to this Court's decisions in case numbers 25401 and 25402 involving the Roman Catholic Diocese, schools and boards of education. I believe there is no reason the appellants in case number 25143 should not pay the "fee" at issue since, unlike churches and schools, they

are not exempted under W.Va. Code § 11-3-9.

First, I note the great importance of the municipal taxes at issue here. Government performs no more important service than providing its citizens with fire protection. This is a very basic and historical government service, and one that private citizens are unable to undertake for themselves. In order to provide this service, local governments must staff fire departments with trained personnel and provide these personnel with modern firefighting equipment. This requires a lot of money. This money is generated through the levying of taxes on those who reap the benefits of effective fire protection. This is at it should be.

However, Article X, § 1 of the Constitution of West Virginia provides, in part, that “property used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation.” This constitutional authorization is codified by the Legislature in W.Va. Code § 11-3-9 (1998). Specifically, W.Va. Code § 11-3-9 provides, in pertinent part:

(a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

(5) Property used exclusively for divine worship;

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

This code section derives, at least in part, from the recognition that those enumerated institutions which are supported by the public, either through taxation or private gifts, and that exist for the educational, literary, scientific, religious, or charitable enrichment of society should fulfill their missions absent the burden of taxation. This is altogether fitting and proper. The majority, however, resorts to semantic sophistry in order to avoid the unambiguous language of W.Va. Code § 11-3-9. In short, the majority holds that a tax is not a tax when it is called a fee.

In holding that if a tax is called a “fee” it can be levied against those institutions lawfully exempt from taxation, the Court opens wide the

door for unlimited government collection of so-called fees. Government's penchant for taxation depends on its ability to devise increasingly creative and expensive schemes to justify the need for the levying of additional taxes. It will not be long now before legitimate "fees" for fire and flood protection are joined by more questionable "fees" such as recreation fees, clean air fees, pollution fees, beautification fees, road paving fees, garbage fees, cultural event fees, parking fees, sporting event fees, and regatta fees. Anyone doubting that such a proliferation of government "fees" could and will occur need only look at the history of taxation in the United States in the twentieth century to be convinced. Also, while the above-mentioned "fees" may be collected to pay for desirable things, these "fees" should be labeled what they really are: taxes.

"The power to tax involves the power to destroy," noted Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819). This is also true of the power to collect "fees." No matter what you call it, the money taken from the Catholic Diocese and the schools involved in this case means that there is less money in the operating

budgets of these institutions. This is money that would otherwise be spent on teachers' salaries, new textbooks, equipment, or building improvements.

In his oral argument before this Court, the lawyer for the Ohio County Board of Education and Wheeling Jesuit University contended that the board of education will be forced to pay almost one million dollars a year out of the school budget as a result of this "fee." This "fee," therefore, is really a tax paid by the school children in Ohio County to the detriment of their education. Regardless of whether the collection of the money is called a tax or a fee, it has the same effect on the appellants' finances.

Shakespeare wrote, "That which we call a rose by any other name would smell as sweet."² The Bard's words are equally true regarding the noxious odor of taxes. That which we call a tax by any other name smells just as bad.

In sum, I agree with the United States Court of Appeals, Fourth Circuit in *United States v. City of Huntington, West Virginia* in its assessment that the Huntington user fee "is a thinly disguised tax." 999 F.2d 71, 74. I believe this is true of all the fees involved here. Further,

²*Romeo and Juliet*. Act II, Sc. 2, Line 43.

the Court of Appeals held that the federal government is immune from paying these exact same fees. Therefore, I would hold that if the federal government is immune from paying a “fee,” the other entities listed in W.Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse now must be to the federal courts to set things right. Accordingly, I would find that W.Va. Code § 11-3-9 exempts the Diocese and the schools from paying the “fees” at issue. This is clearly one instance in which the Diocese should not be bound to render unto Caesar. By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

I am authorized to state that Justice McCuskey joins me in this dissent.

