



JOURNAL

A Public Policy Monthly from the Citizens League



The future of judicial selection in Minnesota

How the *Republican Party v. White* may change Minnesota's judiciary

by David Schultz

Imagine turning on your television and hearing a judicial candidate say: "A vote for my opponent puts a baby killer on the Supreme Court" or "If elected to the Supreme Court, I promise to crack down on frivolous lawsuits."

Don't think political ads like these can happen in Minnesota? Think only Texas and Ohio have high-financed, partisan, media-driven campaigns? Well, think again. The future of Minnesota judicial elections could very well be headed for Texas. As a result of two court decisions in *Republican Party of Minnesota v. White*—one by the United States Supreme Court and one by the 8th Circuit Court of Appeals—in 2006 we may see judicial candidates seeking party endorsements, soliciting contributions, and announcing their positions on controversial issues.

Why would anyone want to politicize the courts and turn judicial races into partisan, issue-driven and money-dominated events? The answer is similar to the one Willie Sutton once gave when asked why he robbed banks: "Because that is where the money is." In Minnesota, as in other states, the courts are no longer seen, in the words of Alexander Hamilton, as the "least dangerous branch" of the government, without either control over the sword or purse, and possessing neither force nor will but merely judgment. Instead, state courts, including those in Minnesota, are major policy players.

For example, the Minnesota Supreme Court has found that a right to privacy protects a woman's right to terminate a pregnancy and to receive public funding for an abortion if on public assistance. The Minnesota courts have also invalidated laws proscribing consensual same-sex sodomy, and a conceal-and-carry gun law. Furthermore, as the recent legislative session revealed, the state judiciary is a major player in the budget process, with the authority to order spending for essential state functions.

Overall, the Minnesota courts are major political and policy players in the state, and so there are clear incentives for those who seek to influence which candidates are elected to the bench.

Before *White*

Before the two *White* decisions, two provisions of the state constitution controlled judicial selection in Minnesota. Article VI, section 7 of the Minnesota Constitution provides for the election of judges and justices to six-year terms. Conversely, section 8 provides for gubernatorial appointment of judges and justices to fill out a remaining term when there is a vacancy. Since 1912, state judicial races have been designated as nonpartisan, and in 1974, Canon 5 of the *Minnesota Code of Judicial Conduct* imposed additional restrictions on judicial candidates. The *Code* prohibited judicial candidates from announcing their views on disputed legal or political issues (the "announce" clause), affiliating themselves with political parties (the "partisan activities" clause), or personally soliciting or accepting campaign contributions (the "solicitation" clause).

These rules were meant to promote the integrity of judges and encourage an independent judiciary. The belief was that judicial candidates who announce their views on topics that may come before them later as judges might be seen as biased or lacking impartiality. Hence, judicial elections were to be nonpartisan affairs where voters select candidates based on perceived judicial character and integrity, and not the candidate's political views, party affiliation, or ability to raise and spend campaign money.

Yet the Canon 5 rules have not necessarily produced better judicial elections. The reality is that the state actually has a dual selection system, with gubernatorial appointment more the norm than the exception. In 2003, 91 percent of the Minnesota judges were initially

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CONNECTIONS

Building a League of Citizens



Policy and a Pint— Strapped: Why America's 20- and 30- Somethings Can't Get Ahead

With author Tamara Draut and Chris Farrell, host of MPR's MarketPlace Money. Hosted by The Current's Steve Seel.

STRAPPED, a new book by Tamara Draut, offers a groundbreaking look at the new obstacle course facing young adults as they try to build careers, buy homes, and start families. Various economic and social trends over the last 30 years, as well as adverse

government policies, have conspired to alter dramatically the process of becoming an adult.

Co-presented by Citizens League and 89.3 The Current.

Wednesday, February 8. 6 p.m.

Varsity Theater, Minneapolis.

Go to www.citizensleague.net/events to register.

Matching grant doubles impact of new members

We've earned more than \$7,000 of the \$10,000 matching grant from the Pohlad Family Foundation since the start of our membership campaign. The dollars represent 131 new individual members, giving us a stronger voice in Minnesota's non-partisan public policy arena.

Please help us earn the remaining \$3,000 in matching dues by inviting at least one friend or colleague to join the Citizens League. Personal asks are the most effective way to expand our membership. If you need membership recruitment brochures or sample invitation letters, just email our membership coordinator at membership@citizensleague.net. Easier yet, direct your civic-minded friends to our website, where they can join online. Thanks in advance for helping us broaden—and diversify—our membership!

Remember, the Pohlad grant doubles the impact of every new individual membership dollar. Help us earn the full amount!

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The Community Connections Calendar is your one-stop shop for public affairs events in the Twin Cities.

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Thanks to our volunteers

Emelia Carroll
Kurt Koroschetz



Politics isn't our problem

Politics is the solution to our problems

by Sean Kershaw

I love the simplicity and effectiveness of our new logo and identity: *Common ground. Common good.*

But what connects the two? How do you move from providing common ground to achieving the common good? What unites our members' passion for making Minnesota better with their expectations that the Citizens League stay relevant and their work have an impact?

Politics!

Every major elected office in Minnesota is up for grabs this year, and we must rebuild our capacity to solve public problems like education, transportation, and health-care. But how can we get there? How can we achieve our great potential as a state and as citizens? How can we counteract the cynicism that corrodes public life?

Politics!

Politics gone bad

It's too bad that we spend so much time kicking politics to the curb: blaming it for our legislative and policy dysfunctions. We talk about "policy, not politics" as if this were a good thing.

'Politics' isn't the problem. *Bad* politics is the problem. Excessive partisanship, special interests and a mistaken definition of politics cause citizens to tune out and become cynical, and prevent us from solving the problems we all care about.

We've turned politics into sideshows and distractions. In the midst of unprecedented economic and demographic changes that challenge our economic health and quality of life, we devote time and resources to banning gay marriage on one side of the spectrum, and to Cindy Sheehan and Moveon.org's brands of protest on the other.

We've lost the political capacity to address relatively easy issues like building a sports stadium, and complicated issues like rising healthcare costs and coverage.

We let ideology and single issue groups fill this political vacuum. We blame ideological differences for gridlock at the legislature rather than an inability to

We're inadvertently blocking our own path forward—plowing the snow into the driveway and then wondering why we can't get the car out in the morning.

reconcile these differences. Our major political parties focus on the extremes of the political spectrum (witness our party caucus system), and too many voters are motivated more by the other side being wrong than their side's ability to govern. The 2006 governor's race can't be a replay of the "if they say the sky is blue I'll say it's red" 2004 presidential election if we want to move forward.

Politics gone good

We're inadvertently blocking our own path forward—plowing the snow into the driveway and then wondering why we can't get the car out in the morning.

It's time to redeem and redefine politics and how we practice it everywhere.

If democracy is "rule by the people," then politics is the practice of democracy—the *means* to solve public problems. Guided by democratic values, politics is how we achieve the common good despite all of our very real differences. Politics is how we implement good policy. It's what citizens do—how they govern.

We engage in politics all the time, everywhere—it's like the air we breathe. We can no more deny it than stop breathing. The point is to stop denigrating politics, and start re-imagining how we can all do it differently—and better.

For example, students at Avalon School (a charter school for grades 7-12 in Saint Paul) surveyed their peers last year about what made high school students successful, and their education meaningful—and then they worked to implement these policy ideas with their teachers. In doing so they were practicing political leadership and developing great policy insights about how to motivate and engage high school students in their education.

When the emerging 2020 Caucus at the legislature works to redirect political conversations to a long-term policy agenda that includes issues like the impact of demographic changes on healthcare, taxes, and economic growth, they are building public awareness of the problem and the bi-partisan political coalition necessary to implement solutions to these problems in the future.

And when the Citizens League endorses "political competence" as one of our fundamental values (as we are about to do), we are saying that we should model this behavior ourselves.

Our political opportunity

Re-imagining politics builds on the momentum and interest of our members and most Minnesotans for better public outcomes. It restores trust in the democratic process and builds real opportunities for policy solutions in all institutions.

Minnesota has succeeded in the past not by rejecting politics, but by reinventing it and building new political capacity and leadership. We must be ready to reinvent politics again in order to close the gap between common ground and common good. ●

Sean Kershaw is President of the Citizens League, and can be reached at skershaw@citizensleague.net or 651-293-0575x14.

FACTS UNFILTERED

Why Racial Disparities Matter

Each month, Citizens League members and staff will collaborate to select a timely policy topic, then ask the important—and sometimes uncomfortable—questions and dig up the answers. Just the facts, unadulterated and unspun.

Questions, comments, corrections? We need more Facts Unfiltered volunteers! If you are willing to roll up your sleeves and dig into the facts, if you have suggestions for a future Facts Unfiltered policy topic—or if you just think we got something wrong—e-mail us at facts@citi-zensleague.net.

The shape of Minnesota's population

In October 2005, the Brookings Institution, sponsored by the Itasca Project, released *Mind the Gap: Disparities and Competitiveness in the Twin Cities*. Two images in particular caught our attention: population pyramids showing the relative age and the number of whites and people of color in Minnesota.

Both of the images shown here were generated using 2000 census data available on the Minnesota State Demographic Center Census 2000 website (www.demography.state.mn.us/Census2000.html).

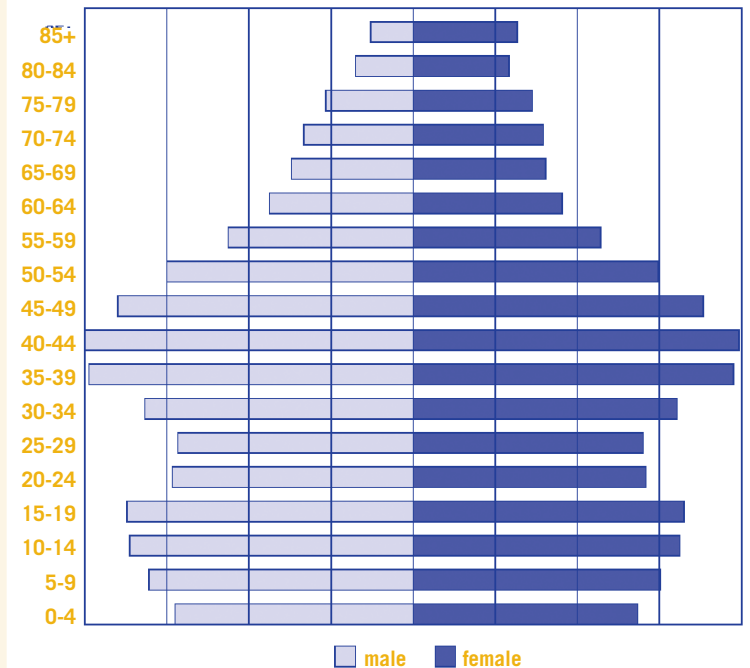
What do these shapes mean?

The numbers along the left side of each graph are age ranges. The size of the various bars indicates the number of people in that age category. But the numbers aren't important: you can get all the information you need just by glancing at the overall shape of each graph.

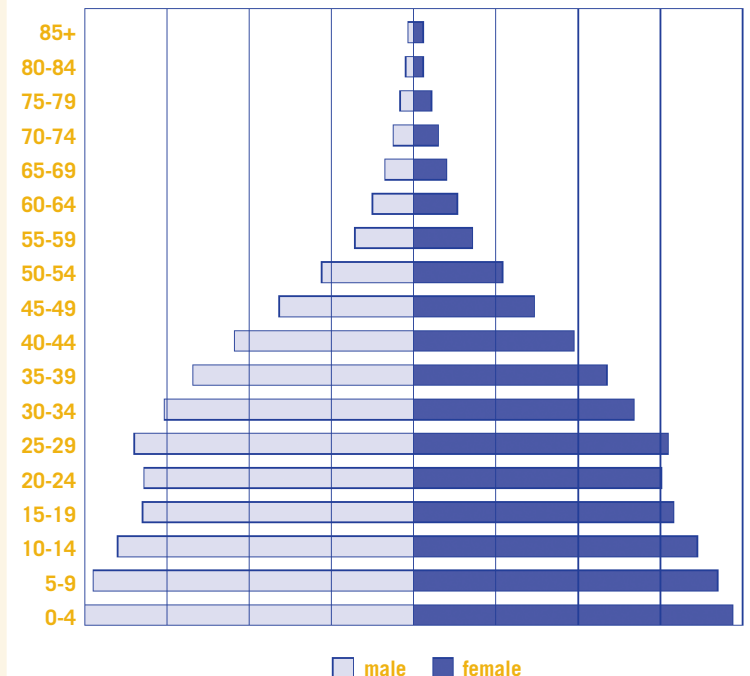
The population pyramid for whites in Minnesota is fattest in the middle—that is, there are lots of white Minnesotans between the ages of 35 and 55. But the population pyramid for people of color in Minnesota is fattest at the bottom: there are more kids of color under 18 than adults between 20 and 40.

These two graphs are not on the same scale, so they should not be compared directly. But the population pyramids are a visual reminder that in the next half century, Minnesota's populations of color will grow much faster than its white population. And that means that if Minnesota wants to stay successful, we need to make sure that our populations of color are successful, too. ●

2000 population for whites in Minnesota



2000 population for total minorities in Minnesota





What do we know and what do we need to know?

The Minnesota Anniversary Project seeks to develop a bold agenda for our state's future

by Stacy Becker

Minnesota is a great place to live, work and play—right?

Absolutely. But great places don't just materialize, they are created. That creative force requires courage, innovation, hard work, talent, commitment and the investment of resources. The Minnesota we live in today was created by the foresight of Minnesotans a long time ago. The Minnesota we live in tomorrow and the one we leave for our children will be the one created by all of us.

What legacy do we want to leave? What would Minnesota need to do to achieve that legacy? These are the questions at the heart of the Citizen League's Minnesota Anniversary Project, in honor of our state's 150th birthday in 2008. The goal of the Anniversary Project, MAP 150, is to put forth an ambitious, farsighted policy agenda for Minnesota's future, along with solutions to some of our state's pressing problems.

As a way to kick start this discussion, the Citizens League convened a diverse group of 20 leaders from business, government, academia, nonprofit and faith-based institutions. We asked them to identify the top two or three challenges that Minnesota *must* address in order to stay a strong, healthy state. We heard some predictable things, but some intriguing and surprising things as well.

Flexibility and citizen engagement

Two very consistent themes emerged from our discussions. First, the leaders agreed that business as usual will not provide the solutions Minnesota needs. The world we know today will hardly be recognizable 25 years from now. Technology, unprecedented demographic shifts, and the looming prospect of major economic changes and corrections will alter our world in ways that are difficult to predict. The competitive society will be the one with smart, adaptable, proactive citizens and institutions. Fear of change, rigid rules and slow-moving bureaucracies must be left behind.

The second theme our leadership group stressed was the importance of citizen engagement. The challenges in front of us are serious and complicated, and require new ways of thinking and acting. Without citizens' support, political leaders will not be willing to enact the major changes that are needed for Minnesota to stay competitive and prosperous.

Active citizen engagement supposes a number of things. It calls for leadership that encourages citizens to think big, to challenge old notions, and to believe in a better future. It builds on our deep well of pride about Minnesota, but forces us to face down our hubris about Minnesota's superiority. Active citizenship might also involve re-imagining citizenship and how it is practiced, and a shift in attitudes so that government is no longer expected to "solve" all problems through bureaucratic programs. Instead, we

might contemplate how we move toward systems that emphasize the role of all institutions (not just government), where these institutions can be more adaptable and self-correcting, and where citizens more skilled at working together and becoming more self-sufficient.

Most important, it supposes a civility that many of the leaders found lacking today. We have lost the ability to constructively hash out our most important concerns. We need to recreate the space to engage in thoughtful, respectful discussions. Sometimes these might be uncomfortable and certainly there will be many times when we disagree. But if we cannot learn to do this, divisive partisan politics will continue to rule.

The seeds of an agenda for Minnesota

Specifically, we asked the leadership group: What are the top two or three policy challenges that will make or break Minnesota over the next 15 years? Not surprisingly, education, workforce productivity, and health care came to the fore, perhaps though, in some new ways.

The challenge put forth for our educational system is to compete at and meet world class standards, not U.S. standards, especially in science and technology. A more seamless educational system is needed, from pre-kindergarten, through post-secondary college or vocational education. And we need to reconsider society's responsibility: If in the late 1800's, Minnesota decided that a high school education was of such paramount importance that it provided free public schooling, what is our public responsibility now in a world where post-secondary skills are just as critical?

Over the next 30 years, the growth in Minnesota's work force will slow considerably, from about 1.5 percent annually in this decade to three-tenths of a percent in the 2020's. The competitive economy will be the one with the most productive workers. Minnesota will need to assist workers in increasing their productivity and making the transition to new economic realities. Racial disparities must be overcome so that immigrants and people of color have a full range of opportunities to participate in the economic mainstream. We may need to rethink retirement age given increasing life spans.

If we do not redesign our health care system it will crowd out all other spending, making discussions about investments in education moot. What would a health care system based on wellness, not sickness, look like? How do we align consumers' desire for health care with their responsibility for their own health, and their willingness to pay for marginal treatments? How can we move away from an employer-based health care system to improve health insurance portability for people and global competitiveness for businesses?

We have lost the ability to constructively hash out our most important concerns. We need to recreate the space to engage in thoughtful, respectful discussions.

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What do we know and what do we need to know?

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The leaders also suggested that we need to give new thought to “regional economics.” The locus of competition these days is the region, not the city nor the state. This is true in the metropolitan area and in outstate Minnesota. Investments made or foregone in one part of a region affect the competitiveness of the entire region. And we need to better understand that just because a cost is not born directly, it probably is being absorbed elsewhere (as pointed out, for example, in the Citizen League’s full cost of transportation study).

Some of the leaders called for changes in the electoral system to help our legislature look more like the people they represent—that is, a more culturally and racially diverse legislature. They wondered, “How do we reward elected officials who do the right thing?” Immigration was another common concern, with some pointing out that immigrants are attracted into lower-waged jobs which support important industries in Minnesota. The same immigrants are then vilified for the costs they impose on the state, with a poor understanding of the benefits they bring. Others cautioned that our state finance and revenue system may be structurally unbalanced, especially given the demographic changes ahead.

Questions, too

As if these policy challenges were not difficult enough, the discussions yielded some important questions that are relevant to almost any policy discussion.

- What myths or dearly held ideas must we shed in order to make the changes that are needed? For example, the myth that it’s someone else’s school that is failing our kids—but only 7 percent of our seventh grade students test at highly proficient levels in reading and 14 percent in math.
- What legacy will the baby boom generation leave its kids?
- In making change, how can we move from archaic models of government bureaucracy and programs to models which provide incentives to citizens and institutions to act in ways consistent with the common good?
- How should we rethink the social contract between government and citizens? For example, if the majority of the future workforce will be in lower-paid but important jobs, such as retail, health care, and day care (highest growth will be in retail) what responsibility do we hold to help families survive economically?
- What does an “elder-friendly” society look like?
- How would we modernize state finances, moving way from a Byzantine system that hides and defers real costs to a system tailored to today’s economic and demographic realities, one which provides incentives to make the changes we need (e.g., to live more healthily, to work productively, to get a post-secondary education) and fosters wise public investments?
- How do we encourage Minnesotans to see themselves as connected to and responsible for governing? How do we create more self-sufficient citizenry and institutions?
- How do we develop in our citizens the capacity to adapt to change and optimism about change that will provide political support to do the right thing for the future?

An invitation

In the next few months, MAP 150 will consider these and other issues to determine an agenda for Minnesota’s future. We’d love to hear from you. If you have comments or ideas on these issues or on others that have not been raised, please email us at info@citizensleague.net. Also let us know if you’d like to be involved with MAP 150. Over the next few years there will be a variety of opportunities to participate. With your help, we hope that MAP 150 will truly excite the imagination and civic commitment of citizens throughout the state. ●

Stacy Becker is a policy consultant and a member of the Citizens League Policy Advisory Committee.

Public Leadership Panel Participants

John Adams
Humphrey Institute, University of Minnesota

Peter Bell
Metropolitan Council

Diane Benjamin
Minnesota KIDS COUNT, Children’s Defense Fund Minnesota

Duane Benson
Tunheim Partners

Carol Berde
McKnight Foundation

Jan Berry
Metropolitan Alliance of Community Centers

Bill Blazar
Minnesota Chamber of Commerce

Katherine Fennelly
Humphrey Institute, University of Minnesota

Maria Gomez
Former Commissioner of Minnesota Department of Human Services

Justin Huenemann
American Indian Families Project, Hennepin County

Larry Jacobs
Center for the Study of Politics and Governance, Humphrey Institute, University of Minnesota

Ken Keller
Denny Center for Science, Technology and Public Policy, Humphrey Institute, University of Minnesota

David Laird
Minnesota Private College Council

Stacey Millett
Northwest Area Foundation

Chuck Muscoplat
Minnesota Agricultural Experiment Station

Raymond Robertson
Department of Economics, Macalester College

Steve Rothschild
Twin Cities Rise!

Brian Rusche
Joint Religious Legislative Coalition

Tom Stinson
State Economist

David Strom
Taxpayers League of Minnesota

Carrie Thomas
Jobs Now Coalition

Jack Uldrich
The NanoVeritas Group

Faster transcripts for college students

There's a first time for everything. In a move that begs the question "why hasn't someone else thought of this before?" Indiana has become the first state in the country to allow its students to submit their high school transcripts to colleges and universities electronically. The service—dubbed Indiana E-Transcript—is free to students, high schools and colleges and is being funded by the Indiana Secondary Market, a nonprofit organization that works to make college more affordable for Indiana students. Everyone, it seems, is pleased about how the service will speed up the college admissions process: colleges and universities will see all their transcript information stored in one central location, high school guidance counselors can get out from under the yearly load of transcript requests, and students can get their thick admission envelopes more quickly.

"It's been the Holy Grail of admissions, to be able to transit transcript data electronically," said Barmak Nassirian, associate executive director of the American Association of College Registrars and Admissions Officers, in a quote to the Indianapolis Star. "If Indiana pulls it off, it will be significant. That would be marvelous and it would be a good omen for the rest of the country." ●

Indiana Department of Education: www.doe.state.in.us
(search "e-transcript" for information about the program)

Better care for abandoned newborns

A century ago, hospitals and convents would leave a basket and a pile of blankets by their front door so that mothers who intended to abandon their babies could leave them safe and warm. Today, incubator-like "baby boxes"—a modern update to those baskets—are popping up all over Europe. The *Christian Science Monitor* recently reported on the boxes and the controversy they are causing. "The mother rings the bell, deposits the baby, and closes the door, which locks immediately. The bell alerts the nurse's station and sends a page to the doctor and nurse on duty. The foundling is collected within 60 seconds and taken to a maternity hospital for care. Ultimately, the child will be put up for adoption."

Critics worry that the boxes will encourage mothers to abandon their children, but Michaela Marksova-Tominova, head of the Czech Republic's Department of Family Policy and Social Work, says that they are missing the point. "It is only to protect these children that are killed by the mothers," she said. "It can't harm anybody." ●

"'Baby boxes' help abandoned infants," by Mindy Kay Bricker, www.csmonitor.com (requires archive pass purchase).

Civilians patrol Florida streets

Lots of kids grow up wanting to be police officers and now citizens in Florida's Polk County can live out that childhood fantasy. CAP volunteers patrol their communities in a marked car provided by the county sheriff's office. The program was instituted by the Polk County Sheriff's Office in 2004 as a way to help monitor fast-growing residential areas. Volunteers are trained by the sheriff's office and can call in any suspicious activity they see. But the real value of the CAP car is as a deterrent.

"The response has been terrific," said Joe Miele, a CAP volunteer and former police officer. "We get a lot of hand waving." His wife, Marie Miele, added: "And people slow down when they see the car. They don't speed as much when we're there." ●

"Residents take on roles of lawmen; Polk, Osceola offer programs," by Mike Grogan for *The Ledger* (Lakeland, Florida), www.theledger.com.

Safer highway crossings for critters

Why did the moose cross the road? And how can it make it to the other side? When animals try to cross busy roadways, the results can be dangerous—and as suburbs sprawl into animal habitats, it's becoming a bigger problem in many communities. Cities and states across the country have come up with creative ways to move animals over, under or past highways.

"In Maine, the threat is moose. In Washington, elk. In Massachusetts, deer," writes Nick Timiraos for www.stateline.org. Other areas face more exotic critter problems: Florida has built 24 underpasses for panthers, California's underpasses are designed for tortoises, and two tunnels in Massachusetts protect migrating salamanders. Evidence from Canada suggests that these "critter crossings" do a lot of good. A series of 22 underpasses and two overpasses along the Trans-Canada Highway in Banff National Park have helped decrease elk and deer deaths by 95 percent, says Tony Clevenger of the Western Transportation Institute at Montana State University. ●

"Why did the moose cross the road?" by Nick Timiraos, www.stateline.org

The future of judicial selection in Minnesota

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appointed to the bench. For the Minnesota Supreme Court, six of the seven then-sitting Justices got their jobs by initial appointment. In many cases sitting judges, inspired in part by their dislike for campaigning, have resigned before their term expired so that the governor could fill the vacancy.

A second factor undercutting the effectiveness of judicial elections is that most judicial races in the state are uncontested. For example, in 2004, there were 23 judicial races in Ramsey County (2nd Judicial District) and 19 of them (83%) were uncontested. In 2002, there were 12 races and 75 percent were uncontested.

Voters also often bypass judicial candidates on the ballot, either because they lack information or incentive. “Voter fatigue” figures significantly in judicial selection: 28 percent of voters don’t vote for judicial candidates and 31 percent report they vote on the basis of gender or ethnicity (Scandinavian last name).

Overall, it would be hard to conclude that judicial elections have been shining successes. Given candidates’ limited ability to challenge incumbents or to raise the resources necessary to run a successful campaign, some have argued that the current Canon 5 rules make a mockery of judicial elections, and violate candidates’ constitutional rights. One judicial candidate decided to challenge the rules in court.

White, round one

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. While campaigning he criticized several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint was filed with the Board of Lawyers Professional Responsibility charging that Wersal violated the announce clause of Canon 5. The Board dismissed the complaint saying the rule was unconstitutional, but Wersal abandoned his campaign, saying he was afraid additional ethics complaints could be filed. He ran again in 1998 for the Supreme Court and this time he sought an advisory opinion from the Board to determine whether it would enforce the announce clause. The Board declined to render an opinion. In response, Wersal, joined by the Republican Party of Minnesota, filed a challenge to the announce clause in federal court, claiming it violated his First Amendment right to free speech. The district court upheld the announce clause and the decision was affirmed by the 8th Circuit. The U.S. Supreme Court, in a 5-4 decision, reversed the lower court, finding the “announce” clause violated the First Amendment and remanded the case to the lower courts. Writing for the majority, Justice Scalia concurred with the 8th Circuit that the announce clause imposes a content-based restriction on the exercise of First Amendment rights that necessitates strict scrutiny. He rejected promoting impartiality as a constitutionally compelling justification for the announce clause. Finally, the Court also concluded

that limiting what judicial candidates can discuss prevents them from discussing what elections are about: issues and policy.

White, round two

Closely following Justice Scalia’s opinion, an en banc opinion of the 8th Circuit on remand declared the announce, partisan-activities, and solicitation clauses of Canon 5 unconstitutional on First Amendment grounds.

The majority’s ruling found that the Canon 5 partisan-activities clause to be unconstitutional because it was underinclusive. It assumes that only political parties and not other organizations, such as the NRA or the NAACP, are a source of bias or a threat to judicial independence, and it permits affiliating with a party only up to the point when an individual becomes a judicial candidate, and then such association is prohibited because it is corrupting.

The majority also ruled that the solicitation clause constitutes a content-based and viewpoint restriction on speech because it prohibits judicial candidates’ from speaking to others about a particular subject, *i.e.*, contributing money to their campaign.

And as with the partisan-activities clause, the court ruled the solicitation clause is not narrowly tailored, in that a mere signature on a fund-raising letter would not necessarily indicate bias or an inability to be open minded. As with the partisan-activities clause, specific instances of bias could be addressed with a judge’s recusal.

Lessons from other states

What lessons can Minnesota learn from other states when it comes to judicial selection? First, judicial selection methods matter and, second, the experience of states with partisan elections has not necessarily been good.

Not all states pick their judges in the same way. Thirty-nine states elect their judges. Fifteen states use a variation of the Missouri plan where judges are initially appointed and then face a subsequent retention election. An additional 11 states use other methods, such as gubernatorial appointment, to select judges. Each of these selection processes produces different results in terms of who serves and how they rule. For example, appointed judges are more likely to respond to a wider variety of groups and interests than are elected ones. Similarly, appointed judges seem more disposed to support individual rights than elected ones. How judges are selected may affect how they rule, with elected individuals feeling less autonomy to innovate and step back from voters than appointed ones.

Second, for some, Ohio and Texas are examples of what is wrong with contested, partisan, judicial races. In Ohio, interest groups are heavily involved in partisan campaigns, and some races have cost millions of

dollars, with noncandidate independent expenditures topping \$8 million.

But Texas is held out as in a class of its own. Until the mid 1980s the Texas Supreme Court was dominated by the Democratic Party. But anger over some of its decisions led to multimillion-dollar spending by the political parties and interest groups to change the courts. The result: heavily partisan and costly races often featuring negative and attack ads more typical of those found in legislative races. Studies suggest that the outcomes of these campaigns altered the public perceptions and decisions of the Texas courts.

Some fear that if partisan elections become the norm, Minnesota could become another Texas. If judges can announce positions, they will pander to special interests. If judges can solicit contributions, they will shake down attorneys who appear before them, or lawyers will be compelled to give to their campaigns. Finally, judges might lose their judicial independence as they become beholden to special interests and political parties for financial support. Whether all this will happen in Minnesota as a result of the *White* decision is only a matter for speculation now. Yet if the experiences from other states are any indication, Minnesota courts are poised to change.

Where do we go from here?

Minnesota is appealing the 8th Circuit opinion to the Supreme Court in the hope of defending Canon 5. Assuming *certiorari* is denied, or that the 8th Circuit opinion is affirmed, there are two basic options for Minnesota regarding judicial selection: an elected or an appointed judiciary.

Should Minnesota stick with an elected judiciary, partisan elections might not emerge, or they could bring a new and healthy light to the selection of judges. Armed with more specific information about candidates, their positions and party affiliation, voters might become energized by competitive, issue-driven judicial elections. The *White* decision might encourage a greater diversity of candidates to run for office, highlight the important policy and political roles the judiciary has in the state, and bring needed accountability to the courts. In this light, the *White* decision could be seen as a healthy and important injection of democracy.

Another option is to do nothing and hope for the best. Minnesotans may not tolerate candidates, parties, or interest groups who would seek to politicize the courts. Maybe Minnesota's political culture and sensibility is different from Texas. Yet challenges to Canon 5 by Wersal and the Republican Party suggest that some are ready for more wide-open judicial elections, and others will follow suit, especially given the important role that the state Court has played in the last few years on controversial issues such as abortion, gay rights, guns, and the state budget.

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Making Sense of White and First Amendment Law

The reasoning in the two *Minnesota Republican Party v. White* decisions may seem confusing, but a brief explanation of how courts look at free speech claims should clarify the opinions.

When government laws or rules that affect constitutional rights, such as freedom of speech, are challenged, the burden is on the government to show why they are constitutional. The courts use a *strict scrutiny test* to determine constitutionality. To survive strict scrutiny, the government must meet a three part test.

- *The government must show that it had a compelling interest to adopt the law or rule.* This interest must be a very important public policy objective, such as, in the *White* cases, to prevent judicial bias or corruption.
- *The rule or law must be narrowly tailored or written in promoting this governmental interest.* By that, there must be no other way to achieve this interest except by affecting free speech. In addition, the law or rule cannot regulate more speech than is necessary. If it does, the courts will say that the law or rule is overinclusive and declare it unconstitutional. If on the other hand it does not regulate all the speech it should to achieve this governmental objective, the courts will say the law or regulation is underinclusive and declare it unconstitutional. The under- and overinclusive tests are employed as ways to make sure that laws affecting speech are not arbitrary.
- *The regulation must be the least restrictive or burdensome way to achieve this objective.* By that, this must be the most minimal way free speech rights can be affected while trying to secure the government interest.

If the government cannot meet all three requirements, then the law or rule is unconstitutional. By design, it is very hard for the government ever to demonstrate an interest so compelling that it justifies overriding an individual's free speech rights.

In *White I*, Justice Scalia stated that the Canon 5 announce clause was a content-based restriction on First Amendment rights. Using strict scrutiny analysis, he ruled that Minnesota did not have a governmental interest so compelling as to override free speech rights.

In *White II*, the Eighth Circuit declared the announce, solicitation, and partisan activities clauses were a violation of the First Amendment. The Court stated that while Minnesota had a compelling governmental interest in preventing judicial bias and corruption, the Canon 5 regulations failed strict scrutiny analysis because they were neither narrowly tailored nor the least restrictive means to promoting that interest.

To learn more about the potential ramifications of the Republican Party vs. White case, sign up for the Citizens League upcoming Mind Opener: Partisan Endorsements and an Independent Judiciary, with Minnesota Supreme Court Justice Alan Page. Find out more and register online at www.citizensleague.net/events.

Republican Party of Minnesota v. White Timeline

1858 Minnesota Constitution creates elected six-year terms for state justices and judges.

1912 Minnesota judicial races designated as non-partisan.

1974 Canon 5 of the Minnesota Code of Judicial Conduct prohibits judicial candidates from announcing their position on issues (announce clause), affiliating with a political party (partisan-affiliation clause), and personally soliciting political contributions (solicitation clause).

1996 Gregory Wersal runs as a candidate for the Minnesota Supreme Court. Wersal identifies himself as a Republican, seeks the party endorsement, solicits political contributions, and speaks at political gatherings where he criticizes the Court's crime and abortion ruling.

A complaint is filed against Wersal with the Minnesota Board of Lawyers Professional Responsibility (MBLPR) claiming he violated Canon 5.

In response, Wersal withdraws from the Supreme Court race.

1998 Wersal runs for the Minnesota Supreme Court.

Wersal requests an opinion from MBLPR asking them whether they intended to enforce the announce clause against him. The MBLPR refuses to issue an opinion.

Wersal, joined by the Republican Party of Minnesota, challenges the Canon 5 restrictions.

2002 The United States Supreme Court declares the Canon 5 announce clause unconstitutional and remands to the lower courts to determine if the solicitation and partisan affiliation clauses are unconstitutional.

2004 The Eighth Circuit Court of Appeals declares the solicitation and partisan affiliation clauses unconstitutional.

2006 First state judicial races after *Republican Party of Minnesota v. White* take place. Three Minnesota Supreme Court seats are on the ballot.

The future of judicial selection in Minnesota

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Another possibility is that the Minnesota State Bar Association (MSBA) could assume a more active role in judicial elections, providing more public education, or maybe issuing guidelines for judicial campaign behavior and then publicly admonishing candidates who violate them.

Critics might claim this third option is arrogant, elitist, and bound to fail. It is arrogant and elitist in the sense that it assumes that in a democracy only lawyers know what is best in terms of who should be judges and what issues should be discussed. It also seems to assume that the people themselves cannot make good choices and that it is the task of attorneys to educate the masses as to what is really important and how to vote. Finally, given the public reputation of lawyers in our culture, will public condemnations of judicial candidates by the MSBA be heard or carry any weight? If anything, such pronouncements might backfire.

What about public financing for judicial candidates? Public funding might address the "solicitation" concerns, but would not deal with either the "announce" or the "partisan-affiliation" concerns unless the voluntary acceptance of public money required candidates to accept the three clauses of Canon 5. Such a tie-in is constitutionally permissible. However, judicial candidates cannot constitutionally be compelled to accept public financing and those most interested in more partisan races would be unlikely to seek public financing if the price were adherence to new restrictions.

Even if candidates did accept public financing, as some state constitutional and legislative candidates do, nothing would prevent political parties and interest groups from making independent expenditures on their behalf. Thus far the courts have not supported bans or limits on independent expenditures. This means Minnesota could have judicial races with political funding and strategies no different from other campaigns in the state.

Perhaps the only viable option if the state stays with an elected judiciary is to explore the modification of recusal rules. Both the U. S. Supreme Court and 8th Circuit opinions suggest that the remedy for bias is recusal. Yet there are constitutional limits here.

An appointed judiciary?

Perhaps it's time to consider moving towards an appointed judiciary. Justice O'Connor, concurring in the Supreme Court opinion, noted that the "very practice of electing judges undermines judicial impartiality." Yet a decision to turn to an appointed judiciary should not be premised upon the simple notion that elections are bad in general, and worse for the courts because the people can be tricked. Instead, as the 8th Circuit stated, the state needs to defend an appointed judiciary less in terms of how it avoids the ruling in *Republican Party v. White* and more in terms of how an appointed

judiciary best promotes their role in a democracy as a defender of minority rights, often despite majority preferences.

As noted earlier, elected judges are less likely to protect individual rights than are those appointed by the governor. One reason why the Minnesota courts have been relatively strong defenders of individual rights is that the state has a *de facto* appointed judiciary with more than 90 percent of its judges initially appointed. Given this figure, and given how poorly the current election system operates in terms of lack of candidate information and voter fatigue, a *de jure* move to an appointed court system would not be a major leap. Yet the question remains, how to appoint?

Not all appointment processes are good or the same. For example, Minnesota could adopt a federal model with gubernatorial appointment, state Senate confirmation, and either lifetime or long-term appointment. However, not everyone is convinced that such a model ensures accountability or that the confirmation process produces sufficient information or allows for proper scrutiny. Another problem with this model is that it may not produce a diverse judicial selection pool, instead leaving it open to governors to select friends. Finally, such a process does not guarantee that the appointment and confirmation process will be any less political than elections, as evidenced by recent appointments to the federal bench.

One remedy might require the governor to select judges from a list submitted by a judicial selection committee.

Another option for judicial selection would be some variation of the Missouri Plan where judges are initially appointed to the bench and then, after one or two years, they face the voters in an uncontested retention election. The Missouri plan attempts to combine the best of elections and appointments, but it has two defects. First, voters have little information to base their decisions on in a retention election. Second, retention elections will not prohibit judges from affiliating with parties, announcing their views, or soliciting contributions. Special interests will be able to spend money in retention races, perhaps forcing judges into doing all that Canon 5 sought to prevent.

Republican Party of Minnesota v. White portends to be a watershed decision in Minnesota that will affect how state judges are selected. But exactly what the impact will be, and whether it will prompt a move towards an appointed judiciary, are unanswered questions at this time. ●

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PROFILES



Bringing new voices to the discussion

New Citizens League member and Hispanic Chamber founder Val Vargas promises to enliven the debate on immigration policy

by Susan Herridge

Stories about Val Vargas inevitably focus on the upwardly mobile aspect of her life. Born and raised in the Twin Cities, she was, at age 21, a single mother working at Kentucky Fried Chicken. KFC told Vargas they would pay for college if she'd move to Oklahoma City and take a job running a distribution center there. She quickly agreed, and while she was there, she earned a degree in economics. Eventually, she returned to Minneapolis to work at her father's tax consulting and preparation business, the Andover-based Vargas, Inc., which she still runs today.

Her family was not one to focus on their heritage, Vargas notes. "We didn't speak Spanish in the home, and we were not encouraged to hold onto the language or to our Mexican roots." So it is an unexpected turn of events that she is now something of a cultural icon in the Hispanic community—Vargas is co-founder and CEO of the Hispanic Chamber of Commerce of Minnesota (HCCM). Founded in 2000, the organization now boasts nearly 300 members, five paid staff, and an 11-member Latino board of directors.

If the words "Chamber of Commerce" conjure up a vision of sedate monthly breakfast networking meetings, think again.

"[HCCM] doesn't stand for 'Chamber of Commerce' anymore," explains Vargas. "It's purely an acronym that stands alone, and it's building a brand for all the services we offer." While traditional chambers offer just one area of service, HCCM offers the Hispanic community a variety of services—and it's the collection of services that make HCCM, a 501(c)3 nonprofit, a very interesting organization.

In addition to the chamber, HCCM offers online training, and, free to members, bilingual technical assistance on a mix of topics for businesses and individuals.

HCCM also offers home ownership counseling, and, in 2007, intends to offer foreclosure prevention counseling through an agreement with the National Council of La Raza.

HCCM is also a member of a coalition that draws from six Midwest states and includes many corporate partners. That coalition offers Latino individuals and businesses a one-stop place to find information on career development, job postings, resume postings and recruitment programs for colleges and universities. HCCM offers customized products that help corporate partners fast-track Latino workers on the job.

"The common thread across all of the services offered is economic development" explains Vargas. "Through businesses we offer access to information and training that help transition our community into stakeholders."

A new voice at the table

Vargas joined the Citizens League because she wanted to become more involved. "I've lived here all my life, I'm 50—it's about time that I got involved, to try to give back. I want to offer the insight that my community can bring, and let my example encourage others in my community to get involved."

That attitude fits well with the mission of the Citizens League and its goal of creating a broad dialogue among Minnesotans about critical issues. The drive for new members has aimed, in part, at bringing new perspectives and new voices to the table, including new members from communities of color. As a new member, we asked Vargas to talk about some of the issues she sees as important to the Hispanic community.

After a moment's thought, she dives right in, tackling one of the most controversial issues of the day: immigration.

Governor Tim Pawlenty recently made front page news with his report on the cost of illegal immigration and his seven-point immigration plan. The governor's report hasn't been well received in the Hispanic community.

"We feel targeted," Vargas says. "Everyone knows that this is directed to the Hispanic community, since other immigrant communities are here legally—there are only a

small handful of exceptions to this. The governor used immigration as an election issue in his first campaign, and he's going to use it again, but this time he has all the resources of state government behind him."

Vargas points also to news coverage about the varying and variable statistics on the number of undocumented immigrants living in Minnesota, some 18,000 by one count, or according to the governor's estimate, 85,000.

"The HCCM is extremely disappointed in the governor's lack of reliable information, and that he would use unreliable data to cause such a public stir," Vargas continues.

More than the number, however, Vargas is disappointed that the governor is focusing only on the negatives, "on the costs of undocumented immigrants—he doesn't focus on the buying power and the taxes they pay."

But maybe correctly defining the problem is also part of issue here: are undocumented workers a public policy problem, or a source of future economic vitality, as Vargas's own story attests?

"I am an American, and I support our laws and understand that our borders need to be secure," Vargas says ... "but I also have to consider that I am here and contributing what I do most likely because there was an undocumented worker in my past that made all this possible." ●

Look for more on the issue of undocumented works in upcoming issues of the Minnesota Journal.

Susan Herridge is the principal of Herridge Marketing, a strategic planning and communications consulting firm that works in the nonprofit and for-profit fields. She has been a Citizens League member for two years.

Upcoming Events

02/01

Mind Opener: Land of 10,000 Lawsuits? Minnesota's growing areas are on a crash course with clean water laws. How can we avoid becoming the Land of 10,000 Lawsuits? Is the proposed Clean Water Legacy the answer? 7:30 a.m. NEW LOCATION: Four Points Sheraton Minneapolis

02/08

Policy and a Pint: "Strapped: Why America's 20- and 30-Somethings Can't Get Ahead," with author Tamara Draut and Chris Farrell, host of MPR's MarketPlace Money. 6:00 p.m., Varsity Theater, Minneapolis

02/23

Mind Opener: Partisan Endorsements and an Independent Judiciary with Minnesota Supreme Court Justice Alan Page Following two court decisions in Republican Party v. White Minnesota's process for selecting its state court judges may have been transformed. But how? 7:30 a.m., University of St. Thomas School of Law, downtown Minneapolis.

For more information or to register for these events, click to www.citizensleague.net/events. Find more events like these on the Community Connections Calendar: www.pointclickengage.org.



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PERIODICALS

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