STATE COURT

# Docket Watch®

The Federalist Society for Law and Public Policy Studies: State Courts Project

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## Same-Sex Marriage in the State Courts

*By John Shu*

Gay marriage litigation continues to occur in several states. In the first half of 2006, state courts in Washington, New York, and Georgia, and the U.S. Court of Appeals for the 8th Circuit decided controversial gay marriage related cases. This article, the second in a series, will update, overview and summarize those cases.

### *I. Washington*

#### Andersen v. King County

In 1998, Washington state adopted its Defense of Marriage Act ("DOMA"), which amended Revised Code of Washington ("RCW") 26.04.010 to read "Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable;" RCW 26.04.020(1)(c) prohibits marriage "when the parties are persons other than a male and a female;" and RCW 26.04.020(3) "[a] marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection (1)(a), (1)(c), or (2) of this section."

In 2004, same-sex couples from various cities in Washington sued after being denied marriage licenses. The plaintiffs claimed that the Washington State Defense of Marriage Act of 1998 was unconstitutional under the Washington State Constitution on the following grounds: equal protection, the equal rights amendment, that marriage is a fundamental right, and the privileges and immunities clause. On July 26, 2006, the Supreme Court of the State of Washington issued its ruling declaring no constitutional right to same-sex marriage. *Andersen* is particularly interesting because, unlike the other gay marriage cases, its plaintiffs argued a privileges and immunities violation.

The court was fractured, with six opinions from nine justices. Justice Barbara Madsen wrote the lead opinion, with Chief Justice Gerry Alexander and Justice

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A FOCUS ON:

## FDA Labeling and State Liability

*By Daniel Troy*

Were state and federal courts to defer sufficiently to FDA determinations of drug safety, the negative consequences of the current liability regime would be much less pronounced. Yet this has often not been the case. In recent years, FDA's legal authority and scientific expertise over drug labeling and advertising have been implicitly, although repeatedly, questioned in state and federal courts. In response, FDA has intervened in select cases where its authority and expertise may be undermined

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INSIDE THIS ISSUE

## FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this third issue of *State Court Docket Watch* in 2006. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here are not necessarily those of the Society, but are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in assiduously tracking state court jurisprudential trends.

In this November 2006 issue, John Shu offers his second installment in a series on the treatment of same-sex marriage in state courts around the country. Also featured is an excerpt from Daniel Troy's noteworthy look at FDA labeling and state liability regimes.

Included in the issue are articles on judicidial accountability in Kansas, the Ohio Supreme Court's protection treatment of eminent domain, asbestos litigation in Michgian, and Colorado's immigration reform.

*State Court Docket Watch* invites its readers to submit articles on cases in their respective states. Please contact Debbie O'Malley at 202-822-8138 or domalley@fed-soc.org for more information.

## CASES IN FOCUS

# Same-Sex Marriage in the State Courts

Charles Johnson joining. "Here," Justice Madsen wrote, "the solid body of constitutional law disfavors the conclusion that there is a right to marry a person of the same sex." While she seemed sympathetic to the same-sex marriage cause, she indicated that the place of recourse for same-sex marriage advocates was through the political process, writing "[w]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it … [w]e see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington." Chief Justice Alexander's concurring opinion stated that the state legislature and the people of Washington have the right to "broaden the marriage act or provide other forms of civil union if that is their will."

Justice Madsen's opinion emphasized the separation of a judge's personal view from the law, writing "[i]t is important to note that the court's role is limited to determining the constitutionality of DOMA and that our decision is not based on an independent determination of what we believe the law should be … As Justice Stevens explained, a judge's understanding of the law is a separate and distinct matter from his or her personal views about sound policy. . . Personal views must not interfere with the judge's responsibility to decide cases as a judge and not as a legislator."

Justice Madsen revealed her personal viewpoint outside the court. "I did what I could do to make [the opinion] straightforward and clear," Justice Madsen said in an interview. "Obviously, from a personal point of view I might have liked a different outcome."[1]

### *Standard of Review*

The court held that the rational basis standard of review was proper because the plaintiffs failed to show that they are members of a suspect class or that they have a fundamental right to "marriage that includes the right to marry a person of the same sex." The court found that the State had a rational basis to "promote and encourage stable families." The court stated that the legislature was entitled to believe that letting only opposite-sex couples marry would "encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive." Justice Johnson stated in his concurrence that it "was reasonable for the Washington Legislature to conclude that the

biological nature of one man one woman as a reproductive unit provides an objective and non-arbitrary basis for defining marriage." The court reiterated several times that "the rational basis standard is a highly deferential standard."

### *Privileges and Immunities*

Article I, § 12 of the Washington Constitution contains the privileges and immunities clause, which reads: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

The court held that the trial court erroneously applied an independent constitutional analysis when deciding whether DOMA violates the privileges and immunities clause because DOMA did not involve a grant of positive favoritism to minorities. Thus, the court stated that the privileges and immunities clause provides the same protection—and should be applied using the same analysis—as the equal protection clause. The court stated that the privileges and immunities clause "has been historically viewed as securing equality of treatment by prohibiting undue favor, while the equal protection clause has been viewed as securing equality of treatment by prohibiting hostile discrimination." The court held that DOMA does not involve the grant of a privilege or immunity to a favored minority class. Thus, the court stated that the appropriate question is whether the plaintiffs were discriminated against as members of a minority class, which requires an equal protection analysis.

### *Equal Protection*

The court determined that the plaintiffs were not members of a suspect class, citing *High Tech Gays v. Def. Indus. Sec. Clearance Office*,[2] and *Flores v. Morgan Hill Unified Sch. Dist.*.[3] The court acknowledged that gays and lesbians have suffered a history of discrimination. The court held, however, that homosexuality is not immutable: "[t]he plaintiffs do not cite other authority or any secondary authority or studies in support of the conclusion that homosexuality is an immutable characteristic. They focus instead on the lack of any relation between homosexuality and ability to perform or contribute to society. But plaintiffs must make a showing of immutability, and they have not done so in this case." In footnote 6, however, Justice

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## Judicial Speech in Kansas

The Supreme Court held in *Republican Party of Minnesota v. White*[1] that the announce clause in Minnesota's Code of Judicial Conduct was unconstitutional. That decision has paved the way for numerous lawsuits challenging various state canons governing the practices of judicial candidates.

The Court's holding provides a brief history of judicial elections and the canons that have been adopted in the United States to guide candidates' behavior in such elections. According to the holding, before 1812, only Vermont chose its judges by election.[2] By the time of the Civil War, most states had changed their systems so that they also elected their judges.[3] During the 19th century and until 1924, judicial candidates' election speech was unregulated.[4] In 1924, the American Bar Association (ABA) adopted a canon providing that judicial candidates may not announce their views regarding conclusions of law.[5] Some (but not all) of the states that elected judges adopted the same provision, or something similar. The clause was modified by the ABA in 1972, but it essentially remained the same and continued to forbid candidates from announcing their views, broadening the prohibited topic from "conclusions of law" to "disputed legal or political issues." Minnesota adopted the latter clause, which was held unconstitutional in the above-mentioned *White* case.

In 1990, the ABA, concerned that the announce clause violated the First Amendment, adopted a replacement canon that prohibited judicial candidates from making "statements that commit or appear to commit the candidate to cases, controversies, or issues that are likely to come before the court."[6] This canon, along with others, has been litigated numerous times since *White* because it is often construed to have the same effect as an unconstitutional announce clause.

In May 2006, Kansas Judicial Watch (a political action committee), Judge Charles M. Hart (standing for retention election in 2008), and 2006 judicial candidate Robb Rumsey filed suit in the United States District Court for the District of Kansas to block enforcement of Kansas judicial canons preventing state court judicial candidates from responding to a questionnaire asking their views on legal and political

issues, and foreclosing them from personally seeking public support. The case, *Kansas Judicial Watch, et al.* v. *Stout, et al.*,[7] was brought against members of the Kansas Commission on Judicial Qualifications and members of the Disciplinary Administrator's office—entities charged with disciplining judges and lawyers who violate the judicial canons of Kansas and the state's Rules of Professional Conduct.

Specifically, the plaintiffs challenged the commits clause, which provides that judicial candidates should not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;"[8] the pledges and promises clause, providing that judicial candidates "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;"[9] and a disqualification clause, requiring judges to recuse themselves when "a judge's impartiality might reasonably be questioned."[10] Plaintiffs also brought suit to prevent enforcement of the solicitation provision prohibiting judicial candidates from personally going door-to-door to seek nomination petition signatures from citizens. That clause requires that "a candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support."[11]

In February 2006, Kansas Judicial Watch sent a questionnaire to candidates for Kansas state judicial office. The questionnaire requested that the candidates state their views on policies and court decisions related to taxation, same-sex marriage, the death penalty and various other issues. All but one of the seven who responded refused to answer any of the questions, stating that they believed this would violate the Kansas canons governing judicial candidates' speech.

The judicial candidate plaintiff asked the Kansas Judicial Ethics Advisory Panel if he could answer the questionnaire without violating the judicial canons, and the panel informed him that he could not do so pursuant to the pledges and promises clause and the commits clause. A prior advisory opinion also stated that a similar questionnaire could not be answered, but reasoned that doing so would equal a request for public endorsement in violation of the solicitation of public support clause. In addition, a separate advisory opinion indicated that judicial candidates could not go door-to-door to ask citizens to sign nomination petitions because it would violate the solicitation clause.

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# Ohio Supreme Court Limits Eminent Domain

*By David J. Owsiany*

Since the Supreme Court's decision in *Kelo v. New London*[1] last year, eminent domain and property rights issues have taken center stage in state courts.[2] In July 2006, the Ohio Supreme Court in *Norwood v. Horney*[3] placed significant limits on eminent domain.

### *Facts of the Case*

In 2002, a group of developers approached the City of Norwood about building a commercial development in the appellants' neighborhood. The proposed development project was a complex of private office space, rental apartments, condominiums, and retail stores. Norwood expected the development to generate nearly $2 million in annual revenue for the city.[4]

The developers successfully acquired the property of a substantial majority of the property owners in the area through private sales. They could not, however, convince the appellants, a small group among the property owners, to sell.[5] The developers then asked Norwood to acquire the property through eminent domain and transfer it to them to develop.[6]

Norwood used funds provided by the developers to retain a consulting firm to prepare an urban renewal study. The study acknowledged that many of the homes in the area were in good condition, but concluded that the neighborhood was in a "deteriorating area." It went on to estimate that, due to the construction of a major highway in the area and the continuing piecemeal conversion of property from residences to businesses, the neighborhood would continue to deteriorate.[7]

Based on the study, the local planning commission recommended approval of the redevelopment plan. The Norwood City Council then passed a series of ordinances: (1) to adopt the redevelopment plan to eliminate "deteriorating" and "deteriorated" areas within the City of Norwood, (2) to authorize Norwood to enter into an agreement with the developers to build the proposed commercial development in the appellants' neighborhood, and (3)

to appropriate the appellants' properties. Norwood then filed complaintsagainst the appellants to seize their properties.[8]

Following a hearing, the trial court found that the City Council had abused its discretion in finding that the neighborhood was a "slum, blighted or deteriorated area." The court found but a paucity of evidence that the majority of structures in the area were conducive to ill-health and crime, detrimental to the public's welfare, or meeting otherwise the criteria of a "slum, blighted, or deteriorated area." Nevertheless, the court upheld the City Council's determination that the neighborhood was in a "deteriorating area."[9]

After juries rendered verdicts on the value of the appellants' properties, Norwood deposited (with the court) the full amount awarded and obtained titles to the properties. Norwood then transferred the properties to the developers, which began demolishing the houses in the area immediately.[10] The trial court refused to enjoin the developers from destroying the properties pending appeal, and the court of appeals denied a stay of the trial court's judgment. Upon appeal of those rulings, the Ohio Supreme Court accepted the cases and issued orders preventing the appellees from destroying the properties pending review of the taking.[11]

### *Court's Overview of Private Property Rights and Eminent Domain Authority*

Justice Maureen O'Connor began her analysis for a unanimous Ohio Supreme Court by pointing out that the "rights related to property, i.e., to acquire, use, enjoy, and dispose of property" are among the "most revered in our law and traditions."[12] Citing Richard A. Epstein's book *Takings: Private Property and the Power of Eminent Domain*, the court referred to the "Lockean notions of property rights" which the founders of Ohio expressly incorporated into the Ohio Constitution.[13]

The court also acknowledged the "state's great power to seize private property"[14] creates an "inherent tension between the individual's right to possess and preserve property and the state's competing interests in taking it for the common good."[15]

The court noted that James Madison was "[m]indful of that friction and the potential for misuse of the eminent domain power." Accordingly, Madison's proposed draft of the Takings Clause included two equitable limitations on its use that were eventually

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# Michigan Supreme Court Takes Step to Address Asbestos Litigation Problems

*By Mark A. Behrens*

Asbestos-related lawsuits filed by claimants who are not sick have occupied the courts in Michigan and across the nation for years. Nationally, up to 90% of recent asbestos-related lawsuits have been filed by people who have no present impairment and may never become sick from asbestos exposure. These filings are consuming resources that are also needed to compensate cancer victims and have pushed an estimated eighty-five companies into bankruptcy. As the longtime manager of the federal asbestos multi-district litigation docket explained, "Only a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle" with other claimants who are not sick.[1] In an effort to address this, the Michigan Supreme Court issued an administrative order on August 9, 2006 that immediately outlawed the "bundling" of asbestos cases for settlement or trial.[2] The court's order will eliminate some of the non-injury cases historically filed in Michigan.

In the past, some courts allowed—even encouraged—the consolidation of asbestos cases at trial because the judges thought that joining dissimilar cases could resolve the litigation more quickly. Sick plaintiffs were used to "leverage" settlements for the non-sick. Several years ago, former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to adopt such procedural shortcuts:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the

rules may not allow joinder.[3]

Now, however, there is a better understanding that bending procedural rules to put pressure on defendants to settle cases does not make cases go away; the practice invites new filings. As Duke Law School Professor Francis McGovern has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."[4] One West Virginia trial judge involved in that state's asbestos litigation acknowledged that, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases."[5] Some also believe that consolidations raise serious due process issues because defendants lack a meaningful opportunity to defend against individual claims.

The Michigan order is the latest sign that judges are taking a fresh look at this practice. Courts are beginning to believe that, in addition to fundamental fairness and due process problems, consolidating cases to force defendants to settle is a bit like using a lawn mower to cut down weeds in a garden—the practice may provide a temporary fix to a clogged docket, but ultimately the approach is likely to create more problems than it solves. Recently, the Mississippi Supreme Court has severed several multi-plaintiff asbestos-related cases. In one of the cases,[6] the court called the joinder of 264 plaintiffs who alleged asbestos exposure over a seventy-five year period to products associated with 137 defendants a "perversion of the judicial system. . . ." In July 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions. In 2005 and 2006, Georgia, Kansas, and Texas enacted laws that generally preclude the joinder of asbestos cases at trial.

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# Colorado's Immigration Reform

*By Gwen Benevento*

On June 12, 2006, the Colorado Supreme Court refused to allow a ballot initiative that would have denied most state services to illegal immigrants in *Manolo Gonzalez-Estay v. Lamm, et.al.* The ballot initiative, known as Initiative 55, was the culmination of a three-year effort to address the problem of illegal immigration in Colorado.

Initiative 55 sought to prohibit the State of Colorado and all cities, counties, and political subdivisions within from providing any non-emergency services to persons not lawfully in the United States. The question before the Colorado Supreme Court was whether Initiative 55 contained multiple subjects in violation of the single subject rule of the Colorado Constitution (Article V, Section 1(5.5)). The majority determined that Initiative 55 only appeared to have a single subject, and it considered the purposes and possible effects of the Initiative to determine whether there was a single subject. The majority primarily held that the single subject rule was violated because the Initiative had at least two incongruous purposes: (1) decreasing taxpayer expenditures to the welfare of individuals not lawfully present in Colorado; and (2) restricting access to administrative services. The justices ruled 4-2, with one abstention, that Initiative 55 violated the single subject rule.

The dissent objected to the majority's characterization of the "straightforward provision." It argued, Initiative 55 contained a single concise mandate, which, on its face, contained only one subject: the government must restrict non-emergency services to those lawfully present in the United States. The dissent questioned the majority's inquiry into the purposes and practical effects of the Initiative. While the majority equated multiple purposes with multiple subjects, the dissenting opinion reasoned that "the constitutional limitation itself . . . does not purport to examine the hearts of those advancing an initiative but merely prescribes the form an initiative must take for it to be considered by the electorate."

Initiative 55 proponents blamed the court's decision on judicial activism and politics, calling the ruling arbitrary and unfair. The proponents of the Initiative had three main criticisms with the court's ruling. First, the court appeared to broaden precedent by using an expansive interpretation of the term "subject," thus giving the court significant discretion in single subject cases. Second, only the narrow

question of the single subject rule was before the court, yet the opinion went beyond the matter on trial to criticize the measure on other potential constitutional issues. Third, the decision was unnecessarily delayed; the court waited three months to issue this decision, preventing a rewrite before the November ballot deadline.

Days after the ruling, proponents asked for a rehearing, which the Colorado Supreme Court denied with a revised ruling. Believing the court's decisions were flawed and politically motivated, Colorado Governor Bill Owens called a special session of the Colorado Legislature to address the state's immigration problem.

The Legislature passed comprehensive legislation, signed by Governor Owens, including two initiatives that will be on the ballot this fall. The initiatives propose to limit tax deduction for illegal alien wages and to demand that Colorado's Attorney General sue the federal government to enforce federal immigration laws.

The key piece of legislation from the special session was House Bill 1023, which requires state and local agencies to verify the citizenship or legal status of all applicants over the age of eighteen for any public benefits in Colorado, effective August 1, 2006. This new statute denies most non-emergency services to illegal aliens over the age of eighteen. Individuals now seeking public benefits in Colorado must present valid photo identification, and the bill mandates use of the federal Systematic Alien Verification of Entitlement (SAVE) program to determine eligibility for benefits. Due to the efforts of Governor Owens and the Legislature, Colorado now arguably has the toughest immigration laws in the country.

*Same-Sex Marriage, (Cont'd. from page 3)*

Madsen wrote that "[w]e recognize that this question is being researched and debated across the country, and we offer no opinion as to whether such a showing may be made at some later time," perhaps leaving the door open to future litigation depending on scientific findings of immutability. The court also found that gays and lesbians have asserted political power by getting several statute and municipal codes to provide economic benefit. Thus, because the plaintiffs were not members of a suspect class, the court analyzed DOMA under the rational basis review standard.

### *Fundamental Right*

The court held that the plaintiffs did not have a fundamental right to same-sex marriage, primarily because, among other things, same-sex marriage is not deeply rooted in Washington or American history. The court also noted that nearly all of the United States Supreme Court decisions which declare marriage to be a fundamental right expressly link marriage to the fundamental rights of procreation, childbirth, and child-rearing. Justice Madsen wrote, however, that "history and tradition are not static," to which Justice Johnson (concurring) wrote that state and national history were real and ascertainable. Justice Madsen noted that no appellate court has ever found a fundamental right to gay marriage.

The court recognized the many advantages that married couples have over non-married ones. The plaintiffs, however, affirmatively requested that the court not consider whether denial of statutory rights and obligations to same-sex couples, aside from the status of marriage, violates the state or federal constitution. The court went on to state that DOMA's limiting the right to marry to opposite-sex couples furthers governmental interests in procreating and raising children, biologically related to a mother and a father, in a stable, healthy environment. The court noted that DOMA was not motivated by animus. For example, fifteen legislators who voted for DOMA also voted to add sexual orientation laws against discrimination. The court further noted that under a rational basis review, even if animus partially motivated legislative decision making, "unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests."

### *Due Process and Privacy*

The plaintiffs argued that DOMA violated the right of personal autonomy protected by the due process and privacy clauses of Washington's Constitution, which read, respectively, "[n]o person shall be deprived of life, liberty, or property, without due process of law," Article I, § 3, and "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law," Article I, § 7.

The court rejected these claims, stating that there is no fundamental right to same-sex marriage in Washington, and no history of marriage that includes same-sex marriage. Thus, "the citizens of Washington

have not held a privacy interest in marriage that includes a right to marry a person of the same sex." Justice Madsen used an interesting phrase, however: "There is evidence that times are changing, but we cannot conclude at this time the people of Washington are entitled to hold an expectation that they may marry a person of the same sex."

### *Equal Rights Amendment*

The Equal Rights Amendment ("ERA"), Article 31, § 1 of the Washington Constitution, states "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

The court, as did the trial courts, rejected the plaintiffs' argument that DOMA violated the ERA. The court reasoned that men and women are treated identically under DOMA; neither may marry a person of the same sex. The court stated that DOMA does not, therefore, classify nor discriminate on the basis of sex. Interestingly, the court noted that the ERA's legislative history clearly indicates that it was not intended to promote or grant same-sex marriage. The court distinguished *Loving v. Virginia,*[4] which struck down anti-miscegenation statutes, from same-sex marriage, because DOMA did not discriminate on the basis of sex, whereas the Virginia statute did.

Finally, Justice Madsen appeared to be pleading directly to the legislature when she wrote, "given the clear hardship faced by same-sex couples evidenced in this lawsuit, the legislature may want to reexamine the impact of the marriage laws on all citizens of this state."

### *Dissent*

Justice Fairhurt's dissent centered around two key beliefs: (1) that allowing same-sex couples the right to marry in no way harms the state's legitimate interests, and (2) that the right to marry the person of one's choice is a fundamental right.

Justice Bridge's dissent centers around two key beliefs: (1) gays and lesbians have traditionally suffered discrimination, and (2) the court has a duty to protect constitutional rights.

Justice Chamber's dissent centered around the belief that the privilege of marriage is not available to all citizens on equal terms in violation of Washington's privilege and immunities clause.

## *II. New York:* Hernandez v. Robles

On July 6, 2006 the New York Court of Appeals, New York's highest court, held that "the New York Constitution does not compel recognition of marriage between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature." Judge Robert S. Smith wrote for a 4-2 majority, with Chief Judge Judith S. Kaye dissenting. Judge Victoria A. Graffeo wrote a separate concurrence. Judge Albert M. Rosenblatt took no part.

*Hernandez v. Robles* is a consolidation of four different cases involving forty-four same-sex couples who unsuccessfully tried to obtain marriage licenses in New York and then sued, seeking declaratory judgments that the restriction of marriage to opposite-sex couples was invalid under the New York Constitution. In each individual case, the Appellate Division, New York's intermediate appellate court, found no constitutional right to same-sex marriage.

The court stated that all the parties acknowledge that New York's Domestic Relations Law ("DRL") limits marriage to opposite-sex couples, and stated that certain *amici*'s suggestion that the statute could be read to permit same-sex marriage was "untenable."

The plaintiffs-appellants claimed that the DRL violates the New York Constitution's Due Process Clause (Article I, § 6, which reads: "No person shall be deprived of life, liberty or property without due process of law") and Equal Protection Clause (Article I, § 11, which reads: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof").

The court analyzed these claims under the rational basis standard of review. The court emphasized that it was not analyzing "whether the Legislature must or should continue to limit marriage [to opposite-sex couples]; of course the Legislature may … extend marriage or some or all of its benefits to same-sex couples."

The court identified two key grounds which rationally support limiting marriage to opposite-sex couples: (1) for the welfare of children, promoting stability, and avoiding instability in opposite-sex, i.e., relationships that cause children to be born, rather than same-sex relationships, which require adoption or technological intervention; and (2) that it is better, other things being equal, for children to grow up with both a mother and a father. The court noted that sociological studies do not establish beyond doubt that children fare equally well in same-sex and opposite households, and stated that, in the absence of conclusive scientific evidence, the Legislature could rationally

proceed on the common-sense premise that children will do best with a mother and father.

### *Due Process*

The court took great pains to distinguish gay marriage from the anti-miscegenation laws that *Loving v. Virginia*[5] declared unconstitutional. The court found that the fundamental right to marry does not encompass the right to same-sex marriage. The court noted that *Hernandez* was more similar to *Washington v. Glucksberg*[6] than it was to *Lawrence v. Texas.*[7] The court pointed out that the plaintiffs-appellants did not, as the petitioners in *Lawrence* did, seek protection against State intrusion on intimate, private activity; rather, the plaintiffs-appellants sought from the courts access to a State-conferred benefit that the Legislature has rationally limited to opposite sex couples. In her concurrence, Judge Graffeo rejected the plaintiffs' substantive due process argument claims that the "right to privacy derived therein grants each individual the unqualified right to select and marry the person of his or her choice." Judge Graffeo also noted that, unlike *Lawrence,* the DRL "is not a penal provision and New York has not attempted to regulate plaintiffs' private sexual conduct or disturb the sanctity of their homes. And, in contrast to the Texas statute, New York's marriage laws are part of a longstanding tradition with roots dating back long before the adoption of [New York's] State Constitution." The court stated that because there were no fundamental rights at issue, it would review the DRL under the rational basis standard, which it passed.

### *Equal Protection*

The plaintiffs argued that the DRL discriminated on the basis of gender, which requires analysis under a heightened intermediate scrutiny, and on the basis of sexual orientation, which the plaintiffs claimed also requires analysis under a heightened intermediate scrutiny. The court held that the DRL did not put men and women in different classes, and did not give one class a benefit not given to the other. The court held that both women and men are permitted to marry people of the opposite sex, but not people of their own sex. Judge Graffeo noted that any person, regardless of sexual orientation, could marry another person of the opposite sex. She also noted that the plaintiffs conceded that the DRL was "not enacted with an invidiously discriminatory intent—the Legislature did not craft the marriage laws for the purpose of disadvantaging gays and lesbians."

The court then found that classifications based on sexual orientation should be reviewed under the rational basis standard. The court stated that "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." The court rejected the plaintiffs' argument that if the relevant State interest is the protection and welfare of children, then the category of those permitted to marry, opposite-sex couples, fails rational basis review because it is both under-inclusive (both same-sex couples and opposite-sex couples may have children), and over-inclusive (many opposite-sex couples cannot or do not want to have children). The court found that while the Legislature "might rationally choose to extend marriage or its benefits to same-sex couples," it could also "rationally make another choice, based on the different characteristics of opposite-sex and same-sex relationships," namely that "the Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability [via marriage and its attendant benefits] in opposite-sex relationships will help children more." The court also found that "limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing. A legislature that regarded marriage primarily or solely as an institution for the benefit of children could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea."

The court specifically stated that "we emphasize once again that we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong … [t]he dissenters assert confidently that 'future generations' will agree with their view of this case. We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives."

### *Dissent*

Chief Judge Kaye dissented on three main points. First, extrapolating from *Lawrence,* that the fundamental right in question was the right to marry,

not the right to same-sex marriage. Second, that the correct question with respect to equal protection is "not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any legitimate basis for excluding those who are not covered by the law. (emphasis in original)" Third, that the court should not "avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic … the Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy."

## *III. Georgia:* Perdue v. O'Kelley, et al.

On July 6, 2006 the Georgia Supreme Court unanimously ended a non-substantive challenge to a state constitutional amendment defining marriage only as "the union of man and woman" and prohibiting marriage between persons of the same gender. Justice Robert Benham, who became the first African-American to serve on the Georgia Supreme Court when then-Governor Joe Frank Harris appointed him in 1989, wrote for a unanimous court. Justice Harold D. Melton did not participate in the ruling.

On November 2, 2004, the people of the State of Georgia approved, by a 76% majority, a proposed constitutional amendment that became Article 1 Section 4 Part 1 of the Georgia Constitution of 1983. It reads as follows:

> Recognition of Marriage
>
> (a) This state shall recognize as marriage only the union of man and woman. Marriage between persons of the same sex are prohibited in this state.
> (b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

Prior to the vote, the plaintiffs had sued in state court, asking the court to enjoin the vote. The plaintiffs claimed that the proposed amendment would likely violate Georgia's "Single Subject Rule," which requires that the text of a proposed ballot measure may not relate to more than one subject and may not have two or more distinct and separate purposes, which are not germane to each other. The Georgia Supreme Court denied injunctive relief in *O'Kelley v. Cox*,[8] noting that the sole question was whether the judiciary could "properly interfere in the constitutional amendment process, and prevent voters from expressing their approval or disapproval of the proposal which their elected representatives, by a two-thirds vote of each house of the General Assembly, have determined should be submitted to them." Citing *Gaskins v. Dorsey*,[9] the court stated that it could not encroach upon the legislative process and did not have any authority to bar the general election on November 2, 2004 from proceeding exactly as scheduled.

The plaintiffs again sued after the amendment passed, this time seeking a declaration that the amendment was unconstitutional because (1) the ballot language was misleading and (2) the amendment contained multiple sections dealing with more than one subject, thereby violating the requirement in Art. 10 Section 1 Paragraph 2 of the Georgia Constitution of 1983, which reads: "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles may be submitted as a single amendment." The plaintiffs argued that the amendment had dual purposes: (1) to limit the definition of marriage as the union of a man and a woman, and (2) to refuse legal benefits and protections to same-sex couples in civil unions.

The trial court rejected the challenge to the ballot language but held that the amendment was unconstitutional, finding that the first sentence of subparagraph (b), "[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage," dealt with how same-sex marriages would be treated in Georgia rather than defining marriage as between man and woman.

The Georgia Supreme Court made a point of stating that it was "not presented with any issue regarding the ballot language and we do not, as an appellate court, judge the wisdom of the amendment. 'With the wisdom or expediency of the amendment this court does not deal. The legislature and the people have passed upon that.' *Hammond v. Clark,* 136 Ga. 313, 333 (71 SE 479) (1911)."

The court applied the "Germaneness Test" in analyzing the multiple subject matter issue. "The test of whether an Act or a constitutional amendment violates the multiple subject rule is whether all of the parts of the Act or of the constitutional amendment are germane to the accomplishment of a single objective."[10] Applying the test, the court noted that the appellant contended that the objective is "the non-recognition of Georgia of same sex conjugal relationship," and the appellees argued that the objective was to define "marriage as the union between man and woman, reserving that status exclusively to different-sex couples." The court found that both of those expressions have a commonality of exclusiveness, establishing that marriage and its attendant benefits belong only to unions of man and woman. The court held that that "exclusiveness is the essence of the amendment's purpose."

The court then held the sentence "[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage" to be germane to the objective of reserving marriage and its attendant benefits exclusively to unions of man and woman. Thus, the court held that Georgia's marriage amendment was constitutional because the first sentence of subparagraph (b) of the amendment did not address a different objective than that of the amendment as a whole and did not render the amendment in violation of the multiple-subject prohibition of Art. 10 Section 1 Paragraph 2 of the Georgia Constitution of 1983.

## *IV. U.S. Court of Appeals for the 8th Circuit (Nebraska):* Citizens for Equal Protection, et al. v. Bruning

On July 14, 2006, the U.S. Court of Appeals for the Eighth Circuit held that a Nebraska constitutional amendment codified as Article I, § 29 of the Nebraska Constitution did not offend the Equal Protection Clause, the Bill of Attainder Clause, nor the First Amendment of the U.S. Constitution. Chief Judge James Loken wrote for an unanimous court.

Section 29, entitled "Marriage; same-sex relationships not valid or recognized," reads as follows: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Nebraska's amendment went farther than similar bans in other states by barring same-sex couples several legal protections afforded heterosexual couples, such as the ability to share health insurance.

### *Equal Protection*

The plaintiff-appellees, relying on *Romer v. Evans*,[11] argued that § 29 violated the equal protection clause by raising "an insurmountable political barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship." They did not assert a right to gay marriage or same-sex unions. Rather, they claimed that because § 29 was a state constitutional amendment, rather than state-wide legislation restricting marriage to a man and a woman, it deprived gays and lesbians of "equal footing in the political arena."

Like the other courts discussed in this article, the Eighth Circuit made particular note to distinguish the legal ruling from any personal viewpoint. "Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests,' (citing *Romer,* 517 U.S. at 672)."

The Eighth Circuit determined that § 29 should be analyzed under the rational basis review standard. The court noted that *Romer* used rational basis review to analyze the Colorado amendment. The court further noted that a state "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved ... [t]his necessarily includes the power to classify those persons who may validly marry." The court found that the Colorado enactment in *Romer* was distinguishable from § 29 because the Colorado enactment repealed all existing and barred all future preferential politics based on orientation, conduct, practices or relationships. Contrastingly, the court found that § 29 limits the class of people who may validly enter into marriage and the legal equivalents to marriage such as civil unions and

domestic partnerships. Thus, the court held, § 29 was not so broad as to render Nebraska's reasons for its enactment "inexplicable by anything but animus" towards same sex couples.

### *Bill of Attainder*

The Eighth Circuit also found that § 29 was not a bill of attainder, which the U.S. Supreme Court defined as "a law that legislatively determines guilt and inflicts punishment."[12] The court held that a political disadvantage is not punishment for the purposes of bills of attainder. The court further stated § 29 "is not punishment in the functional sense because it serves the non-punitive purpose of steering heterosexual procreation into marriage, a purpose that negates any suspicion that the supporters of § 29 were motivated solely by a desire to punish disadvantaged groups." Finally, the court noted that despite the plaintiffs-appellees arguments, the U.S. Supreme Court stated in *Nixon* that the Bill of Attainder Clause "was not intended to serve as a variant of the equal protection doctrine."[13]

### *First Amendment*

The district court had ruled *sua sponte* that § 29 violated the plaintiffs-appellees' First Amendment rights to associational freedom and to petition the government for redress of grievances, "which encompasses the right to participate in the political process, also protected by the First Amendment." The Eighth Circuit noted that the plaintiffs-appellees did not raise a First Amendment claim in the district court nor on appeal. The Eighth Circuit held that § 29 did not violate the First Amendment because (1) it did not "directly and substantially" interfere with the plaintiffs-appellees' ability to associate in lawful pursuit of a common goal, and (2) it seemed "exceedingly unlikely" that § 29 would prevent persons from continuing to associate. The court noted that the district court cited no case supporting its "suggestion" that § 29 violated the right to petition the government for redress of grievances. The court stated that while the First Amendment guarantees the right to advocate, it does not guarantee political success. The court further noted that the district court erred by confusing the First Amendment and equal protection analyses and standard of review.

### *Conclusion*

Gay marriage litigation continues to be an active and controversial area of litigation, and future articles in the series will continue to cover them. For example, on October 5, 2006 the intermediate appellate division in California overturned the San Francisco trial court, finding no constitutional right to gay marriage and declaring that "[c]ourts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage … judges are not free to rewrite statutes to say what they would like, or what they believe to be better social policy." The case is almost sure to go to the California Supreme Court.

As of this writing only one state, Massachusetts, has found a constitutional right to gay marriage. The cases covered in this article have much in common, but perhaps one of the most striking is the extra effort the majority judges made to insulate themselves personally from the legal rulings.

## Endnotes

[1] David Postman, "Nine Justices, Six Opinions, No Consensus," Seattle Times, July 27, 2006 *available at* http://seattletimes.nwsource.com.

[2] 895 F.2d 563 (9th Cir. 1990) (holding that homosexuality is behavioral, and thus not immutable).

[3] 324 F.3d 1130, 1137 (9th Cir. 2003) (homosexuality not a suspect class).

[4] 338 U.S. 1 (1967).

[5] 338 U.S. 1 (1967).

[6] 521 U.S. 702 (1997).

[7] 539 U.S. 558 (2003).

[8] 278 Ga. 572, 604 S.E.2d 773 (2004).

[9] 150 Ga. 638, 104 S.E.433 (1920).

[10] *Carter v. Burson,* 230 Ga. 511, 198 S.E.2d 151 (1973).

[11] 517 U.S. 620 (1996).

[12] *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468.

[13] *Nixon,* 433 U.S. at 471.

**Update from the New Jersey State Courts Project:**

In *Lewis v. Harris* decided on October 25, the seven justices of the New Jersey Supreme Court unanimously ruled that the state constitution's guarantee of equal treatment entitles same-sex couples to all of the rights and benefits heterosexual couples obtain through civil marriage. Three of the justices dissented, however, arguing that the state constitution includes a fundamental right to same-sex marriage.

The court ordered the New Jersey Legislature to revise within 180 days the state's 1912 marriage laws in one of two ways: (1) the Legislature can make New Jersey the first state to recognize same-sex marriage through legislative action; or (2) lawmakers can follow the leads of Connecticut and Vermont and give same-sex couples all of the benefits of marriage, but by another name, such as "civil union."

Although the court stopped short of mandating recognition of a fundamental right to same-sex marriage, the decision nonetheless is a departure from recent rulings in Washington State and New York that rejected gay couples' claims to marriage and the benefits it confers.

*Michigan, (Cont'd. from page 6)*

The Michigan Supreme Court's order, a 4-3 decision, comes after three years of study as to how to respond to asbestos litigation problems in that state. In August 2003, the court was petitioned by scores of defendant companies and numerous *amici* seeking the adoption of a statewide inactive asbestos docket to prioritize cases for trial utilizing objective medical criteria. Some have argued that the court should give additional consideration to this proposal in addition to its anti-bundling order. Although, many see the new order as a step in the right direction.

The Staff Comment to the new order notes that the purpose of bundling was "to maximize the number of cases settled." The order further explains, "Bundling can result in seriously ill plaintiffs receiving less for their claim in settlement than they might otherwise have received in their case was not joined with another case or other cases."

In his concurring opinion, Justice Markman also said that the order would "advance the interests of the most seriously ill plaintiffs whose interests have not always been well served by the present system." Chief Justice Taylor and Justices Corrigan and Young joined in the concurrence.

Justices Cavanagh, Weaver, and Kelly dissented. Their main complaint was that the new order will clog the court system since each asbestos case must now be tried individually. The argument is that bundling is necessary for court efficiency.

The Michigan Supreme Court has invited public comment on the new order until December 1. If the new rule remains intact, and is effective. Michigan may well see fewer cases by persons whose claims are either premature (because the individual is not sick) or actually meritless(because the person will never develop an asbestos-related impairment).

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## Endnotes

[1] *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996) (Weiner, J.).

[2] *See* Admin. Order No. 2006-6, Prohibition on "Bundling" Cases (Mich. Aug. 9, 2006), *available at* 2006 WLNR 14601437.

[3] The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 6 (1999) (statement of the Hon. Conrad L. Mallett, Jr.).

[4] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

[5] *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen.

[6] Harold's Auto Parts v. Mangialardi, 889 So. 2d 493, 495 , 495 (Miss. 2004).

*Kansas, (Cont'd. from page 4)*

The district court ruled in July that the Kansas judicial canons that prevent candidates from effectively announcing their views on disputed legal and political issues and from personally seeking public support and contributions are unconstitutional and preliminarily enjoined Kansas officials from enforcing them. The court held that the pledges and promises clause and the commits clause are overbroad because they sweep in legitimate speech, causing judicial candidates' speech to be chilled. The clauses fail to properly limit their prohibition to pledges, promises, and commitments to "decide an issue in a particular way." The court reasoned that the state has interpreted the clauses, through advisory opinions issued by its Ethics Advisory Panel, to "operate as a de facto announce clause," the clause held unconstitutional by the Supreme Court in *White*.

The court also considered the constitutionality of the clauses as applied to the questionnaire sent to judicial candidates by Kansas Judicial Watch and found them to be unconstitutional because the questions "merely require the candidates to announce their views on disputed legal and political issues," speech protected by the Supreme Court's decision in *White*.

The court found that the entire solicitation clause, which prohibits candidates from personally soliciting publicly stated support or campaign contributions, is unconstitutional because it fails strict scrutiny analysis. The clause, according to the court, "prohibits an entire class of speech relating to campaigns, which is intended to influence voters in the election." The court also found that the solicitation clause is unconstitutional as applied to the questionnaire and as applied to prospective judicial candidates who desire to seek signatures from citizens so that they can qualify as candidates.

A scheduling conference has been set for mid-September 2006 to discuss discovery and a date for final resolution of the case. *Kansas Judicial Watch v. Stout* is one of several cases brought by plaintiffs after *White* to challenge canons that infringe upon judicial candidates' right to announce their views on disputed legal, political, and social issues as well as canons that encroach on other constitutional rights.[12]

## Endnotes

[1] 536 U.S. 765 (2002).

[2] *Id.* at 785.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 786.

[6] *Id.* at 773 n.5.

[7] No. 06-4056-JAR, 2006 U.S. Dist. LEXIS 50765 (D. Kan. July 19, 2006).

[8] Kansas Judicial Canon 5A(3)(d)(ii).

[9] Kansas Judicial Canon 5A(3)(d)(i).

[10] Kansas Judicial Canon 3E(1).

[11] Kansas Judicial Canon 5C(2).

[12] Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission, 388 F.3d 224 (6th Cir. 2004) (applying *White* to Kentucky's pledges and promises clause and commits clause to find that the defendants could not demonstrate a likelihood of success on the merits to justify staying the lower court's preliminary injunction); Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005) (applying the *White* Court's analysis to Minnesota's partisan-activities and solicitation clauses); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (relying on *White* to apply strict scrutiny to Georgia's canons that prohibited judicial candidates from making negligent false statements and misleading or deceptive true statements and from personally soliciting campaign funds, as well as a provision permitting the commission to issue a cease and desist order to the candidate for violating those provisions); O'Neill v. Coughlan, No. 1:04CV1612, 2004 U.S. Dist. LEXIS 29401 (N.D. Ohio Sept. 14, 2004) (applying the *White* Court's analysis to Ohio's political-affiliation clause, an advertising provision, and a requirement to "maintain the dignity appropriate to judicial office"); Spargo v. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated on other grounds,* 351 F.3d 65 (2d Cir. 2003) (holding that various canons restricting political activity of judicial candidates were unconstitutional under *White*). *See also* Alaska Right to Life v. Feldman, 380 F. Supp. 2d 1080 (D. Alaska 2005) (holding the pledges and promises clause and the commits clause unconstitutional under *White*); North Dakota Family Alliance v. Bader, 361 F. Supp. 2d 1021 (D. N.D. 2005) (same); Family Trust Foundation of Kentucky, Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (same). *But see* Pennsylvania Family Institute, Inc. v. Black, No. Civ. 105 CV 217, 2005 WL 2931825 (M.D. Pa. Nov. 4, 2005), *appeal pending* (3d Cir) (holding that plaintiffs lacked standing to challenge the pledges and promises, commits, and recusal clauses).

*Ohio, (Cont'd. from page 5)*

incorporated into the Fifth Amendment: the "public use" requirement and the "just compensation" rule.[16]

The Ohio Supreme Court also provided an overview of the historical development of eminent domain, noting that in America's "nascent period" takings usually had palpable benefits for the public, such as the building of roadways, navigable canals, and government buildings.[17] As "America shifted from an agrarian society to an industrialized and increasingly urban one," eminent domain authority was "used widely to support the creation of the nation's physical infrastructure and those enterprises necessary for continued expansion and development, such as utilities, railroads, and mines." Though these takings often involved significant benefit to individuals and corporations, "many legislatures and courts affirmed their use under the principle that they afforded some larger, general benefit to the public."[18]

During the 20th century, the broad concept of public use "entrenched" itself in eminent domain jurisprudence.[19] Eventually, almost every court, including of course the Ohio Supreme Court, "upheld takings that seized slums and blighted or deteriorated private property for redevelopment, even when the property was then transferred to a private entity," because the elimination of such blight amounted to "a public use."[20]

This trend, with its broad justification, culminated last year with the *Kelo v. New London* decision, wherein the U.S. Supreme Court determined that general economic development was a public use under the Fifth Amendment to the U.S. Constitution.

## *Applying Ohio Law to Norwood's Actions*

The Ohio Constitution provides that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare." Like the Fifth Amendment to the U.S. Constitution, the Ohio Constitution permits private property to be taken for "public use," with compensation.[21]

In *Norwood v. Horney*, the Ohio Supreme Court made clear that determining whether proposed condemnations are consistent with the Ohio Constitution's "public use" requirement is a "constitutional question squarely within the court's authority."[22] It also noted that eminent domain is a power of last resort for the good of the public, not simply a vehicle for municipalities to finance community improvements.[23]

The state's highest court also noted that due process demands that the state provide meaningful standards in its laws,[24] and that laws that are too vague tend to "suffer a constitutional infirmity."[25]

The court set out a two-part test to determine whether a law is void for vagueness:

> (1) laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly; and
> (2) laws must provide explicit standards for those who apply them in order to prevent arbitrary and discriminatory enforcement.[26]

The court also indicated that because statutes or regulations regarding eminent domain implicate a fundamental constitutional right, (the right to possess private property), courts should apply a "heightened standard of review" in determining whether they are void for vagueness.[27]

The Norwood Code permits the City of Norwood to appropriate property in "deteriorating" areas. Under the Norwood Code, factors to consider in determining whether an area is "deteriorating" include incompatible land uses, lack of adequate parking, and diversity of ownership. The trial court identified additional factors, including increased traffic, dead-end streets, numerous curb cuts and driveways, and small front yards.[28]

Ohio's highest court concluded that under the Norwood Code, the standard for designating a neighborhood a "deteriorating area" was not just ongoing or future prospect of deterioration, but also the "danger of deterioration."[29]

The court therefore concluded that the Norwood Code provision was void for vagueness, because "deteriorating area" was a "standardless standard."[30] It provided a litany of conditions for what qualified as "deteriorating" but offered little guidance in application. In fact, the court stated, all the standards used in *Norwood* to meet the "deteriorating" qualification exist in virtually every urban American neighborhood.[31] "Rather than affording fair notice to the property owner," the court found, "the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement."[32]

The court further held that the term "deteriorating area" cannot be used as a standard for a taking because it "inherently incorporates speculation as to the future condition of the property," rather than focusing on the condition of the property at the time of the taking.[33] To uphold such a speculative standard, the court said, would be permitting the derogation of a cherished and venerable individual right based on nothing more than "a plank of hypothesis flung across an abyss of uncertainty."[34]

The court also struck down the section of the Ohio statute that effectively prohibits the issuance of stays or injunctions during appellate review of eminent domain actions.[35] The Ohio Supreme Court recognized the General Assembly's interest in favoring a scheme in which eminent domain matters would receive expedited attention in the courts. However, the court found that the statute's blanket proscription on stays or injunctions against the taking and using of appropriated property pending appellate review was an "unconstitutional encroachment on the judiciary's constitutional and inherent authority in violation of the separation-of-powers doctrine."[36]

The court concluded that although it is "imperative that appellate courts review these cases as expeditiously" as possible, "we doubt the courts' ability, absent the authority to issue a stay, to move more quickly than a bulldozer."[37]

## *Conclusion*

In framing the issue in *Norwood v. Horney*, the Ohio Supreme Court noted that it "must balance two competing interests of great import in American democracy: the individual's right to the possession and security of property, and the sovereign's power to take private property away from the individual for the benefit of the community."[38]

The Supreme Court in *Kelo v. New London* favored the sovereign's power to take private property for the community's benefit, when it held that economic benefit alone was a "public use" under the Constitution. But, the *Kelo* Court recognized that state constitutions may provide additional protection to property owners in these matters by limiting the use of appropriation.[39]

Last year, following the *Kelo* decision, the Ohio General Assembly created a task force to study the use and application of eminent domain in Ohio and imposed "a moratorium" on economic takings for transfer to private entities until further legislative remedies could be considered.[40]

In *Norwood v. Horney*, the Ohio Supreme Court gave the General Assembly and local governments a roadmap as to what constitutes "public use" under the Ohio Constitution, and made clear that economic development alone is not enough. Recognizing that vague or imprecise definitions can lead to abuse of the eminent domain power, the court held that a "fundamental determination" must be made before permitting the appropriation of property for redevelopment. According to the court, the property, "because of its existing state of disrepair or dangerousness," must pose "a threat to the public's health, safety, or general welfare," in order to be taken for redevelopment. The court specifically found that government does not have the authority to appropriate private property based on the "mere belief, supposition or speculation that the property may pose such a threat in the future."[41]

By clearly and narrowly defining the constitutional standards for "public use," the Ohio Supreme Court has circumscribed the eminent domain power and strengthened claims based on private property rights in Ohio.

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## Endnotes

[1] 125 S.Ct. 2655 (2005).

[2] *See The State of Eminent Domain Law*, State Court Docket Watch (The Federalist Society, State Courts Project: Washington, D.C.) March 2005 at 1.

[3] __Ohio St.3d __, 2006–Ohio–3799 (*hereinafter Norwood*).

[4] *Id.* at ¶ 17.

[5] *Id.* at ¶ 20.

[6] *Id.* at ¶ 21.

[7] *Id.* at ¶ 22.

[8] *Id.* at ¶ 23.

[9] *Id.* at ¶ 26.

[10] *Id.* at ¶ 30.

[11] *Id.* at ¶ 31.

[12] *Id.* at ¶ 34 (citation omitted).

[13] *Id.* at ¶ 37 (citation omitted).

[14] *Id.* at ¶ 39.

[15] *Id.* at ¶ 40.

[16] *Id.*

[17] *Id.* at ¶ 45.

[18] *Id.* at ¶ 48.

[19] *Id.* at ¶ 51.

[20] *Id.* at ¶ 59.

[21] OHIO CONST. art. I, § 19.

[22] *Norwood*, at ¶ 69 (quoting Wayne County v. Hathcock, 471 Mich. 445, 480 (2004)).

[23] *Id.* at ¶ 79 (quoting Beach-Courchesne v. Diamond Bar, 80 Cal.App.4th 388, 407 (2000)).

[24] *Id.* at ¶ 81.

[25] *Id.* at ¶ 82 (quoting Ashton v. Kentucky, 384 U.S. 195, 200 (1966)).

[26] *Id.* at ¶ 83 (quoting Grayned v. Rockford, 408 U.S. 104, 108-109 (1972)).

[27] *Id.* at ¶ 88.

[28] *Id.* at ¶ 93.

[29] *Id.* at ¶ 99.

[30] *Id.* at ¶ 98.

[31] *Id.* at ¶ 93.

[32] *Id.* at ¶ 98.

[33] *Id.* at ¶ 104.

[34] *Id.* at ¶ 103 (quoting Edith Wharton, *The Descent of Man*, 35 SCRIBNER'S 313, 321 (Mar. 1904), reprinted in 1 THE SELECTED SHORT STORIES OF EDITH WHARTON 49, 62 (1991)).

[35] OHIO REV. CODE, § 163.19

[36] *Norwood*, at ¶ 125.

[37] *Id.* at ¶ 133.

[38] *Id.* at ¶ 1.

[39] *Supra* note 1, ("[N]othing in our opinion precludes any state from placing further restrictions on its exercise of takings power.").

[40] Am. Sub. S.B. 167, 126th Gen. Assem. (Ohio 2005).

[41] *Norwood*, at ¶ 103.

***FDA Labeling, (Cont'd. from page 3)***

by state law. In the two cases discussed below, state law claims against drug manufacturers concerning the adequacy of labeling and advertising were allowed to proceed, even though the requested relief, if awarded, would squarely conflict with specific prior determinations made by FDA. In each of these cases, an FDA Shield Law on the Michigan model might well have made FDA involvement unnecessary.

More recently, in the preamble to its long-awaited Physician Labeling Rule, FDA explicitly set forth its view that FDA approval of prescription drug labeling preempts most state-law tort claims based on alleged deficiencies in FDA-approved labeling. Nonetheless, it is unclear whether courts hearing state tort cases will give this language an appropriate degree of deference. At least until an authoritative ruling requires all courts in the United States to recognize the validity of FDA's exercise of preemptive authority over drug labeling, state-by-state legal reform will remain an important aspect of efforts to ensure a pharmaceutical-liability regime that serves the long-term health interests of all Americans.

### *DOWHAL V. SMITHKLINE BEECHAM CONSUMER HEALTHCARE*

In 1999, Paul Dowhal filed a citizen suit in the Superior Court of the State of California, San Francisco County, under the state's Safe Drinking Water and Toxic Enforcement Act (Proposition 65), against manufacturers, distributors, and retailers of over-the-counter nicotine replacement products.[1] California environmental protection authorities had listed nicotine as a developmental and reproductive toxicant.[2] Dowhal argued that the defendants were required to disseminate publicly—through labeling—a statement that the State of California had determined that these products cause birth defects or other reproductive harm.[3]

Specifically, Dowhal sought to require the defendants to label over-the-counter nicotine replacement products with the following statement: "Warning: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." Alternatively, the plaintiff sought an injunction requiring the following warning or a comparable one: "If pregnant or breast-feeding, ask a health professional before use. Nicotine, whether from smoking or medication, can harm your baby. First try to stop smoking without the patch."

A year after filing his complaint under Proposition 65, Dowhal submitted a citizen petition to FDA. That petition asked FDA to require manufacturers of nicotine replacement products to label their products with a warning like the "harm your baby" warning set forth above. After reviewing the pertinent scientific evidence, FDA rejected the

proposal, including the information submitted with the petition. FDA determined that the requested warning was not scientifically supportable. FDA concluded, further, that the Proposition 65 warning could cause pregnant and nursing women to conclude, mistakenly, that using a nicotine replacement therapy product presents health risks that are as grave as those associated with smoking.

Indeed, FDA had prohibited manufacturers from labeling their products voluntarily with a Proposition 65 warning. In January 1997, FDA denied a request from one manufacturer of nicotine replacement products for permission to change the label for its product to add Proposition 65 warning language. The agency advised the manufacturer to use the FDA-approved labeling, which includes a statement encouraging pregnant and nursing women to seek professional advice before using nicotine replacement therapy. In March 2001, FDA confirmed in a letter to other manufacturers that using additional warning language to satisfy Proposition 65 could render their products misbranded under the Federal Food, Drug, and Cosmetic Act (FDCA).[4]

The Superior Court granted summary judgment to the defendants on the ground that Proposition 65 is impliedly preempted by the FDCA. Dowhal appealed to the California Court of Appeal. FDA submitted an *amicus curiae* brief supporting the defendants.[5] The agency's legal theory rested on the doctrine of conflict preemption: First, the labeling sought by Dowhal was preempted by the FDCA because it would be impossible for the defendants to comply with both Proposition 65 (as interpreted by the plaintiff) and with the FDCA (as applied by FDA). In essence, if the defendants were to adopt the warning language advocated by Dowhal, they would be in violation of the prohibition in the FDCA against selling misbranded drugs.[6] Second, application of Proposition 65 to nicotine replacement products in the manner advocated by Dowhal would pose an obstacle to the accomplishment of the full purposes and objectives of the FDCA.

The Court of Appeal reversed the Superior Court's decision in July 2002, finding that in the FDA Modernization Act (FDAMA), Congress intended to exempt Proposition 65 from preemption, and that this disposed of the defendants' preemption arguments.[7] The court refused to resolve whether, by complying with the FDCA and not including the warning language advocated by Dowhal, the defendants exposed themselves to Proposition 65 liability.[8]

In August 2002, the defendants petitioned the Supreme Court of California for review of the Court of Appeal's decision. FDA submitted a letter brief in support of the petition the following month.[9] In October 2002, the Supreme Court of California granted the petition.[10] In August 2004, that court reversed the decision of the Court of Appeal. Concluding that FDA had barred all possible warnings that would have complied with Proposition 65,[11] the Supreme Court of California applied the doctrine of conflict preemption to hold that Proposition 65 was preempted insofar as it conflicted with FDA requirements.[12]

In so deciding, the court explicitly clarified that it was immaterial to the question of preemption whether Dowhal's warning could in some sense be classified as truthful.[13] As the Supreme Court of California correctly explained, FDA's authority is not limited to prohibiting statements that are false.[14] The agency is also charged with prohibiting those statements which, though perhaps formally "true," would be misleading.[15] The Supreme Court of California found that FDA was well within its authority to conclude that the labeling of a nicotine replacement product must indicate that it is better for a pregnant woman to use a nicotine replacement product than to continue smoking.[16]

### *Motus v. Pfizer, Inc.*

When FDA specifically considers and rejects language regarding the risk of a particular adverse event allegedly associated with a prescription drug or class of drugs, courts applying state tort law should not allow failure-to-warn claims based on the absence of such language. Yet that is exactly what happened in a lawsuit filed in California against Pfizer Inc. The case involves ZOLOFT (sertraline HCl), a drug in the selective serotonin reuptake inhibitor (SSRI) class used to treat depression.

Pfizer submitted its original new drug application (NDA) for ZOLOFT in 1988. FDA evaluated all relevant scientific data and found no causal link between the drug and an increased risk of suicide. In 1990, FDA convened a meeting of the Psycho-pharmacological Drugs Advisory Committee (PDAC) to assess ZOLOFT.[17] The committee unanimously concluded that the drug was safe when used to treat depression.[18] The original labeling approved with the NDA for ZOLOFT on December 30, 1991, included

precautionary language concerning the risk of suicide in depressed patients, but did not specifically warn that the drug increased suicidal ideation or the risk of suicide.[19] ZOLOFT later was approved for use in four other psychiatric disorders.

On three other occasions, FDA specifically considered and rejected claims that another SSRI causes suicide. In 1990 and 1991, FDA received two citizen petitions alleging a link between the SSRI PROZAC (fluoxetene) and suicide. One petition sought market withdrawal; the other asked FDA to require a "black box warning" in PROZAC's labeling concerning a putative link between the drug and suicide. FDA examined the data concerning the risk of suicide and other violent behavior and SSRIs, and rejected both petitions. In 1997, FDA declined to grant a third citizen petition requesting additional suicide warning language in the labeling for PROZAC.

FDA also obtained expert advice as to whether antidepressants generally increase patients' suicide risk. In 1991, FDA requested that the PDAC review the scientific evidence relating to the risk of suicide and the pharmacological treatment of depression. On September 20, 1991, the PDAC determined unanimously that the evidence did not indicate that use of any particular drug or class of drugs to treat depression heightens the risk of suicide. The advisory committee also heard remarks from the then-Director of FDA's Division of Neuropharmacological Drug Products concerning the risk that modifying the labeling could misleadingly overstate the risk of suicide and cause a reduction in the use of pharmacotherapy to treat depression.

In 2002, FDA conducted yet another internal review of scientific evidence regarding SSRIs and suicide.[20] The review revealed no difference in the risk of suicide between patients using SSRIs and patients on placebo.[21] However, after reviewing further studies the agency refined its position in late 2004 and early 2005.[22] FDA now warns that antidepressants, including Zoloft, "may increase suicidal thoughts and actions in about 1 out of 50 people 18 years or younger," and that "[s]everal recent publications report the possibility of an increased risk for suicidal behavior in adults who are treated with antidepressant medications."[23]

Despite FDA's position prior to October 2002, Pfizer has been a target of state law failure-to-warn claims based on the absence of additional warning language concerning suicide in the labeling for ZOLOFT. Notably, in November 1998, a candidate for the city council and failing businessman named Victor Motus visited his doctor, appearing depressed and frustrated.[24] His physician diagnosed moderate depression and prescribed ZOLOFT 25 mg for seven days, followed by 50 milligrams of ZOLOFT for fourteen days.[25] Six days after visiting his doctor, Motus committed suicide by shooting himself.[26] His wife sued Pfizer, claiming that, under California law, the company had acted negligently by failing to warn adequately in the package insert and marketing materials that ZOLOFT could cause suicide.[27]

The United States District Court for the Central District of California (to which the case had been removed on the ground of diversity) held that federal law did not preempt the plaintiff's state tort law claims.[28] In making this finding, the court relied on cases finding that FDA's regulation of labeling did not preempt all tort actions.[29] The court did not carefully analyze whether requiring the additional warning language sought by the plaintiff would conflict with FDA's conclusion that SSRIs do not heighten the risk of suicide.

FDA filed an *amicus curiae* brief in the United States Court of Appeals for the Ninth Circuit, contending that the plaintiff's state law claims could not stand.[30] The FDA-approved labeling for ZOLOFT discusses the risk of suicide that accompanies depression, but does not identify ZOLOFT as a potential cause of suicide. The labeling thus reflects FDA's specific finding that ZOLOFT does not cause suicide, contrary to the language that would be included in the labeling were the plaintiff to prevail.

In affirming the judgment of the district court, the Ninth Circuit explicitly declined to reach the district court's preemption holding.[31] Instead, the Ninth Circuit rested its conclusion on the prescribing doctor's failure to read Pfizer's warnings or rely on information provided by Pfizer's representatives in making his decision to prescribe ZOLOFT.[32] As the doctor would not have been aware of any warning Pfizer issued, Mrs. Motus could not prevail on a claim that the inadequacy of Pfizer's warnings caused her husband's death."

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## Endnotes

[1] Dowhal v. SmithKline Beecham Consumer Healthcare, A094460, 2002 Cal. App. LEXIS 4384, at ***2 n.1 (Cal. Ct. App. July 12, 2002) (reversing trial court decision granting summary judgment for defendants on preemption grounds), *review granted*, 56 P.3d 1027 (Cal. 2002) (en banc), *judgment reversed*, 88 P.3d 1 (Cal. 2004).

[2] 2002 Cal. App. LEXIS 4384, at ***3 (citing Cal. Code Regs. tit. § 12000(c)).

[3] *Id.* at ***5.

[4] *Id.* at ***9.

[5] Amicus Curiae Brief of the United States of America in Support of Defendants/Respondents SmithKline Beecham Consumer Healthcare LP, *et al.*, Dowhal v. SmithKline Beecham, Case No. A094460 (Cal. Ct. App. filed Mar. 22, 2002)

[6] *Id.* at 13.

[7] 2002 Cal. App. LEXIS 4384, at ***16-17 (citing 21 U.S.C. § 379r).

[8] *Id.* at ***29-30.

[9] Letter from Robert D. McCallum, Jr., Ass't Attorney General, *et al.*, to Frederick K. Ohlrich, Supreme Court Clerk/Administrator, Dowhal v. SmithKline Beecham Consumer Healthcare LP, *et al.* (S. Ct. No. S-109306) (filed Sept. 12, 2002).

[10] *Dowhal*, 56 P.3d 1027 (Cal. 2002).

[11] Dowhal v. SmithKline Beecham Consumer Healthcare, 88 P.3d 1, 11-12 (Cal. 2004).

[12] *Id.* at 11.

[13] *Id.* at 12.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 14-15.

[17] Motus v. Pfizer, Inc., 127 F. Supp. 2d 1085, 1088 (C.D. Cal. 2000) [hereinafter *Motus I*], *summary judgment granted*, Motus v. Pfizer, Inc., 196 F. Supp. 2d 984, 986 (C.D. Cal. 2001) [hereinafter *Motus II*], *appeal docketed*, Motus v. Pfizer, Inc., Case Nos. 02-55372 & 02-55498 (9th Cir. Mar. 12, 2002).

[18] *Motus I*, 127 F. Supp. 2d at 1088. The facts of FDA's review of the NDA for ZOLOFT, and its consideration of the need for suicide warnings in the labeling of SSRIs as a class, are recounted *id.* at 1089-90.

[19] The "Precautions" section of the proposed labeling, which FDA instructed Pfizer to use "verbatim," included the following statement:

*Suicide*—The possibility of a suicide attempt is inherent in depression and may persist until significant remission occurs. Close supervision of high risk patients should accompany initial drug therapy. Prescriptions for Zoloft (sertraline) should be written for the smallest quantity of capsules consistent with good patient management, in order to reduce the risk of overdose.

*Id.* at 1088.

[20] Amicus Brief for the United States in Support of the Defendant-Appellee and Cross-Appellant, and in Favor of Reversal of the District Court's Order Denying Partial Summary Judgment to Defendant-Appellee and Cross-Appellant, Motus v. Pfizer, Inc., Case Nos. 02-55372 & 02-55498, at 22 (9th Cir. filed Sept. 3, 2002) (citation omitted).

[21] *Id.*

[22] Amicus Brief for the United States, Kallas v. Pfizer, Inc., No. 2:04-cv-998 (D. Utah filed Sept. 15, 2005).

[23] *FDA Alert: Suicidal Thoughts or Actions in Children and Adults*, July 2005, http://www.fda.gov/cder/drug/infopage/sertraline/default.htm.

[24] *Motus II*, 196 F. Supp. 2d at 986.

[25] *Id.*

[26] *Id.* at 987.

[27] *Id.* at 984.

[28] *Motus I*, 127 F. Supp. 2d at 1087.

[29] *Id.* at 1092.

[30] Amicus Brief, *supra* note 100.

[31] Motus v. Pfizer, Inc., 358 F.3d 659, 660 (9th Cir. 2004).

[32] *Id.* at 660.

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