

WISCONSIN CATHOLIC CONFERENCE

EYE ON THE CAPITOL

March 23, 2012

WILL STATE SUPREME COURT TAKE JUSTICE BRENNAN'S ADVICE?

By John Huebscher, Executive Director

For over 30 years, Associate Supreme Court Justice William Brennan was among the most influential members of the U.S. Supreme Court. Appointed by President Eisenhower in 1956, he and Earl Warren led the Court's "liberal wing" through the 1960's. Brennan's background was somewhat unusual in that his prior judicial experience occurred not in the federal courts, but on the New Jersey Supreme Court.

As the U.S. Supreme Court became more conservative, Brennan began urging lawyers and other advocates of individual liberty to pursue what he called a "new Federalism." Brennan recalled that many state constitutions include provisions that are more protective of individual liberty and civil rights than the U.S. Constitution. In Brennan's view, these state constitutions provide a foundation for state laws and policies that the U.S. Supreme Court might not find in the federal Constitution.

In recent years, the Wisconsin Supreme Court has found just that in the area of religious liberty.

As we know, the First Amendment of the U.S. Constitution provides that "Congress shall make no law regarding the establishment of religion..." This "establishment clause" prevents government aid to religion or public endorsement of religious practice. Our State Supreme Court has interpreted the Wisconsin Constitution to mean the same thing. Thus, the rule in Wisconsin has been that if a practice is acceptable under the First Amendment, it is acceptable under the Wisconsin Constitution.

We also know that the First Amendment prevents the federal government from "interfering with the free exercise" of religion. And where the free exercise of religion is concerned, the Wisconsin Supreme Court has held that Article 1, Section 18 of our State Constitution provides a greater protection for the right of conscience than does the First Amendment. Under such analysis, the Court upheld the practice of allowing parents to use state funded vouchers for religious schools in the Milwaukee Parental Choice Program and affirmed a "ministerial exemption" that gives churches greater discretion in hiring and firing certain of its employees.

Our Supreme Court may soon get two more chances to apply this "new Federalism." One case touches upon religious liberty. The other addresses the issue of voting rights.

The religious liberty issue may surface in regard to state and federal mandates that Catholic organizations purchase health insurance that includes coverage for services the Church regards as immoral. It is still possible that federal and state law can be adapted to accommodate religious liberty. But that has not happened yet. Unless it does, the possibility of litigation is very real.

The issue of voting rights emerged last year when the legislature required voters to produce proof of their identity in the form of a photo identification card when they cast their ballots.

Opponents challenged this requirement on the grounds that it discriminates against those who don't have a Wisconsin driver's license or other such document. Such individuals tend to be young voters, those who are poor, members of racial minority groups, and elderly citizens. Supporters of the photo I.D. requirement have countered that the U.S. Supreme Court has upheld similar laws in other states.

Earlier this month, a Dane County judge issued a permanent injunction against the photo I.D. requirement. Citing Article III of the Wisconsin Constitution which holds that every U.S. citizen age 18 or older is a qualified voter, the judge held that the right to vote in Wisconsin is strictly protected and that some voters cannot be denied the right to vote simply because they lack an I.D. card available to the "fortunate majority." His ruling will be appealed.

If these cases do in fact reach our state Supreme Court, one suspects that advocates for religious freedom and voting rights will both hope that the "new Federalism" encouraged by Justice Brennan has a friendly audience in the State Capitol.

-30-