STATE COURT
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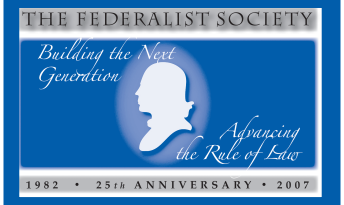

JANUARY 2007

Ohio Supreme Court Upholds Charter School Law

By Chad A. Readler

In 1997, Ohio enacted a public charter school program, allowing parents, primarily those living in urban school districts, to choose what school their children will attend. To make the choice a more meaningful one, Ohio augmented the public school options available to parents by authorizing the creation of privately run public charter schools, called "community schools."[1]

Ohio's school choice initiative came under legal fire in 2001, when various parties affiliated with Ohio's traditional public schools, including two teacher unions, filed state constitutional challenges to the community school program. In support of their constitutional claims, the plaintiffs cited a string of recent opinions—known as the *DeRolph* litigation—in which the Ohio Supreme Court had declared Ohio's school funding system unconstitutional. Taking a more deferential approach to the Ohio General Assembly's education policy choices than it did in *DeRolph*, the Ohio Supreme Court rejected the constitutional claims aimed at the state's community school program, allowing the program to remain in place.[2]

While numerous, the constitutional challenges to the community school program asserted in *Ohio Congress* generally can be characterized in one of two ways. First, the plaintiffs claimed that community schools are not part of the "system of common schools" required by Article VI, Section 2 of the Ohio Constitution. Second, they claimed when students leave traditional public schools for public community schools, the traditional schools lose the state funding associated with those students, depriving traditional schools of the ability to provide the "thorough and efficient" system of education also required by Article VI, Section 2.

Rejecting the "common schools" challenge, the court concluded that, from both a legal and operational perspective, community schools are "common schools" in all meaningful respects. As a legal matter, the General Assembly made clear that "[a] community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education."[3] And from an operational perspective, traditional schools

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Extraterritorial Application of State Antitrust Law Rejected in Texas

By Jack Park

In late October 2006, the Supreme Court of Texas handed down a decision with important antitrust and federalism implications. In *Coca-Cola Co. v Harmar Bottling Co.*,[1] the court, by a narrow 5-4 margin, reversed a decision of the Texas Court of Appeals at Texarkana that was discussed in the February 2004 issue of *State Court Docket Watch*.[2] In so doing, the Texas Supreme Court aligned the treatment of so-called Calendar Marketing Agreements (CMAs) under the Texas antitrust statute with the prevailing treatment of such agreements in other courts. The court also limited

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INSIDE THIS ISSUE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, The Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles 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 tracking state court jurisprudential trends.

In this January 2007 issue, Chad Readler updates us on Ohio's school choice initiative, and the state supreme court's most recent weighing-in on the matter; Jack Park explains the Texas Supreme Court's decision to reject extraterritorial application of antitrust law; Joseph McHugh reports on the Pennsylvania Supreme Court's affirmation of the state's fetal homicide law; John Hilton explores the Missouri Supreme Court's reasons for rejecting a state voter ID law meant to curtail ballot fraud; and Aaron Silletto talks about the debate over free speech in Kentucky judicial elections. See, also, the piece on two interesting cases from the Washington Supreme Court.

Whatever opinion might be construed herein is exclusive to the author, not representative of The Federalist Society. We invite readers to submit responses, criticism or articles on cases in their respective states: paigner@fed-soc.org.

CASE IN FOCUS

Pennsylvania Supreme Court Upholds Fetal Homicide Act

By Joseph McHugh

The Supreme Court of Pennsylvania, in *Commonwealth of Pennsylvania v. Matthew Bullock*,[1] unanimously upheld the constitutionality of an act that makes it a criminal offense for anyone—other than the pregnant woman herself or doctors "engaged in good faith medical practice" or performing an abortion—to kill an unborn child. The court rejected three constitutional challenges by Mr. Bullock, including an equal protection argument in which Bullock essentially argued that the father of an unborn child should not be treated differently than a mother who kills her unborn child. The majority found that the pregnant mother, because she is physically carrying the child, is not similarly situated to the father or anyone else, and it therefore was not arbitrary for the legislature to carve out an exception for the mother from the fetal homicide restrictions that apply to everyone else.[2] Justice Baer joined the majority in full, but wrote separately to stress that *Roe v. Wade*[3] "and its progeny remain the law in this nation and any attempt, based upon the legislature's choice of language in the Act, to undermine its constitutional imperative is unavailing."[4]

Factual Background

Bullock's girlfriend, Lisa Hargrave, was twenty-two to twenty-three weeks pregnant when, on New Year's Eve (2002), the two of them ingested cocaine and alcohol at a party. After returning to their apartment, Hargrave continued ingesting cocaine, ignoring Bullock's request that she stop doing so—at least for the rest of the night—given her pregnancy. Bullock, in a confession to police, stated that he then "blacked out" while arguing about this and when he regained consciousness found that he was on top of Hargrave, choking her. Worried that Hargrave would call the police, Bullock tied her up, later returning to tape her mouth shut, and ultimately strangling her to death when she continually tried to free herself. The unborn child died of asphyxia. A jury found Bullock guilty of third degree murder as to Hargrave and guilty of voluntary manslaughter as to the unborn child. Bullock's appeal to the Pennsylvania Supreme Court concerned only the voluntary manslaughter conviction under Pennsylvania's Crimes Against the Unborn Child Act.[5]

Statutory Scheme

Pennsylvania's Crimes Against the Unborn Child Act, passed in 1997 and effective on March 31, 1998, is intended to protect unborn children from unlawful injury or death. It establishes three levels of murder, as well as voluntary manslaughter and aggravated assault of an unborn child,[6] none of which applies to consensual abortion, doctors engaged in good faith medical practice, or pregnant women with regard to their own pregnancies. Under the Act, an unborn child is defined, by reference to the Abortion Control Act,[7] as a fetus *at any stage* of gestation.[8] Voluntary manslaughter of an unborn child is defined as negligently or accidentally killing an unborn child, without legal justification, in the course of trying to kill someone else who has done something to seriously provoke "sudden and intense passion" in the would-be killer.[9]

Constitutional Challenges Unavailing

Bullock argued that the Act was unconstitutionally vague and overbroad and that it violated his right to equal protection. According to Bullock, the Act was impermissibly vague because a person of ordinary intelligence could not understand what "death" means when applied to a non-viable fetus.[10] Because the Act did not require that the fetus be viable outside the womb at the time of death, the Act did not provide fair warning of precisely what conduct was criminal—if the fetus was not viable outside the womb, it was not actually alive and so could not suffer death from anything someone might do to it.[11] The court cut short this argument, noting that the definition of unborn child to include *all* stages of gestation was "neither obscure nor difficult to grasp;" viability outside the womb was not required for people to understand what would constitute killing a fetus.[12] The statute's protection was intended to extend to a fetus, not to "define the concept of personhood or establish when life as a human being begins and ends."[13] The court stated that "the concepts of life and its cessation are readily understandable by persons of ordinary intelligence relative to biological life forms beginning at the cellular level . . . Accordingly, viability outside of the womb is immaterial to the question of whether the defendant's actions have caused a cessation of the biological life of the fetus."[14]

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Missouri Supreme Court Rejects Voter ID Law

*By John Hilton**

Missouri has had a serious and recurring problem with multiple-cast and fraudulent ballots, and general misrepresentation of identity at election polls. News reports estimate that the names of more than 10,000 deceased people appear on Missouri's voter rolls.[1] In October 2006, nearly 1,500 "potentially fraudulent" voter registration cards were discovered in St. Louis City, including those of three deceased persons.[2]

Several organizations have been implicated in the fraud through investigations over the years. Operation Big Vote delivered 3,800 "suspect" voter registration cards to the St. Louis City Election Board in March 2001 on the mayoral primary's deadline registration date. Among those purported to have registered were several prominent deceased St. Louisians and one dog.[3] The ensuing investigation resulted in guilty pleas from six canvassers[4] and conviction of the organization's leader.[5] All of the cards in the aforementioned October 2006 news report had been turned in by the Association of Community Organizations for Reform Now (ACORN).[6] In St. Louis County ACORN turned in hundreds of incorrect address change cards, including one "signed" by a dead person.[7] Thousands more suspicious cards surfaced in Kansas City on the eve of 2006 general election. One member of the Kansas City Board of Elections vividly described the voter rolls as having been "raped."[8] Most of the cards originated with ACORN.[9] On the Wednesday before Election Day, a federal grand jury in the Western District of Missouri indicted four ACORN employees for intentionally submitting false voter registration cards.[10]

The problem has been no less pronounced in general elections. News reports estimated at least 235 deceased persons "voted" in 2004.[11] In 2000, 1,268 St. Louis residents who had not registered by the deadline nonetheless voted by court order.[12] A study by Matt Blunt, then the Secretary of State and now Governor, concluded that 1,233 of these persons should not have been allowed to vote.[13] The Blunt Report also found that 114 federal and state felons illegally voted,[14] 68 people "likely" voted more than once[15], and 14 ballots were cast in the names of deceased individuals.[16] A less exhaustive study conducted by the outgoing Secretary of State, published in early 2001, found that 135 individuals who were not registered voters and did not have a court order nonetheless were allowed to vote.[17]

The state legislature began to respond to the public perception that Missouri's ballot boxes were vulnerable to fraud and mismanagement by passing an election reform bill in 2002. The bill, which brought Missouri into compliance with the federal Help America Vote Act, contained a voter ID requirement.[18] Previously, Missouri law merely required a voter somehow to "identify himself" in order to receive a ballot. Under the 2002 bill, voters were required to present some form of "personal identification," including any state or federal ID, a college ID card, or a current utility bill or pay stub.[19] Voters whose identity could not be determined at the polls were permitted to cast a "provisional ballot" that would be verified and counted at a later date.[20]

The 2006 Missouri Voter Protection Act strengthened the ID requirement by defining "personal identification" as a state-issued driver or non-driver license, any photographic military ID, or any other non-expired state or federal government document bearing the voter's signature and photo.[21] A two-year transition period was added to ease the law's impact. During the transition period, any voter who could not produce acceptable identification could still vote with a provisional ballot after (1) signing an affidavit affirming his or her identity, and (2) producing valid identification per the 2002 law.[22] Mentally or physically handicapped voters, voters older than sixty-five, and voters whose religious beliefs prevented them from having an accepted form of identification were permanently exempted from the ID requirement and could vote after signing a similar affidavit.[23] All other voters who did not have an acceptable form of identification could obtain non-driver licenses from the state free of charge; a "mobile processing unit" would bring non-driver licenses to the elderly and disabled free

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Carey v. Wolnitzek and the Future of Kentucky Judicial Elections

*By Aaron J. Silletto**

Just before Election Day (2006), the United States District Court for the Eastern District of Kentucky preliminarily enjoined the enforcement of portions of the Kentucky Code of Judicial Conduct[1] ("the Code") in *Carey v. Wolnitzek*.[2] The lawsuit was brought by Marcus Carey, a candidate for Justice of the Supreme Court of Kentucky, Sixth Appellate District, against the Kentucky Judicial Conduct Commission, the Kentucky Inquiry Commission, and the Kentucky Bar Association--agencies charged with the enforcement of the Code. *Carey* is the latest decision in the ongoing controversy surrounding the scope of the free speech rights of candidates in state judicial elections.[3]

The *Carey* plaintiff made facial and as-applied First Amendment challenges to five canons of judicial conduct and one Kentucky statute governing judicial recusal. Mr. Carey sought during the 2006 campaign to post on his website answers to specific questions he had formulated—questions, he proposed, his opponent also answer: (1) his judicial philosophy in interpreting the law, (2) his opinion as to the controversial doctrine of "jural rights" under the Kentucky Constitution, (3) his beliefs as to when life begins as a legal matter, (4) whether the "best interest of the child" standard is an appropriate consideration in certain family law contexts, (5) what recognition should be given to God when discussing the foundations of American law and justice, and (6) whether there is a constitutional right to abortion or gay marriage under the Kentucky Constitution. Mr. Carey also sought to state publicly his political party affiliation, to seek endorsement from other political officials, and to personally solicit contributions during his campaign. The plaintiff alleged that all of these activities were unconstitutionally prohibited by the relevant portions of the Code of Judicial Conduct and the Kentucky statute at issue.

To begin, Carey challenged the "Commit Clause" of the Code of Judicial Conduct, which prohibits a judge or judicial candidate from "intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court."[4] The court noted that the Kentucky Supreme Court, in its commentary on the Commit Clause, had stated that the current language of the clause was adopted with the intent that it conform to the holdings in *Republican Party of Minnesota v. White*[5] and *Family Trust Foundation of Kentucky v. Wolnitzek*.[6] However, the commentary specifically allows judges and judicial candidates to "inform the electorate of their judicial and political philosophies and their thinking on points of law so long as the candidates make clear that they will decide matters on the facts and law as presented and developed in the cases that come before them."

Whether a judicial candidate intended his statements to be taken as a commitment to rule in a certain way, and whether a reasonable person would perceive the statements as such a commitment, the court opined, are determinative of whether the statements would violate the Commit Clause. Thus, the words spoken and the context in which they are

spoken are the key to deciding the issue. Because Carey did not disclose the particular statements he intended to make in response to the questions he had formulated, the court held that it was impossible to determine whether Carey would violate the Clause by answering the questions. Distinguishing other cases, including the *Family Trust Foundation* case, where the plaintiffs had asked questions of judicial candidates and thus suffered an "informational injury" by the candidates' refusal to answer, the court held that Carey had failed to show a credible, objective threat to his First Amendment rights. Therefore, the constitutional challenge to the Commit Clause was dismissed on grounds of lack of standing and ripeness.

The second and third provisions of law Carey challenged were the "Recusal Requirements," contained both in the Code of Judicial Conduct[7] and in Kentucky statutory law.[8] These provisions generally require that a judge recuse himself in any situation in which either he has "expressed an opinion concerning the merits of the proceeding" or when his "impartiality might reasonably be questioned."

The court found two problems with Carey's challenge to the Recusal Requirements. First, without knowing what Carey intended to say in response to the questions he posed, it was impossible for the court to say whether those statements might cause Carey's

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Member Report from the Washington Supreme Court:

In *Amunrud v. Board of Appeals* (Wash. 2006), the Washington Supreme Court upheld (6 to 3) the constitutionality of RCW 74.20A.320's provisions for the suspension of driver and other professional licenses when a parent is six months or more in arrears of child support.

RCW 74.20A.320 was passed pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). In order to receive federal block grants, states must operate child support programs that meet certain federal requirements. This includes setting procedures for suspending driver and other professional licenses when persons fail to meet child support obligations.

Writing for the majority, Justice Barbara Madsen maintained that the statute embodied a rational relation between the suspension of said licenses and the state's interest in enforcing child support orders. This conclusion was premised upon the application of rational basis review, "the most relaxed form of judicial scrutiny." Chief Justice Gerry Alexander and Justices Charles Johnson, Bobbe Bridge, Susan Owens, and Mary Fairhurst joined the majority.

Justice Madsen acknowledged that said licenses are property interests requiring due process protections. But she rejected Amunrud's claims that he was denied a meaningful hearing and was not allowed the opportunity to show that revoking his professional taxi cab license would harm his ability to pay back child support payments. According to Justice Madsen, the statute provided for an administrative hearing to challenge the license suspension, as well as the right to appeal the suspension, and the opportunity to obtain a release from the suspension by signing a repayment agreement. In a footnote, Justice Madsen asserted that the Washington Constitution's Due Process Clause (Article I, Section 3) provides equal, but not greater protection than the federal Due Process Clause.

Justice Madsen denied that there is a fundamental right to earn a living or pursue an occupation. To claim such, she argued, is to turn back over 100 years of Washington Supreme Court rulings and return the state to the *Lochner* era. Rather, Justice Madsen maintained the right to earn a living is simply a liberty interest protected by basic due process requirements. Her opinion noted that the Washington statute is not concerned with driving or professional safety, but that it satisfies rational basis scrutiny as a means of furthering the state's compelling interest in protecting children.

Justice Richard Sanders penned a dissenting opinion, signed by Justices James Johnson and Tom Chambers, concluding that the Washington statute bore no relation to traffic safety, and infringed upon Amunrud's right to earn a living, ultimately failing to satisfy due process requirements.

The right to earn a living, wrote Justice Sanders, is a fundamental right receiving constitutional protection by federal and state due process requirements. As such, Justice Sanders maintained that the Washington statute at issue should be subjected to strict scrutiny. However, he also asserted that even under a less-exacting standard the statute at issue lacked adequate justification.

To satisfy due process, Justice Sanders insisted that a statute must satisfy a three-part test, articulated in *Lawton v. Steele*[1] and several other Washington Supreme Court decisions. First, the law must be aimed at achieving a legitimate public purpose. Second, the law must use means reasonably necessary to achieve that purpose. Last, it must

not be unduly oppressive.

Wrote Justice Sanders, the police power to regulate or revoke licenses is not unlimited, but must bear a real and substantial relation to the legitimate reason for the licensing. He noted the dissenting opinion of Justice Madsen in *State v. Shawn P.*,[2] involving a statute revoking or denying driver licenses to minors who had been found guilty of possessing or consuming alcohol, regardless of whether they drove while possessing or consuming. Justice Madsen's *Shawn P.* dissent opined that where there is no "immediate connection with operating a motor vehicle, the license revocation is arbitrary and lacks the rational relationship demanded by substantive due process."[3] Justice Sanders concluded that failure to pay child support has no rational relationship with driving safety, and is therefore void.

Finally, Justice Sanders contended that historic methods of collecting child support (garnishment, civil liability, property liens, contempt of court) and federal prosecution are less intrusive, more effective means of accomplishing the goal of the statute than taking away a debtor's income source.

In *SuperValu Holdings, Inc. v. Department of Labor & Industries* (Wash. 2006), the Washington Supreme Court was faced with the issue of whether a voter initiative prevented the state government from regulating all kinds of ergonomics, or whether the initiative only repealed specific ergonomics regulations, but left the state able to regulate ergonomics through its other workplace regulatory authority.

The court held that the Department of Labor & Industries (L&I) has the power to regulate business-place ergonomics through its "general duty clause" in the Washington Industrial Safety and Health Act (RCW 49.17.060(1)), and ruled that voter Initiative 841 (passed in 2003) did not deprive L&I of such power.

Washington voters passed Initiative 841 in 2003, repealing controversial ergonomics regulations promulgated by L&I in 2000. The Initiative, by its terms, deemed the regulations "expensive" and "unproven." Section 2 of the Initiative provided that "[t]he state ergonomics regulations…are repealed," and that "[t]he director shall not have the authority to adopt any new or amended rules dealing with musculoskeletal disorders" unless and to the extent required by the U.S. Congress or the federal Occupational Safety and Health Administration. Section 3 of the Initiative stated that its provisions "are to be liberally construed to effectuate the intent, policies and purposes" of the Act.

The case arose when L&I filed for a subpoena to obtain from SuperValu Holdings, Inc. all written information on its program for preventing musculoskeletal injuries. A Pierce County trial court had refused to enforce the subpoena, essentially concluding that L&I no longer has any authority to regulate ergonomics under the terms of Initiative 841.

Justice Tom Chambers wrote the opinion for the court on behalf of the 8-1 majority. (Justice James Johnson was recused from the case and was replaced by Judge Christine Quinn-Brintnall of Division II of the Washington Court of Appeals.) Justice Chambers concluded that "[n]othing in I-841 suggests that L&I is stripped of its *general* regulatory authority to address serious or deadly ergonomics-related workplace hazards by way of RCW 49.1.060(1)" (emphasis added). Instead, he wrote that the plain terms of the Initiative suggested that voters only intended to repeal *specific* ergonomics regulations and to prohibit L&I from adopting new ergonomics regulations that are similar to the ones repealed.

Justice Chambers also maintained that because of Initiative 841 limits L&I may only regulate ergonomics under its General Duty Clause. Thus, the agency now has a higher burden when attempting to prove a violation. He asserted that to prove a violation of the general duty clause, L&I must demonstrate that an employer failed to keep the workplace clear of (1) a hazard, which (2) was recognized, and (3) caused or was likely to cause death or serious injury.

Justice Richard Sanders wrote the dissent. He concluded that "[w]hile I-841 does not specifically mention the general duty clause, the fact that it deemed ergonomics 'unproven' removes L&I's authority to investigate and enforce it as a 'recognized' hazard." Justice Sanders characterized L&I's General Duty Clause arguments as resting on the assumption that ergonomics hazards are "recognized"—a groundless assumption in light of the Initiative.

Moreover, Justice Sanders pointed out that L&I's repealed ergonomics regulations did not identify any ergonomics hazards, but instead required employers to analyze various risk factors to ascertain any hazards.

L&I now has a different and expanded definition of ergonomics that extends to "psychological" hazards as well as physical ones.

Endnotes

1 152 U.S. 133 (1894).

2 122 Wn.2d 533 (Wash. 1993).

3 *Id.* at 569.

Pennsylvania Fetal Homicide Act, (Cont'd. from page 3)

The court also rejected the overbreadth argument. As an initial matter, it viewed the claim as sounding in substantive due process (not overbreadth, because overbreadth only applies to First Amendment claims).[15] Noting that substantive due process "'provides heightened protection against government interference with certain fundamental rights and liberty interests,'"[16] the court pointed out that Bullock had no right "to unilaterally kill the unborn child carried by another person" and that the United States Supreme Court has affirmed that states have an "'important and legitimate interest' in protecting fetal life at all stages, even if that interest only becomes 'compelling' at viability."[17] Bullock's substantive due process claim failed because he could not identify any fundamental right infringed by the Act.[18]

Bullock's final, and perhaps most significant, constitutional argument was that his right to equal protection was violated by a statute that held a natural father criminally responsible for harm he caused to his unborn child, but excused a mother from such conduct merely by reason of her pregnancy.[19] The court disagreed. Legislatures can draw reasonable classifications; and the appropriate level of scrutiny "depends upon the type of categorization involved and the nature of the right affected."[20] The challenged distinction consisted of "the mother versus everyone else." It did not involve invidious distinctions based on race, national origin, gender or legitimacy that would be subject to heightened scrutiny.[21] And the right that Bullock asserted—to unilaterally kill the unborn child that another was carrying—"is neither fundamental nor important—indeed it does not exist."[22] Thus, rational-basis review was proper and the Act passed muster. The legislature's purpose in distinguishing between the mother and everyone else was deemed rational: "[s]imply put, the mother is not similarly situated to everyone else, as she alone is carrying the unborn child."[23]

The court then went on to reject Bullock's non-constitutional challenges to a jury instruction.[24]

Justice Baer wrote a concurring opinion on the constitutional challenges because he felt the need to stress that the court's opinion offered no basis to undermine *Roe*. The United States Supreme Court "has clearly concluded that states have an important and legitimate interest in protecting fetal gestation from the outset of a pregnancy through the birth of a child" and the legislature was acting consistent with that interest when it passed the Act.[25] However, the legislature was only criminalizing "*certain acts* that would result in the cessation of the gestational process."[26] It was not attempting to define the concept of personhood or to define when life begins or ends. And the court, in upholding the Act, was not defining a fetus "as a life-in-being" nor was it "endorsing the notion that the interruption of the reproductive process is the killing of human life. *Roe* and its progeny remain the law in this nation and any attempt, based upon the legislature's choice of language in the Act, to undermine its constitutional imperative is unavailing."[27]

Endnotes

1 --- A.2d ---, 2006 WL 3797944 (12/27/06), *hereinafter Bullock*.

2 *Bullock*, slip op. at 6.

3 410 U.S. 113 (1973).

4 *Bullock*, slip op. at 8.

5 18 Pa.C.S. §§ 2601-2609 (*hereinafter* "the Act").

6 *See* 18 Pa.C.S. §§ 2604-2606.

7 18 Pa.C.S. §§ 3201-3220.

8 More precisely, the Abortion Control Act defines both an "unborn child" and a "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth." 18 Pa.C.S. § 3203, cited in the Act's definition of "unborn child" at 18 Pa.C.S. § 2602.

9 18 Pa.C.S. § 2605(a).

10 *Bullock*, slip op. at 2-3.

11 *Id.* at 2.

12 *Id.* at 3.

13 *Id.*, citing *State v. Merrill*, 450 N.W.2d 318, 324 (Minn. 1990).

14 *Id.* at 3-4.

15 *Id.* at 4.

16 *Id.* at 4, quoting *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

17 *Id.* at 4, quoting *Roe*, 410 U.S. at 163, and citing, among others, *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

18 *Id.*, slip op. at 4.

19 *Id.* at 5.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 6-8.

25 *Id.* at 8.

26 *Id.* (emphasis added).

27 *Id.*

Missouri Voter ID Law, (Cont'd. from page 4)

of charge.[24] Governor Blunt signed the Act on June 14, 2006.

Plaintiffs filed suit against the law in state and federal court, but the federal suit (spearheaded by People for the American Way) was stayed. At the state level, Jackson County sued claiming that the law violated a portion of the Missouri Constitution known as the Hancock Amendment, which prohibits the state from imposing unfunded mandates on political subdivisions.[25] Jackson County argued that because counties likely would have to process more provisional ballots, especially during the transitional period, the new law created an unfunded mandate. In a separate suit, a group of individual plaintiffs claimed that the law burdened their right to vote in violation of the state constitution.[26]

The state suits were consolidated for a trial before Circuit Judge Richard Callahan, who overturned the law on September 14, 2006.[27] It is unclear from the opinion what level of scrutiny Judge Callahan employed (rational basis, intermediate, strict), or whether he overturned the law on equal protection grounds or because it infringed on a fundamental right shared by all citizens. Whatever the reason, Callahan concluded that the "voting restrictions imposed by SB 1014 impermissibly infringe[d] on core voting right [sic] guaranteed by the Missouri Constitution." Judge Callahan rejected the Hancock Amendment challenge, which argument the plaintiffs dropped on appeal.

The Supreme Court of Missouri held that SB 1014 violated the Equal Protection Clause of the Missouri Constitution.[28] The court used strict scrutiny, and decided the case under the Missouri Constitution (although it made reference to federal precedent throughout the opinion). Under the federal REAL ID Act of 2005, a citizen needs a U.S. passport or birth certificate in order to receive a driver or non-driver license. Missouri charges $15 for an official birth certificate; an expedited U.S. passport can cost upwards of $200. The court identified additional "practical costs," such as navigating state and federal government bureaucracies, and traveling to and from government agencies in pursuit of the required documentation. The custom of a married woman taking her husband's name convinced the court that the law disproportionately affected women, and extrapolated from that to hypothesize about the difficulties that the poor, elderly, and disabled could face under the new law. It therefore concluded that the law substantially burdened a fundamental right, and could not be justified unless found "necessary to accomplish a compelling state interest."

While recognizing that the state has a "compelling interest in preserving electoral integrity and combating voter fraud," the court held that SB 1014 could not withstand strict scrutiny. First, the court deferred to the trial court's factual findings and held that "voter impersonation fraud" has not been a problem in Missouri since the 2002 ID requirement was enacted. Thus, the court held that the state's asserted interest was non-existent. It also held that the photo ID requirement would not work to prevent other types of alleged voter fraud, such as "absentee ballot fraud, voter intimidation, and inflated voter registration rolls." Thus, the court concluded that the law was not narrowly tailored to prevent voter fraud. From reading the decision, however, it is not clear whether the law failed the "compelling interest" prong, the "narrowly tailored" prong, or both (under the strict scrutiny standard).

The court also rejected the argument that the law combated the *perception* of voter fraud. The court was worried that "the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights."

Alone in dissent from the court's unsigned per curiam opinion, Justice Stephen Limbaugh argued that the issue was not yet ripe. To Limbaugh's mind, the law's two-year transition period meant that no citizen's right to vote would be burdened until the 2008 general election because they could easily cast a provisional ballot in the meantime. Limbaugh would have held that the plaintiffs lacked standing until 2008. Justice Limbaugh further noted in his dissent that even assuming arguendo that "voter impersonation fraud" never happens in Missouri, for what reason does a person register to vote under a false name, except ultimately to commit voter impersonation fraud?[29]

Critics of this case have argued that whether one agrees with the court's reasons for overturning the Voter Protection Act, the decision effectively short-circuited the democratic process. Had the court found the law's transition period severable and constitutional (as Limbaugh did), voters would have experienced the new law in effect. Voters who had to cast provisional ballots in 2006 would have realized that to vote in 2008 they would need to obtain a photo ID from the state, which would require various official documents. Legislators could have been contacted, pressure groups could have formed, and the people's representatives could have debated amending or repealing the law. Having been thoroughly vetted in the court of public opinion, the issue would have been fully ripe for consideration by the state supreme court in 2008.

Meanwhile, the need to protect the integrity of Missouri's election process remains. Supporters of the 2006 Act recently announced that the legislature would address the issue again in 2007.[30] Hoping to prevent a replay of 2006, the bill's sponsor acknowledges that the state must find a way to pay for the documents (passport, birth certificate) voters need to receive a state-issued photo ID. But after the court's decision in *Weinschenk*, the constitutionality of any such law is doubtful. It is certain, however, that this issue is not going away any time soon.

**John Hilton is a graduate of Harvard Law School and a member of the Kansas City Federalist Society chapter.*

Endnotes

1 Matt Wynn, Columbia Missourian, "Deceased Still on State's Voting Rolls," Nov. 2, 2006.

2 Jo Mannies, St. Louis Post-Dispatch, "Suspect Voter Registration Cards Found in St. Louis," Oct. 11, 2006.

3 Jo Mannies, St. Louis Post-Dispatch, "Director of Get-Out-The-Vote Program Subpoenaed by Federal Grand Jury," April 21, 2001.

4 Robert Patrick, St. Louis Post-Dispatch, "6 Plead Guilty in Vote Fraud Case," Dec. 17, 2004.

5 Robert Patrick, St. Louis Post-Dispatch, "Jury Finds Montgomery Guilty in Vote Fraud Case," Feb. 11, 2005.

6 *Id.*

7 Jo Mannies, St. Louis Post-Disptach, "More Bogus Election Forms Found", Oct. 25, 2006.

8 Dave Helling, KC Buzz Blog, "James: The registration rolls are a mess," 11/21/06, *available at* http://kcbuzzblog.typepad.com/kcbuzzblog/2006/11/james_the_regis.html (last accessed Nov. 29, 2006).

9 Dave Helling, The Kansas City Star, "Election Officials Seek Voter Registration Inquiry," Oct. 24, 2006.

10 Dave Helling, The Kansas City Star, "False Voter Registrations Allegedly Submitted," Nov. 1, 2006.

11 *Supra* note 1.

12 "Mandate for Reform: Election Turmoil in St. Louis, November 7, 2000," by Secretary of State Matt Blunt, issued on 7/24/2001, at 8. *Available at* http://bond.senate.gov/mandate.pdf (last accessed Oct. 29, 2006).

13 *Id.* A sampling of excuses from the voters' affidavits: "Forgot to [register]," "Missed registration deadline of 10/11/00", "for the democratic party," and "I don't know."

14 *Id.* at 8-9, 24-25.

15 *Id.* at 9, 25-26.

16 *Id.* at 9, 26.

17 "Analysis and General Recommendations Report Regarding the November, 2000 General Election in the City of St. Louis," by Secretary of State Rebecca McDowell Cook, issued on Jan. 4, 2000, at 9. Copy of report on file with the author.

18 Senate Bill 675, § 115.427.1(1)-(6), *available at* http://www.senate.state.mo.us/02info/billtext/tat/SB675.htm (last accessed 11/13/06).

19 *Id.*

20 R.S.Mo. § 115.430 (Supp. 2006).

21 R.S.Mo. § 115.427.1(1)-(4) (Supp. 2006), *available at* http://www.moga.state.mo.us/statutes/C100-199/1150000427.HTM (last accessed 12/4/06).

22 R.S.Mo. § 115.427.13 (Supp. 2006), *available at* http://www.moga.state.mo.us/statutes/C100-199/1150000427.HTM (last accessed Dec. 4, 2006).

23 *Id.* at § 115.427.3-4.

24 *Id.* at § 115.427.7.

25 Mo. Const. Art. X, § 21 (Supp. 2006), available athttp://www.moga.state.mo.us/const/A10021.HTM (last accessed Dec. 4, 2006).

26 Mo. Const. Art I, § 25 (Supp. 2006), *available at* http://www.moga.state.mo.us/const/A01025.HTM; art. VIII, § 2 (Supp. 2006), *available at* http://www.moga.state.mo.us/const/A08002.HTM (last accessed Dec. 4, 2006).

27 Weinschenk v. Missouri, case no. 06AC-CC00656, and Jackson County v. Missouri, case no. 06AC-CC00587, both in Circuit Court of Cole County, Missouri (Division II). Copy of opinion on file with the author.

28 Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006).

29 *Id.* at 228.

30 Bob Priddy, MissouriNet, "Voter Photo ID to Return," 1/12/2007, *available at* http://www.missourinet.com/gestalt/go.cfm?objectid=D8C287FA-3594-496F-9D382DA84B387D66&dbtranslator=local.cfm (last accessed Jan. 12, 2007).

Texas Antitrust Law, (Cont'd. from page 1)

the remedial scope of the Texas statute, holding that it "will not support extraterritorial relief in the absence of a showing that such relief promotes competition in Texas or benefits Texas consumers."[3]

The underlying lawsuit concerned CMAs which Coca-Cola bottlers had entered into with retailers in Texas, Oklahoma, Arkansas, and Louisiana. In exchange for promotional payments, the retailers provided a variety of time-bound advertising, product placement, and sale pricing that favored Coca-Cola products. Five Royal Crown Cola franchisees, whose products competed with Coca-Cola and Pepsi products in the carbonated soft drink market, sued the Coca-Cola Company and several distributors of Coca-Cola and Dr. Pepper alleging that their use of CMAs constituted an unlawful monopoly, attempt to monopolize, conspiracy to monopolize, and tortious interference with a business relationship.[4] The Royal Crown franchisees based their claims on the Texas Free Enterprise and Antitrust Act of 1983 (TFEAA),[5] but included the entirety of the territory of the Coca-Cola bottlers within their claims. That area included not only eleven counties in Texas, but also three counties in Oklahoma, twenty-one counties in Arkansas, and five parishes in Louisiana.

After a jury trial that lasted several weeks, the district court in Morris County, Texas, entered judgment in favor of the RCC franchises, awarding monetary damages of some $13.8 million, plus an award of $500,000 in attorney fees and injunctive relief. The damages award was meant to compensate the RCC franchisees for lost profits, future lost profits, and lost franchise value. The Texas trial court's injunction prohibited certain activities of the Coca-Cola entities throughout the relevant territory, including portions of Arkansas, Oklahoma, and Louisiana.

The Texas Court of Appeals reversed the award of attorney fees and remanded that issue for further proceedings, but otherwise affirmed the judgment.[6] It rejected the contention that, by entering an injunction that applied to portions of Arkansas, Oklahoma, and Louisiana, the trial court had exceeded its authority under the Texas antitrust statute. It reasoned that all of the conduct had a connection to Texas and, in the absence of contention to the contrary, presumed that the antitrust laws of those neighboring states would likewise view the CMAs with disfavor.[7] The court also rejected the Coca-Cola entities' attack on the adequacy, both legal and factual, of the showing of antitrust injury.

In an October 20, 2006 decision, the Texas Supreme Court reversed the judgment of the Court of Appeals. It held that the TFEAA "will not support extraterritorial relief in the absence of a showing that such relief promotes competition in Texas or benefits Texas consumers."[8] The court explained that the TFEAA could not be enforced "as it has been here—that is, by awarding damages and injunctive relief for injury that occurred in other states."[9] Nor could the Texas courts adjudicate the validity of the CMAs under the law of Arkansas, Oklahoma, or Louisiana. The court held: "Texas courts, as a matter of interstate comity, will not decide how another state's antitrust laws and policies apply to injuries confined to that state."[10] Finally, the court held that the RCC franchisees' showing of antitrust injury was legally insufficient to sustain the judgment under Texas law. Accordingly, the court dismissed the RCC franchisees' claims of injury occurring in other states and ruled that they should take nothing on their claims of injury in Texas.

Antitrust

The majority explained, "Generally speaking, a CMA provides that during stated periods of time a retailer will promote a wholesaler's products in preference to competing products in exchange for payments and price discounts from the wholesaler."[11] Retailers and wholesalers do not generally compete, so CMAs operate as vertical restraints on trade, not horizontal restraints.[12] This characterization is legally significant because, while horizontal restraints are presumptively illegal, nearly all vertical restraints, including CMAs, are not. Rather, vertical restraints are generally analyzed using a rule of reason approach, "according to which the trier of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[13] As the majority noted, "CMAs are used throughout the country and have repeatedly withstood antitrust challenges, and . . . CMAs, including CMAs previously used by Coke, are not in themselves anti-competitive."[14]

The majority concluded that the RCC franchisees did not make a sufficient showing of market harm to prove their TFEAA claims. It recognized that, while the CMAs in Coke's hands could have had an anticompetitive effect, the fact of injury could not be inferred. Rather, the RCC franchisees had to show that Coke's CMAs foreclosed a substantial portion of the competition in a relevant market. This required more than proof of isolated instances of higher prices. The RCC franchisees had to show a general adverse effect on consumers throughout

a territory or the region. Their failure to present evidence that "any relevant market claimed by the RCC franchisees was harmed by Coke's CMAs"[15] meant that the RCC franchisees could not prevail.

The Coke entities' use of CMAs was not invalid, either per se or because they violated the rule of reason, even though Coke was the dominant player in the market. The evidence showed that Coke held some 75-80% of the market for nationally branded carbonated soft drinks, Pepsi held some 13-15%, and the RCC franchisees held the rest. Coke contended, however, that competition in the market was vigorous, and the RCC franchisees were suffering from too much legitimate competition. The RCC franchisees' failure to show a general adverse effect on consumers meant that they did not overcome the presumption that Coke's use of CMAs was lawful. Put differently, the majority's decision means that even dominant market players can compete on the basis of efficiency, including price, product superiority, or both.

The dissenters would have affirmed the jury's verdict on the TFEAA claims in part. In their view, "There is a line between competing and bullying, and the jury found that Coke crossed it."[16] The dissenters recognized that "much" of what the bottlers complained about, the discounts Coke offered for favorable shelf and display placement, was legal. While the jury was entitled to determine whether Coke's CMAs were predatory, it could not award damages, and thereby punish Coke, for legal conduct. The dissent would have remanded for a recalculation of damages.[17]

The majority's treatment of the TFEAA claims resolves one aspect of the lower court's decision. In the 2004 discussion of the court of appeals' decision in *State Court Docket Watch*, it was pointed out that the decision "appears to revive the notion . . . that the antitrust laws exist to protect even less efficient rivals from the competition by larger, and more efficient, market players."[18] That lower court had rejected the argument of the Coca-Cola entities that the CMAs did not work in an unlawful anticompetitive way because they produced lower prices for consumers. As the court of appeals put it, although the TFEAA's purpose of promoting economic competition "would often include lower prices, we believe public policy logically would encourage maintenance of more then one real supplier of a type of product."[19] In other words, the TFEAA protects competitors from some forms of vigorous competition. By contrast, the Texas Supreme Court majority started from the premise that it "must . . . construe the TFEAA in harmony with federal antitrust caselaw to promote competition *for consumers' benefit*."[20]

Extraterritorial Effect

The RCC franchisees sought to pursue claims for injuries incurred outside Texas in two ways. First, they contended that the TFEAA has extraterritorial application. Second, they contended that the state courts of Texas could apply the antitrust laws of Arkansas, Oklahoma, and Louisiana to the portions of their claims that related to injuries incurred in those states. The Texas Supreme Court rejected both contentions.

With respect to the extraterritorial reach of the TFEAA, the majority concluded that the law would not support an award of damages and injunctive relief based on injuries incurred in other states. The majority drew on the United States Supreme Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*,[21] in which the Court held that federal antitrust law does not provide a remedy for injuries incurred in foreign countries where those injuries are independent of any domestic injury and the foreign effect caused the foreign injury. As the *Harmar* majority observed, "[W]ithin our federal system one may ask: why should Texas law supplant Arkansas, Louisiana, or Oklahoma law about how best to protect consumers from anti-competitive conduct and injury in those states?"[22] It explained that refraining from making law for another state was particularly appropriate where the anti-competitive conduct at issue was not illegal per se.

The majority further held, "The TFEAA does not, in clear language afford a cause of action for injury outside the state, and we will not imply one."[23] The majority pointed to § 15.04 of the TFEAA, which provides, in part, that the Act is intended "to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefit of that competition to consumers in the state."[24] Granting relief to the RCC franchisees for injuries incurred in the neighboring states did not promote or maintain competition in Texas or provide benefits to Texas consumers.

With respect to the ability of the Texas state courts to entertain claims based on the laws of the states in which the injury was incurred, the majority invoked considerations of interstate comity. Unlike the court of appeals, which had presumed that the laws of Arkansas, Louisiana, and Oklahoma were the same as the law in Texas, because the Coca-Cola defendants did not contend otherwise, the majority declined to do so. It stated, "For a court or one state to undertake to determine what would benefit competition and consumers in another state would pose a significant affront to the interstate comity sister states should accord each other in our federal system."[25]

Instead, the courts of the neighboring states should consider the claims arising from the injuries incurred there. Again, those injuries were independent of any injury to competition or consumers in Texas, so splitting them apart should not be considered inappropriate.

The majority rejected the view of the dissent, which asserted that the issue was not jurisdictional at all, but one of choice of law or of forum non conveniens. As to choice of law, the issue was not which state's law should be applied but, rather, "whether a Texas court can or should enforce law that is so policy-laden as to affect the economy of another state."[26] Similarly, with respect to forum non coveniens, the question was whether Texas courts should speak to the issue. Interstate comity considerations said they should not.

Conclusion

Given that CMAs are both widely used and generally viewed as legal, the court's reversal of a judgment that brought their use into question may be seen as aligning Texas law more closely with the general rule. The answer for the RCC franchisees may not be an antitrust claim, but more vigorous promotional efforts on their part, including CMAs of their own. Declining to apply the TFEAA extraterritorially, the majority held it was honoring the interest of interstate comity, refusing to let the Texas state courts determine and apply the laws of neighboring states to injuries that occurred outside Texas. That view is, like all things, bound to divide opinion.

Endnotes

1 __ S.W. 3d __, 2006 WL 2997436 (Tex. Oct. 20, 2006).

2 "Extraterritorial Application of State Antitrust Law (Texas), State Court Docket Watch (February 2004), 4.

3 __ S.W. 3d at __, 2006 WL 2997436 at * 1.

4 The RCC franchisees also sued the manufacturer of Pepsi, the Pepsi-Cola Company, Pepsico, Inc., its corporate parent, and two Pepsi bottlers, but the Pepsi parties settled before trial. The Coca-Cola parties received a credit against the monetary portion of the judgment against them for the amount of the Pepsi settlement.

5 Tex. Bus. & Com. Code §§ 15.01-.26 (Act of May 26, 1983, 68th R.S., ch. § 19, 1983 Tex. Gen. laws 3009, as amended).

6 111 S.W. 3d 287 (Tex. App. 2003).

7 111 S.W. 3d at 296.

8 __ S.W. 3d at __, 2006 WL 2997436 at *1.

9 __ S.W. 3d at __, 2006 WL 2997436 at *6.

10 __ S.W. 3d at __, 2006 WL 2997436 at *2.

11 *Id.*

12 *See, e.g.* Business Electronics Corp. v. Sharp Electronic Corp., 485 U.S. 717, 729, 108 S. Ct. 1515, 1522-23 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restrains, and those imposed by agreement between firms at different levels of distribution as vertical restraints.")

13 State Oil Co., v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 279 (1997) (Vertical maximum price fixing is not a per se violation of the Sherman Act.)

14 __ S.W. 3d at __, 2006 WL 2997436 at * 2 (footnote omitted). In the omitted footnote, which the majority repeated later in its opinion, the majority noted six cases in which attacks on CMAs had been rejected, and one in which a claim under section 2 of the Sherman Act succeeded. *See* __ S.W. 3d at __, fn. 10, __, fn. 69, 2006 WL 2997436 at * 2 fn. 10, 13 fn. 69.

15 __ S.W. 3d at __, 2006 WL 2997436 at * 13.

16 __ S.W. 3d at __, 2006 WL 2997436 at * 15. (Brister, J., dissenting).

17 __ S.W. 3d at __, 2006 WL 2997436 at * 23. (Brister, J., dissenting).

18 "Extraterritorial Application of State Antitrust Law (Texas),", at 8.

19 111 S.W. 3d at 305.

20 __ S.W. 3d at ___, WL 2997436 at * 11 (emphasis added).

21 542 U.S. 155, 124 S. Ct. 2359 (2004).

22 __ S.W. 3d at __, 2006 WL 2997436 at * 6

23 __ S.W. 3d at __, 2006 WL 2997436 at * 7.

24 *See* Tex Bus. & Com. Code § 15.04.

25 __ S.W. 3d at __, 2006 WL 2997436 at * 8.

26 __ S.W. 3d at __, 2006 WL 2997436 at * 10.

Ohio Charter School Law, (Cont'd. from page 1)

and community schools, the court observed, are subject to the same regulations regarding enrollment, testing, and student safety. Each set of schools is publicly funded, may not charge tuition, must be nonsectarian, and may not discriminate in their enrollment.[4] Equally true, all public school students, no matter what school they attend, must pass the same state-mandated graduation tests and must take the same state-mandated proficiency and achievement tests. Likewise, all public schools, traditional schools and community schools alike, must maintain adequate facilities and meet all health and safety requirements in accordance with the same state standards.[5]

Nonetheless, important differences highlight the two public school programs. As the court observed, private individuals, not public officials, run community schools; their school boards are appointed, not elected, as is the case for traditional school districts in Ohio. And unlike traditional schools, which are regulated primarily by Ohio Revised Code provisions enforced by state and local regulators, community schools are governed in large measure by the contracts they hold with authorized sponsors, which include colleges and universities, county educational service centers, school districts, and education-oriented non-profit organizations. In accordance with state law, the sponsor contracts specify, among other things, the curriculum, operational standards, and financial policies each school will utilize.[6] With sponsors serving as the primary regulators for community schools, the state plays a secondary role, serving as an oversight body for both schools and sponsors.[7]

Equally true, community schools, consistent with the General Assembly's intent, are allowed some measure of "enhanced flexibility" in their administration and operation.[8] As a result, the standards the schools face, as set forth in their sponsor contracts and the Ohio Revised Code, are similar to, but not entirely the same as, those faced by traditional public schools. That said, other unique features of the community school program suggest that the schools are in many ways more accountable for their performance than their sister traditional schools. "[C]ommunity schools face heightened accountability to parents and sponsors. Either can threaten shutdown: sponsors by suspending operations pursuant to R.C. 3314.072, and parents by withdrawing their children."[9] "Traditional schools, on the other hand, may not be shut down no matter how poorly they perform (although they will face decreased funding)."[10]

In the final analysis, the two systems' legal and operational similarities were enough that their differences did not take community schools outside the realm of "common schools" contemplated by Ohio's constitution. Indeed, adhering to its longstanding interpretative rule that "legislative enactments are entitled to a strong presumption of constitutionality,"[11] the court observed that "[r]equiring community schools to be operated just like traditional public schools would extinguish the experimental spirit behind R.C. Chapter 3314."[12]

The Ohio Supreme Court also rejected the contention that the community school program, which reallocates state funding when a student leaves a traditional school for a community one, violates the Ohio Constitution's guarantee of a "thorough and efficient" public education system.

By way of background, for over a decade the Ohio state courts had before them the *DeRolph* litigation, which presented a state constitutional challenge to Ohio's school funding system. When the case reached the Ohio Supreme Court in 1997, the court declared the state's school funding program unconstitutional, setting off a high-profile back-and-forth with the Ohio General Assembly. On three subsequent occasions, the Ohio Supreme Court was asked to reevaluate the program's constitutionality in light of changes the General Assembly had made to the funding system. It was not until 2002 that the court relinquished jurisdiction over the case. And even then, in its fourth *DeRolph* opinion, the court declared again the school funding system unconstitutional and directed the General Assembly to remedy the violation through a systematic overhaul of the school funding system. This time, however, the court declared that it would no longer stay involved in the matter.

In the subsequent community school litigation, the program's challengers, citing the court's *DeRolph* decisions, contended that the community school program deprived traditional public schools of vital state funds by allowing students to leave for community schools, leading to reduced state funding for each student's former school. In rejecting that constitutional claim, however, the court observed that "[w]henever a student leaves, for any reason, the school district's funding is decreased and the district continues to receive state funding based on the students actually attending."[13] As a constitutional matter, the court added, the "General Assembly has the exclusive authority to spend tax revenues to further a statewide system of schools compatible with the Constitution."[14] And "[n]othing in the Constitution," the court explained, "prohibits the General Assembly from reducing funding because a school district's enrollment decreases."[15]

From a jurisprudential standpoint, the *Ohio Congress*

decision signaled a shift in the court's approach to litigation, invoking school funding and education-related public policy issues. Unlike in *DeRolph*, where the supreme court on three separate occasions declared unconstitutional the state's system for funding public schools and directed the General Assembly to fix the funding system, in *Ohio Congress* the court took a more restrained approach in its review of public policy issues. In noting that "a court has nothing to do with the policy or wisdom of a statute,"[16] the court concluded that education policy is best left in the hands of the legislature, not the courts. In the court's words, policy matters are "the exclusive concern of the legislative branch of the government."[17] The General Assembly, the court explained, is "entrusted with making complicated decisions about our state's educational policy," decisions that are "entitled to deference."[18]

In addition to its jurisprudential significance, the *Ohio Congress* decision also had immediate practical effects. Had the court struck down the program, that decision, depending upon the remedy ordered, could have resulted in the closing of Ohio's 305 charter schools—displacing their 72,000 students and 3,900 teachers.

Today, Ohio, along with over forty other states, employs some type of charter school program. And state appellate courts in California, Michigan, New Jersey, and Utah have likewise rejected similar state constitutional challenges to their charter school programs.

Endnotes

1 *See* Ohio Revised Code Chapter 3314.

2 *See* State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education, 857 N.E.2d 114 (Ohio October 25, 2006).

3 Ohio Revised Code 3314.01(B).

4 *Supra* note 2, at 1152.

5 *See id.*

6 *See* Ohio Revised Code 3314.03 ("Each [sponsor contract] shall specify the following . . . .").

7 *Id.* at 1152–53.

8 *Id.* at 1158.

9 *Id.*

10 *Id.*

11 *Id.* at 1155.

12 *Id.* at 1159.

13 *Id.*

14 *Id.* at 1160.

15 *Id.*

16 *Id.* at 1155.

17 *Id.*

18 *Id.* at 1166.

Kentucky Judicial Speech Case, (Cont'd. from page 5)

impartiality to reasonably be questioned. Second, the Recusal Requirements pertain only to sitting judges, not candidates. Thus, reasoned the court, "determining that Carey has established a current injury-in-fact as a result of the Recusal Requirements would require the Court to engage in a series of conjectures and hypotheticals regarding the content of the statements he intends to make during the campaign, the types of cases that would come before him if he is elected justice and whether the Kentucky Supreme Court would determine that Carey's impartiality could be reasonably questioned in those cases as a result of the unknown statements." Hence, the court dismissed Carey's challenge to the Recusal Requirements on standing and ripeness grounds.

In dicta, the court "question[ed] whether recusal is actually a sanction for engaging in speech," given that judges are required to recuse in a whole host of circumstances, including "benign activity" such as the judge's relationship to a party to an action or his financial investments. It is an interesting question posed by the court, as it had been addressed by none of the parties to the *Carey* case. While not decided by the *Carey* court, left for argument another day, the court's observation brings into question whether any judge or judicial candidate will ever have standing to challenge the constitutionality of the Recusal Requirements, if recusal is not tantamount to any injury to the judge or candidate.

The fourth ethics provision Carey alleged to be in violation of the First Amendment was the Code's "Endorsement Clause," which proscribes a judge or judicial candidate from "mak[ing] speeches for or against a political organization or candidate or publicly endors[ing] or oppos[ing] a candidate for public office."[9] The court turned back Carey's challenge to the Endorsement Clause, finding that the text of the clause itself did not prohibit Carey from seeking the endorsements of other political officials. Even though the Kentucky Supreme Court has yet to decide whether the Endorsement Clause prohibits his proposed endorsement-seeking, the court found that "it is highly likely that the Kentucky Supreme Court would interpret the clause in a way that would moot the constitutional issue raised by Carey." Because Carey again failed to demonstrate that his proposed activities would in fact violate the clause, he "failed to establish the requisite injury required to satisfy the standing or ripeness doctrines."

Fifth, Carey challenged the Code's "Solicitation Clause," which provides that a judge or judicial candidate "shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy."[10] And lastly, the plaintiff's complaint challenged the constitutionality of the Code's "Partisan Activities Clause."[11] This provision provides that a judge or judicial candidate "shall not identify himself or herself as a member of a political party in any form of advertising or when speaking to a gathering." There is one exception to this rule contained in the provision itself: "If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party."

The district court found that Carey did have standing to raise First Amendment challenges to both the Solicitation Clause and the Partisan Activities Clause. By proposing to personally solicit campaign contributions and to publicly announce his political affiliation during the course of the campaign, the court found that Carey had stated his intention to act precisely in the way prohibited by these provisions. He therefore established a credible threat that he would be sanctioned for engaging in these activities. Due to the immediacy of the threat and the "considerable hardship" to the parties if the court did not address the matter, the court also found Carey's Solicitation Clause and Partisan Activities Clause challenges ripe for review.

Applying strict scrutiny, the court declared both provisions unconstitutional. In doing so, the court rejected three purported justifications put forward by the defendants to save the Solicitation Clause. First, requiring a judge to raise funds through a committee does not further the state's interest. In the case of actual partiality, it will not prevent a judge who is predisposed to favoring parties who contributed to his campaign from doing so. In the case of any partiality perceived by the public, the perception is unlikely to be dispelled where a judge's committee solicits money on the judge's behalf instead of the judge doing so himself.

Second, the clause does not further the state's interest by prohibiting one-on-one solicitations. Campaign finance regulations make the identities of campaign contributors a matter of public record, and judicial candidates will presumably be in regular contact with their campaign committees. Non-contributors may therefore be identified by a process of elimination. "[A] solicitee's fear of disfavor cannot be significantly reduced by solicitations through committees rather than by candidates."

Third, the Solicitation Clause does not reduce the potential for corruption because it eliminates one-on-one solicitations by a candidate. Blatantly corrupt activities are

prohibited by other provisions of the Code, so a ban on all direct solicitations with the aim of preventing corrupt solicitations is overbroad. The court therefore held that the Solicitation Clause "does not serve the state's interest in preserving the actual or apparent impartiality of the elected judiciary."

With respect to the Partisan Activities Clause, the court offered three reasons for striking it down as well. First, the Clause does not further the state's interest in judicial impartiality or the appearance thereof. It does not prohibit speech for or against particular parties in any particular case, but only restricts speech identifying the candidate as a member of a political party. The court also held that preventing partiality toward a particular legal view was not a compelling state interest. The Clause, according to the court, is also a poorly suited means of ensuring a judge's actual open-mindedness.

Second, the court specifically rejected the defendants' purported interest in ensuring "nonpartisan elections" and "judicial independence." Permitting a candidate to state his political party affiliation would not change the nominating structure of an election or change the appearance of the ballot, turning a nonpartisan election into a partisan one. As it is, political party affiliations are a matter of public record and candidates are allowed to disclose their party membership, if asked directly; so the Partisan Activities Clause does not prevent the electorate from learning a candidate's political party membership. Further, the Clause does not prevent political parties from publicly funding or endorsing a candidate.

Finally, the Partisan Activities Clause does not serve the state's interest in avoiding the appearance of the Judiciary's independence from the influence of political parties. The Clause is under-inclusive if its goal is to keep the public from learning the candidates' political affiliations, as this information is a matter of public record. It does not prevent political parties from funding or endorsing judicial candidates at all. Therefore, the court held, it is not narrowly tailored to serve any compelling state interests proffered by the defendants, and is unconstitutional.

Accordingly, the court granted Carey's motion for a preliminary injunction, but only as to the Solicitation Clause and the Partisan Activities Clause. As to all the other ethics rules challenged by Carey, the court granted the defendants' motions to dismiss.

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Endnotes

1 Rule 4.300 of the Rules of the Kentucky Supreme Court ("SCR").

2 *Carey v. Wolnitzek*, No. 3:06-36-KCC, 2006 WL 2916814 (E.D. Ky. Oct. 10, 2006) (opinion and order granting plaintiff's motion for preliminary injunction in part, and granting defendants' motions to dismiss in part).

3 For additional historical background in this area of the law, *see* "Judicial Speech in Kansas," *Federalist Society State Court Docket Watch* (Nov. 2006 ed.), at 3.

4 SCR 4.300, Canon 5(B)(1)(c).

5 536 U.S. 765 (2002) (holding that a judicial canon that a judge or judicial candidate shall not "announce his or her views on disputed legal or political issues" violates the First Amendment).

6 345 F. Supp. 2d 672 (E.D. Ky. 2004) (holding that the prior version of the Commit Clause, as well as a judicial canon that prohibits judges and judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," both violate the First Amendment).

7 SCR 4.300, Canon 3(E)(1).

8 Ky. Rev. Stat. § 26A.015(2)(e).

9 SCR 4.300, Canon 5(A)(1)(b).

10 SCR 4.300, Canon 5(B)(2).

11 SCR 4.300, Canon 5(A)(2).

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