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The Forty-Two Hundred Dollar Question: May State Agencies Have Discretion in Setting Civil Penalties under the North Carolina Constitution

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The Forty-Two Hundred Dollar Question: "May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?"

In North Carolina more than thirty state agencies possess statutory authority to assess civil penalties, and many have discretion over the amount charged.[1] North Carolina courts have held that the authority to establish the amount of a penalty is judicial in nature.[2] As such, this discretion appears to violate the separation of powers clause of the North Carolina Constitution,[3] which requires that "the legislative, executive, and supreme judicial powers . . . be forever separate and distinct from each other."[4] The state constitution does provide, however, that judicial power may be vested in an administrative agency "as may be reasonably necessary as incident to the purposes for which the agencies were created."[5] Thus, whether an agency may hold judicial power, such as the discretion to set the amount of penalties, ultimately rests in the reasonable necessity of that power in fulfilling the agency's statutory objectives.

When assessments of civil penalties are challenged, few of the contestants proffer constitutional theories as the basis of their objections.[6] Agency discretion in setting penalty amounts did face a test of constitutionality when brought to the attention of the North Carolina Supreme Court in *In re Appeal from Civil Penalties*.[7] In *In re Appeal* the court held valid the Department of Natural Resources and Community Development's (NRCD) ability to set the amount of penalties for violations of the Sedimentation and Pollution Control Act[8] under article IV of the state constitution. The North Carolina Supreme Court had not addressed the validity of flexible fines since 1968 in *State ex rel. Lanier v. Vines*,[9]

1. *See, e.g.*, N.C. GEN. STAT. § 113A-126(d) (1989) (Coastal Resources Commission granted power to assess fines up to $250 for minor violations and up to $2500 for major violations); *id.* § 125-2(6) (1986) (Department of Cultural Resources given power to fix reasonable penalties for damage or failure to return books or other material to library); *id.* § 143-151 (1987) (Commissioner of Insurance granted power to fine up to $1000 penalty for each violation of the Code for Manufactured Homes, maximum not to exceed $1,000,000 per year); see also New Brief for the State at app., In re Appeal from Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989) (No. 543A88) (list of state agencies with civil penalty authority).

2. *See* State *ex rel.* Lanier v. Vines, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968). Discussing a statute granting the Commissioner of Insurance power to assess a penalty, the Lanier court said, "[A]pplication of the law, . . . so as to make the penalty commensurate with the conduct of the agent in question is of the essence of judicial power." *Id.* at 496, 164 S.E.2d at 167; *see also* 1 AM. JUR. 2D Administrative Law § 173 (1962) (discussing the judicial nature of the power to decide and pronounce judgments).

3. N.C. CONST. art. I, § 6.

4. *Id.*

5. *Id.* art. IV, § 3.

6. *See, e.g.*, Pamlico Marine Co. v. North Carolina Dep't of Natural Resources, 80 N.C. App. 201, 341 S.E.2d 108 (1986) (appeal from $250 penalty for violation of the Coastal Area Management Act claiming permit requirement not applicable to fact situation); State *ex rel.* Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 384 (1983) (challenge to penalty for violation of the Sedimentation Pollution Control Act claiming lack of effective administrative remedy).

7. 324 N.C. 373, 379 S.E.2d 30 (1989).

8. N.C. GEN. STAT. § 113A-64(a)(2) (1983) (amended 1989).

9. 274 N.C. 486, 164 S.E.2d 161 (1968).

when the court examined the reasonable necessity of the Commissioner of Insurance's power to impose a penalty varying from a nominal sum to $25,000.[10] *In re Appeal* is significant because it updates the judiciary's view of the role that varying penalties play in modern law enforcement in consideration of the limits imposed on the discretion to set those penalties. While *In re Appeal* does not establish the constitutionality of every state statute permitting flexible fines, it limits the scope of *Lanier* and establishes guidelines for determining when administrative discretion is reasonably necessary and thus constitutional.

This Note examines the logic supporting *In re Appeal* in light of case history and policy concerns. It discusses one possible rationale for limiting the *Lanier* holding and expresses concerns about expanding the reasonable necessity of varying penalties. The Note concludes that although *In re Appeal* is a needed aid in defining the constitutionality of many administrative penalties, its holding may leave the validity of many statutes in question.

In 1983 real estate developers Dennis Harris, Natalie Harris, and Roy Hall subdivided eighteen acres of land in Caldwell County without taking the sedimentation control measures required by statute.[11] An NRCD inspection resulted in the issuance of a Notice of Violation, which warned that the department could impose a civil penalty if the developers did not correct the violations.[12] The department issued the notice in accordance with a North Carolina statute that gives the Commissioner of the NRCD authority to assess penalties of "not more than one hundred dollars"[13] for violations of the Sedimentation Pollution Control Act. The statute also allows the Commissioner to consider each day of continuing violation as a separate violation.[14]

In January 1984 the NRCD assessed against the developers a civil penalty of seventy-five dollars a day for fifty-six days covering a period from mid-October to mid-December 1983, totalling $4,200.[15] In October 1985 an NRCD hearing officer affirmed the penalty and demanded payment from the developers.[16] The developers appealed the officer's decision to superior court. They claimed the agency lacked jurisdiction to fine Hall because it had not notified him of the violation.[17] They also claimed the penalty was "arbitrary and excessive."[18] The developers did not argue that the statute granting the NRCD power to assess the size of the penalty was unconstitutional, but only disputed the reasonableness of the penalty amount. The superior court did not specifically address either of the

10. *Id.* at 497, 164 S.E.2d at 167-68.

11. *In re Appeal*, 324 N.C. at 375, 379 S.E.2d at 31-32.

12. *Id.* One means of preventing sedimentation pollution is to create a natural or artificial buffer around the area being developed. The court considered inadequate the defendants' attempt to prevent sedimentation with hay bales after being notified of their violation. Record at 9-11, *In re Appeal* (No. 543A88).

13. N.C. GEN. STAT. § 113A-64(a)(1) (1983) (amended 1989). The 1989 amendment raised the $100 per day limit on penalties to $500 per day. *Id.* § 113A-64(a)(1) (1989).

14. *Id.* § 113A-64(a)(1) (1989).

15. *In re Appeal*, 324 N.C. at 375, 379 S.E.2d at 32.

16. *Id.*

17. Record at 20.

18. *Id.* at 18.

developers' contentions, but chose instead to base its judgment on a constitutional objection that apparently was not asserted in the pleadings.[19] The court vacated the penalty on the ground that the NRCD had absolute discretion to establish the amount of the fine in violation of Article I section 3 of the North Carolina Constitution.[20]

Although it rejected the trial court's "absolute discretion" rationale, a divided panel of the North Carolina Court of Appeals upheld the superior court's decision.[21] Instead, the majority followed *Lanier* and held that the state constitution "does not permit an administrative agency to assess a civil penalty whose amount varies with any agency discretion."[22] The *Lanier* decision prohibited the Commissioner of Insurance from exercising discretion to set penalties up to $25,000[23] and, according to the court of appeals, determined "the constitutionality of any agency penalty whose amount varied in the discretion of the agency."[24] The court of appeals realized its decision might create a undesirable result, stating that:

> While we agree that *Lanier*, a twenty-year-old case, may not express the "modern" view of an agency's exercise of judicial powers, *Lanier* controls the result in this case. . . . We agree the long term enforcement of the Act would be better served by our Supreme Court's overturning *Lanier* than by our drawing questionable distinctions which *Lanier* has in any event rejected in advance.[25]

Nevertheless, because the court of appeals considered itself obliged to follow a strict interpretation of *Lanier*, it affirmed the lower court's holding that the penalty was unconstitutional.[26] Judge Becton dissented, arguing *Lanier* did not hold that the power to impose "a varying penalty offends our Constitution in all circumstances."[27] Judge Becton read *Lanier* to mandate a case-by-case analysis of discretionary penalties.[28]

The North Carolina Supreme Court agreed with Judge Becton that prior precedent did not invalidate all discretionary agency penalties.[29] The NRCD's judicial power, the court found, was reasonably necessary considering the agency's purpose, the range of discretion granted, and the guidelines that accompanied the discretion.[30] The supreme court did not overturn *Lanier* as the court of appeals recommended. Rather, the supreme court confined *Lanier* strictly to

19. *In re* Appeal from Civil Penalty, 92 N.C. App. 1, 6, 370 S.E.2d 572, 575 (1988), *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

20. *In re Appeal*, 324 N.C. at 375-76, 379 S.E.2d at 32.

21. In re Appeal from Civil Penalty, 92 N.C. App. 1, 10, 373 S.E.2d 572, 577-78 (1988), *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

22. *Id.* at 11, 373 S.E.2d at 578.

23. State *ex rel.* Lanier v. Vines, 274 N.C. 486, 497, 164 S.E.2d 161, 167-68 (1968).

24. *In re* Appeal from Civil Penalty, 92 N.C. App. 1, 12-13, 373 S.E.2d 572, 579, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

25. *Id.* at 18, 373 S.E.2d at 582.

26. *Id.*

27. *Id.* at 19, 373 S.E.2d at 582 (Becton, J., dissenting).

28. *See id.* at 19, 373 S.E.2d at 583 (Becton, J., dissenting).

29. *In re Appeal*, 324 N.C. at 379-80, 379 S.E.2d at 34.

30. *Id.* at 381-83, 379 S.E.2d at 35-36.

its own facts and found it not inconsistent with the constitutional principal that judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes.[31]

Having reached the conclusion that the state's constitution permitted agency discretion in setting penalty amounts, the supreme court next examined whether discretion is reasonably necessary for the purposes of sedimentation pollution control. In doing so, it evaluated the purposes of the NRCD as well as the objectives of sedimentation pollution control.[32] Noting that time is of the essence in preventing sedimentation pollution, the court concluded that the power to levy a civil penalty may provide swifter compliance than injunctive remedies sought in courts.[33]

The court then examined the judicial power[34] to be conferred upon the NRCD, including an assessment of the restraints on that power, in order to establish the extent of the NRCD's discretion.[35] The court considered the amount of the penalty (with a fixed ceiling of $100 per day) as well as mandatory standards for determining what constitutes a violation.[36] The supreme court observed that "plenary guiding standards exist to check the exercise of NRCD discretion"[37] and noted the five factors[38] that the NRCD considers when assessing the penalty amount. In its analysis, the court also mentioned the availability of numerous grounds for judicial review of the penalty.[39]

The North Carolina Supreme Court addressed the issue of agency discretion to set fines over twenty years ago in *State ex rel. Lanier v. Vines*.[40] The court examined a statute that conferred "upon the Commissioner of Insurance a discretion, subject to no guiding rules or standards, to impose a civil penalty not in excess of $25,000."[41] The statute also gave the Commissioner power to permanently revoke the licenses of agents who violated it.[42] In determining that the

31. *Id.*

32. *Id.* at 380-81, 379 S.E.2d at 34-35.

33. *Id.* For a discussion of the hazards of sedimentation pollution, see Brief for Amici Curiae (North Carolina Council of Trout Unlimited and the North Carolina Wildlife Federation) at 12-13, *In re Appeal* (No. 543A88).

34. Judicial power is the ability "to decide and pronounce judgment and carry it into effect" in contrast to the administrative power to make "provisional decisions of questions of law." 1 AM. JUR. 2D *Administrative Law* § 173 (1962); *see also infra* notes 43-45 and accompanying text (describing the legislature's ability to grant judicial power).

35. The examination of guidelines is common practice in cases judging the validity of delegation of legislative authority to agencies. *See, e.g.*, Adams v. North Carolina Dep't of Natural and Economic Resources, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (Constitution does not inhibit the delegation of legislative authority to Coastal Resources Commission if accompanied by adequate guiding standards).

36. *In re Appeal*, 324 N.C. at 382-83, 379 S.E.2d at 36.

37. *Id.*

38. The five factors consist of the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, whether the violation was committed willfully, and the prior record of the violator in complying with the statute. *Id.; see also* N.C. GEN. STAT. § 113-649(a)(3) (1983) (amended 1989).

39. *In re Appeal*, 324 N.C. at 383, 379 S.E.2d at 36.

40. 274 N.C. 486, 164 S.E.2d 161 (1968).

41. *Id.* at 488, 164 S.E.2d at 162.

42. *Id.* at 490, 164 S.E.2d at 163; *see also* N.C. GEN. STAT. § 58-44.6 (1965) (repealed 1983).

discretion to set the penalty amount was not reasonably necessary to accomplish the purposes of the Commissioner, the *Lanier* court emphasized the difference between the legislature's power to delegate its own authority and the legislature's limited ability to confer judicial authority upon an agency.[43] The court noted that constitutional issues arise when the legislature attempts to give away judicial power—power that the legislature itself does not have.[44]

The court began by stating that the prescription of standards to guide and confine administrative officers was a delegation of legislative power. Because judicial powers were at issue, however, the court considered irrelevant the absence of guidelines controlling administrative discretion. The court stated:

> [W]e are not here concerned with whether the Legislature has or has not prescribed standards to guide and confine the administrative officer in his exercise of the power conferred. With or without standards to guide the administrative discretion, the Legislature cannot confer upon an administrative officer judicial power, except within the limits specified in Art. IV, § 3, of the Constitution.[45]

Thus, the *Lanier* court implied that even if the statute had contained standards to guide the Commissioner's discretion, it would not necessarily have been constitutional.

Lanier established a method of examining the necessity of judicial power without examining limitations that the statute might confer along with the grant of discretion. The court claimed that an examination of the prescription of standards or limitations included in the statute was not relevant. However, the court did insist that "the nature and extent" of the discretionary powers of the Commissioner should be a consideration in determining their reasonable necessity.[46] The decision also warranted an examination of the discretion afforded the Commissioner in light of the purpose "for which the agency was established."[47] Without elaborating on the extent of power or the purpose of the Commissioner, the *Lanier* court then declared that the power to revoke a license, as well as the power to hold hearings to determine facts relating to violations, were "reasonably necessary."[48] The court, however, did not find reasonably necessary the "judicial power to impose . . . a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation."[49]

Many years later, *Lanier* guided the North Carolina Court of Appeals in

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43. *See Lanier*, 274 N.C. at 495, 164 S.E.2d at 166.

> Strictly speaking, there is no delegation of the judicial power to the Commissioner by this statute. One delegates his own authorities or powers, not those of another. A branch of government, like an individual, may not delegate powers it does not have. The legislature has, however, by this statute, undertaken to confer upon the Commissioner of Insurance a part of the judicial power of the state. We must, therefore, determine its authority to do so in the light of the foregoing provisions of the Constitution of North Carolina.

Id.

44. *Id.* at 496, 164 S.E.2d at 167.
45. *Id.*
46. *Id.* at 497, 164 S.E.2d at 168.
47. *Id.*
48. *Id.* at 497, 164 S.E.2d at 167.
49. *Id.* at 497, 164 S.E.2d at 167-68.

Young's Sheet Metal & Roofing v. Wilkins,[50] in which a truck driver challenged the authority of the Department of Motor Vehicles (DMV) to fine him for exceeding the weight allowed under his license. The statute in question did not provide a specific penalty for that violation,[51] but did provide for penalties for exceeding maximum axle-weight limits.[52] As was the case here, the licensed weight limit can be less than the axle limit resulting in a violation of the licensed limit but not of the maximum axle-weight limit. The driver questioned the DMV's attempt to extrapolate authority to fine for one violation onto a similar violation that did not include a penalty provision.[53] Reading *Lanier* as broadly objecting to any agency discretion in setting fines,[54] the court struck down the DMV penalty because allowing it would give the DMV an absolute ability to set penalties not provided for by statute, which was "even more discretion" than the supreme court struck down in *Lanier*.[55]

The court of appeals again reviewed *Lanier* in *North Carolina Private Protective Services Board v. Gray, Inc.*[56] The defendant in *Gray* challenged a $2000 penalty for failure to register his employees in violation of chapter 74C, section 17(c) of the North Carolina General Statutes.[57] The statute grants the Private Protective Services Board authority to impose a civil penalty not exceeding $2000 in lieu of revoking or suspending licenses.[58] Unlike the court in *Young's Sheet Metal*, the court of appeals did not interpret *Lanier* to "mean that all administrative civil penalties are per se in violation of the State Constitution."[59] The court distinguished the statute in question from the one at issue in *Lanier* on the basis that it contained guidelines for setting penalties rather than giving the agency unfettered discretion to set penalties up to a certain maximum.[60]

In *In re Appeal* the court of appeals objected to the *Gray* court's method of distinguishing *Lanier* based on the presence of guidelines limiting agency discretion.[61] The court of appeals applied its narrow interpretation of *Lanier* because it refused to distinguish *In re Appeal* from *Lanier* based on the difference in

50. 77 N.C. App. 180, 334 S.E.2d 419 (1985), *cert. denied*, 316 N.C. 202, 341 S.E.2d 574 (1986). The superior court in *In re Appeal* relied on *Young's Sheet Metal* for its determination that the "absolute discretion" given to the NRCD by General Statutes § 113A-64(a)(1) was unconstitutional. *See In re Appeal*, 92 N.C. App. 1, 10-11, 373 S.E.2d 572, 578 (1988), *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989). The North Carolina Court of Appeals subsequently ruled that the statute did not permit absolute discretion and thus ended the case's reliance on *Young's Sheet Metal*.

51. *Young's Sheet Metal*, 77 N.C. App. at 182, 334 S.E.2d at 420 (citing N.C. GEN. STAT. § 20-96 (Supp. 1974) (amended 1985); *id.* § 20-118 (Cum. Supp. 1981)).

52. *Id.; see* N.C. GEN. STAT. § 20-96 (Supp. 1974) (amended 1985); *id.* § 20-118 (Cum. Supp. 1981).

53. *Young's Sheet Metal*, 77 N.C. App. at 181, 334 S.E.2d at 420.

54. *Id.* at 183, 334 S.E.2d at 421.

55. *Id.*

56. 87 N.C. App. 143, 360 S.E.2d 135 (1987).

57. *Id.* at 144, 360 S.E.2d at 136 (citing N.C. GEN. STAT. § 74-17(c) (1985)).

58. N.C. GEN. STAT. § 74C-17(c) (1985).

59. *Gray*, 87 N.C. App. at 146, 360 S.E.2d at 137.

60. *Id.* at 147, 360 S.E.2d at 138. In addition to setting a maximum penalty of $2000, the statute requires that the amount of harm be considered in the penalty's assessment and that the penalty be in lieu of revocation or suspension. *See* N.C. GEN. STAT. § 74C-17(c) (1985).

61. *In re* Appeal from Civil Penalty, 92 N.C. App. 1, 18, 373 S.E.2d 372, 382, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

standards included in the statutes—not an unfounded decision in light of the *Lanier* court's refusal to consider those factors.[62] *Lanier*, after all, claimed to reach its decision on flexible fines without regard to legislative guidelines or lack thereof.[63] Arguably, the only element of the statute that the *Lanier* court examined was discretion. However, the *Lanier* court did not specify whether the grant of discretion was unnecessary in light of the Insurance Commission's purpose or in light of the extent of the judicial power that discretion represented, although it mentioned both considerations in its decision.[64] *Lanier* merely held that the legislature could not grant the power to set a varying penalty to the Commissioner under article IV section 3 of the North Carolina Constitution,[65] which mandates the reasonable necessity of judicial powers granted to the executive branch. Disregarding *Lanier*'s failure to explicitly examine the Commissioner's discretion in regard to the factors mentioned, the court of appeals in *In re Appeal* insisted that *Lanier* "permits only the judiciary (rather than the agency itself) to assess a varying penalty."[66] The majority did not pay attention to the few lines in the *Lanier* opinion that claimed to limit the decision to the question of the Commissioner's discretion.[67]

Though the *Lanier* court provided the opportunity, the court of appeals did not distinguish *In re Appeal* based on the differences in the purposes of the NRCD and the Insurance Commission. Although the court of appeals briefly discussed the purposes of the NRCD,[68] it focused more narrowly on the nature of the power granted the agency.[69] The court of appeals failed to consider that the *Lanier* court, though not articulating its analysis, claimed to have reviewed the power granted the Commissioner in light of the purposes for which the agency was created; that is, the Commissioner's duty to prevent agent dishonesty.[70] The tendency to read *Lanier* without focusing on this claim, no doubt arises from *Lanier*'s concern for and emphasis on the type of powers to be scrutinized.

The difference between the supreme court's interpretation of *Lanier* and that of the court of appeals lies in the attention each court paid to the reasoning process of *Lanier*.[71] Unlike the court of appeals, the supreme court did not feel

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62. *See supra* text accompanying note 45. The supreme court in *In re Appeal* held that the court of appeals had erred by not following *North Carolina Protective Servs. Bd. v. Gray, Inc.*, which addressed the same questions raised in *In re Appeal*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that panel unless it has been overturned by a higher court." *In re Appeal*, 324 N.C. at 384, 379 S.E.2d at 37.

63. State *ex rel.* Lanier v. Vines, 274 N.C. 486, 496, 164 S.E.2d 161, 167 (1968).

64. *Id.* at 496, 164 S.E.2d at 167.

65. *Id.* at 497, 164 S.E.2d at 168.

66. *In re* Appeal from Civil Penalty, 92 N.C. App. 1, 18, 373 S.E.2d 572, 582, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

67. *See Lanier*, 274 N.C. at 497, 164 S.E.2d at 168.

68. *In re* Appeal from Civil Penalty, 92 N.C. App 1, 11-12, 373 S.E.2d 572, 578, *rev'd*, 324 N.C. 373, 379 S.E.2d 30 (1989).

69. *Id.* at 12, 373 S.E.2d at 578-79.

70. *See* N.C. GEN. STAT. § 58-9 (1965) (repealed 1983) (vesting the Commissioner with the duty of preventing "practice injurious to the public by insurance companies").

71. Some have suggested that the court of appeals in *In re Appeal* placed too much emphasis on

obliged to interpret *Lanier*'s holding in light of the five paragraphs explaining why guidelines are irrelevant to the determination of reasonable necessity.[72] Rather, the supreme court narrowly focused on the holding alone. Considering the lengthy review preceding the holding as "*obiter dicta*,"[73] the supreme court was able to confine *Lanier* to its factual situation. Unlike the court of appeals, the supreme court was attuned to the language of *Lanier* that stated:

> Whether a judicial power is "reasonably necessary as an incident to the accomplishment of a purpose for which" an administrative office or agency is created must be determined in each instance in the light of the purpose for which the agency was established and in light of the nature and extent of the judicial power undertaken to be conferred.[74]

The holding of *Lanier* further supports the supreme court's conclusion that *Lanier* mandates an analysis of agency purpose and the extent of power conferred when it states, "[w]e have before us only the attempted grant to the Commissioner of Insurance the judicial power to impose upon an insurance agent . . . a penalty, varying in the commissioner's discretion . . . . We hold such power cannot be granted to him."[75] On the basis of this language, the *In re Appeal* court confined *Lanier*'s prohibition of discretion uniquely to prohibit a grant of discretion to the Commissioner of Insurance. The language shows that the *Lanier* decision did not purport to define reasonable necessity of flexible fines in all situations.

The supreme court's decision to limit the applicability of *Lanier* is consistent with other North Carolina courts' tendency to allow agencies more discretionary power in recognition of the modern role that agencies serve.[76] The supreme court agreed with Judge Becton that " 'mechanical application of the *Lanier* rule ignores the progress made in the way the role of administrative agencies is regarded.' "[77] Indeed, the legislature's recognition of increased adminis-

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a dangling preposition in the Lanier holding to reach the conclusion that it prohibited any varying penalty (as opposed to concluding that only penalties varying widely were unconstitutional). *See* Brief for Amici Curiae (North Carolina Council of Trout Unlimited and the North Carolina Wildlife Federation) at 6-7, *In re Appeal* (No. 543A88). The Amici realized the weakness in an argument based wholly on rules of grammar as is obvious from their comment, "Although amici run the risk of treading the slippery slope of 'what ifs' they feel it is interesting to note that one possible explanation for the majority opinion of the Court of Appeals in the case sub judice might be the location of an awkwardly placed prepositional phrase." *Id.*

72. *See* State *ex rel.* Lanier v. Vines, 274 N.C. 486, 495-96, 164 S.E.2d 161, 166-67 (1968).

73. *In re Appeal*, 324 N.C. at 379, 379 S.E.2d at 34.

74. *Id.* at 379, 397 S.E.2d at 34 (emphasis deleted) (quoting *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168).

75. *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168.

76. "The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies in order to ease the administration of laws as the complexity of economic and governmental conditions increases [sic]." Commissioner of Ins. v. Rate Bureau, 300 N.C. 381, 402, 269 S.E.2d 547, 563 (1980); *see also* Adams v. Department of Natural and Envtl. Resources, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) ("A modern legislature must be able to delegate—in proper instances—'a limited portion of its legislative powers' to administrative bodies which are equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly.' "); 1 AM. JUR. 2D *Administrative Law* § 118 (1951) (discussing modern administrative agencies' need for broad legislative guidelines).

77. *In re Appeal*, 324 N.C. at 381, 379 S.E.2d at 35 (quoting *In re* Appeal From Civil Penalty, 92 N.C App. 1, 20, 373 S.E.2d 572, 583 (1988) (Becton, J., dissenting)).

trative capabilities has led to increased responsibilities for the agencies. Since the supreme court decided *Lanier* in 1968, the state has created more agencies and given administrators greater authority.[78] This trend is especially true of North Carolina environmental agencies whose powers of protection have increased in the past two decades in response to the state's increased need to protect "fragile resources."[79] By 1977, growing agency involvement forced the governor to create the NRCD by joining together the Department of Natural and Economic Resources, the North Carolina Zoological Park, and the Wildlife Resources Commission.[80]

The supreme court's refusal in *In re Appeal* to interpret *Lanier* as banning flexible fines allows the supreme court to examine statutes using contemporary criteria.[81] In its holding, the supreme court in *In re Appeal* speaks of the constitutionality of administrative agencies' power to exercise discretion.[82] By referring to agencies in general, rather than to the NRCD alone, *In re Appeal* establishes that the legislature may confer discretion upon agencies across the board. A decision limited to the NRCD, or to agencies with purposes similar to the NRCD, would have left the powers of agencies with different goals in doubt.[83] Such a decision, which would potentially leave *Lanier* to govern other agencies, would have deprived many of those agencies of much of the enforcement power granted to them. Furthermore, such a decision would encourage the creation of fixed penalties, which often are considered unfair.

Variable fines allow the decision-maker to adjust the penalty according to the culpability of the offender.[84] A first-time offender may be assessed a small penalty whereas a frequent abuser of the laws may be subject to higher fines. Discretion also allows penalties to be proportional to violations. Allowing discretion, however, assumes neutrality on the part of the administrator. If administrators are biased in favor of the violators, discretion may allow the offenders to get off with a lower penalty than would a statute with a fixed fine. Concern that state agencies or commissions may hold biases is not unfounded, especially in the field of environmental protection where vast differences of opinion exist because of political or business concerns.[85]

78. Daye, *North Carolina's New Administrative Procedure Act: An Interpretative Analysis*, 53 N.C.L. REV. 833, 836 (1975) (describing increase in Agency activity up until 1975).

79. NORTH CAROLINA MANUAL 793 (J. Cheney ed. 1987-88) (history of the NRCD's development in the last decade).

80. *Id.*

81. The legislature did not enact the Sedimentation Pollution Control Act until 1973. Its purposes are better analyzed using today's criteria than standards that might have been set in *Lanier*. *See* Act to Establish a Program for the Control of Pollution from Sedimentation, ch. 392, § 15(a)(1), 1973 N.C. Sess. Laws 476, 483 (codified as amended at N.C. GEN. STAT. § 113A-64(a)(1) (1989)).

82. *In re Appeal*, 324 N.C. at 384, 379 S.E.2d at 37.

83. *See, e.g.*, Brief for Amici Curiae (Carolina Legal Assistance) at 1-3, *In re Appeal* (No. 543A88) (arguing that the Department of Human Resources would be less able to protect the rights of nursing home patients if denied the ability to impose flexible fines).

84. *See* Brief for Amici Curiae (Trout Unlimited and North Carolina Wildlife Federation), *In re Appeal* (No. 543A88).

85. *See* The News and Observer (Raleigh), Sept. 5, 1989, at 1A, col. 1 (Environmentalists express concern that the Coastal Resource Commission consists of members of the development industry.).

Though *In re Appeal* permits a grant of discretion to state agencies, it limits an agency's discretionary power to the ability to determine penalties within an authorized range.[86] In addition, adequate guiding standards must accompany the authority.[87] The court does not define, except by example, what will constitute adequate standards and authorized range. The holding of *In re Appeal* established that discretion is not prohibited by the North Carolina Constitution, but its *obiter dicta* could be considered to establish a test for the reasonable necessity of discretion. The opinion does not clarify whether statutes with different maximum fines or guiding standards would meet this test. For example, chapter 143, section 215.114(1) of the North Carolina General Statutes gives the North Carolina Environmental Commission the power to assess up to $5000 a day for violations of air-quality standards and includes only three factors to guide the determination of amount.[88] While this statute and the one challenged in *In re Appeal* both exist for the prevention of pollution, the amount of fines and guidelines differ.

Though the case may not clearly establish the constitutionality of statutes such as section 143-215.114, the danger in explicitly defining "adequate guidelines" or "authorized range" is that courts may declare some statutes unconstitutional on an arbitrary basis when discretion may be necessary for their purposes. The wiser approach to determining a statute's validity, left available by the *In re Appeal* court, is a case-by-case analysis of the challenged discretionary authority.

Future challenges to the holding of *In re Appeal* may help to clarify the definition of authorized range and adequate guiding standards. Although the case provides an opportunity for a challenger to appeal by distinguishing his statute from chapter 113A, in light of the supreme court's willingness to allow discretion in *In re Appeal*, success in limiting the scope of *In re Appeal* is not likely.

In re Appeal sets forth little that legislators, administrators, and violators alike had not assumed already. Nonetheless, the case is important because it confirms these beliefs. Upheaval of many agencies' means of enforcement would have occurred had the opinion not made such a declaration. In addition to preserving the status quo, the decision may provide legislators with additional incentives to include checks on discretion when creating statutes authorizing civil penalties. However, by bringing the issue of constitutionality to attention, the decision could subject the courts to an increase in challenges based on distinctions between statutes. Thus the true extent of a decision intended to establish the constitutionality of flexible penalties in general rests on the outcome of challenges that will be based on constitutional issues unnoticed until now.

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86. *In re Appeal*, 324 N.C. at 384, 379 S.E.2d at 37.

87. *Id.*

88. In determining the amount of the penalty the Commission shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, and the amount of money the violator saved by not having made the necessary expenditures to comply with the appropriate pollution control requirements.

N.C. GEN STAT. § 143-215.114(a)(3) (1987 & Supp. 1989).

When discretion to set the amount of penalties is permitted, discretion to assess only nominal fines also exists. The latter discretion, amounting to the ability to allow violators to escape penalties, still may threaten the effectiveness of many laws. Nonetheless, forbidding discretion of any kind, as the North Carolina Supreme Court no doubt realized, would hamper law-enforcement efforts far more than it would help them, even considering the problems of dishonesty inherent in discretionary power. The court could avoid these problems, however, by encouraging the use of guidelines to establish minimum penalties rather than only emphasizing their use as a means of preventing decision-makers from over-penalizing. But, despite its inattention to this possible use of guiding standards, the decision is historically well-reasoned and practically astute.

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