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Judicial Selection in the States

State courts' judicial selection methods are currently being challenged in several states throughout the country. Whether initiated by state legislatures or through litigation, these proposals, ranging from merely changing the composure of a state's judicial nominating commission to completely altering the method of judicial selection, are receiving significant attention from the legal community in their respective states and nationally. The following are reports from some of the states considering judicial selection reform.

Missouri Looks to Reform The Missouri Plan

by Jonathan Bunch

Missouri's judicial selection process—known as the "Missouri Court Plan"—has been the subject of intense debate in the state since Supreme Court Judge Ronnie White announced his retirement.[1] Nationally, White is probably best known as the Clinton judicial nominee who failed to win confirmation after Senator John Ashcroft made the case that White would be soft on crime. Ever since, conservatives in Missouri have hoped for the opportunity to replace him with a judge possessing an "originalist" approach to the state constitution.

When White announced his retirement earlier this year, that is exactly what conservatives expected. And those expectations were validated when Missouri Governor Matt Blunt immediately "committed to appointing a Missouri Supreme Court judge who will faithfully interpret our constitution and will not legislate from the bench."[2]

But conservatives cried foul when those administering the Missouri Court Plan—"the Appellate Judicial Commission"—gave Blunt the option of picking White's replacement from a panel of three judges whose records looked more like White's than any originalist's. Even more disappointing to conservatives was the perception that the Appellate Judicial Commission had attempted to force Blunt's hand by sending him three options, of whom the most palatable was also most like White in one critical way: she had been fiercely criticized for her record in criminal cases.[3]

... continued page 14

Gay Marriage Update: Iowa & Maryland

by John Shu

Gay marriage litigation continues throughout the several states. Recently a trial court in Iowa struck down Iowa's limitation of marriage to opposite-gender couples, whereas the Maryland Court of Appeals upheld Maryland's similar limitation. This article, the fourth in a series, will briefly analyze these cases.

I. Iowa

In *Varnum v. Brien,* the Iowa District Court for Polk County ruled on summary judgment that Iowa Code § 595.2(1) violated the plaintiffs' due process and equal

... continued page 22

INSIDE

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 jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Debbie O'Malley, at domalley@fed-soc.org.

CASE IN FOCUS

Missouri Supreme Court Unanimously Upholds Statute In Part Creating Civil Liability for Abortion Providers

by Matthew J. Brooker

In 2005, the Missouri legislature enacted a statutory provision that created civil liability for any person that intentionally caused, aided, or assisted a minor child to obtain an abortion without the consent required by Missouri law.[1] The civil cause of action created by the statute is available to both the minor child and to any person required to give his/her consent under Missouri law.[2] Generally, in the absence of consent by court order, an attending physician is required to secure the informed consent of the minor child and one parent or guardian prior to performing an abortion in Missouri.[3]

The potential civil liability of those violating this statute as written is substantial. The damages available to an aggrieved party are defined to include "compensation for emotional injury without the need for personal presence at the act or event."[4] Additionally, the statute expressly permits an award of "attorney's fees, litigation costs, and punitive damages."[5] Furthermore, the civil liability created by the statute as written is far-reaching in that it expressly denies any defense based on compliance with the laws and consent required by a different state or place where an abortion is performed or induced.[6] As a result, the civil liability created by Section 188.250 as written extends not only to abortion providers located inside the state of Missouri but also to persons providing abortions to Missouri minors outside the state that fail to comply with Missouri law.

Planned Parenthood of Kansas (*hereinafter* "Planned Parenthood") challenged the constitutionality of the statute based primarily on the First Amendment, the Commerce Clause, the assertion that the statute imposed on undue burden on a minor's ability to obtain an abortion, and the assertion that the statute infringed upon a minor's right to travel. Jackson County Circuit Judge Charles Atwell narrowly construed the statute by holding that it did not apply to speech or expressive conduct, and otherwise upheld the statute in all other respects.[7]

Appeal was taken directly to the Missouri Supreme Court.[8] After determining that Planned Parenthood had standing to challenge the statute and that the case was ripe for review, the Missouri high court unanimously upheld the statute, after narrowly construing it not to apply to speech or expressive conduct or to wholly out-of-state conduct.[9] While the court upheld the statute, however, the narrow construction applied by the court limited the statute's application and relieved out-of-state abortion providers from the civil liability they would have otherwise been subjected to by the statute, as written by the Missouri legislature.

First Amendment

Planned Parenthood argued that the phrase "aid or assist" impermissibly banned protected speech. The organization claimed that it engaged in protective speech when providing information and counseling to minors about pregnancy options, including abortion. While

... continued page 10

Missouri and New Jersey Courts Reject "Market Share" Liability for Lead Paint Manufacturers

by Brian P. Brooks

Three recent state court decisions have rejected the theory of "market share" liability in nuisance cases brought against the lead paint industry, casting doubt on the future viability of such cases nationwide. In opinions handed down within three days of each other, the supreme courts of Missouri and New Jersey held that municipal governments cannot sue paint manufacturers for the cost of remediating lead paint in residential and commercial buildings or for the cost of providing medical monitoring or direct medical care to residents of buildings containing lead paint. These decisions, and another decision from a trial court in California, have led the *National Law Journal* to speculate that "lead paint litigation is beginning to fade," and signal that—for now, at least—traditional tort concepts of causation will protect businesses from being held liable for injuries they had no role in creating.[1]

In *City of St. Louis v. Benjamin Moore & Co.*, the St. Louis municipal government sued a group of paint manufacturers for damages to fund the city's program to assess, abate, and remediate lead paint.[2] Recognizing that the manufacture and sale of lead paint was not prohibited by any law at the relevant time—the federal government did not ban lead paint until February 27, 1978—the city nonetheless argued that the distribution of lead paint prior to 1978 constituted a "public nuisance" at common law. The city was unable to prove that any specific defendant caused lead contamination in any specific building, but nonetheless argued that liability against the group of defendants was appropriate because each defendant "put lead paint into the stream of commerce." In a 4-3 decision, the Missouri Supreme Court affirmed a trial court ruling that had dismissed the case for lack of causation.

The court began by observing that, "[i]n all tort cases, the plaintiff must prove that each defendant's conduct was an actual cause, also known as cause-in-fact, of the plaintiff's injury." The court noted the city government's argument that the "substantial factor" test of the Restatement (Second) of Torts somewhat relaxes traditional concepts of causation, but pointed out that, even under the Restatement approach, a defendant's conduct "cannot be a substantial factor unless it first meets the test for actual causation." Relying on precedents handed down during the DES pharmaceutical controversy of the early 1980s, the court held that tort liability cannot be imposed on a defendant based solely on a showing of the defendant's market share with respect to an allegedly dangerous product. Instead, the court held that "where

... continued page 30

Michigan Supreme Court Upholds Voter Photo ID Law

On July 18, 2007, the Michigan Supreme Court upheld a provision of Michigan election law that requires voters to show photo identification before voting. In the case *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, the court held in a 5-2 opinion that the photo identification requirement is a reasonable, non-discriminatory restriction that has the legitimate goal of preserving the fairness of elections.[1]

The case centered on Section 523 of the Michigan Election Law.[2] In 1996, the Michigan Legislature amended the Election Law to include Section 523, which requires that a potential voter present photo identification in the form of a driver's license, state-issued identification card, or other commonly known picture identification card before receiving a ballot at a polling location. Section 523 also requires the voter to complete an application listing his or her signature and address. If the voter does not have photo identification, he need only sign an affidavit affirming his valid voter status before being allowed to vote.[3]

Shortly after Section 523 was passed by the legislature and signed into law by the governor, Michigan Attorney General Frank J. Kelley[4] issued an opinion concluding that the photo identification provision violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[5] The attorney general opined that the photo identification requirement was "not necessary to further a compelling state interest" in the absence of significant voter fraud, and that the requirement created "economic and logistical burdens" on people who did not have photo identification.[6] Thereafter,

... continued page 12

Parental Law in the States: Maryland, Minnesota, Pennsylvania

by James A. Haynes

This article reviews recent state court cases in the area of family law which concern rights of custody and visitation. These decisions are of interest because they indicate the degree to which the definition and role of parents have been increasingly shaped by courts. The cases demonstrate how various states have chosen to intervene to apportion the rights of biological and adoptive parents in relation to the claims of other unrelated persons who have been closely involved in the lives of both the parents and their children.

With one exception, all of the opinions in this article involve custody and visitation relationships where one party has adopted a child, or children, and the other party has not, or where one party is a biological parent and the other party is not. When the relationships in question deteriorated and the parties separated, the non-parent sought custody rights, and, in the alternative, visitation rights, and the parent opposed those claims. The general legal concept of "de facto" parent status has been used by judges, lawyers, and academics who face the question of how non-traditional families should be treated. As noted above, all but one of the opinions reviewed here apply some variant of the de facto parent concept.

The de facto parent doctrine identifies and names the legal status of a non-parent who is in the household of a parent and child and who takes on significant responsibilities for the child's welfare. By virtue of close involvement with the child over a relatively long period, the third party establishes a relationship with the child or children analogous to that of a parent. While the test varies among states, generally, a de facto parent is someone who performs parental functions, with the legal parent's consent, and has fostered a relationship with the child for a significant period of time.[1]

Two Massachusetts cases, issued within days of each other, contain strong majority opinions and dissents concerning whether Massachusetts should adopt de facto parent status as part of its family law.[2] The de facto parent questions presented by these cases include:

(a) How does the existence of de facto parents as a class with greater rights than other third parties (including some relatives) but fewer rights than legal or biological parents affect the fundamental constitutional rights of parents to make decisions concerning the care and support of their children?

(b) What consideration, if any, should be given to "co-parenting agreements" or other expressions of intention made between persons when their relationship was viable in determining the visitation rights of a de facto parent when, at a later point, those rights are strongly contested by a legal parent?

(c) Under what circumstances can, or should, courts create and recognize de facto parent status and relationships using their equity powers, and where should courts defer to elected officials to enact such laws?

(d) Does the creation of de facto parent status alter the normative assumptions about the best interests of the child upon which courts generally rely?

Aside from a cluster of de facto parent opinions, one Maryland opinion stands alone because it touches upon the legal definition of the term "mother" in the context of birth certificate information and it does so in the context of Maryland's Equal Rights Amendment. At a minimum, the case of *In re Roberto d. B.* allows a legally sufficient birth certificate to be issued in Maryland which does not name the woman who gave birth to the infant because that woman is not the child's "mother."[3] As a result of this holding, twins born through a normal delivery will not have any person listed as their mother. Their birth certificate will name only the male, who supplied sperm and arranged an in vitro fertilization, as their father.

The Maryland court reaches its result by holding that, because males named as fathers may challenge paternity and successfully defeat the claim, females must, under the law, have an equal right to deny maternity and prevail. To require a woman who gives birth to a child to be listed on the birth certificate as its "mother" is a violation of Maryland's prohibition on discrimination based upon sex. While the purported effect of this opinion is merely to create an exception to current practice in maintaining vital statistics, its reach in family law is potentially far greater. This opinion will be further explored later in this article.[4]

In another case, the Minnesota Supreme Court considered the constitutionality of state custody and visitation statutes in a dispute between a woman who adopted two children from China and her former partner who did not adopt the children but who claimed both custody and, in the alternative, visitation rights because she had been deeply involved in the lives of the children

... continued page 27

Tribal Sovereign Immunity Does Not Bar California's Suit over Campaign Contribution Disclosure Violations

Relying upon the Tenth Amendment and the Guarantee Clause of the U.S. Constitution, the California Supreme Court has found that tribal sovereign immunity does not bar a suit brought in state court against an American Indian tribe for violations of the state's Political Reform Act ("PRA").[1] In *Agua Caliente Band of Cahuilla Indians v. Superior Court*,[2] a 4-3 decision authored by Associate Justice Ming Chin,[3] the court upheld the ability of the state's Fair Political Practices Commission to pursue the Agua Caliente Band of Cahuilla Indians in state court for alleged violations of the state's campaign contribution disclosure laws. As a matter of first impression, and one with few precedents to draw on, the court concluded that the exercise of state sovereignty in the form of regulating its electoral process is protected under the Tenth Amendment and the Guarantee Clause, trumping the tribe's federal common law immunity from suit.

Settlement of Case Before Petition of Certiorari in U. S. Supreme Court

On July 12, 2007, the Fair Political Practices Commission and the tribe announced a settlement of the case,[4] wherein the tribe will not seek a petition for certiorari in the U.S. Supreme Court, leaving the California Supreme Court decision intact. Additionally, while not admitting any intentional violations of the Political Reform Act, the tribe will now be legally considered a "person" subject to the provisions of the Act, and waives its sovereign immunity with respect to the enforcement of any future violations of the Act.

Background of PRA and Tribal Political Activity in State Elections

Seeking to prevent corruption of the political process, California voters in 1974 adopted by initiative the Political Reform Act (PRA), which, among other things, designated the Fair Political Practices Commission (FPPC) to enforce its provisions.[5] Citing in its findings the increased influence attributable from large contributions from wealthy sources,[6] the PRA requires, among other things, that "[r]eceipts and expenditures in election campaigns... be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."[7]

In October 2002, the FPPC sued the Agua Caliente Band of Cahuilla Indians, a federally-recognized Indian tribe,[8] alleging the tribe made substantial campaign contributions to California political campaigns without reporting them under the requirements of the PRA.[9] The complaint alleged that the tribe failed to report political campaign contributions totaling more than $7,500,000 in 1998, $175,250 in the first half of 2001, and $426,000 in the first half of 2002.[10] The complaint also alleged other violations of the PRA, including the tribe's failure to report lobbying interests, late contributions of more than $1 million, and failure to file required semiannual campaign statements.[11] The complaint sought monetary penalties and an injunction ordering the tribe to file the PRA's required disclosure statements.

The tribe moved to quash the service of summons for lack of personal jurisdiction, relying upon tribal sovereign immunity from suit.[12] The trial judge denied the motion, believing that to apply sovereign immunity would intrude upon the state's exercise of its reserved power under the federal Constitution's Tenth Amendment to regulate its electoral and legislative processes, and would interfere with the republican form of government guaranteed to the state under article IV, section 4 of the U.S. Constitution.[13]

Following the trial court's decision, the tribe sought in the state court of appeal a peremptory writ of mandate directing the trial court to vacate its ruling denying its motion to quash service. Ultimately, following an initial denial in the court of appeal, subsequent writ to the California Supreme Court and transfer back to the court of appeal, the latter court decided on the merits against the tribe's motion for a writ of mandate on the merits.[14] It agreed with the trial court that the state's efforts to preserve its republican form of government from corruption implicated both the Guarantee Clause and its reserved rights under the Tenth Amendment, and that those interests outweighed the tribe's claim to sovereign immunity from suit. The court also agreed with the FPPC that resort to a judicial remedy is necessary to enforce the PRA, and that rules or procedures required to protect constitutional rights may themselves be given "constitutional stature."[15] The California Supreme Court granted the tribe's petition for review on the tribal sovereign immunity question and issued the opinion discussed here, affirming the court of appeal's decision.

Before the California Supreme Court, the tribe did not dispute the power of the state to regulate political campaigns under the PRA, or that it is generally subject

to those regulations. Instead, the tribe simply asserted that the state was barred from suing the tribe without its consent to enforce those regulations.[16] It relied heavily upon the U.S. Supreme Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*[17] ("*Kiowa Tribe*"), where the High Court upheld tribal immunity from suit where it related to an off-reservation activity. The tribe also disputed the applicability of the FPPC's Tenth Amendment and Guarantee Clause arguments, relying on *City of Roseville v. Norton*[18] and *Carcieri v. Norton*,[19] in which the federal district courts held that the federal Department of the Interior's placing a parcel of land into a trust for an Indian tribe did not violate the Tenth Amendment. The FPPC, in turn, contended that the doctrine of tribal sovereign immunity is a federal common law doctrine, not constitutionally compelled, that does not give the tribe the power to interfere with state sovereign power over state elections.[20]

The Basis of Tribal Sovereign Immunity

The California Supreme Court analyzed in depth the origin and scope of the doctrine of tribal sovereign immunity, acknowledging the historical and juridical foundation of the doctrine.[21] As is done in most analysis of federal Indian law, the court looked to key principles of Indian sovereignty, first articulated by U.S. Chief Justice John Marshall in, among others, *Cherokee Nation v. Georgia*[22] and *Worcester v. Georgia,*[23] two of the well-known early "trilogy" of Indian cases that also includes *Johnson v. M'Intosh*.[24] In *Cherokee Nation*, Chief Justice Marshall recognized that, while Indian tribes were not foreign countries within the meaning of the Constitution, they possess sovereignty as a state, but are subject to the dominion of the United States.[25] The Chief Justice described tribes as "domestic dependent nations," rather than "foreign states," and consequently denied the Cherokee's motion for an injunction to prevent the State of Georgia from executing certain acts in the territory of the Cherokee Nation.[26] In *Worcester*, the State of Georgia sought to extend its law to the Cherokee Nation. There, the Chief Justice recognized the tribes had been treated as distinct political communities under the protection and dominion of the United States, with territorial and governance rights with which no state could interfere.[27]

The California Supreme Court observed that in *Kiowa Tribe*[28] tribal sovereign immunity from suit was a concept developed "almost by accident" in *Turner v. United States*. [29] The court noted that tribal immunity was then elevated from dictum in *Turner* to holding in *United States v. United States Fidelity & Guaranty Co.,*[30] where the High Court held that, as sovereigns or quasi-sovereigns, a suit against an Indian tribe must fail absent the tribe's consent to be sued.[31] The court further explained and acknowledged the accepted rules of tribal sovereign immunity.[32] In looking to cases concerning the enforceability of a state statute regulating Indian affairs, the court noted that the modern approach is a preemption analysis, involving a balancing of "state, federal and tribal interests."[33] As a practical matter, listing in the Federal Register as a federally-recognized tribe grants a tribe immunity from unconsented suit, by virtue of the federal-tribal relationship.[34]

The court next examined and rejected the arguments of the tribe that sovereign immunity has a constitutional basis simply because the federal constitution provides Congress with plenary power over Indian affairs.[35] First, the court rejected the notion that the "Indian Commerce Clause" of article I, section 8 of the Constitution provides a basis for tribal sovereign immunity, noting that the power there is granted to Congress, and Congress has not granted the tribe immunity from this suit. The court also noted that the PRA involves no interference with activity, commercial or otherwise, or sovereign functions on or near the tribe's reservation.

The court also rejected the Treaty and Supremacy Clauses of the Constitution as a basis for tribal sovereign immunity, noting Congress has not had the power to negotiate treaties under the constitutional provision since 1871, and that there is no treaty with this tribe.[36] The court acknowledged that the Supremacy Clause may serve as a basis for preemption of state law where it conflicts with federal common law in the realm of Indian affairs, but agreed with the court of appeal that the Supremacy Clause tells us that federal law trumps state law. According to the court, "it does not provide textual support for the adoption of that law [meaning tribal sovereign immunity] in the first place."[37]

Finally, in discussing tribal sovereign immunity, the court treats at length the U.S. Supreme Court's decision in *Kiowa Tribe*. In that case, the High Court addressed the issue whether recognized Indian tribes enjoy immunity from suit on contracts, regardless of whether those contracts were made on or off a reservation, or involved governmental or commercial activities.[38] The High Court stated as "a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit of the tribe has waived its immunity."[39] While doubting the wisdom of the policy, the Court in an opinion authored by Justice Anthony Kennedy observed that the Court has sustained sovereign immunity, without drawing a distinction based on where the tribal activities occurred,[40] and upheld the bar against suit to enforce an "off-reservation" debt. The Court also made clear the doctrine was one of federal, not constitutional, law.[41]

The California Supreme Court placed considerable stock in the U.S. Supreme Court's declarations of doubt about the continued viability of the doctrine (which is one reason why the tribe may have settled this case before petitioning for certiorari). The court quoted *Kiowa Tribe* for the notion that the doctrine "extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians."[42] Nonetheless, *Kiowa Tribe* upheld the doctrine, stating that Congress is in a "position to weigh and accommodate the competing policy concerns and reliance interests."[43] In the *Kiowa Tribe* dissent, Justice Stevens, joined by Justices Thomas and Ginsburg, noted that the rule is anomalous in that it allows the tribes to enjoy "broader immunity than the States, the Federal Government, and foreign nations."[44]

The States' Reserved Power under the Tenth Amendment and the Guarantee Clause

Addressing the FPPC's contentions, the California Supreme Court next developed how the federal Constitution's article IV, section 4 guarantee to the states[45] and the reserved powers granted to the states under the Tenth Amendment[46] serve as constitutional limitations on Congress' plenary powers under the Commerce Clause of article I, section 8, clause 3 of the federal constitution. The court noted that in the past the High Court had read the Tenth Amendment less as a cap on congressional power and more as a "truism."[47] The revitalization of the Tenth Amendment briefly came with *National League of Cities v. Usery,*[48] where the High Court concluded the Amendment served as an affirmative limit on congressional power and sheltered "the States' freedom to structure integral operations in areas of traditional governmental functions."[49] However, less than ten years later the high court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,[50] holding that the protection of state sovereignty "lies instead in the structure of the Federal Government," rather than in the Tenth Amendment.[51] *Garcia* looked to the Constitution's giving states equal representation in the Senate and allowing states to choose Senators and electors.[52]

The California court observed that the trend after *Garcia* changed again with the decisions in *Gregory v. Ashcroft*[53] and *New York v. United States.*[54] Relevant here, *Gregory* upheld the state's right to prescribe a mandatory retirement age for the appointed judges, relying on the states' power to determine the qualifications of their governmental officials derived from both the Tenth Amendment and the Guarantee Clause of article IV, section 4. The Supreme Court noted the state action reflected the "unique nature of state decisions that 'go to the heart of representative government.'"[55] As such, the California court noted *Gregory* stands for the notion that the Tenth Amendment and the Guarantee Clause provide an important check on Congress' ability to interfere with the states' "substantial sovereign powers under our constitutional scheme."[56]

Finally, the California Supreme Court observed that the "Supreme Court may be poised to recognize a new meaning of the guarantee clause: a promise by the national government to avoid interfering with state governments in ways that would compromise a republican form of government."[57] In responding to the tribe's assertion that the Tenth Amendment and Guarantee Clause have never been applied to uphold a state's enforcement of a state election provision against a sovereign tribe, the California court found that to date no court has held that the federal common law doctrine of tribal sovereign immunity trumps state authority when a state acts in political matters firmly within its constitutional prerogatives. In fact, allowing the tribe immunity from suit in this context, the court said, would allow the tribes to participate in elections and make campaign contributions unfettered by regulations designed to ensure the system's integrity, "leaving the state powerless to effectively guard against political corruption and putting the state in an untenable and indefensible position without recourse." Accordingly, the court concluded that the Guarantee Clause, together with the rights reserved under the Tenth Amendment, provide the state and the FPPC authority under the federal constitution to bring suit against the tribe in its enforcement of the PRA. The court came to this conclusion in light of "evolving United State Supreme Court precedent" and the constitutionally significant importance of the state's ability to "provide a transparent election process with rules that apply equally to all parties who enter the electoral fray."

The court rejected the tribe's arguments that alternatives to suit, such as examining recipient disclosure reports, pursuing a state-tribal agreement, or petitioning Congress for a change, would have any efficacy. Recipient disclosure reports, for example, may not reveal independent expenditures made on behalf of a candidate or ballot measures. The court concluded that preserving the integrity of the state's democratic system of governance is too important to compromise with weak alternative measures.

A dissenting opinion authored by Justice Carlos Moreno, joined by Justices Kennard and Werdegar, opined that Congress is aware of, and has failed to weaken, the bounds of tribal sovereign immunity. The dissenters also argued that the only recognized limitations on

federal power over the states with any basis in the Tenth Amendment has been the restriction of congressional legislation what would compel a state to enact or administer a federal regulatory program. The dissenters argued no such commandeering is at issue here, and that the majority goes too far with the scope of *Gregory v. Ashcroft*. The dissenters also suggested that the reporting of political campaign contributions presents no more a significant state interest than collecting taxes, an area where tribal sovereign interests have prevailed against the states. Finally, the dissenters appealed to the ideal of tribal economic and political power protected by the ideal of tribal sovereignty, to be adjusted only by Congress and not the states.

Endnotes

1 Calif. Gov. Code ("GC"), § 81000 et seq.

2 40 Cal.4th 239, 148 P.3d 1126 (2006).

3 Justice Chin was joined by Chief Justice George, and Justices Baxter and Corrigan.

4 *See* FPPC announcement, *at* http://www.fppc.ca.gov/index.html?id=48&show=detail&prid=653.

5 GC § 81000.

6 GC § 81001; *see* 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law § 272, pp. 432-433.

7 GC § 81002, subd. (a); *see also,* Fair Political Practices Com. v. Suitt (1979) 90 Cal.App.3d 125, 132.

8 25 U.S.C. § 479a-1.

9 40 Cal.4th at 244.

10 *Id.*

11 *Id.* The Court noted that one of the unreported contributions alleged to have been made by the tribe in March 2002 went to a committee supporting Proposition 51, a statewide ballot initiative that failed at the ballot. It would have authorized $15 million per fiscal year for eight years to fund several projects, including a passenger rail line from Los Angeles to Palm Springs, where the tribe operates a casino.

12 40 Cal. 4th at 244-245.

13 *Id.* at 245.

14 *Id*. at 245-246.

15 *Id.*

16 *Id*. at 246.

17 523 U.S. 751 (1998).

18 219 F.Supp.2d 130 (D.D.C. 2002).

19 290 F.Supp.2d 167 (D.R.I. 2003).

20 40 Cal.4th at 246.

21 *Id*. at 246-250.

22 30 U.S. 1 (1831).

23 31 U.S. 515 (1832).

24 21 U.S. 543 (1823).

25 30 U.S. at 19.

26 *Id*. at 17, 20.

27 31 U.S. at 549-561.

28 523 U.S. at 756 (standing for notion that Indian nations are exempt from suit without congressional authorization).

29 248 U.S. 354 (1919); the California Supreme Court observed that *Turner* involved a suit for damages by a non-Indian who had purchased tribal members' grazing rights. There, "for the sake of argument," the high court made a "passing reference to immunity." (*Kiowa*, 523 U.S. at 757.)

30 309 U.S. 506 (1940).

31 The court cited also *Kiowa Tribe, supra* note 28, at 757; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Dept. of Game of Washington, 433 U.S. 165, 167, 173-173 (1977).

32 *See, e.g.,* Cohen, Handbook of Federal Indian Law (2005 ed.) § 7.05 [1][a], 636.

33 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980); *see also,* Three Affiliated Tribes v. Wold Engineering, P.C., 476 U.S. 877, 884 (1986).

34 67 Fed.Reg. 46, 328 (July 12, 2002).

35 40 Cal.4th at 249.

36 *Id.* at 249-250.

37 *Id*. at 250.

38 523 U.S. at 755-754.

39 *Id*. at 754.

40 *Id.*

41 *Id.* at 758.

42 *Id*. at 758, citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

43 *Id*. at 759.

44 *Id*. at 764 (Stevens, J., dissenting)

45 Article IV, section 4 of the United States Constitution states that "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

46 The Tenth Amendment to the United States Constitution reserves: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states...."

47 Citing United States v. Darby, 312 U.S. 100, 124 (1941).

48 426 U.S. 833 (1976).

49 *Id*. at 852.

50 469 U.S. 528 (1985).

51 *Id*. at 550.

52 *Id*. at 579 (Rehnquist, J., dissenting).

53 501 U.S. 452 (1991).

54 505 U.S. 144 (1992).

55 501 U.S. at 461, citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

56 *Id*. at 461.

57 Citing analysis from several scholars, including Professor Deborah J. Merritt, in *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L.Rev. 815, 821-822 (1994).

Court Bars California Governments from Retaining Private Contingency-Fee Counsel in Nuisance Suits

In a case with national significance, a local Santa Clara County Superior Court judge ruled in a nuisance suit brought against lead paint manufacturers that certain cities and counties are precluded from retaining private lawyers on a contingency basis.[1] The April 4, 2007 order from Judge Jack Komar responded to a motion from the manufacturers for an order to bar payment of contingent fees to private attorneys retained by the cities and counties in the lawsuit. While the order is the subject of the cities' and counties' petition for a writ of mandate in the California Court of Appeal, no ruling has yet been issued on the matter to date.

The superior court relied on earlier California Supreme Court precedent that contingency fee arrangements are antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. As the trial court noted, the California Supreme Court in *People ex rel. Clancy v. Superior Court* ("*Clancy*"),[2] having "evaluate[d] the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance,"[3] disqualified the private contingency-fee attorney.[4] Without elaborating on the standard of neutrality, the trial court rejected the plaintiff cities' and counties' arguments attempting to distinguish *Clancy*.

In the case, the superior court first tackled the government plaintiffs argument that "government attorneys continue to retain and/or exercise decision-making authority and control over the litigation..."[5] Judge Komar noted, however, that outside counsel are co-counsel, "performing work as attorneys for the plaintiff government entities, and consequently they are subject to the standard of neutrality articulated in *Clancy*—meaning the government's attorneys may not have a personal interest in the case. Oversight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality."[6] Addressing the notion that neutrality problems were overcome because the government attorneys retained or exercised decision-making authority and control over the litigation, the judge stated:

> Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.[7]

The judge noted that, as a practical matter, it would be difficult to determine how much control the government attorneys must exercise for a contingent fee arrangement with outside counsel to be found permissible; what types of decisions the government attorneys must retain control over; and whether the government attorneys have been exercising such control throughout the litigation "or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel."[8]

Judge Komar also rejected the plaintiffs' contention that "public policy" should preclude disqualification because government entities lack the resources and specific expertise necessary to prosecute such actions. The judge opined, however, that the standard of neutrality should apply "regardless of the wealth of either the government lawyer or the defendant."[9]

It is important to note that the ruling, even if upheld on appeal, may only apply to affirmative litigation based on a public nuisance cause of action and not other types of litigation engaged in by government agencies. Given the active role of state attorneys general and local governments in pursuing causes of action against businesses for consumer fraud, misrepresentation and unfair trade practices, and their desire on occasion to retain contingency-fee counsel in these cases, it is likely that this ruling will resonate for some time to come.

* *Tom Gede is a Principal of Bingham Consulting Group and of counsel to Bingham McCutchen LLP. A graduate of Stanford University and University of California - Hastings College of the Law, he teaches Federal Indian Law at Pacific-McGeorge School of Law in Sacramento.*

Endnotes

1 Order filed April 4, 2007 (Super. Ct. Santa Clara County Case No. 1-00-CV-788657). The other defendants include American Cyanamid Company; ConAgra Grocery Products Company; E.I. du Pont de Nemours and Company; Millennium Inorganic Chemicals Inc.; NL Industries, Inc.; and The Sherwin-Williams Company.

2 39 Cal.3d 740 (1985) (stopping the Southern California city of Corona from using a private attorney on contingency to pursue a nuisance suit against an adult book store).

3 *Id.* at 743.

4 *Id.* at 750.

5 Order, *supra* note 1.

6 *Id.*

7 *Id.* at 3-4.

8 *Id.* at 3.

9 *Id.* at 4.

Missouri Supreme Court Upholds Abortion Statute In Part

Continued from page 2...

the Missouri Supreme Court agreed that such conduct was protected speech, it elected to narrowly construe the statute rather than to invalidate the statute.[10]

Before electing to narrowly construe the statute, the supreme court examined whether a narrow construction would be inconsistent with legislative intent. The court determined that the legislature sought to ban every form of aid and assistance, and did not "solely target speech or expressive conduct," and that a narrow construction would thereby not violate the intent of the legislature.[11] As a result, the court construed the terms "aid" and "assist" to exclude the provision of counseling or information to minors. So construed, the court held that the statute did not violate the First Amendment or the comparable free speech guarantee of the Missouri Constitution.

Commerce Clause and Due Process

Planned Parenthood argued that the statute violated the Commerce Clause by requiring non-Missouri health care providers and others engaged in conduct wholly outside Missouri to comply with the Missouri consent law before aiding or assisting a Missouri minor in obtaining an abortion outside of Missouri. When addressing this argument, the court stated unequivocally that "Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect."[12]

The court thereby concluded that the statutory provision found in Section 188.250.3, which prohibited the assertion of a defense based on compliance with the consent and/or state law where an abortion is performed, did not apply to "wholly out-of-state conduct."[13] As a result, by once again adopting a narrow construction, the high court limited the statute's application to conduct occurring within the state of Missouri. This narrow construction prevented the statute from creating civil liability for abortion providers outside the state. As a result, the statute's applicability as written was much broader than the statute's applicability as construed by the court.

Undue Burden

Planned Parenthood argued that Section 188.250 imposed an undue burden on a minor's ability to obtain an abortion based on the holding in *Planned Parenthood of Se. Pa. v. Casey*,[14] which prevents states from passing laws "that place a substantial obstacle in the path of a woman seeking an abortion."[15] At the time of the circuit court hearing, evidence established that abortions were only provided in the following Missouri counties: Boone County, St. Louis County, and the City of St. Louis.[16] Planned Parenthood argued that Section 188.250 imposed an undue burden on a minor seeking to obtain an abortion by requiring her to choose between (1) driving long distances to obtain an abortion inside the state of Missouri and (2) obtaining two judicial bypasses (one in Missouri and one in the state where the abortion was going to be performed).[17] Additionally, Planned Parenthood argued that minors seeking to obtain an abortion without parental involvement are often accompanied by a trusted adult, and that the statute's prohibition of aiding or assisting a minor in obtaining an abortion without parental consent would make it difficult for such a minor to find a trusted adult willing to subject themselves to potential civil liability.[18]

The Missouri Supreme Court concluded that Section 188.250 did not impose an undue burden on minors seeking abortions in Missouri. First, it noted that the U.S. Supreme Court had previously approved Missouri's parental consent statute,[19] and that other parenting consent statutes with judicial bypass provisions had been routinely upheld.[20] Second, it rejected the notion that minors would ever be required to obtain two judicial bypasses from different states, or that trusted adults would be deterred from helping minors in obtaining abortions outside of Missouri. In reaching this conclusion, the court reiterated its holding that the statute did not apply to wholly out-of-state conduct.[21] Finally, the court determined that the distance a minor must travel to obtain an abortion is not prescribed by the statute, and that Missouri has an interest in adopting its own abortion regulations, and is not limited by the regulations adopted in other states. The court thereby concluded that Section 188.250 did not impose an undue burden on minors seeking abortions in the state of Missouri.

Right to Travel

Planned Parenthood argued that Section 188.250 violates a minor's right to travel. The Missouri Supreme Court explained that the right to travel is composed of three components: "(1) the right of a citizen of one State to enter and to leave another State, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[22] Planned Parenthood argued that the statute violated the first two components of the right to travel.

The court found that Section 188.250 did not violate

the rights of minors to enter or leave Missouri because it did not impose any obstacles upon minors entering or leaving the state. Because of the high court's narrow construction of the statute, minors are not required to obtain parental consent to obtain out-of-state abortions, and minors are not forbidden from obtaining out-of-state abortions.[23] Furthermore, the court held that minors are not improperly deprived the assistance of adults because the statute does not ban adults from accompanying minors but instead requires that all persons aiding or assisting the minor comply with the parental consent laws of Missouri.[24]

Likewise, the supreme court found that Section 188.250 does not violate the rights of minors to be treated as welcome visitors rather than as unfriendly aliens when temporarily present in Missouri. The court reached this conclusion because the statute does not treat non-Missouri residents differently from Missouri residents.[25] The statute requires that all minors seeking an abortion within Missouri comply with the same rules and requirements before obtaining an abortion.

CONCLUSION

The unanimous ruling in *Nixon* is merely the beginning of the litigation storm brewing over legislative enactments aimed at limiting abortions by the Missouri legislature. While the statute ultimately survived the Missouri Supreme Court's ruling, it was construed narrowly to prevent its application to conduct occurring outside the state of Missouri or to conduct constituting protected speech.

** Matthew Brooker is a graduate of the University of Missouri-Kansas City School of Law, and an attorney at the law firm Cochran, Oswald & Roam, LLC in Blue Springs, Missouri.*

Endnotes

1 R.S.Mo. § 188.250 (2005). See S.B. 1, 93rd General Assem., Special Sess. (Mo. 2005), *available at* http://www.senate.mo.gov/05info/billtextS1/tat/SB1.htm (last viewed 9/07/07).

2 R.S.Mo. § 188.250.2. However, this section prohibits an award of damages to any adult that engages in or consents to another person engaging in a sex act with a minor child that results in the minor's pregnancy in violation of chapters 566 (sexual offenses), 567(prostitution), 568 (incest), or 573 (pornography).

3 R.S.Mo. § 188.028.

4 R.S.Mo. § 188.250.2.

5 *Id.*

6 R.S.Mo. § 188.250.3.

7 Specifically, the circuit court held that the statute "cannot constitutionally reach the giving of information or counseling regarding the reproductive rights and options of minors." Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 736 (Mo. 2007) (en banc).

8 The Missouri Supreme Court has exclusive appellate jurisdiction in determining the validity of a Missouri statute. Mo. Const., art. V, sec. 3.

9 *Nixon*, 220 S.W.3d 732.

10 *Id.* at 741-42. The Court noted that applying a narrowing construction to a statute is the preferred remedy in First Amendment cases rather than invalidating the statute in its entirety.

11 *Id.* at 741.

12 *Id.* at 742. Noting that in *Bigelow v. Virginia,* 421 U.S. 809, 827-28 (1975), Virginia had no police powers over conduct that occurred outside its border and had a very limited interest in regulating what Virginians heard or read about abortion services in New York.

13 *Id.* at 743.

14 505 U.S. 833, 876-77 (1992).

15 *Nixon*, 220 S.W.3d at 743.

16 *Id.* The closest abortion provider in the western part of Missouri was located in Kansas City, Kansas. The Court noted that in Kansas a minor must give her parents notice of her intent to have an abortion or obtain a judicial bypass and that she must be accompanied by an adult when getting an abortion. However, in Illinois, there are no parental consent or judicial bypass requirements. *Id.*

17 *Id.* at 743. Planned Parenthood argued that a minor in Kansas City, Missouri desiring to obtain an abortion without involving her parents would have to choose between either (1) getting a judicial bypass in Missouri and driving to Columbia or St. Louis or (2) obtaining a judicial bypass in Missouri and obtaining a judicial bypass in Kansas. *Id.*

18 *Id.* The statute on its face appears to have been intended to have the effect of reducing the willingness of persons to assists minors in obtaining abortions without parent consent through the imposition of civil liability.

19 *Id.* (citing Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 490-93 (1983) (upholding R.S.Mo. § 188.028)).

20 *Nixon*, 220 S.W.3d at 744 (citing *Casey*, 505 U.S. at 899-900, and Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 518-20 (1990)).

21 *Id.* The Court specifically indicated that Section 188.250 does not apply to adults aiding or assisting minors in obtaining abortions "if or once those minors are not in Missouri." *Id.*

22 *Id.* (citing *Saenz v. Roe,* 526 U.S. 489, 500 (1999)).

23 *Id.* at 744.

24 *Id.* at 744-45.

25 *Nixon*, 220 S.W.3d at 745.

Michigan Supreme Court Upholds Voter Photo ID Law

Continued from page 3...

although the law was validly passed and issued, the Michigan Secretary of State refused to comply with or enforce Section 523.

In 2006, the Michigan House of Representatives adopted a resolution requesting the Michigan Supreme Court to issue an advisory opinion on whether the photo identification requirement of Section 523 violated either the Michigan or the United States constitutions.[7] The court accepted the invitation and requested briefing and argument from the newly elected attorney general Michael A. Cox, who argued as both the opponent and the proponent of the issue.[8]

After hearing oral argument, the Michigan Supreme Court upheld Section 523 in an opinion authored by Justice Robert P. Young, Jr. and joined by Chief Justice Clifford W. Taylor, and Justices Maura D. Corrigan, Stephen J. Markman, and Elizabeth A. Weaver.

The court first recognized, as the U.S. Supreme Court has, that although a citizen's right to vote is fundamental, it is not absolute.[9] For example, legislatures may regulate the time, place, and manner of elections.[10] Legislatures may also enact laws to ensure the purity of elections, preserve ballot secrecy, and establish voter registration requirements.[11] The court noted that the purpose of these laws is not to discourage qualified persons from voting but instead to prevent voter fraud.[12] Thus, an individual's right to vote competes with the state's compelling interest in ensuring the integrity of its elections.[13]

Second, the court relied upon U.S. Supreme Court precedent, holding that a "flexible standard" of scrutiny, rather than strict scrutiny analysis, applies when considering the constitutionality of election laws.[14] Under the federal balancing test set forth in *Burdick v. Takushi*, the initial step in determining the legitimacy of the election law is to consider the nature and significance of the law's burden on the right to vote in comparison to the state's interest.[15] If the burden on the right to vote is severe, the law must be "narrowly drawn" in order to advance a compelling state interest. But if the law is reasonable and not discriminatory, the law should be upheld because it furthers the state's important interest in fairly regulating elections.[16]

Third, the court applied the *Burdick v. Takushi* balancing test to Michigan's Section 523, and determined that the law is constitutional. The court reasoned that, although the photo identification requirement imposes some burden on the voter, the burden is not severe.[17] Most Michigan voters already possess voter identification.[18] Moreover, "the act of reaching into one's purse or wallet and presenting photo identification before being issued a ballot" does not impose a "severe" burden.[19] For those people without photo identification, they may sign an affidavit instead of presenting identification.[20] Thus, the court found, there is no basis to conclude that such a requirement imposes a "severe" burden.[21] Moreover, in order to prevent in-person voter fraud—a goal in which the state has a tremendous interest—the state may impose the reasonable, nondiscriminatory restriction of the photo identification requirement.[22]

Finally, the court held that Section 523 is not a poll tax. The court explained that, while the Michigan Secretary of State charges a fee of $10.00 to obtain a state identification card, voters may bypass the fee by signing an affidavit affirming their validity to vote instead of producing identification.[23] For voters who elect to obtain identification, the fee is waived for the elderly, disabled, and persons who present good cause for a waiver.[24]

Justice Michael A. Cavanagh dissented, arguing that the photo identification burden imposed a severe restriction and a disparate impact on racial and ethnic minorities, the poor, the elderly, and disabled voters, because such voters might not be able to readily obtain photo identification.[25] Under such a severe burden, he argued, the law should be subject to strict scrutiny and narrowly tailored.[26] Justice Cavanagh opined that, because there was nothing in the record to demonstrate that any voter fraud actually existed, the photo identification requirement was not narrowly tailored and therefore violated the Equal Protection Clause of the Fourteenth Amendment.[27] He alleged that the claim of voter fraud was "a tactic used to suppress the votes of minorities and the poor,"[28] and that "our government has failed its citizens" because the majority "endorses misguided legislation that significantly impairs the fundamental right of thousands of our citizens to vote."[29] Justice Marilyn Kelly, dissenting separately, agreed that the Michigan Election Law should be subject to strict scrutiny. She found that the "tragic decision" of the majority severely burdened the right to vote, particularly for the poor and disadvantaged.[30]

The majority criticized Justice Cavanagh's dissent as "inflammatory" and "emotional."[31] The majority found that the right to vote, though important in its own right, also includes the assurance that one's vote will be protected

and will not be cancelled out by fraudulent votes.[32] That is, the state is not required to present proof of voter fraud before it tries to prevent it.[33] Rather, the state is entitled to implement a system that prevents fraudulent votes, even where that system requires photo identification or an affidavit to vote.[34]

Some have argued that the Michigan Supreme Court's opinion is significant not for what it held but for what it declined to hold. In the months prior to the court's decision, the Speaker of the Michigan House and the Michigan Attorney General clashed over whether attorney general Frank Kelly had acted within his state constitutional authority to issue an opinion that effectively struck down Section 523. The Speaker reasoned that attorney general opinions were not binding, and to treat them as such would violate the separation of powers.[35] The attorney general, who by that time was Mike Cox, vehemently defended his office's ability to issue binding opinions, and claimed support for the practice in the state constitution, common law, and statute.[36] This debate quickly exploded into the media, and newspaper editorials were quick to publicize the dispute.[37] Despite this intense and public debate, however, the court reserved the matter for another day by finding that "the effect of an Attorney General opinion is beyond the scope of the advisory opinion."[38]

Significantly, the majority was unwilling to consider the appropriateness of the *policy* choice behind the photo identification requirement. The voter identification requirement was a politically charged public policy issue in Michigan. Both the Michigan Republican Party and the Michigan Democrat Party had waded deeply into the debate and had even submitted amici curiae briefs to the court. In public comments outside the briefing papers, the Democrat Party Chair called the law "part of an ongoing strategy by Michigan Republicans to disenfranchise minority and older voters."[39] The Republican Party Chair said the law was essential to make sure legitimate votes "will not be canceled out by a fraudulent vote."[40] Sidestepping all of these arguments about whether the law was "wise" or "proper," and in reply to the policy arguments made by the primary dissent, the court's majority stated:

> It is clear that [Justice Cavanagh] passionately dislikes the enacted voter photo identification requirement and believes it to be "ill-advised.…" Whether the statute is an "ill-advised" *policy choice* is not a judgment open to the judiciary, this Court, or any member of it. (emphasis original).[41]

Finally, the court's opinion is important because it marked the first significant test of Michigan's voting laws following the turbulent election of 2000. Every state, in conjunction with the Help America Vote Act of 2002, has adjusted its election laws or regulations in some fashion in order to enhance ballot integrity.[42] Challenges to those reforms are currently pending in many state court systems. One thing is for sure: while this might be the first genuine test of Michigan's newly reformed election law, it is certainly not the last.

Endnotes

1 ___ Mich. ___ (2007), 2007 Mich. LEXIS 1582.

2 Mich. Comp. Law §168.523 (passed as Public Act 71 of 2005).

3 *Id*.

4 Attorney General Kelley, a Democrat, was the 50th Attorney General of Michigan. He served from 1961 to 1998, making him the youngest (36 years old), the oldest (74 years old), and the longest serving (37 years) attorney general in Michigan's history.

5 *See Opinions of the Attorney General*, 1997-98, No. 6930, p. 1 (January 29, 1997).

6 *Id*. at 3, 5.

7 *See* Michigan House of Representatives Resolution 199, adopted February 22, 2006. The Michigan House of Representatives requested the advisory opinion pursuant to Article 3, Section 8 of the Michigan Constitution of 1963, which allows the Supreme Court to opine "on important questions of law upon solemn occasions as to the constitutionality of legislation."

8 Attorney General Cox, a Republican, was elected in 2002 and took office on January 1, 2003. He was re-elected to his second and final four-year term in 2006.

9 2007 Mich. LEXIS 1582 at *20.

10 *Id*.

11 *Id*.

12 *Id*. at *22, *citing Attorney General ex rel Conely v. Detroit Common Council*, 78 Mich. 545, 559 (1889).

13 *Id*. at *26-27.

14 *Id*. at *27.

15 504 U.S. 428 (1992).

16 2007 Mich. LEXIS 1582 at *29.

17 *Id*. at *30.

18 *Id*. at *30, *31-32.

19 *Id*. at *30.

20 *Id*.

21 *Id*. at *33.

22 *Id*. at *35-36.

23 *Id*. at *56-57.

24 *Id*. at *58; *see also* Mich. Comp. Law §28.292(14).

25 2007 Mich. LEXIS 1582 at *89.

26 *Id*. at *79.

27 *Id*. at *87.

28 *Id*. at *89.

29 *Id*. at *70.

30 *Id*. at *173-74.

31 *Id*. at *62.

32 *Id*. at *64.

33 *Id*. at *37.

34 *Id*. at *69.

35 *See* Brief of the House of Representatives, Michigan Supreme Court Case No. 130589, at 3, n.1.

36 *See* "Cox to Speaker: Hands Off AG's Constitutional Powers," Press Release of Attorney General Michael A. Cox, July 28, 2006.

37 *See, e.g.*, "House Speaker vs. People's Watchdog," Detroit Free Press, August 2, 2006.

38 2007 Mich. LEXIS 1582 at *6, n. 5.

39 *Court OKs Photo ID for Voting*, The Detroit News, July 19, 2007.

40 *Id.*

41 2007 Mich. LEXIS 1582 at *62.

42 42 U.S.C. §15301 *et seq*.

Judicial Selection in the States

Continued from cover...

The mismatch between conservative expectations and what Blunt was able to deliver has its origins in the nature of the Missouri Court Plan. In contrast to the federal appointment model, where the executive nominates and the legislature confirms judges, Missouri governors must appoint a judge chosen from a panel of three candidates submitted by the state's seven-member Appellate Judicial Commission.

Nearly seventy years after its enactment, new politics and special interests are being used as evidence that the Missouri Court Plan has failed to achieve its stated goals. Specifically, a loosely organized coalition of state scholars, influential lawyers, and lawmakers has argued that the Missouri Bar Association and its close allies control the Appellate Judicial Commission.[4] As a result, Missouri legislators have proposed a number of constitutional amendments that would modify Missouri's judicial selection process by introducing more accountability to the public. The following is a brief summary of the dominant proposals.

HJR 33: –"The Accountable Commission Plan"

HJR 33 would preserve, but modify, the Appellate Judicial Commission. Specifically, it would alter the process by which members of the commission are chosen. The Missouri Bar Association and the Chief Justice currently fill four seats on the Commission. Under the Accountable Commission Plan these seats would instead be filled by the leaders of the House and Senate, who would select two lawyers each. Further, HJR 33 would reverse the order by which the commission interacts with the governor. As stated, the commission currently provides the governor with a panel of three nominees to choose from. Under HJR 33, the governor would submit his preferred candidate to the commission for its approval. The supporters of HJR 33 argue that it will improve the judicial selection process by making those who appoint judges accountable to the people of Missouri for those appointments.

HJR 31: "The Federal Model for Appointment"

As its name suggests, HJR 31 would replace the current Missouri judicial selection process with the federal model of appointing judges. Specifically, the governor would nominate the candidate of his choice and the senate would then vote whether to confirm the nominee after a public hearing. The role of the Missouri bar would be

important, but substantially different from its current role, in that it would be permitted to provide an opinion on the qualification of a particular judge to serve. Further, HJR 31 would prevent the stagnation of nominees that has occurred at the federal level by requiring an up or down vote within 120 days of the nomination.

HJR 34: "Effective Retention and Removal"

Missourians currently have the right to vote whether to retain a judge after that judge has served for twelve years. In practice, critics argue, this "retention vote" has failed to serve any real purpose. The most recent election cycle seems to substantiate this claim, in that a judge with a 30% approval rating—the lowest ever rating of any judge in the entire history of Missouri's retention elections—was retained by a voter percentage within just a few points of judges with the highest ratings in the state. According to critics of the current Missouri Plan, after more than a decade of failed attempts by the Missouri Bar Association and others to "educate" voters concerning the retention vote, it is time to acknowledge that the process is simply broken. HJR 34 would eliminate the "retention vote" and replace it with a process whereby elected representatives determine whether to retain or remove judges. Specifically, a judge must obtain a simple majority of votes at a "decade review" in order to be retained.

HJR 34 also contains an "emergency clause" that gives the governor the power to remove any judge if his call for removal is approved by two-thirds of the house and senate. According to sponsors of HJR 34, the high vote thresholds would avoid pure political motivations and "knee-jerk" removals. Sponsors of HJR 34 also argue that, in practice, such a retention/removal process will do a better job of bringing to light the qualifications and performance of Missouri's judges.

The Missouri General Assembly begins its next session in January 2008. It remains to be seen if any of the proposals to update the Missouri Plan will become law in the Show-Me State next year.

**Jonathan Bunch is an attorney and political consultant in Missouri. He is a former law clerk to Judge Stephen N. Limbaugh, Jr. of the Supreme Court of Missouri and a former speechwriter and policy adviser to Governor Matt Blunt.*

Endnotes

1 *See* Virginia Young, *So You Want to be a Supreme Court Justice,* St. Louis Post Dispatch, August 3, 2007; Bill McClellan, *Nonpartisan Court Plan May Not Be So Nonpartisan*, St. Louis Post Dispatch, July 27, 2007.

2 Press Release, Governor Matt Blunt, "Gov. Matt Blunt Statement on Supreme Court Judge Ronnie White's Retirement Announcement" (May 18, 2007) *available at* http://www.gov.mo.gov/press/JudgeWhite051807.htm.

3 *See*, Attorneys Against Abuse of the Judicial Appointments Process, *The Missouri Non-Partisan Court Plan: Assessing the Summer 2007 Appellate Judicial Commission Process for Judicial Appointment to the Supreme Court of Missouri* (Aug. 2007).

4 *See, e.g.,* Curt Levey, *Supreme Court Showdown in the Show Me State* (Sept. 12, 2007) *available at* http://www.humanevents.com/article.php?id=22335.

Nevada Legislature Passes Proposal to Change Judicial Selection Process

by Matthew D. Saltzman

Presently, judges in Nevada are selected through contested, non-partisan elections. However, earlier this year the Nevada Legislature approved a measure that could lead to an amendment to the Nevada Constitution modifying the prescribed manner of judicial selection. This proposed amendment to the Nevada Constitution would change the judicial selection process from competitive elections to a system of merit selection, sometimes referred to as the "Missouri Plan." Senator William J. Raggio is the primary sponsor of the proposal, documented as Senate Joint Resolution No. 2 ("SJR2").[1]

If the proposed amendment is ultimately passed, Nevada would join a minority of states, including a few of its neighbors (Arizona, Colorado and Utah), in adopting this system.[2] SJR2 was supported by the State Bar, which argued that "[j]udicial campaigns required that candidates devote an increasing amount of time and resources to fundraising and campaigning and a decreasing amount of time to the increasing workload…."[3] (SJR2 is not the first attempt to restructure the judicial selection process in Nevada. Similar proposals before the Legislature and electorate in past years were defeated in 1972 and 1998.[4])

The proposal comes after the *Los Angeles Times* ran a series of articles titled "Juice vs. Justice" in June 2006, which outlined specific incidents of apparent corruption and impropriety among certain members of the Nevada judiciary. The article stated: "In Las Vegas, they are playing with a stacked judicial deck. Some judges routinely rule in cases involving friends, former clients, and business associates and favor lawyers who fill their campaign coffers." As a consequence of the *L.A. Times* articles, and of the extensive media coverage of events

surrounding a particular elected judge, Nevada judges and lawmakers have explored alternative institutional and structural changes to the judicial selection process—hoping these efforts will curb corruption and limit the appearance of conflicts of interest between campaigning judges and campaign contributing lawyers.

However, in order for SJR2 to become law, it will have to pass the unusual and rigorous requirements for constitutional amendment governed by Articles 16 and 18 of the Nevada Constitution.[5] Article 18, Section 1, of the constitution authorizes the Nevada Legislature to initiate proposed constitutional amendments in the form of a joint resolution. In order for the joint resolution to pass, Article 16 requires a majority vote of the legislature in two consecutive legislative sessions. If the proposal survives a majority vote in both sessions, it is then submitted to the people for approval and ratification by a majority vote.

SJR2 passed in the 2007 legislative session. If it passes in identical form in the 2009 session (the Nevada Legislature meets every other year), it must be placed on the ballot for the 2010 General Election. If voters then approve the proposed amendment, the language of SJR2 itself specifies that the new method of selecting judges will take effect, "commencing with a term of office that expires on or after December 31, 2011." Therefore, the amendment could not take effect before 2012.

The Nevada Senate voted on the measure in April, but the vote was divided 15-6, with Senators Amodi, Beers, Cegavske, Heck, McGiness, and Schneider dissenting. Five of the six dissenters are Republicans; Senator Schneider being the only Democrat. Subsequent to the proposal passing in the Senate, SJR2 was transferred to the Assembly. It failed to pass by a vote of 9-5. However, the proposal was subsequently passed by a vote of 30-11 on May 25, after it was amended to change the percentage of the vote that an incumbent judge would be required to receive to survive a retention election, from 60 percent to 55 percent.[6]

Operationally, SJR2 would amend the Nevada Constitution to provide for uncontested "yes or no" retention elections after an initial appointment of judges and justices by the governor. Specifically, under SJR2, when a vacancy occurs on the Nevada Supreme Court or a district court, the governor would appoint a judge from three candidates selected and recommended by the "Commission on Judicial Selection." The governor would only be permitted to select a candidate recommended by the Commission. If he chooses to select none of the candidates offered by the Commission, the Commission must send him three more candidates; however, the governor is then limited to that second group of candidates and must make a selection from that slate. The Commission on Judicial Selection would be composed of nine individuals, five of whom are lawyers, namely (1) the chief justice (or an associate justice designated by the chief justice); (2) four members of the State Bar of Nevada selected by the State Bar; and (3) four non-lawyers, appointed by the governor.

Once the governor makes an appointment, the judge would then be subject to an initial term which expires on the first Monday of January, following the general election, occurring at least 12 months after the judge is appointed. Thereafter, if the judge wishes to serve an additional term, he or she must declare candidacy for a retention election. If the judge obtains the required 55 percent approval in the retention election, he or she would then serve a 6-year term. However, if the judge fails to declare candidacy, or does not obtain the required 55 percent in favor of retention, a vacancy is created at the end of the judge's term, which must be filled once again through the new appointment process.

SJR2 would also require each judge who has declared his/her candidacy for a retention election to undergo a mandatory performance review. Accordingly, the measure contemplates the creation of the "Commission on Judicial Performance" to perform these reviews. This second Commission would be composed of five members, three of whom are lawyers, including (1) the chief justice of the supreme court (or an associate justice designated by the chief justice); (2) two members of the State Bar selected by the State Bar; and (3) two non-lawyers. The Commission would review the judge's record and conduct at least one interview with the judge. At the conclusion of its review, information from the review, including a recommendation on whether the judge should be retained, would be released to the public, no later than six weeks before the election in which the judge is seeking retention.

The arguments for and against SJR2 are beyond the scope of this article.[7] The measure's legislative history details many of the rationales supporting the proposal as well as its weaknesses.[8] Proponents of SJR2 argue that it will stifle corruption in the judiciary by preventing campaign contributions by lawyers as well as eliminating negative campaigning. Advocates of SJR2 also point out that judicial election campaigns are expensive and time consuming, resulting in judges wasting their time campaigning, rather than adjudicating their cases.

Opponents of SJR2 contend that it will simply bring politics behind closed doors because the Commission on Judicial Selection may formulate their appointment decisions based on political persuasion or simple "good

old boy" politicking. Indeed, they argue, there is nothing preventing the Commission on Judicial Selection from selecting judges based on improper motives. Also, given that five of the nine Commission members would be lawyers, there is concern that lawyers will too heavily influence the judicial selection process. Opponents also express fear that retention elections will not adequately address the problems associated with non-performing judges, because, historically, only a minute percentage of judges are ever defeated in retention elections, regardless of the judge's performance.

Whether Nevada citizens will amend their constitution and allow a Commission to choose their judges remains to be seen.

** Matthew D. Saltzman is an attorney and a shareholder at Kolesar & Leatham, Chtd in Las Vegas, Nevada.*

Endnotes

1 S.J. Res. 2, 2007 Leg., 74th Sess. (Nev. 2007).

2 According to the American Judicature Society, less than 25 states have adopted some form of the "Missouri Plan" http://www.judicialselection.us. *See also* Stephen B. Presser et. al., *The Case for Judicial Appointments*, The Federalist Society "White Papers," *available at* http://www.fed-soc.org/publications/pubID.89/pub_detail.asp. *and* Jan Witold Baran, *Judicial Elections: Changes and Challenges*, 42 AJA Court Review 16 (January 2007), *available at* http://www.wileyrein.com/docs/publications/12926.pdf.

3 Nevada State Bar Website, State Bar Supports Senate Joint Resolution No. 2, *available at* http://www.nvbar.org/pdf/sjr2whitepaper.pdf.

4 *See* Minutes of the Senate Committee on Judiciary, S.J. Res. 2, 2007 Leg., 74th Sess. (Nev. 2007) (statement of Sen. William Raggio on March 8, 2007).

5 Nev. Const. art. 16 and art. 18, § 1.

6 *See* S.J. Res. 2, 2007 Leg., 74th Sess. (Nev. 2007) (Amendment No. 984).

7 For a more thorough analysis *see* Presser, *supra* note 2; Michael DeBow et. al., *The Case for Partisan Judicial Elections*, Federalist Society "White Papers," *available at* http://www.fed-soc.org/publications/pubID.90/pub_detail.asp.

8 *See generally,* Minutes of the Senate Committee on Judiciary, S.J. Res. 2, 2007 Leg., 74th Sess. (Nev. 2007).

Proposals to End Judicial Elections in Minnesota

The subject of judicial selection has received considerable attention in Minnesota this year. There are various proposals on the table, which may be considered by the state legislature in 2008. No apparent consensus exists among the bar and public officials, however—which indicates that reform may be unlikely in the near future.

The Minnesota Constitution provides for the direct election of judges at six-year intervals, but the constitution also provides that, if a judgeship becomes vacant mid-term, the governor may appoint a successor. The appointed judge then must stand for (re)election between one and three years after the appointment.[1]

As a practical matter, the exception swallows the rule because judges almost always retire mid-term. For the district courts, a statutorily required Judicial Selection Commission screens applicants and recommends finalists to the governor. Although the governor is not required to select a judge from among the finalists, that is the norm.

Thus, there are very few elections for open judicial seats. Some judges are challenged in each election cycle, but those challenges are usually unsuccessful. In recent decades, fewer than twenty lawyers have successfully challenged a sitting judge, and all of them were at the trial court level.[2] Appellate court judges have been challenged only by little-known candidates who do not mount serious, state-wide campaigns.

Lately there has been renewed interest in amending the constitution so as to eliminate public elections. The primary motive appears to be the desire to prevent expensive, divisive judicial campaigns. The argument in favor of reform is that big-dollar judicial campaigns undermine judicial independence and that, if no action is taken, they eventually will occur in Minnesota.

The Chief Justice of the Minnesota Supreme Court, Russell A. Anderson, addressed the issue in his most recent annual "state of the judiciary" message. He praised the Minnesota court system's "reputation for professionalism, efficiency, innovation, and fairness," but also warned of "storm clouds on the horizon;" namely, "the prospect of partisan, expensive, and harshly negative judicial campaigns.[3] He referred to recent examples in Wisconsin, Washington State, and Alabama.[4]

Due to this concern, the Minnesota Citizens Commission for an Impartial Judiciary was formed in 2006 to study the issue.[5] The commission—commonly known as the "Quie Commission" because it is chaired by Albert H. Quie, a moderate Republican governor from

1979 to 1983—held three public hearings in 2006 and issued a report in March 2007.

In its report, the Quie Commission recommended the creation of an Appellate Court Merit Selection Commission, which would resemble the commission that presently screens applicants for the district courts, and recommended that the governor be required to select a judge from among the finalists recommended by both commissions. This procedure would become the sole means of selecting new judges.[6]

The Quie Commission also recommended that Minnesota replace contested judicial elections with "retention" elections.[7] To facilitate the retention vote, the Quie Commission recommended the creation of a Judicial Performance Evaluation Commission, which would review the performance of judges and provide information to voters, such as by placing the words "qualified" or "not qualified" on the ballots next to the names of incumbent judges.[8]

The Quie Commission voted 14 to 11 in favor of the final report. Several dissenting members, led by Brian Melendez, wrote separately to argue that judges should not face the electorate in any manner after being appointed (but perhaps should face a re-appointment commission). Some members of the minority suggested that the state legislature should confirm judges nominated by the governor and perhaps also confirm them to renewed terms.[9]

On the heels of the Quie Commission report, the Minnesota State Bar Association took up the issue at its annual convention in June 2007. The Association's Assembly[10] adopted, by a 33 to 31 vote, a resolution stating that the organization "supports and prefers" the minority report of the Quie Commission authored by Mr. Melendez but also "finds acceptable, and does not oppose" the majority view of the Quie Commission.[11] At the same convention, Mr. Melendez became President of the Association. Meanwhile, he also serves as Chair of the state's Democratic-Farmer-Labor Party (*i.e.*, the Democratic Party in Minnesota).

It appears that no consensus has developed among Minnesota lawyers and lawmakers. Most observers believe that it would be difficult to persuade Minnesota voters to relinquish their right to elect and re-elect state court judges. Moreover, some people who previously favored reform are having second thoughts. For example, the President of the Ramsey County Bar Association recently wrote a column in the association's monthly newsletter in which he said, "Originally I favored a change and was impressed with the Quie Commission's proposals. I must admit, however, that my thinking has changed somewhat...."[12]

At present, there appears to be only one bill pending in the state legislature on this topic. In January 2007, Sen. Thomas M. Neuville, a Republican lawyer, introduced S.F. 324, which would put a referendum on the 2008 general ballot that would amend the state constitution to eliminate judicial elections and, instead, provide for appointment of judges by the governor with the advice and consent of the state Senate.[13] Additional bills may be offered when the legislature re-convenes in February 2008.

Endnotes

1 Minn. Const. art. VI, §§ 7, 8.

2 Hon. Stephen C. Aldrich, *Minnesota Judicial Elections: Better Than the "Missouri Plan,"* Bench & Bar, Oct. 2002 (reprinted at <http://www2.mnbar.org/[-] benchandbar/2002/oct02/lawyer-at-large.htm>).

3 Hon. Russell A. Anderson, *The State of the Judiciary*, Bench & Bar, Aug. 2007, at 17.

4 *Id.* at 17-18.

5 *Available at* <http://www.keepmnjusticeimpartial.org>.

6 Minnesota Citizens Comm'n for an Impartial Judiciary, Final Report and Recommendations, at 12-14 (Mar. 27, 2007) (reprinted at http://www.keepmnjustice[-] impartial.org/FinalReportAndRecommendation.pdf).

7 *Id.* at 21-23.

8 *Id.* at 16.

9 *Id.* at 25-33.

10 *Available at* http://www2.mnbar.org/governance/assembly/index.htm.

11 *Available at* http://www2.mnbar.org//JudIndependence/Document/MSBA-%20Judicial%20selection.doc.

12 Richard H. Kyle, Jr., *Maintaining an Independent Judiciary*, R.C.B.A. Barrister, Sept. 2007, at 2.

13 *Available at* http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S0324.0.html[-] &session=ls85.

Is the Tennessee Plan Constitutional?

by Maclin P. Davis, Jr.

Since 1994, the elections of judges for eight-year terms to the Tennessee Supreme Court have been conducted pursuant to the Tennessee Plan, in which judges are recommended to the governor by the Judicial Evaluation Commission and retained or rejected by the qualified voters of the state. However, the Tennessee Constitution provides for Supreme Court judges to be elected for eight-year terms by the voters, and some argue that judicial selection in Tennessee should return to this method. In fact, pending litigation and legislation in Tennessee may return the state to its previous method of judicial elections.

In the Tennessee Constitutions of 1796 and 1835, supreme court judges were selected by the legislature. The 1870 Constitution changed that method to provide that they be elected by the qualified voters instead: Article VI, Section 3, of the Tennessee Constitution provides that, "The judges of the Supreme Court shall be elected by the qualified voters of the state" for eight-year terms. That Section has remained un-amended since the constitution was enacted in 1870.

From 1870 until 1971, the legislature did not attempt to change that method of electing supreme court judges. In 1971, however, the legislature adopted the Tennessee Plan (Chapter 198, Public Acts of 1971, page 510) so as to provide for the filling of vacancies on the supreme court by a procedure under which the governor chooses a judge for appointment from three persons nominated by the Appellate Court Nominating Commission.

Governor Bryant Winfield Culberson Dunn appointed a judge to the supreme court from the list recommended by the Judicial Nomination Commission pursuant to that Act. In *State ex rel Higgins v. Dunn,* the Tennessee Supreme Court set aside that appointment because it held it was made too late.[1] In this three-to-one decision, the court also ruled that the Tennessee Plan's provision for filling vacancies was not unconstitutional because the Tennessee Constitution does not define "elected;" the constitution authorizes "elections" for referenda, constitutional amendments and ratification of private acts, which are all limited to approval and disapproval, just as the Tennessee Plan is limited to voter approval or disapproval of judges.

In a vigorous dissent, Judge Allison Humphreys argued that, if supreme court judges are to be elected by retention elections only, then "the Legislature can do away with popular elections for civil officers. This means that the Legislature constitutionally keeps all constitutional civil officers in office until they are recalled by a per centum of the vote the Legislature chooses to fix."[2]

Proponents of the Tennessee Plan claim that the ruling in *Higgins v. Dunn* establishes the constitutionality of the Tennessee Plan. However, opponents of the Tennessee Plan contend that the *Higgins* decision does not apply to elections under the Tennessee Plan for eight-year terms because that case involved only an appointment of a judge to fill a vacancy, not an eight-year term; it held that the appointment was void under the statute; the statute involved in that decision was repealed by the next session of the legislature following the decision; the three-to-one majority opinion failed to consider the meaning of the words "elected by the qualified voters" at the time of the adoption of the 1870 constitution. Further, if that decision was recognized as precedent on the meaning of those words, it could lead to the legislature passing a new statute to have retention elections for the governor and members of the Tennessee Senate and House.

Opponents of the Tennessee Plan also contend that, as a matter of law, the *Higgins* case decided in 1973 was overruled by the Tennessee Supreme Court in *Delaney vs. Thompson*.[3] That case reviewed a trial court decision which held that, since the constitutionality of the Tennessee Plan as related to an eight-year term was not addressed in the *Higgins* case, the *Higgins* decision was not controlling. The trial court further held that the Tennessee Plan is unconstitutional on its face because it does not allow the qualified voters to exercise their constitutional right to elect judges. On appeal, the Tennessee Court of Appeals reversed that holding by the trial court and held that the Tennessee Plan is constitutional. The supreme court granted an appeal and reversed the ruling of the court of appeals.

Opponents of the Tennessee Plan further assert that the public has never consented to the election of supreme court judges by retention elections for eight- year terms and, therefore, the meaning of the words "elected by the qualified voters" at the time the constitution was adopted in 1870 should still be followed. At the constitutional convention where the 1870 Constitution was adopted, it was decided that the Tennessee Constitution should be changed so that supreme court judges would be elected for eight-year terms by the qualified voters. Thus, many argue that the plain meaning of "elected by the qualified voters" is that judges had to be elected by the voters in popular elections.

In 1977, the Tennessee Legislature proposed an amendment to the Tennessee Constitution to authorize the election of supreme court judges by retention elections rather than by the qualified voters. That amendment was rejected by the public in a referendum. Nevertheless, in 1994, the state legislature enacted the Tennessee Plan for the retention election of Supreme Court judges. Presently in Tennessee, opponents of the Tennessee Plan are contending that the Tennessee public has never consented to the retention election of Supreme Court judges for eight-year terms. Whether the Tennessee Plan will remain in effect in its present form in the future is still a matter of great debate.

Endnotes

1 496 S.W.2d 480 (1973).

2 Id. at 493.

3 982 S.W.2d 857 (1998).

Judicial Selection Litigation in New York

by Benjamin L. Ginsberg & John Hilton

As this series of articles demonstrates, judicial selection is a hot topic in many states right now, including New York. In Tennessee, the governor rejected a panel of supreme court nominees and when the Judicial Selection Commission refused to allow members of the rejected panel to re-apply a "firestorm" erupted.[1] Debate rages in Missouri, where critics of the Nonpartisan Court Plan argue that it allows unaccountable, unelected elites to dominate the selection process.[2] Florida reformed its Judicial Nominating Commission to reduce the influence of the state Bar Association.[3]

In 2006, a federal district judge overturned New York's system for selecting trial judges.[4] Upholding the preliminary injunction, the United States Court of Appeals for the Second Circuit concluded, "through a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a *de jure* election into a *de facto* appointment."[5] The U.S. Supreme Court granted certiorari; oral arguments took place on October 3.[6]

The lead plaintiff, Margarita Lopez Torres, is a Brooklyn Civil Court judge originally elected with the support of the local Democratic organization. Party leaders directed her to hire a certain local party activist as her law clerk. Judge Lopez Torres refused and was warned that if she aspired to become a Supreme Court Justice "the party leaders would not forget this," and without their support she would not succeed.[7] But she was re-elected to the Brooklyn Civil Court, defeating a party-backed candidate in the primary election and receiving more votes in the general election than any Democratic candidate for Supreme Court Justice in Brooklyn. Despite her obvious popular support, Judge Lopez Torres failed four times to obtain her party's nomination for a Supreme Court seat.

The New York Constitution requires that Supreme Court Justices be popularly elected.[8] To protect against perceived threats to judicial independence, in 1921 reformers devised "a three-part scheme that combines a primary election, a nominating convention, and a general election." First, party members choose judicial delegates in a primary election. The state is divided into twelve judicial districts, which are subdivided into assembly districts (between nine and twenty-four, depending on population). The parties decide how many delegates to allot each assembly district. Every delegate slate must gather 500 signatures from party members residing in that assembly district, and each party member may sign only one slate's petition. "Consequently, the number of available signatories shrinks each time a party member signs a designating petition." Because petition signatures are routinely challenged and disqualified, "in order to run a full complement of delegates, a judicial candidate must gather at least 9,000 signatures (in the judicial district with only nine assembly districts) and as many as 24,000 signatures (in the judicial district with 24 assembly districts)." For example, between 1999 and 2003, in four judicial districts, 87.3% of the delegate races were uncontested and the qualified slates were "deemed elected," so "voters did not even see the delegates' names on the ballot, much less have the opportunity to vote them up or down." The primary ballot does not indicate which judicial candidate a slate supports, so the candidate must somehow communicate this information to voters.

Within two weeks of the primary election, the parties hold nominating conventions ("perfunctory, superficial events," according to the district court). The delegates are technically uncommitted, but the court found that "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." The time frame "is unrealistically brief," and delegates are firmly controlled by party power-brokers: Between 1990 and 2002, 96% of nominations were uncontested. Conventions typically last less than an hour, where candidates were nominated and confirmed by delegates who cannot pronounce their names.

Single-party rule is the norm in many judicial districts, making the general election "little more than a ceremony." Between 1990 and 2002, more than half of general elections were uncontested in eight of the state's twelve judicial districts. Such is the case in Judge Lopez Torres's Brooklyn, where winning the Democratic Party's nomination is tantamount to winning the general election.

Judge Lopez Torres and others challenged the system, claiming that it violated their freedom of association. After a thirteen-day hearing with testimony from twenty-four witnesses and 10,000 pages of exhibit evidence, the district court found that "the plaintiffs are likely to succeed on their First Amendment claim" and granted a preliminary injunction effective after 2006. Until the state legislature enacts a new process for selecting supreme court justices, the district court ordered that nominations should take place by primary election.

A unanimous panel of the Second Circuit upheld the district court. The U.S. Constitution does not "require[] a state to provide for the popular election of judges," but

"[i]f the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles."[9] These rights, analyzed jointly, include "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[10] Finding that the law severely burdens these rights, the court applied strict scrutiny.

The court rejected the proposition that the First Amendment does not apply to indirect delegate primary elections, and that nominating conventions are per se constitutional.[11] Because "New York's delegate selection process is one of public election," and the "judicial delegates hold no party leadership position and exercise no party authority other than to act, in the ideal, as conscientious proxies for the communities that elected them," the court concluded that the associational rights of the parties do not outweigh those of New York voters and candidates.

Applying a clear error standard of review, the court upheld the district court's factual finding that the system's burdens are severe. Nor was the court persuaded that alternative means of ballot access (*e.g.,* as an independent or write-in candidate) saved the challenged scheme. The defendants suggested several state interests that the system protects: parties' associational rights; racial, ethnic, and geographical diversity; and judicial independence. But the court found that the law was not narrowly tailored to serve these interests. A party's associational rights can be protected, for example, by requiring a one-year affiliation requirement for primary voters. The court doubted that the system promotes racial, ethnic, or geographic diversity. As to judicial independence, there are "less burdensome means to serve that end," such as public financing of judicial campaigns or "a narrowly tailored law preventing a judicial candidate from campaigning based on her views 'for or against particular parties.'"[12]

Finally, the defendants complained that the district court should have devised a new system, but this is "inviting the District Court to act as a one-person legislative chamber—precisely what is forbidden." Finally, the Second Circuit found that the district court did not ignore legislative intent when it ordered that primary elections be held until the legislature re-wrote the law, because "nominations for other judicial offices, such as Civil Court Judge and County Court Judge, are made by primary election."

The New York Legislature has not adopted legislation to change the current scheme. By agreement of the parties, however, nominations will be by judicial convention again in 2007.[13] Meanwhile, as mentioned above, oral arguments before the Supreme Court of the United States took place on October 3. Judicial selection is an increasingly visible issue nationwide, and the U.S. Supreme Court's decision will be watched carefully in many jurisdictions far beyond the Empire State's borders.

** Benjamin L. Ginsberg is a partner at Patton Boggs LLP. John Hilton is an associate at the firm.*

Endnotes

1 Ken Whitehouse, "Attorney General backs Judicial Selection Commission," Nashville Post, 7/26/2006, *available at* http://www.nashvillepost.com/news/2006/7/26/attorney_general_backs_judicial_selection_commission (last accessed 9/28/2007).

2 *See, e.g.*, Thomas Walsh & William G. Eckhardt, "Our judges are selected behind closed doors," Southeast Missourian, 7/23/2007, *available at* http://www.semissourian.com/story/1232631.html (last accessed 9/28/2007); *Show Me the Judges*, Wall Street Journal, 8/30/2007.

3 2001 Fla. HB 367, codified at Fla. Stat. § 43.291.

4 Lopez Torres v. New York State Bd. of Elections, 411 F.Supp.2d 212 (E.D.N.Y. 2006).

5 Lopez Torres v. New York State Bd. of Elections, 462 F.3d 161, 200 (2nd Cir. 2006).

6 New York State Bd. of Elections v. Lopez Torres, 127 S.Ct. 1325 (Feb. 20, 2007).

7 The Supreme Court of the State of New York is a trial court of general jurisdiction. The court of appeals is the highest court in New York State.

8 N.Y. Const., art VI, § 6.

9 Quoting Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

10 Quoting Anderson v. Celebrezze, 460 U.S. 780, 787 (1983).

11 Citing United States v.Classic, 313 U.S. 299 (1941); Terry v. Adams, 345 U.S. 461 (1953); American Party of Texas v. White, 415 U.S. 767 (1974).

12 Quoting Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002).

13 Carol DeMare, *Judicial Conventions Face Test*, The Times Union, July 23, 2007.

Gay Marriage Update: Iowa & Maryland

Continued from cover...

protection rights.[1, 2] In Iowa, the party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists.[3] The non-moving party may only resist the motion by "set[ting] forth specific facts constituting competent evidence to support a prima facie claim."[4] In other words, the non-moving party "must show there is a genuine issue of fact" if the moving party adequately supports its summary judgment motion.[5] Iowa Code § 595.2(1) provides that "[o]nly a marriage between a male and a female is valid." Judge Robert Hanson enjoined Polk County from refusing to issue marriage licenses to same-sex couples.[6, 7] Four hours later, Judge Hanson stayed his ruling, but one same-sex marriage license was issued in the interim.[8] As of this writing, the case is scheduled to be appealed to the Iowa Supreme Court, which may either hear the case directly or send it to the Iowa Court of Appeals.

The plaintiffs were twelve lesbians and gay men who comprised six same-sex couples, two of which have minor children. The defendant was Timothy Brien in his official capacity as the Recorder for Polk County, Iowa. The court noted that the state failed to provide sufficient facts; in stark contrast, the plaintiffs provided strong factual support for their case.[9] For example, the court pointed out that the state failed to provide sufficient facts supporting the state's basic interest in providing a married man and married woman as the optimal environment for raising children.[10] Even worse, the state simply denied the plaintiffs' facts "for lack of knowledge" with insufficient reference to the record, rather than putting forth the state's own facts to sufficiently challenge the plaintiffs' facts such that the court could find a genuine issue of material fact.[11] The state's failure to submit facts was so dire that the court accepted as undisputed "all of the facts contained in the 'Statement of Material Facts in Support of All Plaintiff's Motion for Summary Judgment.'"[12]

A. Due Process

The state's failure to provide sufficient facts led to the court ruling against it and finding that § 595.2(1) violated the plaintiffs' due process rights. The court rejected the state's rationales behind prohibiting same-sex marriage, and noted that "the Defendant makes no argument that promoting procreation, child rearing by a mother and father in a marriage relationship, promoting stability in opposite sex relationships, promoting the concept of traditional marriage or conservation of state and private resources are compelling state interests, despite the fact that it his burden to do so."[13] The court did this even though Iowa's rationales were the same as or similar to the rationales of other states which recently had their bans on same-sex marriage upheld. The *Varnum* court did not cite these other states. The court further noted that Iowa failed to show that § 595.2(1)'s prohibition of same-sex marriage advanced any of those goals.[14]

The *Varnum* court noted that the United States and Iowa Supreme Courts both found that marriage is a fundamental right.[15] The court stated that "Due Process rights are fluid, and that such protections 'should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution is not merely tied to tradition, but recognizes the changing nature of society.'"[16] The court asserted that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[17] As a finding of fact, the court found that "[m]arriage has evolved over time, in legislatures and courts, to meet the changing needs of American society and to embody fuller notions of consent and personal choice.... Marriage in the United States is virtually unrecognizable from its earlier common law counterpart, having undergone radical, unthinkable changes in laws...."[18] The court found that any state law that "significantly interferes" with the right to marry is subject to strict scrutiny, stating that § 592(1) "constitutes the most intrusive means of the State to regulate marriage."[19] The court stated that the state failed to sufficiently explain how § 595.2(1) was either narrowly tailored or the only means available to protect and/or promote the state's compelling interests. The court then summarily concluded that same-sex marriage is a fundamental right, without analyzing the difference, if any, between marriage as a fundamental right and same-sex marriage as a fundamental right. The court provided some indication about its self-perceived role to "preserv[e] civil rights" with comparisons to *Loving v. Virginia,*[20] where the U.S. Supreme Court struck down Virginia's anti-miscegenation law prohibiting marriage between different races.[21]

Interestingly, the *Varnum* court held that § 595.2(1) is "extremely overinclusive" because it prevents a distinct group from marrying, and "extremely underinclusive" because it "fail[s] to regulate at all how heterosexuals enter into marriage and procreative relationships."[22]

The court rejected the plaintiffs' claim that the statute violates the rights of privacy and familial association contained in the Iowa Constitution, stating, however, that "the Court is sympathetic to the children's claims of stigma

and hardship created by the statutory scheme prohibiting their same-sex parents from marrying in Iowa."[23]

B. Equal Protection

Article I, § 6 of the Iowa Constitution states that "[a]ll laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."[24] The *Varnum* court employed intermediate scrutiny in analyzing the plaintiffs' equal protection claim because it was the "Plaintiffs' own sex" that precludes them from marriage.[25] The court rejected the defendant's argument that § 595.2(1) is not gender-based because it applies equally to men and women, likening it to the statute struck down in *Loving*, which Virginia argued was not race-based because it applied equally to both blacks and whites.[26] The court instead concluded that the statute is not substantially related to an important state interest because the defendant failed to prove that any of the rationales previously listed and analyzed under due process are important state interests, or that preclusion of same-sex marriage would advance those goals.[27] Therefore, the court held that the statute also violated equal protection under the Iowa Constitution.[28]

The court rejected the plaintiffs' argument that § 595.2(1) impermissibly classifies children raised by same-sex couples. Again, the court stated that it was "particularly sympathetic," but found no basis for such a ruling.[29]

C. Rational Basis

The *Varnum* court further held that § 595.2(1) failed a rational basis test.[30] A statute satisfies rational basis scrutiny if it serves a legitimate governmental interest, and the means employed by the statute bear a rational relationship to the government's interest.[31] The court stated that it was willing to view as legitimate state rationales promoting procreation, promoting child rearing by a father and a mother in a marriage relationship, promoting stability in opposite-sex relationships where children may be born (which the court referred to, collectively, as "responsible procreation"), and conserving state and private resources. The court, however, flatly rejected the state's fifth rationale, "promoting the concept of fundamental marriage or the integrity of traditional marriage." The court, expressing that it was flouting Iowa's legislative and political intent, explained that, despite a "governing majority" wishing to limit marriage to heterosexuals, neither history nor tradition was sufficient to uphold the law. The court cited *Lawrence v. Texas,*[32] and *Callendar v. Skiles,*[33] for the proposition that constitutional rights change along with society. The court also strongly hinted that § 595.2(1) was passed solely out of a "bare desire" to harm gays.

The court also rejected the "responsible procreation" rationales, stating that (1) the state failed to submit evidence showing how excluding same-sex marriage promotes responsible procreation; (2) the state actually admitted many of the plaintiffs' factual assertions, including the plaintiffs' assertion that same-sex couples are purportedly equal to opposite-sex couples with respect to child-rearing; (3) "the traditional make-up of the family has changed;" and (4) the state allows marriage for couples who are either unable or unwanting to have children. Lastly, the court rejected the state's conservation of resources argument because "Defendant has not explained this purported purpose at all and has cited no authorities or evidence supporting it."[34] Once again, the state's reliance on merely denying the plaintiff's facts, failure to present its own facts, and accompanying failure to show genuine issues of material facts led to the court ruling in favor of the plaintiffs.

D. Conclusion

Judge Hanson concluded that § 595.2(1) "violates Plaintiffs' due process and equal protection rights" and "must be nullified, severed and stricken... so as to permit same-sex couples to enter into a civil marriage."[35] It appears that the two main factors in his decision were (1) the state's severe failure to present sufficient facts to support its case and to present a genuine issue of material fact; and (2) Judge Hanson's view that due process rights, marriage, and the Iowa Constitution should not be bound by historical tradition and must change with the times. It does not appear that Judge Hanson considered or found persuasive the decisions of other state courts which analyzed and upheld similar statutes limiting marriage to one man and one woman. The defendant O'Brien, *vis à vis* State of Iowa (Polk County), is appealing under docket number 07-1499.[36]

II. Maryland

In *Conaway v. Deane*, the Maryland Court of Appeals upheld the state's limitation of marriage to opposite-gender couples.[37] Maryland's 1973 marriage statute, Family Law Code § 2-201, provides that "[o]nly a marriage between a man and a woman is valid in this State."[38] In 2004, the American Civil Liberties Union (ACLU), on behalf of nineteen gay men and lesbians, sued after they were denied marriage licenses in Maryland. The plaintiffs claimed that the Maryland statute was unconstitutional under the Maryland Declaration of Rights on the grounds that the statute (1) discriminates based on gender, (2) discriminates based on sexual orientation in violation

of equal protection, and (3) burdens the exercise of the same-sex couples' fundamental rights to marry in violation of due process. The trial judge in Baltimore, Judge M. Brooke Murdock, found in favor of the plaintiffs, relying heavily on *Loving v. Virginia.* On September 18, 2007, the Maryland Court of Appeals, with Justice Glenn Harrell writing for the 4-3 majority, issued its opinion declaring § 2-201 constitutional.[39]

A. Standard of Review

The court held that rational basis review applied to the marriage statute because it did not discriminate on the basis of gender, implicate a suspect or quasi-suspect class, or burden a fundamental right. Under rational basis review, "the classification will pass constitutional muster so long as it is 'rationally related to a legitimate governmental interest.'"[40] Additionally, the court noted that rational basis review carries a strong presumption of constitutionality.

B. No Gender-Based Discrimination

The court held that Maryland's Equal Rights Amendment was intended and had been interpreted to combat discrimination between men and women as classes. The court stated, "[it] stretch[es] the concept of gender discrimination to assert that [the marriage statute] applies to treatment of same-sex couples differently from opposite-sex couples."[41] The court held that § 2-201 did not discriminate on the basis of gender because it equally prohibits the same conduct for each class. Additionally, the court found most persuasive that many other jurisdictions had rejected the argument that statutes limiting marriage to heterosexual couples discriminate impermissibly based on gender.

The court rejected the plaintiffs-appellees' argument that § 2-201 should be examined as to how it affects each individual person seeking to marry, rather than as discrete classes suffering from disparate treatment.[42] The court stated that "a statute does not become unconstitutional simply because, in some manner, it makes reference to race or sex." The court, however, acknowledged that equal application of a statute does not automatically mean that the statute does not violate the Equal Protection Clause of the Constitution or Maryland Declaration of Rights. The court distinguished *Loving*, holding that the Virginia statute's primary purpose was to maintain "white supremacy" and subordinate non-whites as a class, regardless of its equal application to whites and non-whites. As evidence of this racist intent, the court noted that the Virginia statute prohibited whites from marrying non-whites, but did not prohibit other racial groups from marrying amongst each other. The court held that there was no showing that Maryland's marriage statute intended to subordinate men or women as a class. The court held that, absent such a showing, the Maryland Equal Rights Amendment "does not mandate the state recognize same-sex marriage based on the analogy to *Loving*."[43]

C. Equal Protection

The court held that a statute which discriminates on the basis of sexual orientation does not trigger strict or heightened scrutiny because sexual orientation is neither a suspect nor quasi-suspect class. The court stated that while homosexuals have suffered discrimination, sexual orientation does not meet the criteria for determining a new suspect class because homosexuals are not a sufficiently politically powerless group entitled to "extraordinary protection from the majoritarian political process" and that there is no generally accepted conclusion that homosexuality is an immutable characteristic.[44] The court cited evidence of the group's political power by showing how legislative successes in recent years have granted protections for homosexuals.[45]

The court also found persuasive the numerous cases that have addressed this issue and found that homosexuality is not a suspect class. It also noted that the U.S. Supreme Court in *Lawrence v. Texas*[46] struck down a law aimed at homosexuals under rational basis review, not strict scrutiny.

D. Fundamental Right under Due Process

While acknowledging that the right to marry is a fundamental liberty protected by the Constitution, the court held that the right to marry another person of the same sex is not a fundamental right. Judge Harrell noted the importance of exercising the utmost care in asserting a right or liberty interest, because it "place[s] the matter outside the arena of public debate and legislative action."[47] The court then held, "[w]ith these principles in mind, and in light of Maryland's history of limiting marriage to those unions between members of the opposite sex, coupled with the policy choices of nearly every other state in the Nation, we do not find that same-sex marriage is so deeply rooted in this State or country as a whole that it should be regarded at this time as a fundamental right."[48]

The court agreed that cases such as *Loving v. Virginia* established that the right to marry is fundamental. However, the court found that *Loving* and other similar cases did not extend this fundamental right to same-sex marriage. Judge Harrell declared that *Loving* and other similar cases found that the right to marriage is fundamental "due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species."[49]

Loving held the right to marriage was guaranteed to interracial couples, despite the long history of prohibition on interracial marriage. The court held that "[t]he basis for

the Supreme Court's decision as to the interracial couples' due process challenge was that '[m]arriage is one of the 'basic civil rights of man,' *fundamental to our very existence and survival.*'"[50] Thus, the court found that *Loving's* conclusion that the right to marriage is fundamental "was anchored to the concept of marriage as a union involving persons of the opposite sex."[51] Therefore, the court held that *Loving* was not controlling, and that there was no fundamental right to same-sex marriage.

E. Maryland's Marriage Statute Passes Rational Review

The court held that "the State has a legitimate interest in encouraging marriage between two members of the opposite sex, [because it is] a union that is uniquely capable of producing offspring within the marital unit."[52] The court recognized that, despite the "gradual erosion" in the traditional family structure, it still had to grant deference to the legislature.[53] Thus, the state's interest in fostering procreation was a sufficient rational basis to uphold the marriage statute. The court reiterated that "marriage enjoys its fundamental status due, in large part, to its link to procreation."[54] Additionally, the court recognized that the vast majority of courts which had addressed this issue made similar findings.

F. Dissents

Justice Raker's dissent supported adopting a decision similar to the Supreme Court of New Jersey in *Lewis v. Harris*.[55] Justice Raker opined that there is no fundamental right to same-sex marriage, but argued that committed same-sex couples have a constitutional right to the benefits and privileges afforded married heterosexual couples.

Justice Battaglia's dissent argued that the marriage statute should not be reviewed under rational basis review because Maryland law applies strict scrutiny to laws that draw classifications based on sex. Justice Battaglia argued that the case should be remanded for an evidentiary hearing to determine if the state's asserted interest passes strict scrutiny.

Chief Justice Bell argued that the fundamental right at issue was improperly characterized as the right to same-sex marriage, when it should have been the right to marriage. He concluded that the right to marry is fundamental, whether it be a heterosexual couple or same-sex couple.

G. Conclusion

Contrary to other courts' decisions upholding statutes limiting marriage to opposite-gender couples, the *Conaway* majority made no special efforts to sound apologetic for its decision. The court passed no judgment on the soundness of the state's interest in supporting only opposite-sex marriage.[56] Nevertheless, the court clearly noted throughout the opinion that its findings were aligned with the majority of state courts throughout the country. In its final sentence, however, the court left the final decision up to the legislature, stating that:

> In declaring that the State's legitimate interests in fostering procreation and encouraging the traditional family structure in which children are born are related reasonably to the means employed by Family Law § 2-201, our opinion should by no means be read to imply that the General Assembly may not grant and recognize for homosexual persons civil unions or the right to marry a person of the same sex.[57, 58]

**John Shu wishes to recognize and thank Mr. Ryan Darby and Ms. Carrie Law of Chapman Law School for their hard work and invaluable assistance with this article.*

Endnotes

1 Iowa Code § 595.2(1).

2 Varnum v. Brien, 2007 WL 2468667 No. CV5965 (Iowa Dist. Ct. Polk County, Aug. 30, 2007).

3 *Id.* at *2, citing Schlueter v. Grinnell Mut. Reins. Co., 553 N.W.2d 614, 615 (Iowa Ct. App. 1996).

4 *Id.*, quoting Hoefer v. Wisc. Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 339 (Iowa 1991).

5 *Id.*, quoting Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983).

6 *Id.* at *37.

7 Governor Tom Vilsack (D) appointed Judge Hanson to the bench in 2003. Judge Hanson received his undergraduate degree from Stanford University in 1978 and his law degree from the University of Iowa in 1981. Prior to his appointment, he clerked for the Iowa Supreme Court and practiced law privately.

8 Monica Davey, *Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway*, N.Y. Times, Sept. 1, 2007, *available at* http://www.nytimes.com/2007/09/01/us/01iowa.html.

9 There exists some controversy as to whether Judge Hanson was not already leaning towards ruling for the plaintiffs. For example, Judge Hanson stated, in his finding of fact, that the Iowa statute was "passed in response to marriage litigation brought by same-sex couples in Hawaii in order to ensure that lesbian and gay people are treated unequally to everyone else in Iowa;" that "[t]hrough the marriage exclusion, the State devalues and de-legitimizes [gay relationships] and perpetuates the stigma historically attached to homosexuality;" and equated homosexuality with gender and race. *Varnum, supra,* at *14.

10 *Id.* at *27.

11 *Id.* at *8.

12 *Id.*

13 *Id.* at *27.

14 *Id.* at *27-28.

15 Loving v. Virginia, 388 U.S. 1 (1967); Sioux City Police Officers'

Ass'n v. City of Sioux City, 495 N.W.2d 687, 695 (Iowa 1993).

16 *Varnum* at 27, citing Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999).

17 *Id.* at *31.

18 *Id.* at *23.

19 *Sioux City*, 495 N.W.2d at 696.

20 388 U.S. 1 (1967).

21 *Varnum, supra,* *27.

22 *Id.* at *27. This finding is somewhat odd because presumably Iowa already regulates heterosexual marriages. For example, Iowa's minimum age of consent to marry is 18, with those 16 or 17 needing parental consent.

23 *Id.* at *28.

24 *Id.* at *28, citing Iowa Const. Art. I § 8.

25 *Id.*

26 *Id.* at *29, citing *Loving*, 388 U.S. at 87.

27 *Id*.

28 *Id.*

29 *Id.* at *29-30.

30 *Id*. at *30.

31 *Id.*, citing Glowacki v. State Bd. of Med. Examiners, 501 N.W.2d 539, 541 (Iowa 1993).

32 539 U.S. 558, 577-78 (2003).

33 591 N.W.2d 182, 190 (Iowa 1999).

34 *Id.* at *31.

35 *Id*. at *36-37.

36 Iowa judicial candidates are selected by a commission, and the governor appoints judges from that list. Judges face retention elections after one year in office "and then at regular intervals." Only four judges have not been retained since Iowa adopted this system.

37 2007 Md. LEXIS 575 (Md. 2007).

38 Md. Family Law Code Ann. § 2-201.

39 Justice Harrell wrote the majority opinion, with Justice Wilner, Justice Cathell, and Justice Greene joining the opinion. Justice Raker concurred in part and dissented in part. Chief Justice Bell and Justice Battaglia dissented.

40 Conaway v. Deane, Op. at 45 (Md. 2007) (citations omitted).

41 *Id.* at 34 (citations omitted).

42 The plaintiffs-appellee's argument was heavily based on *Loving v. Virginia,* 388 U.S. 1 (1967).

43 *Id*. at 41 (citations omitted).

44 *Id*. at 60, 70 (citations omitted).

45 *Id*. at 60, 61 (citations omitted).

46 539 U.S. 558 (2003).

47 *Id.* at 95 (citations omitted).

48 *Id*. at 96.

49 Conaway v. Deane, Op. at 77.

50 *Id*. at 77 (emphasis in original).

51 *Id*. at 98, citing Standhardt v. Super. Ct. of Ariz., 77 P.3d 451, 458 (Ariz. Ct. App. 2003).

52 Conaway v. Deane, Op. at 98.

53 *Id*. at 103–106 (citations omitted).

54 *Id*. at 99 (citations omitted).

55 Lewis v. Harris, 188 N.J 415 (N.J 2006) (laws banning same-sex marriage violate the equal protection guarantees of the New Jersey Constitution; and legislature must amend marriage statutes to include same-sex couples or create a parallel statutory structure which will provide the same rights of marriage).

56 Two of the judges in the majority, Justices Wilner and Cathell, are now retired but participated in the decision because they participated in the hearing and conference of the case. The remaining justices are serving ten-year terms, with Justice Harrell facing re-election in 2010, and Justices Greene and Raker facing re-election in 2016.

57 Conaway v. Deane, Op. at 109.

58 Immediately after the opinion issued, certain Democrat members of Maryland's Democrat-controlled legislature stated that they would push for legislation recognizing same-sex marriage, while others stated they would push for civil unions. Certain conservative members of the legislature stated that they would push for a constitutional amendment banning same-sex marriage.

Parental Law in the States: Maryland, Minnesota & Pennsylvania

Continued from page 4...

over several years.[5] The Minnesota court accepted, on the record below it, that although SooHoo did not adopt, she and Johnson co-parented the children. For example, SooHoo participated in selection of child-care providers and schools; SooHoo and Johnson attended school conferences together; Johnson listed SooHoo as "mother number two" in information provided to the school; SooHoo was involved in the children's homework, extra-curricular activities, meal preparation, and appointments with doctors, and she took the children on vacation to visit her family. According to the record relied upon by the court, Johnson did not object. After their relationship dissolved, Johnson allowed SooHoo only minimal contact with the children. The lower court denied SooHoo custody, but allowed extensive visitation. It also ordered both SooHoo and Johnson to seek or continue counseling.

Johnson appealed, and the Minnesota Supreme Court considered her challenge that the state laws on third party custody were facially unconstitutional and also unconstitutional as applied. The court accepted that Johnson had a fundamental right in the care, custody, and control of her children. The court then determined that the right was not absolute and that the state had a compelling interest as *parens patriae* in such matters as requiring school attendance and forbidding child labor. In addition, the court found an affirmative interest in promoting relationships between a child and someone in *loco parentis* to that child as a means of promoting the child's welfare.[6]

The Minnesota Supreme Court held that SooHoo was a de facto parent under Minnesota's statutory test. That test was narrow enough, the court held, to pass the strict scrutiny required by the U.S. Supreme Court.[7] The Minnesota Supreme Court found a part of the state's visitation law unconstitutional because it placed the burden of proof on the parent to prove that visitation would be harmful to the child. The court placed the burden on the third party claiming visitation to show, by clear and convincing evidence, that the proposed visitation would be in the child's interest.[8]

Maryland's intermediate appellate tribunal, the Court of Special Appeals, adopted the de facto parent concept without a specific legislative enactment in the case of *S.F v. M.D.*[9] This case did not involve assertion of a custody claim by the de facto parent but only a dispute about visitation. The Maryland court declared that in the absence of a statute or judicial precedent to the contrary a de facto parent, seeking visitation over the objections of a parent, need not show exceptional circumstances or parental unfitness. The Maryland Court of Special Appeals looked to the record of the trial court which found that the appellant had served the functional role of a parent for the first three years and eight months of the child's life and introduced the term de facto parent into the opinion as a synonym.[10] The Court of Special Appeals found that the lower court had not abused its discretion in failing to award visitation to appellant.

In a similar case, Maryland's Court of Special Appeals awarded visitation to a de facto parent. In *Janice M. v. Margaret K.*[11] The court denied custody to the de facto parent and affirmed the lower court's ruling that the parent would retain custody. The opinion states that the U.S. Supreme Court's decision in *Troxel* did not modify *S.F. v. M.D.*[12] While defending its earlier decision, the Maryland court also emphasized the restrictive, limited effect of *S.F v. M.D.* which "will not open the floodgates to claims of de facto parenthood…."[13] Recently, the Maryland Court of Appeals heard on appeal the Court of Special Appeals decision of *Janice M. v. Margaret K.* The court questioned in oral argument whether Maryland had adopted the concept of de facto parent status.[14]

In Pennsylvania, a more complex factual situation came before the Superior Court this year in the case of *Jacob v. Schultz-Jacob*.[15] Jacob (appellee) and Schultz-Jacob (appellant) lived together for nine years, during which they underwent a commitment ceremony in Pittsburgh and entered into a civil union in Vermont. After their relationship ended, a dispute arose involving the custody, visitation, and support of four children. Two of the children were nephews of Jacob, whom she adopted: A.J. and L.J. The remaining two children:, Co. J. and Ca. J., were Jacob's biological children through artificial insemination by Carl Frampton (also named as an appellee), a long-time friend of the Schultz-Jacob. Frampton was apparently persuaded by Schultz-Jacob to act as a sperm donor, and Frampton continued to take an active role in the children's lives, including making voluntary financial contributions to their support.

When the case reached the Pennsylvania Superior Court, Jacob had been awarded shared legal and partial physical custody of A.J. and L.J. Legal and physical custody of Co. J. and Ca. J. was shared with Frampton.

Jacob voluntarily relinquished custody of L.J. to Schultz-Jacob (who was awarded primary physical custody of L.J.) and began to pay for his support. Schultz-Jacob filed for review of the award of custody, and to join Frampton as an essential party because of his potential liability for support payments. Schultz-Jacob argued that the children's best interests and her *in loco parentis* status (stipulated by the parties) should have caused the trial court to award her custody.

The Pennsylvania Superior Court employed an abuse of discretion standard of review rather than conducting de novo review of the lower court's decision. It determined that a third party *in loco parentis* to a child had standing to litigate a custody claim, but that there was a presumption in favor of biological or "natural" parents as to the merits of a custody dispute.[16] The court did not reverse the lower court's award of custody based upon any finding below that the children's best interest required a different result as to custody.

The remainder of the opinion analyzed the relationship and obligation of Frampton as an essential party, potentially liable to pay child support. The Pennsylvania Superior Court did not dwell on Frampton's role as a mere sperm donor because he voluntarily sought and assumed a role in the lives of his biological children. He contributed financial support, failed to contest an award of partial custody, encouraged the children to call him "Papa," and expressed an intention to move closer to the children in order to spend time with them.[17] The court predicated Frampton's support obligation, in part, on the theory of equitable estoppel by finding that Frampton had accepted responsibilities for the children and therefore would not be excused from supporting them. The opinion does not state whether the enforceable, equitable right belongs to the children, appellant, appellee or some combination.[18] However, Frampton was held liable for some level of support.

The final opinion discussed in this article differs significantly from the others in that it embraces a state constitutional issue. In the case of *In re Roberto d.B.,*[19] the initial question presented was whether a birth certificate can be issued without the name of the woman who gave birth listed as the mother. The Circuit Court for Montgomery County denied a request by the appellant, Roberto d.B., that her name be removed because she was a "gestational carrier" and did not expect or desire to be the parent to twins born as a result of the implantation of fertilized eggs in her uterus.[20] The appellant filed an appeal to the intermediate appellate court, the Court of Special Appeals. However the Maryland Court of Appeals took jurisdiction over the case before any action by the Court of Special Appeals. As explained by Chief Judge Bell, writing for the majority of the Maryland Court of Appeals:

> The appellant is the genetic father of the twin children, having provided his sperm to fertilize donated eggs. The egg donor, not a party to this case, is the genetic provider of the egg. The appellee is the gestational carrier of the fertilized eggs that developed in her womb, despite having contributed no genetic material to the process.
>
> ... The appellant's primary contention is that the parentage statutes in Maryland, as enforced by the trial court below, do not "afford equal protection of the law to men and women similarly situated." Maryland's Equal Rights Amendment (citations omitted) specifies that "[e]quality of rights under the law shall not be abridged or denied because of sex." The appellant contends that because Maryland's parentage statutes allow a man to deny paternity, and do not, currently allow a woman to deny maternity, these statutes, unless interpreted differently, are subject to an E.R.A. challenge.[21]

The majority opinion cites numerous cases from Maryland and other jurisdictions, but Chief Judge Bell does not assert that any case directly holds that paternity statutes which fail to provide an opportunity for a woman who has given birth to challenge maternity violates the provisions of any constitution or statute. The majority dismisses the "best interest of the child" standard as irrelevant to this factual situation. There is no contest as to parental rights when the gestational carrier does not wish to assert any claim, and the physical act of giving birth is presumed not to be dispositive. The majority also determined that, because there is no evidence of unfitness on the part of the appellant to be the custodial parent, there is no need to weigh the best interest of the twins.[22]

The majority comments on adoption as a method for deletion of a name from a birth certificate.[23] The majority also includes the appellant's "…additional arguments that we need not address to resolve this case." These arguments concern the possible categories of female parentage: birth mother as gestational carrier, egg donor as genetic mother.[24] Finally, Chief Judge Bell responded to a vigorous dissent by Judge Cathell by asserting directly that the majority does not define what a "mother" is and does not create an "intent standard" by which a woman who does not intend to be a parent may deny maternity.[25]

Three judges dissented from the four-judge Maryland Court of Appeals majority opinion. Judge Cathell attacked the majority for failing to defer to the legislature on issues so fundamental to society. He argued that the reach of the majority opinion extends far beyond the limited,

administrative, and record-keeping matters it purportedly addresses:

> In my view, if ever there was an instance for deference to the legislative branch of government—to permit it an opportunity to set public policy—it is this case. Instead, less than seven unelected (in contested elections) judges, are, in essence, stating that it is good public policy for the people of this State to permit the manufacturing of children who have no mothers—even at the moment of birth.[26]

The dissent also pointed to the faulty logical analysis by the majority. Taken on its own terms, the dissent argues that the majority fails to understand paternity law.

> Neither appellant nor the woman that carried the child through the gestation period deny that she bore and delivered the child and that it came out of her birth canal. If appellant or either woman were asserting the same issue that exists in paternity litigation, the majority might have a point. What the majority fails to realize in its opinion, is that what a man is doing when he challenges paternity is that he denies his particular involvement in fertilizing an egg and thus he asserts he is not the particular or correct father of the child—a man is not asserting that the child has no father at all.[27]

A second dissent by Judge Harrell, joined by Judge Raker, focused on the lack of an adequate factual record from the circuit court, and that no argument was offered on behalf of the twins, the egg donor or the nominal appellee— the un-named "gestational carrier." There was no brief or oral argument on behalf of any party other than the appellant, and the dissent characterized that as "…woefully inadequate to support the license taken by the majority opinion."[28] The dissent would have remanded the case to the circuit court for creation of a complete record.

CONCLUSION

The cases reviewed here, however briefly, represent a sampling of how courts in different States have applied and changed concepts within family law. In Massachusetts, the reason to adopt the concept of de facto parent was as a judicial response to the reality of "non-traditional families."[29] The Court of Special Appeals in Maryland found the same need to expand the range of parental status and adopted what it characterized as a strict test for de facto parent status.[30] The status of that test currently awaits a decision by the Maryland Court of Appeals.

Finally, in *In re Roberto d. B.,* the Maryland Court of Appeals cited the possibilities of reproductive technology as the reason to limit, rather than expand, parent status:

> The law is being tested as these new techniques become more commonplace and accepted; this case represents the first challenge in Maryland. The case *sub judice* presents a novel question of law, one of first impression in this Court: must the name of a genetically unrelated gestational host of a fetus, with whom the appellant contracted to carry *in vitro* fertilized embryos to term, be listed as the mother on the birth certificate when, as a result, children are born?[31]

It remains to be seen how much alternative relationships and reproductive science will remake family law in the state courts.

** James A. Haynes is an attorney in Baltimore.*

Endnotes

1 Robin Fretwell Wilson, "Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents," *in* Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution (Robin Fretwell Wilson, ed., 2006), a*vailable at* http://ssrn.com/abstract=825664.

2 *See* Youmans v. Ramos 711 N.E.2d 165 (Mass. 1999) and E.N.O. v. L.M.M. 711 N.E.2d 886 (Mass. 1999). Both cases contain an analysis of the de facto parent concept and dissenting critiques of the role of the judiciary in adopting it without legislative action. *See also* Adam Narris, *Are You My De Facto Mommy? Third-Party Visitation Rights: A Case Comment on Youmans v. Ramos* 35 New England Law Review 3, 685-716.

3 923 A.2d 115 (Md. 2007).

4 The four-vote majority opinion, filed May 16, 2007 in this case, is not fully consistent with the later opinion in which the court of appeals held by a four-vote majority (Raker, J. concurring in part and dissenting in part, Bell, C.J. and Battaglia, J. dissenting) that the Maryland Equal Rights Amendment does not require the state to establish or recognize marriage between persons of the same sex. *Conaway, et. al. v. Deane, et. al.,* No. 44, September Term 2006, filed Sept. 18, 2007, _____ A.2d _____ (2007).

The different results and analysis in the two opinions might be explained by variations in the court's membership. The court of appeals consists of a chief judge and six judges. Maryland allows for the recall of retired judges. Retired Judge Eldridge participated in the court's deliberations in *In re Roberto d. B.,* and voted with the majority, but was not a participant in *Conaway*. Judge Greene, the most recent appointee, sat only on *Conaway*, and voted with the majority. Judge Raker sat in both cases and dissented in *In re Roberto d. B.* and dissented in part and concurred in part in *Conaway*. Judge Wilner, now retired, was the only member of the Court to join the four vote majority in both opinions. Chief Judge Bell wrote the Court's opinion in *In re Roberto d. B.* but did not cite the case in his dissent. Judge Battaglia cited the opinion five times in her eighty-page dissent. Battaglia dissent, slip op. at 33, 53, 54, 56, 77.

At the start of October 2007, the court of appeals had two vacant seats awaiting appointment and confirmation. The durability of *In re Roberto d. B*. and *Conaway* as precedent will reflect the philosophy and temperament of the new members of the Court.

5 SooHoo v. Johnson 731 N.W, 2d 815 (Minn. 2007).

6 *SooHoo* at 822 (citing Lehr v. Robertson 463 U.S. 248, 258 (1983), London Guar. & Accident Co. v. Smith 64 N.W.2d 781,

785 (1954)). The affirmative proposition that the Court has not only the power but the duty to decide which relationships in a child's life should be "promoted" places a difficult burden on judges, who must decide what relationships deserve special consideration amid the conflict of litigation and predict the future needs of the child and capacities of various adult parties seeking a piece of the child's life. The factual and legal situations which must arise would surely tax the wisdom of the wisest court.

7 *SooHoo* at 820-822 (citing Troxel v. Granville, 530 U.S. 57 (2000)).

8 *Id*. at 824.

9 751 A.2d 9 (Md. App. 2000).

10 *Id*. at 12, 15-16.

11 910 A.2d. 1145 (2006).

12 *Janice M*. at 1152.

13 *Id.*

14 Caryn Tamber, *Idea of De Facto Parent Gives Judges Pause*, The Daily Record, May 31, 2007, at 1B ("Maryland Law").

15 923 A.2d. 473 (Pa. Super. 2007).

16 *Id.* at 477, 478.

17 *Id*. at 481.

18 *Id*. at 480.

19 *Supra* note 3.

20 *Id*. at 118.

21 *Id*. at 119, 120.

22 *Id*. at 130.

23 *Supra* note 4, at 119.

24 *Supra* note 14, at 124.

25 *Supra* note 15, at 125.

26 *Id*. at 135.

27 *Id*. at 133,134.

28 *Supra* note 4, at 141.

29 E.N.O. at 891.

30 *Janice M.* at 1152.

31 *In re Roberto d.B.,* at 117. The majority appears to regard the development of reproductive science and the evolution of individual choice as inexorable forces, as if contemporary events and ideas were beyond analysis or change. Of course, human communities are not capable of infinite change, and change and improvement are not synonymous. The very need for courts suggests otherwise.

Missouri and New Jersey Courts Reject "Market Share" Liability for Lead Paint Manufacturers

Continued from page 3...

a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product." The court went on to reject the city's alternative argument that, whatever the merits of market-share liability in the private tort context, a governmental action to recover the cost of remediating public health hazards is not subject to normal causation rules. The court stated:

> Although the city characterizes its suit as one for an injury to the public health and suggests that it is for this injury that it is suing, this is not the case. The damages it seeks are in the nature of a private tort action for the costs the city allegedly incurred abating and remediating lead paint in certain, albeit numerous, properties. In this way, the city's claims are like those of any plaintiff seeking particularized damages allegedly resulting from a public nuisance.

Three dissenting justices urged a contrary result based on the proposition that, in a public nuisance action, "there is no injured person for whom it is necessary to determine which wrongdoer caused the particular personal injury." The dissenters analogized the lead-paint controversy to a dispute over water pollution, in which "ten defendants pour toxic sludge... [into] a stream. The purpose of a nuisance lawsuit would be to require the polluters to clean up the sludge. The point of the lawsuit would not be to provide a remedy to an individual who claims to have been injured by the toxic sludge."

Three days later, the New Jersey Supreme Court rejected the analogy of the Missouri dissenters. In the case of *In re Lead Paint Litigation*, the New Jersey court considered an action brought by various cities and counties for monetary relief to recover the costs of remediating lead paint in buildings, providing medical care, and educating citizens about lead paint dangers.[3] Echoing the Missouri dissenters' recognition that the public nuisance doctrine covers generalized environmental pollution as such, the New Jersey court held that governmental entities bringing public nuisance claims are limited to seeking abatement injunctions, and may not bring actions for monetary relief. While the New Jersey court held that private plaintiffs may sue for damages caused by a public nuisance, the court ruled that such damages are available "only if the private plaintiff has suffered harm of a kind

different from that suffered by other members of the public." Unlike the Missouri decision, the New Jersey ruling turned in part on the court's interpretation of a state statute—the Lead Paint Act—which, in declaring the presence of lead paint in buildings to be a "public nuisance," used the term in the limited sense recognized by the common law.

Two justices dissented from the New Jersey court's decision, acknowledging that it was correct under traditional legal principles, but arguing that those principles should be modified to create broader liability where necessary to provide a remedy to a potentially dangerous product. The dissent, authored by Chief Justice James R. Zazzali, asserted that the New Jersey Supreme Court "has a duty to reconcile outdated formulations of the common law with the complexities of contemporary society. The common law must stand ready to adapt as appropriate, to shape, redress, and remedy so as to answer measure for measure the particular evil it pursues." According to the dissenters, there is a legal "right to be free from the harmful effects of lead paint," and imposing liability under the public nuisance doctrine would be "an appropriate and efficient means for vindicating" this right.

What some legal commentators have found most surprising about the Missouri and New Jersey decisions is not that they invoked the traditional elements of tort law to limit monetary recovery to those cases in which a particular injured party could prove that his injuries were caused by the conduct of a particular defendant—that principle has been in place literally for centuries. The surprising feature of the two decisions is that they were decided by such narrow majorities—4-3 in Missouri, and 4-2, with one justice abstaining, in New Jersey. These legal experts argue that the narrow majorities commanded by such time-honored common-law principles evidences the peril faced by businesses that have organized their operations in reliance on these principles, and reveals a serious threat to the rule of law as applied in the context of mass tort litigation. They point to the proposition stated by the New Jersey dissenters—that, in reviewing claims for retrospective monetary relief, courts should "adapt" and "shape" new remedies rather than adhering to "outdated formulations of the common law"—to prove this point, since the most basic feature of the rule of law is the law's ability to be known in advance by persons seeking to comply with its requirements.

Perhaps a greater protection than the narrow majorities in Missouri and New Jersey is another recent decision from a California trial court that did not address the merits of a similar lead-paint lawsuit, but instead addressed something even more important: the validity of a contingency fee agreement between the municipal plaintiff and an outside law firm it had retained to prosecute its public nuisance claim. According to the California Superior Court judge overseeing *County of Santa Clara v. Atlantic Richfield Co.*, such contingency fee arrangements are improper in public nuisance cases because they violate the neutrality required of attorneys representing the government. One thing is certain, whether market-share liability is valid or not as a matter of law in the world of lead paint litigation, the amount of litigation is likely to be significantly lower if the municipal plaintiffs are barred from hiring contingency-fee lawyers and are instead forced to internalize the costs of litigation.

Endnotes

1 Amanda Bronstad, National Law Journal (August 21, 2007), *available at* http://www.law.com/jsp/article.jsp?id=1187600822362#.

2 226 S.W.3d 110 (Mo. 2007).

3 924 A.2d 484 (N.J. 2007).

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The Federalist Society
For Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036