"EIGHT WAYS TO SUNDAY": WHICH DIRECTION, KENTUCKY SUPREME COURT?

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By John K. Bush & Paul E. Salamanca*

Introduction

Attempted synthesis of the rulings of Kentucky's highest court threatens to go the proverbial "eight ways to Sunday."¹ For one thing, although Kentucky is not very populous² and its Supreme Court sharply limits discretionary review,³ still literally thousands of opinions have been rendered by the Court and its predecessor, the Kentucky Court of Appeals, which prior to 1975 was the only appellate court in the Commonwealth. Also, great diversity of judicial philosophy among the Court's members has resulted in sometimes warring opinions that make divergent points resembling the scattershot of a Kentucky dove hunter.

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As this paper will explain, the Kentucky Supreme Court has exerted its power forcefully in a variety of areas. These include changes in the common law that depart significantly from precedent or from the apparent position of the legislature; the development of two doctrines, "jural rights" and the right to privacy, that substantially restrain the ability of the Kentucky General Assembly to adopt reformative legislation, particularly in the area of torts; and finally, decisions that appear to limit the role of the legislature in the scheme of separated powers, either by overlooking textual provisions intended to preserve legislative autonomy, or by justifying substantial judicial oversight of legislative activity in terms of abstract or modest constitutional provisions.

Discussion

Perhaps no Kentucky Supreme Court Justice demonstrated the significance of who sits on the Court better than the late Justice Charles M. Leibson, who served from 1983 through 1995. Former Chief Justice Robert F. Stephens praised him as among the twentieth-century "giants" on Kentucky's highest court, who "will... be most remembered for his forceful and scholarly opinions in the developing areas of so-called 'plaintiffs' cases.""4 Justice Leibson once observed that "the doctrine of stare decisis does not commit us to the sanctification of ancient fallacy.... The common law is not a stagnant pool, but a moving stream."5 Much of the story of the Kentucky Supreme Court in controversial cases over the past two decades can, depending on one's perspective, be analogized to riding the wave-or fighting the wakeproduced by the splashing kicks of Justice Leibson and others in that moving stream.

A. Common Law

1. Summary Judgment

The "plaintiffs' cases" referenced by Chief Justice Stephens have been encouraged by the summary judgment standard adopted by Kentucky's highest court. Since 1986, summary judgment has generally been easier to obtain in federal courts because of a so-called "trilogy" of cases issued that term - Celotex Corp. v. Catrett, Anderson v. Liberty Lobby Inc. and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.⁶ In 1991, by contrast, the Kentucky Supreme Court ² rejected the trilogy's approach and reaffirmed a summary judgment standard that allows far more cases to go to trial at the state level.7

In Steelvest, Inc. v. Scansteel Service Center, Inc., the Kentucky Supreme Court reviewed the trilogy and found the standard therein to "have appeal."⁸ Nevertheless, the Court "perceive[d] no oppressive or unmanageable case backlog or problems with unmeritorious or frivolous litigation in the state's courts that would require us to adopt a new approach such as the new federal standards."9 The Court thus recognized a summary judgment standard in Kentucky state court that differs substantially from its federal counterpart. Perhaps most importantly, although a federal movant is entitled to summary judgment unless the respondent can show a "scintilla" of evidence which would reasonably support a jury verdict in her favor, in Kentucky the movant is not entitled to summary judgment unless it appears impossible for the respondent to produce evidence that would warrant a verdict in her favor.¹⁰

As a result of these differing standards, plaintiffs in Kentucky have been known to omit federal causes of action from a complaint filed in state court, and thereby

avoid removal to federal court, because of a perception that a weak claim has less chance of survival in a federal forum.¹¹ Justice Leibson, however, argued that a high bar for summary judgment helps eliminate judicial bias. "The more judges take cases away from juries," he argued in Horton v. Union Light, Heat & Power Co., "the more the concepts of reasonable conduct, negligence and gross negligence become synonymous with the view of the judge or judges on that court. Likewise, the more the interpretative power is delegated to juries, the more these concepts become the aggregate of discrete findings by juries."12

2. Tort

The Court's solicitousness for the role of the jury in the legal system has at times failed to translate into similar solicitousness for stare decisis or for the role of the General Assembly in the formation of public policy. The Court has abolished torts, recognized new ones, and modified well-established rules of proof without much deference to precedent or to the General Assembly's views on the subject.

Occasionally, the Court has implemented changes in the common law that are in synch with the views of the legislature. For example, in Hilen v. Hays,13 the Court adopted comparative negligence to replace contributory negligence, and later without much controversy "[t]he General Assembly codified the holding of Hilen v. Hays and its progeny in KRS 411.182."14 But often the Court has acted to implement policy preferences in seeming conflict with determinations by the legislature.

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For example, in *Grayson Fraternal Order of Eagles v. Claywell*¹⁵ the Court held that a person injured by a drunk driver could sue the dram shop operator who provided alcohol to the driver when he was actually or apparently intoxicated. Writing for the Court, Justice Leibson asserted that "as the arbiters of the common law our court is not eternally mated to a presently indefensible position."¹⁶ Writing in dissent, however, Justice James B. Stephenson complained that "a rule of law that has achieved the status of public policy should be addressed by the legislature."¹⁷ Justice Roy N. Vance argued in a separate dissent that the Court had "judicially enacted a 'dram shop' law when the General Assembly has declined to do so."¹⁸

Similarly, in *Giuliani v. Guiler*,¹⁹ the Court recognized another new tort where the legislature had refused to act. *Giuliani* overruled *Brooks v. Burkeen*²⁰ and *Adams v. Miller*,²¹ to hold that a minor could maintain a claim for loss of parental consortium. The *Giuliani* Court asserted that "[t]he doctrine of *stare decisis* does not commit us to the sanctification of ancient fallacy,"²² but the dissent argued that the majority's decision violated the separation of powers because the legislature had recently considered and rejected a bill that would have created the cause of action at issue. "That action, which the majority opinion mischaracterizes as inaction, was also within the legislature's constitutionally granted prerogative," argued the dissent, concluding:

Today, the majority opinion holds in this case that because the legislature rejected Senate Bill No. 139, this Court shall enact it by judicial fiat. In so doing, the majority has exceeded the constitutional jurisdiction of this Court.²³

The Court also has exercised a power it has claimed the legislature lacks: namely, the ability to eliminate a common law cause of action, as was demonstrated in *Hoye v. Hoye*²⁴ and *Gilbert v. Barkes*.²⁵ In *Hoye* the Court abolished the tort of alienation of affection, and, in *Gilbert*, the tort of breach of promise to marry was similarly eliminated.

The dissent in *Gilbert* complained that the Court had adopted a double standard respecting the so-called "jural rights" doctrine, which was first recognized in *Ludwig v. Johnson.*²⁶ In *Williams v. Wilson*, the Court interpreted the doctrine to prohibit "the Legislature from abolishing rights of action for damages for death or injuries caused by negligence"²⁷ as they existed in 1891, when Kentucky adopted its present Constitution. According to the dissent in *Gilbert*, however, the Court had done this very thing:

In *Williams v. Wilson*, a majority of this Court reiterated the constitutional myth that common law causes of action which existed prior to the adoption of the present Constitution, are "jural rights" which cannot be abolished. Like the cause of action for alienation of affections, the cause of action for breach of promise to marry falls into that category. . . . Far be it from me to defend the jural rights doctrine . . . However, if a pre-1891 cause of action is cloaked with constitutional protection, it is protected as well from an act of this Court as it is from an act of the legislature.²⁸

In addition to creating and abolishing torts, the Court has recently altered the burden of proof for what had previously been well-established rules governing "socalled 'slip and fall' cases brought by business invitees who claim to have been injured as a result of slipping on a foreign substance while conducting business on commercial premises."²⁹ In Lanier v. Wal-Mart Stores, Inc., the Court eliminated the customer's burden of proving either that the business caused the foreign substance/object to be on the floor or that "the substance/ object had been on the floor for a sufficient length of time that it should have been discovered and removed or warned of by the proprietor or his employees."³⁰ Instead, the Lanier Court held, the customer now must only prove "that there was a foreign substance/object on the floor and that such was a substantial factor in causing his accident and injury."³¹ The burden then shifts to the proprietor to prove "that his employees did not cause the substance/object to be on the floor and that it had been there for an insufficient length of time to have been discovered and removed or warned of by his employees."32

The *Lanier* Court reasoned that its change of the common law was justified because, among other things,

"[t]he modern self-service form of retail sales encourages" self-service shopping and hence increases "the risk of droppage and spillage."³³ Moreover, the *Lanier* Court asserted, "[i]t is . . . common knowledge that modern merchandising techniques employed by self-service retail stores are specifically designed to attract a customer's attention to the merchandise on the shelves and, thus, away from any hazards that might be on the floor."³⁴

The *Lanier* dissent argued that the Court's concerns about the mass retailing shopping environment did not justify abandoning well-established common law rules. Writing for the dissent, Justice Martin Johnstone noted that "[t]his Court has consistently held that 'established precedent which itself is based upon a reasonable premise' should not be overturned unless 'the need to change the law is compelling."³⁵ Justice Johnstone complained that "[u]nder the majority's new shifting the burden of proof standard, a plaintiff need only assert that he slipped and fell on a transient substance and was injured as a result thereof"—a "minimal requirement" that "eviscerates plaintiffs' obligation to prove breach of duty under negligence law" and results in the proprietor becoming "an insurer for a customer's safety."³⁶

Similarly, in *Larkin v. Pfizer, Inc.*,³⁷ the Court adopted the "learned intermediary" doctrine to relieve a drug manufacturer from liability to the ultimate consumer if it provides adequate warning to the prescribing physician. The dissent argued that the majority improperly fashioned a new exception to liability under the Kentucky Product Liability Act, which, the dissent contended, was "a matter solely within the discretion of the General Assembly, and not the judiciary."³⁸ The *Larkin* dissent contended that the majority's decision provided "a type of summary immunization for pharmaceutical manufacturers and makes the adequacy of warnings to the ultimate consumer a question of law for the court and not a question of fact for the jury."³⁹

Most recently, in *T & M Jewelry, Inc. v. Jennifer Hicks by and through her Parents and Next Friends*,⁴⁰ the Court held that a sporting goods store could be liable to plaintiffs suing on behalf of an accidental shooting victim based upon common-law negligence arising from the store's sale of a handgun to a person under the age of twenty-one in violation of federal law. In dissent, Justice John C. Roach argued that the Court had overstepped its bounds and had intruded on the legislative prerogative:

The Castle [*i.e.*, the sporting goods store] unquestionably violated a federal criminal law and is subject to federal criminal prosecution for its actions. That, however, should be the limit of the role of federal law in this matter, since, as the majority has held, Congress did not also create a private cause of action under the Federal Gun Control Act. I would note that it is not surprising that the General Assembly has a different view of firearms than Congress given the long tradition of firearms ownership in Kentucky. But absent express statutory preemption by Congress, e.g., by creating a civil remedy, our own public policy, as announced by the General Assembly, should control in this matter. I for one believe that the public policy of our Commonwealth is best defined by the elected representatives from places like Sandy Hook, Allen, Winchester, Fairdale, Tompkinsville, and Paducah—not by representatives from Massachusetts, New York, California, Florida, Wisconsin, Oregon, and Hawaii.41

3. Contract

Kentucky's highest court has also in recent years created new substantive law to eliminate the ability of parties to contract in certain areas, apparently without consideration for the views of the General Assembly. The Court's activity in this regard is most pronounced in the field of insurance. For example, in *Lewis v. West American Insurance Co.*,⁴² the Court held that certain family or household exclusion clauses in liability insurance policies are invalid and unenforceable. *Lewis*, however, was not an anomalous decision for voiding an insurance provision on grounds of public policy. As the majority noted in *Lewis*, the Court had in earlier cases "determined that insurance companies could not enforce even a clearly written anti-stacking provision in their uninsured motorist policies."⁴³

The Kentucky Supreme Court concluded that the contractual provisions at issue in *Lewis* violated public policy, but to reach its holding it had to overrule the Court of Appeals' decision in *Staser v. Fulton.*⁴⁴ In his dissent, Justice Walter Baker acknowledged that "the majority

states a compelling case," but that whether the contractual exclusion should be voided was "a decision for the General Assembly, whom the people choose to determine public policy."⁴⁵

B. Constitutional Law

1. Privacy

For at least part of its recent history, the Kentucky Supreme Court was notable for its willingness to find rights in the state constitution above and beyond those in the U.S. Constitution. Justice Leibson was perhaps the foremost leader in expanding the Court's interpretation of state constitutional rights. One admiring commentator observed that "[t]he transformation of Justice Leibson's opinions demonstrates that, given time to evolve and grow, state constitutional adjudication can succeed in creating an alternative body of constitutional law that may be more protective of individual rights and more reflective of the people than federal constitutional law."⁴⁶

Perhaps in no other area did Kentucky's highest court so dramatically transform its views, and thereby assert independence from the rulings of the U.S. Supreme Court, than with respect to the scope of a constitutional right to privacy. In the early 1970s, the Kentucky Court of Appeals (then the state's highest court) adopted a relatively narrow interpretation of privacy in upholding Kentucky's abortion statute.⁴⁷ By the early 1990s, in contrast, the Kentucky Supreme Court had embraced an expansive view under the Kentucky Constitution. Indeed, Kentucky was the first state whose highest court immunized consensual sodomy from criminal prosecution under the state constitution in the wake of a contrary holding of the U.S. Supreme Court under the federal Constitution.⁴⁸ The Kentucky Supreme Court's more recent opinions, however, may signal a less ambitious approach in future privacy cases.⁴⁹

Sasaki v. Commonwealth,⁵⁰ decided a year before Roe v. Wade,⁵¹ illustrates the skepticism the courts of Kentucky once exhibited toward arguments articulated in terms of a constitutional right to privacy. In Sasaki, the Court upheld Kentucky's law punishing abortion against various federal constitutional challenges, including a claim under the Ninth Amendment. Seven years before, in Griswold v. Connecticut,⁵² the Supreme Court of the United States had held that the federal Constitution *****

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protects a married woman's right to use contraceptives. Although the *Sasaki* Court recognized that, under *Griswold*, the federal Constitution "secures inviolate" "a right to privacy in certain matters of marriage, family and sex," it went on to reason that this right "is not absolute" and can be regulated if the government has a "compelling reason."⁵³ It then found such a reason, holding "that the state has such a compelling interest in the preservation of life, including fetal life, that even the fundamental right [of privacy]... must be subordinated to that state interest."⁵⁴ According to the Court in *Sasaki*:

Although it is clear that the state has a compelling interest in the preservation of potential human life, the existence of that interest could, as several courts have suggested, be better balanced with a woman's interest in and right to privacy. But this would be a matter for the legislature. The determinative point which must be recognized is that a compelling interest does exist under which a statute of this rigidity must be held to be constitutional. The court's only responsibility in this case is to decide the constitutionality of the statute. It is not the job of the court to deliberate upon the quality of the statute. We feel that the statute could and should be reformed to more fairly recognize the interest of the pregnant woman, but matters of mollification and reform are subjective matters which must be left up to the legislative branch of the government.55

The Kentucky Supreme Court's affirmance of the state's efforts to protect unborn life was short-lived, however. What the Sasaki Court determined in 1972 was a "compelling interest" had become virtually nonexistent by 1983, according to a plurality opinion rendered by the Kentucky Supreme Court that year. In Hollis v. Commonwealth,56 the Court affirmed the dismissal of a murder indictment for destruction of a fetus against the mother's wishes. Writing the plurality opinion, Justice Leibson rejected the state's argument that Roe stood "for the proposition that a viable fetus should be considered a 'person' whose life is entitled to constitutional protection."57 In fact, argued Justice Leibson, "[t]he thrust of *Roe* was from the opposite direction, that no state can prohibit terminating the life of a fetus . . . until the final trimester of pregnancy, and not even then when necessary to protect maternal life or health."58

Of course, this analysis did not dispose of the issue before the Court, because the General Assembly could legitimately choose to punish the destruction of a fetus even if a fetus is not a person for purposes of the Fourteenth Amendment. As Professor John Hart Ely famously pointed out years ago, nothing in the Constitution prevents the legislature from enacting statutes to protect

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"non-persons" from destruction.⁵⁹ In any case, Justice Leibson's interpretation of *Roe* gave little, if any, weight to the protection of unborn life, and his constitutional views in turn informed his reading of the Kentucky homicide statute, which he concluded on the basis of constitutional and other considerations could not have been intended by the legislature to apply to the taking of the life of a fetus. In Justice Leibson's view, to treat a fetus as a "person" within the meaning of the Kentucky Penal Code would have been to impermissibly "expand the class of persons who could be treated as victims of criminal homicide," which "[t]his Court cannot presume to do."⁶⁰

As a formal matter, of course, *Hollis* was simply a case about statutory interpretation that did not literally proceed from any constitutional right to privacy. But in *Commonwealth v. Wasson*,⁶¹ Justice Leibson, writing for the majority, held that a privacy right implicit in the Kentucky Constitution prohibited criminal prosecution of consensual homosexual sodomy even though the U.S. Supreme Court had upheld such prosecution in a case involving a federal constitutional challenge, *Bowers v. Hardwick*.⁶² In *Wasson*, Justice Leibson described *Bowers* as "a misdirected application of the theory of original intent."⁶³

In contrast with the Sasaki Court, which had not even considered a right of privacy protected by the Kentucky Constitution, the Wasson Court not only recognized such a right, but in fact declared there was more privacy protection under the Kentucky Constitution than under the U.S. Constitution. Although Wasson acknowledged that "[n]o language specifying 'rights of privacy,' as such, appears in either the Federal or State Constitution" and that "[t]here was no mention of a right of privacy" in any state constitutional debates, the Wasson Court reasoned that "Kentucky cases recognized a legally protected right of privacy based on our own constitution and common law tradition long before the United States Supreme Court first took notice of whether there were any rights of privacy inherent in the Federal Bill of Rights."64

As its principal support, *Wasson* relied upon *Commonwealth v. Campbell*,⁶⁵ a 1909 case in which the highest Court of Kentucky had struck down under the state constitution "an ordinance that criminalized *****

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possession of intoxicating liquor, even for 'private use."⁶⁶ *Wasson* emphasized the *Campbell* Court's statement that "^[i]It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."⁶⁷ Justice Leibson contended that "[a]t the time *Campbell* was decided, the use of alcohol was as much an incendiary moral issue as deviate sexual behavior in private between consenting adults is today."⁶⁸

Since *Wasson*, the Kentucky Supreme Court has not issued any opinion that further enlarges constitutional privacy rights, and, in fact, recent decisions suggest that the Court may scale back its broad pronouncements from the Leibson era. In *Yeoman v. Commonwealth*,⁶⁹ decided in 1998, the Court noted that *Wasson* "made clear that the privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States Constitution."⁷⁰ Nonetheless, the *Yeoman* Court went on to reject a privacy challenge brought by physicians and a patient to a provision of a health care reform statute allowing collection and use of certain medical data.⁷¹

Most recently, in a 2006 opinion, *Posey v. Commonwealth*,⁷² the Court upheld a conviction for possession of a firearm by a convicted felon at his private residence over the argument of Justice Will T. Scott in dissent, that "[i]t is simply wrong to arrest, charge and convict Kentuckians of 'felony crimes' for keeping a weapon in their own home – without any evidence the weapon was intended to be used for unlawful purposes."⁷³ None of the opinions issued in *Posey* even mentioned any state constitutional right of privacy that might be implicated, seemingly not taking all that seriously *Wasson*'s broad implication that it is not "within the competency of government" to regulate a citizen's private affairs within his own home.

Also, in a 2004 decision, *Commonwealth v. Morris*,⁷⁴the Court overruled *Hollis* and criticized Justice Leibson's reasoning in the latter case as ignoring clear legislative direction that the criminal homicide statutes extend to all "human beings," which the Court construed to include a viable fetus.⁷⁵ The *Morris* Court stated that "[t]he more enlightened cases have departed from the 'born alive' rule" adopted in *Hollis* "in favor of recognizing that a viable fetus can be the victim of a homicide."⁷⁶

Morris followed a 2003 decision, Grubbs v. Barbourville Family Health Center, P.S.C.,⁷⁷ which refused to recognize "so-called 'birth-related torts,' i.e., wrongful conception or pregnancy, wrongful birth, and wrongful life."78 Grubbs reaffirmed a similar ruling two decades earlier in Schork v. Huber,79 which had provoked a sharp dissent by Justice Leibson. In his concurring opinion in Grubbs, Justice Donald C. Wintersheimer (who had written for the majority in Schork) maintained that "the paramount reason for rejecting a wrongful life claim involves the very dignity of the human person and the very sanctity of human life itself."80 In his dissent in Grubbs, Justice James E. Keller contended that the Court's refusal to recognize a tort action against a doctor that fails to disclose birth defects invaded the plaintiffs' right to make an informed decision on the question of abortion.⁸¹

Although the majority opinions in *Morris* and *Grubbs* did not address the constitutional right of privacy *per se*, the emphasis of those cases on the state's interest in protecting the fetus harkens back to the reasoning of *Sasaki*. They provide precedent for the Court to distance itself from its perceived hostility in the Leibson era towards the state's efforts to regulate in favor of unborn life. Along

with cases like *Yoeman* and *Posey*, which recognize a role for state regulation of private matters in citizens' homes, this authority may also establish a basis for the Court to cabin the broad implications of *Wasson*, which would seem to cast in doubt a wide spectrum of regulatory legislation, including legislation that has nothing to do with consensual sodomy.

2. Separation of Powers

Although separation of powers has a long tradition on both sides of the Atlantic, it is not always appreciated as a good. This is particularly likely when a substantial part of the population believes in good faith that it can improve the status quo, but is unable to secure the requisite change from the elective branches of government. When this happens, separation of powers can be downright exasperating, at least to those holding the belief in question.

However, as Justice Frankfurter poignantly noted in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments.⁸²

In certain respects, the Supreme Court of Kentucky has done its part to maintain separation between the branches of government. Perhaps most famously, in *Legislative Research Commission v. Brown*,⁸³ the Court reviewed various statutes designed to bolster the legislature's effectiveness, particularly when it is not in session.⁸⁴ Most notably, the legislature empowered its administrative arm, the Legislative Research Commission ("LRC"), to veto or delay certain executive initiatives pending the legislature's return.

Not surprisingly, defenders of the legislation asked the Court to adopt a "liberal" approach to separation of powers and uphold these innovations. Also not surprisingly, opponents asked for "strict" construction of these principles. For the most part, the Court sided with the opponents, emphasizing the historical, textual, and precedential basis for strict separation of powers in Kentucky.⁸⁵

Given the legislature's limited resources, short sessions, and basic prerogative to make public policy, and also given the explosive growth of the administrative state, the General Assembly sought to establish a mechanism whereby a subset of its members (the leadership of the LRC) could respond to the executive's exercise of delegated discretion. The Court, however, rejected these justifications and applied the following principles of constitutional law: the legislature does not make policy through a subset of its members; it does not exist when it is not in session; and it must present proposed legislation to the Governor for approval.

In the recent decision of Fletcher v. *Commonwealth ex rel. Stumbo*,⁸⁶ the Court held that the power of the purse lies in the legislature, and that the Governor could not adopt a comprehensive "spending plan" to operate the executive branch of government in the absence of an omnibus appropriation. In Fletcher, the legislature had adjourned without appropriating funds for almost every executive function, and the Governor had asserted an authority, predicated on various nonappropriating statutes and constitutional provisions, for withdrawing money from the treasury to sustain the activities of the executive branch.87 Despite the practical appeal of the Governor's assertion, which his predecessor had also asserted in the same circumstances, the Court held that the provision of Kentucky's Constitution that assigns the power of the purse to the legislature "means exactly what it says."88

a. Structural Provisions

Some argue that the Supreme Court of Kentucky has not taken structural concerns involving the legislature sufficiently seriously where it perceives its own prerogatives to be at stake. Although certain language in the recent case of *Baker v. Fletcher* suggests that the Court might be taking the legislature's prerogatives more seriously,⁸⁹ much remains to be seen.

Critics of the Court in this area base their objections on two arguments. First, they maintain that the Court

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has misapprehended structural provisions of the Constitution intended to protect legislative independence, which the Court itself has identified as an important facet of our constitutional system.⁹⁰ Second, they argue that the Court has interpreted certain abstract or modest provisions of the Constitution in such a way as to reduce or even preclude legislative initiative in vast and important areas of public policy.

In recent years, the Court has more than once required a member of the legislature sued in his or her official capacity to submit to judicial process without consent—in the face of constitutional language,⁹¹ as well as supporting precedent, appearing to dictate a contrary result.⁹² The precursor for this line of cases was *Rose v*. Council for Better Education, Inc.,⁹³ a famous case involving educational finance. When Rose reached the Supreme Court, the only two appellees were the presiding officers of the two houses. Although the Court did not consider the question of legislative immunity as such, it did assert an authority to declare legislation unconstitutional against legislative defendants.⁹⁴ In the abstract, of course, such a declaration does not require such a defendant. Nevertheless, an improbable practice seemed to arise from Rose whereby plaintiffs could seek judicial relief against members of the legislature. Indeed, in new litigation pertaining to educational finance,95 not only did the plaintiffs obtain service against members of the legislature without their consent, they also gave notice to these members of an intention to take their depositions. The trial court ultimately granted protective orders. Even more poignantly, in *Stephenson v. Woodward*, the Court functionally sustained a *quo warranto* against a sitting member of the legislature.⁹⁶

At least some of the foregoing may be in flux, however, because of certain language in the recent case of Baker v. Fletcher.97 In this case, employees of the executive branch of government argued that former Governor Paul E. Patton had improperly denied them a 5% raise when he adopted his executive spending plan in the summer of 2002. (They had received a raise of 2.7%, as the General Assembly would have provided in the bill that it did not enact.) Ruling against the employees, the Court took the position that the defendant in the case, incumbent Governor Ernie Fletcher, could not redress their injury (assuming they had one), and that the proper defendants, the members of the General Assembly, were immune from suit under the Constitution.98 The Court went on to complicate this general issue, however, by indicating that the employees could have brought suit against "the Clerk of each House (for certifying passage of the budget bill) or any other official actor who took part in the process."99 Why the Court made this observation is not entirely clear. As Justice William S. Cooper pointed out in his dissent, if the General Assembly had appropriated money for the raise and had lacked authority to deny it after it had vested, the employees would not have needed a legislative defendant.¹⁰⁰

The other structural component of the Constitution about which the Court appears to have engendered some controversy is the provision that authorizes each house of the legislature to adjudicate the "qualifications, elections and returns of its members."¹⁰¹ In *Stephenson v. Woodward*, noted above, the Court held that the authority conferred by this provision applies only to individuals who are already members of the chamber in question.¹⁰² In other words, the houses may only judge the "elections" and "returns" of individuals already admitted to membership, notwithstanding the fact that a would-be member's putative "election" and "return" would necessarily precede his or her appearance in the chamber for admission. This aspect of *Stephenson* may prove difficult to reconcile with existing legislative and judicial practice. Legislatures across the country have adjudicated the qualifications, elections, and returns of individuals who *present* themselves for membership for centuries,¹⁰³ and the Supreme Court of the United States has specifically held that the word "member" in the virtually identical federal provision includes would-be members.¹⁰⁴ Later in its opinion, the *Stephenson* Court suggested that the Constitution might authorize a house of the legislature to adjudicate the "elections" and "returns" of a would-be member, but not the qualifications,¹⁰⁵ without attempting to reconcile this suggestion with its earlier assertion, and without explaining how two nouns in a series could be subject to one temporal regime, but the third to another.¹⁰⁶

b. Policy-Making Authority

In another vein, the Court has also relied upon abstract language in the Constitution to justify substantial limitation upon the policy-making authority of the General Assembly. Most notably, these limitations have involved educational funding and tort reform.

Under Section 183 of the Constitution, the General Assembly must "provide for an efficient system of common schools throughout the State."¹⁰⁷ In *Rose v. Council for Better Education, Inc.*, noted above,¹⁰⁸ the Court declared that the state's entire system of paying for its schools failed this section.¹⁰⁹ In reaching this holding, the Court emphasized two apparent facts: first, that fiscal support for education varied immensely from district to district; and, second, that educational outcomes across the state were deficient in relation to national averages.

Although praised by many, *Rose* has also been subject to criticism. For example, an "efficient" system of schools would appear to be one that gets the most bang for its buck, but this did not appear to constitute much, if any, of the Court's reasoning. In addition, even if an "efficient" system could somehow be interpreted to require substantially equal educational opportunity to all students,¹¹⁰ a court cannot define such a concept in a way that does not permanently transfer intricate policymaking authority from the legislature to the judiciary. As Justice Leibson noted in his dissent in Rose:

A judicial pronouncement in the present case opens the doors of the courthouse to a host of new lawsuits by litigants seeking a forum to argue questions of public policy which are incapable of specific judicial resolution. In line with the legal truism that "bad cases make bad law," we can expect this case to be cited as precedent in a new wave of litigation involving issues that should be debated in the forum of public opinion, and then legislated rather than litigated.¹¹¹

Justice Leibson's prediction of new litigation in this area has, in fact, come to pass. In *Young v. Williams*, plaintiffs have presented to the trial court a variety of methodologies for determining what an "efficient" system of schools entails.¹¹² If it accedes to the plaintiffs' request, the trial court will have to decide whether to require the General Assembly to consider, and perhaps even adhere to, the "Professional Judgment" model, the "Successful Schools" model, the "State-of-the-Art" model, or an "econometric approach."¹¹³

The Court has reached a similar set of conclusions regarding tort reform, taking modest language in Sections

"Under Section 183 of the Constitution, the General Assembly must 'provide for an efficient system of common schools throughout the State." ... [A]n 'efficient' system of schools would appear to be one that gets the most bang for its buck, but this did not appear to constitute much, if any, of the Court's reasoning {in Rose}."

14, 54, and 241 of the Kentucky Constitution and from that language establishing a formidable bulwark against legislative discretion in this area. Section 14 simply provides that every person shall have legal redress for injuries "by due course of law;" Section 54 only prohibits the General Assembly from "limit[ing] the amount to be recovered for injuries resulting in death, or for injuries to person or property;" and Section 241 merely ensures the continued availability of a cause of action for wrongful death.¹¹⁴ Nothing in these sections appears to involve punitive damages, which by definition do not entail "recover[y] for injuries" because such damages are intended to punish and deter the defendant rather than compensate the plaintiff.

In *Williams v. Wilson*,¹¹⁵ however, the Court relied on these constitutional provisions as authority for a "jural rights doctrine" to invalidate an attempt by the legislature to define or clarify the level of scienter required to sustain an award of punitive damages. The Court reasoned that this doctrine prevents the legislature from enacting laws that have the effect of "impairing" a plaintiff's ability to obtain the full judgment that might otherwise be available.¹¹⁶

Conclusion

The Supreme Court of Kentucky has taken a fairly aggressive, and some might say overly aggressive, approach to the formulation of public policy and to the determination of where its own prerogatives end and those of the General Assembly begin. Whether the Court will continue on this course remains to be seen.

Endnotes

¹ As we sometimes say in Kentucky, "There's eight ways to Sunday." Miltimore Sales, Inc. v. International Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005) (Martin, J.).

² Kentucky's estimated population in 2005 was 4,173,405, or 25th in rank among all states. *See* http://en.wikipedia.org/wiki/Kentucky.

³ "The granting of discretionary review is, as the name indicates, a matter of discretion and 'will be granted only when there are special reasons for it." Elk Horn Coal Corp. v. Cheyenne Resources, 163 S.W.3d 408, 419 (Ky. 2005) (quoting CR 76.20(1)). "Normally, a claim that the Court of Appeals merely erred in its decision will not be a special reason to grant a motion for discretionary review." *Id.* at 419 n.46 (quoting 7 Kurt A. Philipps, Jr., *Kentucky Practice, Rules of Civil Procedure Annotated*, Rule 76.20, cmt. 1 (5th ed. West Group 1995)).

⁴ Robert F. Stephens, *Tribute to Justice Charles M. Leibson*, 84 KY. L.J. 447, 448 (1996).

⁵ Hilen v. Hays, 673 S.W.2d 713, 717 (Ky. 1984).

⁶ See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

⁷ *See* Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

⁸ Id. at 482.

⁹ *Id.* at 482-83.

¹⁰ Ramey v. St. Claire Medical Center, 2004 WL 2481393, at *6 (Ky. Ct. App. 2004) (Barber, J., dissenting) (quoting *Steelvest*, 807 S.W.2d at 482).

¹¹ See, e.g., Gay v. DHL Worldwide Express, 2005 WL 564111 (Ky. Ct. App. 2005) ("The record clearly reflects that Daniel [*i.e.*, the plaintiff] never asserted a claim under the ADA [*i.e.*, Americans with Disabilities Act] in his complaint.... Presumably, this was a conscious attempt by Daniel to avoid the federal court's summary judgment standard if the case were removed to federal court.").

¹² 690 S.W.2d 382, 385 (Ky. 1985).

¹³ 673 S.W.2d 713 (Ky. 1984).

¹⁴ Degener v. Hall Contracting Corp., 27 S.W.3d 775, 784 (Ky. 2000).

¹⁵ 736 S.W.2d 328 (Ky. 1987).

¹⁶ *Id.* at 332.

¹⁷ Id. at 337 (Stephenson, J., dissenting).

¹⁸ Id. at 338 (Vance, J., dissenting).

¹⁹ 951 S.W.2d 318 (Ky. 1997).

²⁰ 549 S.W.2d 91 (Ky. 1977).

²¹ 908 S.W.2d 112 (Ky. 1995).

- ²² 951 S.W.2d at 320.
- ²³ Id. at 325 (Cooper, J., dissenting).
- ²⁴ 824 S.W.2d 422 (Ky. 1992).
- ²⁵ 987 S.W.2d 772 (Ky. 1999).
- ²⁶ 243 Ky. 533, 49 S.W.2d 347 (1932)

²⁷ 972 S.W.2d 260, 266 (Ky. 1998) (quotation marks, citation, and emphasis omitted).

²⁸ *Gilbert*, 987 S.W.2d at 778 (Cooper, J., dissenting) (citations omitted).

²⁹ Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003).

³⁰ *Id.* at 434.

- ¹² ³¹ *Id.* at 435.
 - ³² *Id.*
 - ³³ *Id.*
 - ³⁴ *Id.* at 436.

³⁵ Id at 437 (Johnstone, J., dissenting) (quoting Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 946 (Ky. 1987)).

³⁶ *Id*.

³⁷ 153 S.W.3d 758 (Ky. 2004).

³⁸ *Id.* at 770 (Wintersheimer, J., dissenting).

³⁹ *Id.* (Wintersheimer, J., dissenting).

40 189 S.W.3d 526 (Ky. 2006).

⁴¹ Id. at 534 (Roach, J., dissenting) (citation omitted).

42 927 S.W.2d 829 (Ky. 1996).

⁴³ *Id.* at 834 (citing *Hamilton v. Allstate Ins. Co.,* 789 S.W.2d 751 (Ky. 1990), and *Chaffin v. Kentucky Farm Bureau Ins. Co.,* 789 S.W.2d 754 (Ky. 1990)).

44 684 S.W.2d 306 (Ky. Ct. App. 1984)(upholding

validity of family exclusion clause).

⁴⁵ 927 S.W.2d at 838 (Baker, J., dissenting).

⁴⁶ Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 Ky. L.J. 1009, 1009 (1998).

⁴⁷ See Sasaki v. Commonwealth, 485 S.W.2d 897 (Ky. 1972).

⁴⁸ See Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).

⁴⁹ *See, e.g.,* Yeoman v. Commonwealth 983 S.W.2d 459 (Ky. 1998).

⁵⁰ Sasaki, 485 S.W.2d 897.

⁵¹ 410 U.S. 113 (1973).

- ⁵² 381 U.S. 479 (1965)
- ⁵³ Sasaki, 485 S.W.2d at 902.
- ⁵⁴ *Id*.
- ⁵⁵ *Id.* at 903.
- ⁵⁶ 652 S.W.2d 61 (Ky. 1983).
- ⁵⁷ *Id.* at 62.
- ⁵⁸ Id.

⁵⁹ John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973) (emphasis original) (footnote omitted):

[T]he argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.

- ⁶⁰ *Hollis*, 652 S.W.2d at 63.
- ⁶¹ 842 S.W.2d 487 (Ky. 1992).

⁶² 478 U.S. 186 (1986), overruled by Lawrence v. *Texas*, 539 U.S. 558 (2003).

⁶³ *Wasson*, 842 S.W.2d at 497.

⁶⁴ *Id.* at 493.

65 117 S.W. 383 (1909).

⁶⁶ Wasson, 842 S.W.2d at 494.

⁶⁷ Id. at 494-95 (quoting Campbell, 117 S.W. at 385).

⁶⁸ *Id.* at 495.

⁶⁹ 983 S.W.2d 459 (Ky. 1998).

⁷⁰ *Id.* at 473.

⁷¹ See id. at 474.

72 185 S.W.3d 170 (Ky. 2006).

⁷³ *Id.* at 183 (Scott, J., concurring in part and dissenting in part).

74 142 S.W.3d 654 (Ky. 2004).

⁷⁵ *See id.* at 660 (overruling *Hollis*); *id.* at 658-59 (discussing the statutory definition of "person").

⁷⁶ *Id.* at 659.

⁷⁷ 120 S.W.3d 682 (Ky. 2003).

⁷⁸ *Id.* at 686.

79 648 S.W.2d 861 (Ky. 1983).

⁸⁰ Id. at 692 (Wintersheimer, J., concurring).

⁸¹ *Id.* at 698 (Keller, J., concurring in part and dissenting in part).

⁸² 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

83 664 S.W.2d 907 (Ky. 1984).

⁸⁴ Unless the Governor calls a special session, Kentucky's legislature meets only 60 days in even-numbered years and 30 days in odd-numbered years. *See* K.Y. CONST. §§ 36(1), 42. When the Court handed down *LRC v. Brown*, the legislature met 60 days in even-numbered years and not at all in odd-numbered years, absent a call from the Governor.

⁸⁵ See LRC v. Brown, 664 S.W.2d at 911 (quoting

George Washington and Montesquieu); *id.* at 912 (quoting K.Y. CONST. §§ 27-28); *id.* at 912-13 (citing precedent).

⁸⁶ 163 S.W.3d 852 (2005).

⁸⁷ See generally id. at 857-58.

⁸⁸ *Id.* at 863. The provision in question is K.Y. CONST. § 230: "No money shall be drawn from the State Treasury, except in pursuance of appropriations made by law"

⁸⁹ *See* Baker v. Fletcher, 2005-SC-000208-TG, slip op. at 5-11 (Ky. June 15, 2006).

⁹⁰ See generally Taylor v. Beckham, 108 Ky. 278, 56 S.W. 177, 179, *appeal dismissed*, 178 U.S. 548 (1900) (prohibiting the Governor from adjourning the legislature without constitutional authority and noting the importance of legislative independence from the executive).

⁹¹ K.Y. CONST. § 43 provides that "for any speech or debate in either House [the members of the General Assembly] shall not be questioned in any other place."

⁹² See Wiggins v. Stuart, 671 S.W.2d 262, 264 (Ky. App. 1984) (paraphrasing K.Y. CONST. § 43):

When legislators are sued in their official capacity on the basis of legislation which they acted upon, they are being "questioned in another place" for their legislative actions. The immunity not only applies to speech and debate, but to voting, reporting, and every act in the execution of their legislative duties while in either house.

93 790 S.W.2d 186 (Ky. 1989).

⁹⁴ See id. at 203-04.

⁹⁵ See Young v. Williams, Franklin Circuit Court, Civil Action No. 03-CI-00055 and 03-CI-01152.

⁹⁶ 182 S.W.3d 162 (Ky. 2005). The action was not literally a *quo warranto*, but on January 14, 2005, a trial court temporarily enjoined an individual whom the Senate had admitted to membership from serving in that body. On June 1, the same court entered a permanent injunction precluding her from serving, and on December 22, the Supreme Court affirmed that portion of the decision below declaring that the member could not serve. The member resigned shortly after the Senate convened in January 2006.

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- ⁹⁷ 2005-SC-000208-TG (Ky. June 15, 2006).
- ⁹⁸ See id., slip op. at 5.

⁹⁹ Slip op. at 10. In the "budget bill" and related legislation, the General Assembly took steps to ratify Governor Patton's spending plan, including denial of the full raise. The validity of this ratification was one issue before the Court in *Baker*.

¹⁰⁰ See id., slip op. at 5 (Cooper, J., dissenting) ("Appellants needed only to demand payment from the State Treasurer of the appropriated amounts and, if denied, to bring an action for a writ of mandamus.").

¹⁰¹ K.Y. CONST. § 38. This section provides in full that "[e]ach House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law."

¹⁰² See Stephenson, 183 S.W.3d at 167-68.

¹⁰³ The Senate of the United States, for example, has adjudicated the election, return, or qualification of an individual who presented him or herself for membership on numerous occasions. *See* ANNE M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES 1793-1990 (1995). The Senate has also adjudicated the election, return, or qualification of a member *after admitting that person to membership* where the basis for the challenge preceded the member's admission and thus could have justified deferred admission. *See id*.

¹⁰⁴ See Barry v. United States ex rel. Cunningham, 279 U.S. 597, 615 (1929). The analogous provision of the federal Constitution provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members" U.S. CONST. art. I, § 5, cl. [1].

¹⁰⁵ *See Stephenson*, 183 S.W.3d at 168.

¹⁰⁶ By interpreting K.Y. CONST. § 38 in this manner, the Court was able to sustain a declaration by the trial court that an admitted member could not serve and that the Senate's decision to admit this individual to membership was not protected by the Constitution.

- ¹⁰⁷ K.Y. Const. § 183.
- ¹⁰⁸ 790 S.W.2d 186 (Ky. 1989).
- ¹⁰⁹ See id. at 215.

¹¹⁰ The Court justified its broad definition of the term "efficient" in part on review of the debates from the Convention of 1890, which produced Section 183. *See Rose*, 790 S.W.2d at 205-06. Even if these remarks support the Court's conclusion, the textualist can respond that aspirational statements on the floor of the convention that do not find their way into text cannot readily support an interpretation materially different from what the text would suggest, particularly where the result would undermine the structural prerogatives of the legislature.

¹¹¹ Id. at 223 (Leibson, J., dissenting).

("We have exceeded the judicial power vested in the Court of Justice by Section 109 of the Constitution and violated the doctrine of separation of powers constitutionalized in Sections 27 and 28 of the Kentucky Constitution").

¹¹² *See* Memorandum of Council for Better Education, Inc. in Support of Motion for Summary Judgment, *Young v. Williams*, Franklin Circuit Court, Civil Action No. 03-CI-00055 and 03-CI-01152.

¹¹³ See id. at 29-31. Under the "Professional Judgment" model, teams of educational professionals design a program to meet stated goals, and its costs are then estimated. See id. at 29 (quoting the "ACCESS Network"). Under the "Successful Schools" model, the expenditures of districts meeting stated goals are adopted as a starting point. See id. at 30 (quoting same). The "State-of-the-Art" model resembles the "Professional Judgment" model, except that educational experts design the program on the basis of available literature. See id. (quoting same). The econometric approach attempts to determine an appropriate level of funding by analyzing expenditures and results on a statistical basis. See id. at 31 (quoting same).

¹¹⁴ K.Y. CONST. § 241 provides that:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from

the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

- ¹¹⁵ 972 S.W. 2d 260 (Ky. 1998).
- ¹¹⁶ *Id.* at 269.





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