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## Umpires, Not Activists: The Recent Jurisprudence of the Nebraska Supreme Court

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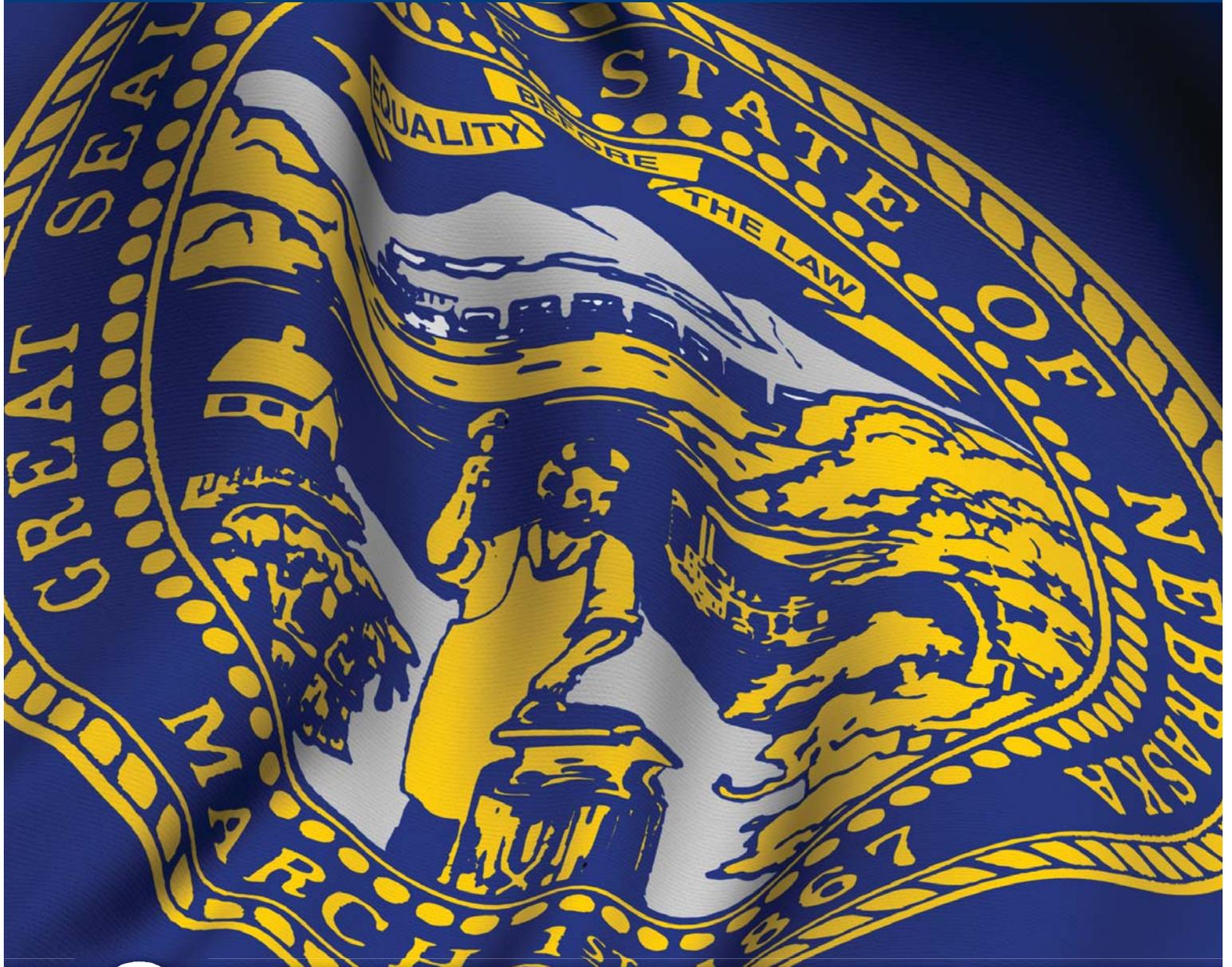
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# UMPIRES, NOT ACTIVISTS

## THE RECENT JURISPRUDENCE OF THE NEBRASKA SUPREME COURT

*Richard F. Duncan*



NE MARCH  
2009

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# Umpires, Not Activists: The Recent Jurisprudence of the Nebraska Supreme Court

Richard F. Duncan

## I. HEREIN OF JUDGES WHO VIEW THEIR ROLE AS UMPIRES, NOT RULERS

I love the “great and glorious game,” as Commissioner Bart Giamatti once described baseball. Because I am both a baseball fan and a law professor, Chief Justice John Roberts grabbed my attention when he compared the role of a judge to that of an umpire during his confirmation hearings before the Senate Judiciary Committee:

My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.<sup>1</sup>

Of course, there is more than one kind of umpire, and Sen. John Cornyn was quick to pick up on this. Referring to a post he had read somewhere in the blogosphere, Sen. Cornyn recounted the “old story” about three different kinds of umpires explaining their approach to calling the game:

First was the umpire that says, “Some are balls, and some are strikes, and I call them the way they are.” The second umpire says, “Some are balls and some are strikes, and I call them the way I see them.” The third said, “Some are balls and some are strikes, but they ain’t nothing till I call them.”<sup>2</sup>

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When asked which kind of umpire was his role model for serving as a judge, Roberts hit the pitch out of the park:

Well, I think I agree with your point about the danger of analogies in some situations. It’s not the last, because they are balls and strikes regardless, and if I call them one and they are the other, that doesn’t change what they are. It just means that I got it wrong. I guess I like the one in the middle because I do think there are right answers. I know that it’s fashionable in some places to suggest that there are no right answers and that the judges are motivated by a constellation of different considerations, and because of that it should affect how we approach certain other issues. That’s not the view of the law that I subscribe to.

I think when you folks legislate, you do have something in mind in particular, and you put it into words, and you expect judges not to put in their own preference, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.

I think when the framers framed the Constitution it was the same thing, and the judges are not to put in their own personal views about what the Constitution should say, but they are supposed to interpret it and apply the meaning that is in the Constitution, and I think there is meaning there, and I think there is meaning in your legislation, and the job of a good judge is to do as good a job as possible to get the right answer.<sup>3</sup>

Chief Justice Roberts has it exactly right. The proper role of a judge is to apply the law, not to make the law. For example, when deciding constitutional issues, judges “should confine themselves to enforcing norms that are stated or are clearly implicit in the written Constitution.”<sup>4</sup> The judge who looks outside the written Constitution “always looks inside himself and nowhere else.”<sup>5</sup> In short, judicial activism occurs when a judge substitutes his personal preferences for those contained in a written constitution or statute. As Roger Clegg has noted, judicial activism “can involve putting something into the text that isn’t there, or taking out something that is there.”<sup>6</sup> Moreover, if a statute violates the Constitution, “it would be judicial activism not to strike it down.”<sup>7</sup> The non-activist judge must follow the Constitution wherever it leads. The activist judge drags the Constitution wherever he wants it to go.

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When activist judges claim to be interpreting a living, breathing, evolving Constitution, they are being disingenuous with the American public. The Constitution does not evolve. Surely, the sudden appearance of new constitutional rules in the fossil record is best explained by a theory of intelligent design, of Creation if you please, by shifting majorities on the Supreme Court. For example, Erwin Chemerinsky observes that activists believe that “the meaning and application of constitutional provisions should *evolve by interpretation*.”<sup>8</sup> “Evolving by interpretation” sure sounds like an account of Creation to me, especially in light of Chemerinsky’s acknowledgement that new constitutional rights, such as “a right to abortion,” can come into being by judicial decree regardless of “what the framers intended.”<sup>9</sup>

In other words, the basic distinction between an activist judge and a non-activist judge is the former follows the law only when it suits him to do so, while the latter follows the law even when it conflicts with his personal beliefs and policy preferences. As Judge Bork has said, the “moment of temptation” for a judge is when he realizes that the law does not embody his personal “political and moral imperative.”<sup>10</sup> When faced with such a temptation, the non-activist judge must set aside his personal values and follow the rule of law. The activist judge, however, will submit to temptation and choose “to rule where a legislator should.”<sup>11</sup> Reduced to its essence, the non-activist judge chooses the “American form of government”<sup>12</sup> over his personal preferences, and the activist judge makes the opposite choice. Thus, it matters a great deal when we evaluate a court as “activist” or “non-activist.”

## II. THE NEBRASKA SUPREME COURT: RESPECTING THE RULE OF LAW

For most of the period of this study, the Nebraska Supreme Court has been occupied exclusively by judges appointed by Governor Ben Nelson, a Democrat who presently serves in the United States Senate.<sup>13</sup> Notwithstanding this single-party domination of the Nebraska Supreme Court, the recent jurisprudence of the court has been marked by a strong and enduring respect for the rule of law and judicial restraint. Although there may be one or two minor blemishes on the court’s score card, my overall impression of this

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court is that it acts like an umpire that enforces the strike zone, as the strike zone is defined in the rulebook. Indeed, if the best umpires are those who go unnoticed because they do their job properly, then the Nebraska Supreme Court is a very good court indeed, because its quiet devotion to the rule of law rarely generates heated attention or controversy. In short, the Nebraska Supreme Court does what all courts should do—it follows the rule of law wherever it leads, with quiet dignity and humility.

### *Separation of Powers and Judicial Restraint: Herein of Political Questions and Educational Funding*

The Nebraska Supreme Court authored a textbook example of judicial restraint and deference to the constitutional prerogatives of the legislature in its seminal 2007 school funding case, *Nebraska Coalition for Educational Equity v. Heineman*.<sup>14</sup> In *Heineman*, a Coalition of school districts and educational activists sued Governor Heineman to enjoin him from implementing Nebraska’s education funding system. The Coalition’s complaint alleged that the existing funding system was unconstitutional because it provided inadequate funding for K-12 public education in violation of the religious freedom and free instruction clauses of the Nebraska Constitution.<sup>15</sup>

Both of these constitutional provisions are directed to the Nebraska Legislature. The religious freedom clause provides in relevant part: “Religion, morality, and knowledge...being essential to good government, it shall be the duty of the Legislature to pass suitable laws...to encourage schools and the means of instruction.”<sup>16</sup> The free instruction clause provides: “The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.”<sup>17</sup>

The Coalition asked the court to decree that the religious freedom and free instruction clauses create a “fundamental right” to an “adequate education”<sup>18</sup> and to enjoin the existing education funding system as unconstitutional, because it does not provide “adequate resources” to satisfy the demands of this new and expensive constitutional right.<sup>19</sup>

In an opinion that should satisfy even the hardest-to-please friend of judicial restraint, a *unanimous* Nebraska Supreme Court held that the Coalition’s

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claims “present nonjusticiable political questions” because the “Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level of public education the Legislature must provide.”<sup>20</sup> In other words, defining and funding an adequate level of education in the public schools of Nebraska is a matter of policy for the Legislature to decide, not a legal question to be decreed by an unelected judiciary.

Moreover, the court’s reasoning in *Heineman* was absolutely first rate. The court began by stating that the distribution of powers clause of the Nebraska Constitution<sup>21</sup> “prohibits one branch of government from exercising the duties of another branch.”<sup>22</sup> This constitutional principle of separation of powers thus precludes the courts from deciding issues committed by the Nebraska Constitution to another branch of state government<sup>23</sup> and enjoins the judiciary from reviewing the wisdom of decisions of the Legislature.<sup>24</sup> In the words of the Nebraska Supreme Court: “That restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature’s plenary power.”<sup>25</sup>

The court’s opinion was also faithful to the will of the People of Nebraska and the state’s history and traditions:

Nebraska’s constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature’s discretion. Even more illuminating, the people rejected a recent amendment that would have imposed qualitative standards on the Legislature’s duty to provide public education.<sup>26</sup>

In short, the Nebraska Supreme Court held that the delicate balancing of competing policy choices and political interests concerning school funding was “beyond [the] ken”<sup>27</sup> of the judiciary and thus constitutes a nonjusticiable political question. The court’s characterization of its holding is full of the kind of wisdom that is so hard to find in modern judicial opinions: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.”<sup>28</sup>

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In a world in which judicial activism has become the norm in many jurisdictions, this opinion of the Nebraska Supreme Court is a balm for the soul, a refreshing reflection of the court’s humble restraint and respect for the political process.

Interestingly, as this Report was about to go to press, the Nebraska Supreme Court decided another important education case. In *Citizens of Decatur for Equal Education v. Lyons-Decatur School District*,<sup>29</sup> the Nebraska Supreme Court held that the Nebraska Constitution does not provide a “fundamental right to equal and adequate funding of schools.”<sup>30</sup> The court applied a deferential rational basis test to the school board’s actions, and held that the school board’s decision to reallocate resources within the school district was “rationally related to its legitimate goal of providing an education to all children in the district.”<sup>31</sup>

*Upholding Term Limits and the Will of the People:  
Herein of the Framers’ Intent and Original  
Understanding*

In *State ex rel. Johnson v. Gale*,<sup>32</sup> a coalition of voters and incumbent legislators brought a mandamus and declaratory judgment action challenging the constitutionality of the term limits provision of the Nebraska Constitution. This provision, which was added to the constitution when the People of Nebraska voted to approve Initiative 415 in November of 2000,<sup>33</sup> provides:

- (1) No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of two consecutive terms regardless of the district represented.
- (2) Service prior to January 1, 2001, as a member of the Legislature shall not be counted for the purpose of calculating consecutive terms in subsection (1) of this section.
- (3) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.<sup>34</sup>

The coalition challenged the constitutionality of the term limits provision under the U.S. Constitution, because, they argued, it violates the Free Speech and Equal Protection Clauses. The Nebraska Supreme Court *unanimously* denied these claims, and, in

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the process, demonstrated its sincere and enduring commitment to original understanding and the will of the people.

The coalition's claims depended upon a particular reading of the term limits amendment, an interpretation that read the provision as disqualifying any legislator "after he or she has served more than half of a second 4-year term."<sup>35</sup> In other words, the plaintiffs interpreted the term limits provision as disqualifying legislators from completing their second terms in office and requiring "political appointees to complete the second term of any incumbent representative."<sup>36</sup>

Although this was a possible reading of the term limits amendment, it is a reading that would render the law absurd and possibly unconstitutional. The Nebraska Supreme Court rejected this strained reading of the amendment, and in the process observed that its duty was to obey "the supreme written will of the people regarding the framework for their government."<sup>37</sup>

The court's opinion authored a textbook for a jurisprudence of original understanding. According to the Nebraska Supreme Court: (1) "[i]t is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution;"<sup>38</sup> (2) constitutional provisions "must be interpreted and understood in their most natural and obvious meaning;"<sup>39</sup> and (3) the court should give effect to the "meaning that obviously would be accepted and understood by laypersons."<sup>40</sup> Moreover, the Nebraska Constitution "must be read as a whole" and, thus, an amendment "becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument."<sup>41</sup> It is hard to argue with the court's learned treatise on constitutional interpretation.

Having set sail on a course of original understanding, the destination the Nebraska Supreme Court reached seems obviously correct—the "plain and obvious meaning" of the term limits provision does not require incumbents to be disqualified before completing their second term. Therefore, the

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provision must be upheld, because it does not violate the First Amendment or the Equal Protection Clause of the U.S. Constitution.<sup>42</sup>

The Nebraska Supreme Court's recent originalist opinion in *Gale* upholding the term limits initiative stands in marked contrast to two decisions the court rendered in the 1990s striking down term limits provisions adopted by the people. In the first of these earlier decisions, *Duggan v. Beerman*,<sup>43</sup> the court declared void a term limits initiative adopted by a vote of the people of Nebraska. The issue in the case was whether the initiative had been validly invoked by a petition signed by a sufficient number of registered voters.

Although some critics charge that the court ignored the plain meaning of the Nebraska Constitution by increasing the number of signatures required to invoke an initiative, the case is not that simple. The problem is that Article III, Section 2 of the Nebraska Constitution had been amended in 1988, and this amendment caused some tension with Article III, Section 4, concerning the proper manner of calculating the required number of signatures to place an initiative on the ballot. The two conflicting provisions are as follows.

Section 2 provides:

The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent *of the registered voters of the state*, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent *of such registered voters*. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed. . . . (emphasis added).

Section 4, however, provides:

*The whole number of votes cast for Governor at the general election next preceding the filing of an initiative*

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*or referendum petition* shall be the basis on which the number of signatures to such petition shall be computed (emphasis added).

The problem for the court in *Duggan* was which of these two clear but inconsistent provisions for calculating the required number of signatures to invoke an initiative should the court follow. If it followed the former—based upon the number of registered voters—it would effectively increase the number of signatures required by a petition drive, because there are more registered voters than voters who actually cast votes at gubernatorial elections.

The court held that “when constitutional provisions are in conflict, the later amendment controls. Thus, article III, § 2, which refers to registered voters, repeals the reference in article III, §4, which refers to those voting in the preceding gubernatorial election.”<sup>44</sup> As a result, the court concluded that the term limits initiative was not invoked by a sufficient number of registered voters and it was therefore void despite being adopted by a vote of the people.<sup>45</sup>

The second controversial term limits decision from the 1990s, involving the same parties as the case just discussed and therefore also known as *Duggan v. Beerman*<sup>46</sup> (or, as I will label it, *Duggan II*), concerned Initiative 408, which sought to impose “term limits on a variety of federal and state elective offices.”<sup>47</sup> Although Initiative 408 was overwhelmingly passed by a vote of the people on November 8, 1994, the Nebraska Supreme Court was obliged to follow a decision of the Supreme Court of the United States invalidating “state-imposed term limits upon congressional offices.”<sup>48</sup> Although the Nebraska Supreme Court cannot be faulted for following a binding precedent of the Supreme Court of the United States, its decision in *Duggan II* has been criticized for the court’s decision to refuse to sever the state term limits provisions from the federal term limits provisions despite the fact that Initiative 408 contained an explicit severability clause. As a result, the court held that the state term limits provisions were “so intertwined” with the unconstitutional federal provisions “that they, too, must be declared void.”<sup>49</sup> The court’s 2007 decision in *Gale* upholding the current term limits provision is thus redemptive as well as originalist.

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*Same-sex Marriage and Adoption:  
Herein of Activism by the People  
and Restraint by the Court*

In November 2000, the People of Nebraska voted overwhelmingly in support of Initiative 416, which added the following provision concerning marriage as Article I, § 29 of the Nebraska Constitution:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

This provision, of course, was designed to ensure that the institution of marriage in Nebraska would never be transformed by an activist court, or even by a future majority in the Legislature. Although the Nebraska Marriage Amendment was declared unconstitutional by an activist federal district judge, its constitutionality was firmly established by a unanimous court of appeals in *Citizens for Equal Protection v. Bruning*.<sup>50</sup> This ruling, which is now the governing rule in the Eighth Circuit, made clear that “a state statute or constitutional provision codifying the traditional definition of marriage” serves “legitimate state interests” and “therefore do[es] not violate the Constitution of the United States.”<sup>51</sup>

In *In re Adoption of Luke*,<sup>52</sup> the Nebraska Supreme Court was asked to decide whether the Nebraska adoption statutes permit one unmarried person to adopt the biological child of her partner without the latter relinquishing her parental rights. Although the issue presented by the case was broader than the issue of adoption by same-sex couples, the facts of *In re Adoption of Luke* involved a same-sex couple.

The biological mother of Luke, a woman identified only as B.P., conceived the child “by artificial semination using semen from an anonymous donor.”<sup>53</sup> B.P.’s unmarried partner, a woman identified only as A.E., wished to adopt Luke. As such, B.P. and A.E. filed a petition “in which A.E. sought to adopt Luke [and] B.P. indicated her ‘consent.’”<sup>54</sup> B.P. did not relinquish her parental rights to Luke, but instead sought only to add A.E. as a second “parent” of the child.

The Nebraska Supreme Court carefully parsed and faithfully interpreted the Nebraska adoption

statutes and held that “[w]ith the exception of a stepparent adoption which is explicitly provided for in the Nebraska adoption statutes and for which no relinquishment is required,” a child is not eligible for adoption unless the biological parents’ rights have been terminated or relinquished.<sup>55</sup> As a result, the paramour of an unmarried parent may not adopt the parent’s child and raise him or her as a co-parent.

Again, this case is significant because the Nebraska Supreme Court resisted all appeals to give the adoption statutes “a liberal rather than a strict construction,”<sup>56</sup> and instead chose to follow the rule of law and “the plain terms and manner of procedure of the Nebraska adoption statutes.”<sup>57</sup>

*Respecting the Reserved Powers of the People:  
Herein of Judicial Restraint and Citizen Petitions*

Under the Nebraska Constitution, the first two powers retained by the People are the initiative<sup>58</sup> and the referendum.<sup>59</sup> These powers give the People of Nebraska the fundamental right to take the reins of government away from the Legislature and the courts by placing important issues directly before the electorate. The initiative and referendum powers are perhaps the most important democratic liberties of a free people, and Nebraskans are very jealous about protecting these retained powers from those who are uncomfortable with the idea that “[h]ere the people rule.”<sup>60</sup> Two recent decisions of the Nebraska Supreme Court demonstrate the court’s enduring commitment to the Nebraska Constitution and the initiative and referendum.

In *State ex rel. Stenberg v. Moore*<sup>61</sup>, the issue concerned the power of the Legislature to facilitate or to restrict the initiative or referendum powers. Under the Nebraska Constitution, the initiative and referendum powers are “invoked” by a petition signed by a particular percentage of registered voters. For example, when the initiative power is invoked to propose an amendment to the Nebraska Constitution, the petition must be signed by ten percent of the registered voters of the state.<sup>62</sup> The Nebraska Secretary of State, who serves as the chief election officer of the state, is responsible for verifying signatures on the petition before placing the proposed initiative on the ballot. Moreover, the Nebraska Constitution provides that “[t]he provisions with respect to the initiative and referendum shall be

self-executing, *but legislation may be enacted to facilitate their operation.*”<sup>63</sup>

The *Moore* case concerned an enactment of the Nebraska Legislature modifying the process for verifying signatures on petitions. The previous law had provided in pertinent part:

All signatures and addresses *shall be presumed to be valid signatures and addresses* if the election commissioner or county clerk has found the signers to be registered voters on or before the date on which the petition was required to be filed with the Secretary of State, except that such presumption shall not be conclusive and may be rebutted by any credible evidence which the election commissioner or county clerk finds sufficient.<sup>64</sup>

However, in 1995, the Nebraska Legislature amended the law by providing that “[t]he signature, date of birth, and address shall be presumed to be valid only if the election commissioner or county clerk finds the printed name, date of birth, street and number or voting precinct, and city, village or post office address to match the registration records.”<sup>65</sup> The Nebraska Attorney General brought a declaratory judgment action to declare the amended statute facially unconstitutional “because it does not act to facilitate the operation of the initiative process.”<sup>66</sup> In other words, by requiring an “exact match” between the information contained on the petition and the voter registration records<sup>67</sup> the law was hampering--not facilitating--the initiative power and was therefore unconstitutional.

The Nebraska Supreme Court accepted the Attorney General’s argument and declared the law unconstitutional. Furthermore, the Court issued a powerful opinion affirming the initiative as “precious to the people” and as a power “which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.”<sup>68</sup> Thus, “legislation which hampers or renders ineffective the power reserved to the people is unconstitutional.”<sup>69</sup>

Sometimes originalism and judicial restraint remind me of castor oil—they are good for you even when they taste awful. As Judge Bork, might say, you must set aside the temptation to impose your own moral and ideological preferences, and follow the rule of law, even when the rule of law produces distasteful results.

For me, such a moment of temptation is exemplified by the Nebraska Supreme Court’s originalist

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jurisprudence in *Pony Lake School District v. State Committee for Reorganization of School Districts*.<sup>70</sup> Even though I dislike the results, I have to admit that the Court was loyal to the rule of law.

*Pony Lake* concerned L.B. 126, which was passed over the Governor's veto on June 3, 2005 and which required the dissolution of Class I school districts by June 15, 2006.<sup>71</sup> Following passage of L.B. 126, a group of citizens sponsored a referendum designed to save Class I schools by referring L.B. 126 to the Nebraska electorate for approval or rejection.<sup>72</sup> Although the sponsors obtained a sufficient percentage of valid signatures to get the referendum on the ballot (7.7 percent), they fell short of obtaining the signatures of 10 percent of registered voters required to suspend the operation of L.B. 126 pending the outcome of the election.<sup>73</sup> In other words, the Class I schools would be eliminated before the general election, and thus before the voters would have an opportunity to reject the law requiring their dissolution.

The basic issue for the Nebraska Supreme Court was whether L.B. 126 was unconstitutional because it "impermissibly burdened the people's right of referendum."<sup>74</sup> This issue turned on the Court's reading of the referendum provisions of the Nebraska Constitution.

The two governing constitutional provisions are Nebraska Constitution Article III, sections 3 and 4. The former sets forth "the number of signatures required to invoke the power to place a referendum measure on the ballot and the number of signatures required to simultaneously invoke the power to suspend an act's operation until approved by voters."<sup>75</sup> The latter "sets forth the number of votes required to enact a ballot petition."<sup>76</sup>

Section 3 provides that petitions invoking a referendum must be "signed by not less than five percent of the registered voters of the state;" however, it requires the petition to be signed by "ten percent of the registered voters of the state" to suspend the challenged law "from taking effect" until the petition has been submitted to "the electors of the state."

Section 4 provides in pertinent part:

A measure initiated shall become a law or part of the Constitution, as the case may be, when a majority of the

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votes cast thereon, and not less than thirty-five per cent of the total vote cast at the election at which the same was submitted, are cast in favor thereof, and shall take effect upon proclamation by the Governor which shall be made within ten days after the official canvas of such votes. . . . The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation.

The plaintiffs argued that L.B. 126 was unconstitutional because its effective date impermissibly burdened the effectiveness of the referendum.<sup>77</sup>

In effect, the plaintiffs were asking the Nebraska Supreme Court to refuse to give effect to the express language of Section 3 concerning the percentage of signatures required on the petition to suspend a challenged law. The Court declined this invitation to ignore an express constitutional process and held that "because plaintiffs have failed to obtain the necessary number of signatures that would suspend the operation of L.B. 126 pending a referendum election, they have received exactly the right reserved" by the Nebraska Constitution.<sup>78</sup> As the Court observed, the Nebraska Constitution represents "the supreme written will of the people" and when its language is clear and unambiguous, "it is not for [t]his court to read into it that which is not there."<sup>79</sup> The rule of law governs in Nebraska, even when we wish it said something else!

*One or Two Areas of Minor Concern:*

*Herein of Capital Punishment and Employment Law*

Capital punishment and employment law are very much outside my area of expertise, but before concluding this report I will briefly discuss a few of the Nebraska Supreme Court's recent decisions in these areas. Although I do not classify these decisions as constituting "judicial activism," they may be of concern to some and perhaps justify a watchful vigilance on the part of the Nebraska citizenry.

Perhaps the Nebraska Supreme Court case generating the most concern among proponents of judicial restraint is *State v. Moore*.<sup>80</sup> In *Moore*, the Nebraska Supreme Court—on its own motion—"reconsidered its order for the issuance of a death warrant" for a convicted murderer.<sup>81</sup> Remarkably, the court acted on its own even though Moore had not requested a stay of execution.<sup>82</sup> The court followed

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the principle that “death is different”<sup>83</sup> and stayed Moore’s execution because another case was pending on the court’s docket in which the court was asked to determine whether, under recent decisions of the U.S. Supreme Court, death by electrocution is “cruel and unusual punishment.”<sup>84</sup> As Justice Gerrard said in his majority opinion, “Although we respect the defendant’s autonomy, the solemn business of executing a human being cannot be subordinated to the caprice of the accused.”<sup>85</sup>

Chief Justice Heavican issued a powerful dissent to the court’s “unprecedented”<sup>86</sup> action, and stated that “Moore’s statements and lack of action show that he has elected to waive his right to challenge the State’s protocol.”<sup>87</sup> His point is well-taken, but so is the majority’s point that “should Nebraska’s mode of execution be found lawful [in the pending litigation], the State’s interest in executing Moore’s sentence would only have been delayed.”<sup>88</sup> Personally, I am in equipoise about this case. Perhaps it is an example of judicial activism, but if this is all we have to worry about in the Cornhusker State, we are very fortunate indeed.

Finally, this Report will briefly consider the Nebraska Supreme Court’s recent decisions recognizing a public policy exception to the “at will employment doctrine” that has traditionally been the “clear rule” in Nebraska.<sup>89</sup> In *Jackson v. Morris Communications Corp.*,<sup>90</sup> the issue before the Nebraska Supreme Court was whether to recognize “a public policy exception to the at-will employment doctrine... for retaliatory discharge when an employee is fired for filing a workers’ compensation claim.”<sup>91</sup> Although the at-will doctrine generally permits an employer to discharge an employee “at any time with or without reason,”<sup>92</sup> the Nebraska Supreme Court has for some time recognized a public policy exception that permits “an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy.”<sup>93</sup> Although the Nebraska Workers’ Compensation Act does not contain a specific provision prohibiting an employer from discharging an employee for filing a claim under the Act,<sup>94</sup> the court decided to give the Act a “liberal construction” to carry out its “beneficent purpose” and held that it “presents a clear mandate” for judicial protection of employees discharged for filing a workers’

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compensation claim.<sup>95</sup> Maybe this is activism, but maybe the court was simply trying to give full effect to employment legislation enacted by the Nebraska Legislature.

Perhaps of more concern to some is the Nebraska Supreme Court’s recent decision, in *Trosper v. Bag ‘N Save*,<sup>96</sup> to extend the holding in *Jackson* to cover retaliatory demotion in addition to retaliatory discharge. As the court explained:

An employee’s right to be free from retaliatory demotion for filing a worker’s compensation claim is married to the right to be free from discharge. Demotion, like termination, coercively affects an employee’s exercise of his or her rights under the Nebraska Workers’ Compensation Act... To promote such behavior would compromise the act and would render illusory the cause of action for retaliatory discharge.<sup>97</sup>

Justice Stephan, who was joined by Chief Justice Heavican, dissented on the theory that the majority had transformed “a narrow exception to the rule of nonliability for discharge into a new theory of liability for retaliatory demotion.”<sup>98</sup> Although I personally might disagree with the court’s new employment law doctrine, I am reluctant to shout “activism” merely because the Nebraska Supreme Court reasonably chose to come out the other way.

*Stop the Presses!*  
*The Nebraska Supreme Court*  
*“Evolves” on Death By Electrocution*

As this paper was going to press, the Nebraska Supreme Court decided *State v. Mata*<sup>99</sup>, a decision in which the “Nelson Six”<sup>100</sup> all voted to declare execution by electrocution unconstitutional under the Nebraska Constitution. Although I have given the Nebraska Supreme Court high marks so far for being a non-activist court, *Mata* is an activist decision. On a scale of 1 to 10, with 1 being non-activist, 10 being extremely activist (and 12 being Justice Blackmun’s decree creating the abortion liberty in *Roe v. Wade*), I rate *Mata* as somewhere between a 6 and a 7.

The Nebraska Supreme Court marshalled all the usual clichés of activism in its opinion in *Mata*. The Court repeatedly embraced “evolving standards of decency,”<sup>101</sup> “changing societal values,”<sup>102</sup> the “instincts of civilized man,”<sup>103</sup> and a “flexible and dynamic”<sup>104</sup>

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interpretation of the constitutional text in the course of its 69-page discourse on what constitutes “cruel and unusual punishment” under Nebraska Constitution Article I, Section 9.<sup>105</sup> It was also careful to assert the activist banality that “[t]he prohibition against cruel and unusual punishment is not a static concept.”<sup>106</sup> As Chief Justice Heavican, the sole Republican appointee on the court, was wise to point out in his thoughtful dissent, the problem with the majority’s evolutionary approach to the task of constitutional interpretation “is that it inherently tempts judges to inject their own subjective values into the constitutional analysis” and risks judges ruling where legislatures should.<sup>107</sup> As Robert Bork has expressed it so eloquently, although “[t]o give in to temptation, this one time, solves an urgent human problem,” it also creates “a faint crack... in the American foundation. A judge has begun to rule where a legislator should.”<sup>108</sup> In other words, new constitutional rules do not evolve by natural processes; they are created based upon the subjective preferences of unelected judges.

The facts of *Mata* make the court’s activism all the more difficult to bear. Raymond Mata, Jr. was convicted of a particularly cruel and gruesome murder of a child, 3-year old Adam Gomez.<sup>109</sup> Not only did Mata murder the young boy, he dismembered him, mutilated him and “relished” the murder.<sup>110</sup> The sentencing panel found that all this “gratuitous violence and unnecessary mutilation” was done for the purpose of punishing “Adam’s mother because [Mata] believed she was pushing him out of her life in favor of Adam’s father.”<sup>111</sup> If ever a murderer deserved to be executed, surely Raymond Mata, Jr. is such a man.

The Nebraska Supreme Court was quite clear about a number of issues in the *Mata* decision. First, the Court made clear that it was not declaring electrocution unconstitutional under the Eighth Amendment to the United States Constitution, “because the U.S. Supreme Court has held otherwise.”<sup>112</sup> Instead, the Court chose to decide the issue under the state constitution, and to look to federal caselaw only for “guidance.”<sup>113</sup> Moreover, since the Nebraska Court believed that the U.S. Supreme Court’s decisions were based upon factual assumptions that were no longer reliable, the Court made clear that in interpreting the Nebraska Constitution’s

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prohibition of cruel and unusual punishment, it would evaluate the issue in light of “contemporary human knowledge.”<sup>114</sup> Regrettably, the Court did not even attempt to consult the original understanding of the Nebraska “cruel and unusual punishment” provision to determine if it was compatible with evolving standards of decency and contemporary knowledge about death by electrocution.

According to the court, new knowledge about electrocution supported its conclusion “that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner’s body.”<sup>115</sup> Moreover, “[e]lectrocution’s proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man,” and thus “violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, §9.”<sup>116</sup> The court stayed Mata’s death sentence, because its decision left the State of Nebraska “without a constitutionally acceptable method of execution.”<sup>117</sup>

As Chief Justice Heavican observed, when the Nebraska Supreme Court treats the leading U.S. Supreme Court precedent upholding the constitutionality of electrocution as “an anachronism”<sup>118</sup> and relies instead on purely subjective factors such as evolving standards of decency and the instincts of civilized man as the basis for its decision, one does not need to be Sherlock Holmes to deduce that judicial activism is at work and it is likely to produce “adverse consequences in future cases.”<sup>119</sup> As Chief Justice Heavican warned:

[T]he majority chooses to essentially retain the Eighth Amendment’s prescriptions but avoids the problem of having to overrule a U.S. Supreme Court decision by purporting to reach its result under the Nebraska Constitution.

While this approach may serve the majority’s purpose, I believe it does so at the expense of clarity in our constitutional doctrine. Before today’s decision, lower courts could rest with confidence on the belief that our constitution requires nothing more than the Eighth Amendment with regard to methods of punishment. By reaching a conclusion that contradicts U.S. Supreme Court precedent, this decision will give lower courts reason to question that belief. At a minimum, attorneys may exploit the ambiguity in today’s decision in subsequent cases.<sup>120</sup>

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The people of Nebraska need to be very vigilant in the post-*Mata* world to ensure that the Nebraska Supreme Court does not continue its slide down the slope of judicial activism. Indeed, *Mata* is reminiscent of the court's activism during the 1990s, when it refused to accept the statutory definition of second degree murder and, as a result, overturned every second degree murder conviction in the state.<sup>121</sup>

### CONCLUSION

Nebraska is the “Big Red” state, both in football and in politics. The people of Nebraska are conservative and they wish to rule themselves, either directly through the retained powers of initiative and referendum, or indirectly through the process of self-government and laws enacted by their democratically-elected representatives. Government by the judiciary is simply not the way we do things in Nebraska.

The people of Nebraska are fortunate to have a state Supreme Court so much in tune with the will of the people. As this Report has shown, recent decisions of the Nebraska Supreme Court demonstrate that the court, like a good umpire, is strongly committed to applying the law as written and to following the rule of law wherever it leads. The court understands that there are right answers and wrong answers when interpreting a written constitution or statutory enactment, and it is committed to finding the right answer even when it disagrees with the wisdom of the law or the policy choices reflected in the law.

Moreover, not only does the Nebraska Supreme Court strive to faithfully follow the rule of law, its opinions often reveal a deep understanding of the proper role of the judiciary in a free and democratic society. The court has eloquently expressed its commitment to the constitutional process of separation of powers and the limited role of the judiciary “to set policy in areas constitutionally reserved to the legislature’s plenary power.”<sup>122</sup> It has written what amounts to a learned treatise on a court’s sacred duty to “carry into effect the intent and purpose of the framers of the Constitution” by interpreting the Nebraska Constitution in accordance with its “most natural and obvious meaning” and in light of the “meaning that obviously would be accepted and understood by laypersons.”<sup>123</sup> The Nebraska Supreme Court has also recently and powerfully expressed its

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“zealous” commitment to protecting the reserved power of the people of Nebraska to amend the state constitution directly through the initiative process.<sup>124</sup> The Court has also made clear that the Nebraska Constitution expresses “the supreme written will of the people” and thus it is inappropriate for the court “to read into it that which is not there.”<sup>125</sup>

Although there may be a few decisions of the court that may give pause to some and justify watchful vigilance by the people of the state<sup>126</sup>—and there is reason to be particularly concerned about the court’s recent decision in *Mata* declaring death-by-electrocution unconstitutional—on balance it is this reporter’s conclusion that the people of Nebraska have a court we can be proud of, a court that is committed (most of the time) to judicial restraint and a jurisprudence of originalism. In short, the Nebraska Supreme Court understands that, like a good umpire, its job is not to make the rules, but rather to make sure “that everybody plays by the rules.”

### Endnotes

1 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States before the Senate Comm. On the Judiciary*, 109<sup>th</sup> Cong. 1st Sess. 55 (September 12-15, 2005) (Statement of John G. Roberts, Jr.). Of course, Chief Justice Roberts was not the first legal scholar to use the umpire analogy. See Douglas O. Linder, *Strict Constructionism and the Strike Zone*, 56 UMKC L. REV. 117 (1987).

2 *Id.* at 266 – 67 (statement of Sen. Cornyn).

3 *Id.* at 267 (statement of John G. Roberts, Jr.)

4 Robert Bork, *The Struggle Over the Role of the Court*, NATIONAL REVIEW at 1137 (Sept. 17, 1982) (quoting John Hart Ely).

5 *Id.* at 1138.

6 Roger Clegg, *A Brief Dialogue on Judicial Activism*, [http://committeeforjustice.org/contents/reading/020806\\_clegg.shtml](http://committeeforjustice.org/contents/reading/020806_clegg.shtml) (2007).

7 *Id.*

8 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 18 (2006).

9 *Id.*

10 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW I (1990).

11 *Id.*

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12 *Id.*

13 The following Nebraska Supreme Court judges were appointed by Governor Nelson: John F. Wright (1994); William M. Connolly (1994); John M. Gerrard (1995); Kenneth C. Stephan (1997); Michael McCormack (1997); John V. Hendry (1998); and Lindsey Miller-Lerman(1998). It was not until 2006, when Governor David Heineman appointed Michael G. Heavican as Chief Justice, that a Republican governor had an opportunity to make an appointment to the court.

14 273 Neb. 531, 731 N.W. 2d 164 (2007).

15 *Id.* at 535, 731 N.W. 2d at 169-170.

16 Neb.Const. art. I, § 4.

17 Neb. Const. art. VII, § 1.

18 273 Neb. At 536, 731 N.W. 2d. at 170.

19 *Id.* at 537, 731 N.W. 2d at 170-171.

20 *Id.* at 557, 731 N.W. 2d at 183.

21 Neb. Const. art. II, § 1 provides in pertinent part:  
“The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.”

22 273 Neb. at 545, 731 N.W. 2d at 176.

23 *Id.* at 545, 731 N.W. 2d at 176.

24 *Id.* at 545-46, 731 N.W. 2d at 176.

25 *Id.* at 546, 731 N.W. 2d at 176.

26 *Id.* at 550, 731 N.W. 2d at 179.

27 *Id.* at 554, 731 N.W. 2d at 181.

28 *Id.* at 557, 731 N.W. 2d at 183.

29 274 Neb. 278, 739 N.W. 2d 742 (2007).

30 *Id.* at 281, 739 N.W. 2d at 748-749.

31 *Id.* at 304, 739 N.W. 2d at 763.

32 273 Neb. 889, 734 N.W. 2d 290 (2007)

33 *Id.* at 891, 734 N.W. 2d at 295.

34 Neb. Const. art. III, § 12.

35 273 Neb. at 893, 734 N.W. 2d at 296-297.

36 *Id.* at 893, 734 N.W. 2d at 297.

37 *Id.* at 896, 734 N.W. 2d at 298.

38 *Id.* at 904, 734 N.W.2d at 303.

39 *Id.* at 903, 734 N.W.2d at 303.

40 *Id.* at 903 - 904, 734 N.W.2d at 303.

41 *Id.* at 905, 734 N.W.2d at 304.

42 *Id.* at 907, 734 N.W.2d at 305.

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43 245 Neb. 907, 515 N.W. 2d 788 (1994).

44 *Id.* at 915, 515 N.W.2d at 793.

45 *Id.* at 916, 515 N.W.2d at 794.

46 249 Neb. 411, 544 N.W. 2d 68 (1996).

47 *Id.* at 412, 544 N.W. 2d at 71.

48 *Id.* at 426, 544 N.W. 2d at 77. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)

49 249 Neb. at 435, 544 N.W. 2d at 82.

50 455 F.3d 859 (8<sup>th</sup> Cir. 2006). Remarkably, the federal district judge had held that the Marriage Amendment “violates the Equal Protection Clause, is an unconstitutional bill of attainder, and deprives gays and lesbians of their First Amendment Rights.” *Id.* at 863. *See* Citizens for Equal Protection v. Bruning, 368 F.Supp.2d 980 (D.Neb.2005). The Eighth Circuit reversed this incredibly arrogant and activist decree of the trial court in all respects, from root to branch.

51 455 F.3d at 870-871.

52 263 Neb. 365, 640 N.W.2d 374 (2002).

53 *Id.* at 366, 640 N.W.2d at 376.

54 *Id.* at 366, 640 N.W. 2d at 376.

55 *Id.* at 377, 640 N.W. 2d at 383.

56 *Id.* at 385, 640 N.W.2d at 388 (Gerrard, J., dissenting).

57 *Id.* at 369, 640 N.W.2d at 378. The Court explicitly refused to accept the request by Appellants “to read into the adoption statutes an additional exception for second-parent adoptions and to disregard the fact that the adoption statutes explicitly provide for stepparent adoptions and do not explicitly provide for second parent adoptions.” *Id.* at 376, 640 N.W.2d at 382.

58 Neb. Const. art. III, § 2 provides: “The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.”

59 Neb. Const. art. III, § 3 provides: “The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature....”

60 President Gerald R. Ford, *Remarks on Taking the Oath of Office as President*, August 9, 1974.

61 258 Neb. 199, 602 N.W.2d 465 (1999).

62 Neb. Const. art.III, § 2.

63 Neb. Const. art.III, § 4. (emphasis added).

64 258 Neb. at 202, 602 N.W.2d at 469-470.

65 *Id.* at 203, 602 N.W. 2d. at 470.

66 *Id.* at 210, 602 N.W.2d. at 474.

67 *Id.* at 210, 602 N.W.2d. at 474.

68 *Id.* at 211, 602 N.W.2d. at 474.

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69 *Id.* at 211, 602 N.W.2d. at 475.

70 271 Neb. 173, 710 N.W.2d 609 (2006).

71 *Id.* at 176, 710 N.W. 2d at 615. The act required the reorganization of school districts by merging Class I districts with larger districts “so that all Nebraska school districts offer education in grades kindergarten through 12.” *Id.* at 176, 710 N.W. 2d at 615.

72 *Id.* at 176, 710 N.W.2d. at 615.

73 *Id.* at 176, 710 N.W.2d. at 615.

74 *Id.* at 180, 710 N.W.2d. at 617.

75 *Id.* at 182, 710 N.W.2d. at 619.

76 *Id.* at 182, 710 N.W.2d. at 619.

77 *Id.* at 182-183, 710 N.W.2d. at 619.

78 *Id.* at 186, 710 N.W.2d. at 622.

79 *Id.* at 187, 710 N.W.2d. at 622.

80 273 Neb. 495, 730 N.W.2d at 563 (2007).

81 *Id.* at 496, 730 N.W.2d at 564.

82 *Id.* at 499, 730 N.W.2d at 565.

83 *Id.* at 497, 730 N.W.2d at 565.

84 *Id.* at 496, 730 N.W.2d at 564.

85 *Id.* at 499, 730 N.W.2d at 566.

86 *Id.* at 503, 730 N.W.2d at 568.

87 *Id.* at 501, 730 N.W.2d at 567.

88 *Id.* at 499, 730 N.W.2d at 566.

89 Jackson v. Morris Communications, Corp., 265 Neb. 423, 657N.W.2d 634 (2003).

90 265 Neb. 423, 657 N.W.2d at 634

91 *Id.* at 424, 657 N.W.2d. at 635.

92 *Id.* at 426, 657 N.W.2d. at 636.

93 *Id.* at 426, 657 N.W.2d. at 637.

94 *Id.* at 428, 657 N.W.2d. at 638.

95 *Id.* at 431-432, 657 N.W.2d. at 640-641.

96 273 Neb. 855, 734 N.W.2d 704 (2007).

97 *Id.* at 864, 734 N.W.2d. at 711.

98 *Id.* at 874, 734 N.W.2d. at 717 (Stephan, J. dissenting).

99 275 Neb. 1, 745 N.W. 2d 229 (2008).

100 The “Nelson Six” reference is to the six Nebraska Supreme Court justices appointed by then Governor Ben Nelson, a Democrat. Chief Justice Heavican, who dissented in *Mata*, was appointed by Gov. David Heineman, a Republican. *See supra* note 13.

101 *See e.g.*, 275 Neb.at 33,41,48, 745 N.W. 2d at 256, 262, 266.

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102 *Id.* at 44, 745 N.W. 2d at 264.

103 *Id.*

104 *Id.* at 42, 745 N.W. 2d at 262.

105 Neb. Const. Art. I, § 9 provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

106 275 Neb. at 41, 745 N.W. 2d at 262.

107 *Id.* at 80, 745 N.W. 2d at 286.

108 BORK, *supra* note 10, at 1

109 275 Neb. at 6, 745 N.W. 2d at 240.

110 *Id.* at 30, 745 N.W. 2d at 255.

111 *Id.*

112 *Id.* at 33, 745 N.W. 2d at 257.

113 *Id.* at 40, 745 N.W. 2d at 261.

114 *Id.* at 41, 745 N.W. 2d at 262.

115 *Id.* at 67, 745 N.W. 2d at 278. According to the court, the “evidence shows that electrocution inflicts intense pain and agonizing suffering.” *Id.* at 69, 745 N.W. 2d at 279.

116 *Id.* at 67, 745 N.W. 2d at 278.

117 *Id.* at 69, 745 N.W. 2d at 279-280.

118 *Id.* at 71, 745 N.W. 2d at 281 (Heavican, C.J., dissenting).

119 *Id.* at 86, 745 N.W. 2d at 290.

120 *Id.* at 72-73, 745 N.W. 2d at 282.

121 *See* Don Stenberg, *Malice In Wonderland*, 30 CREIGHTON L. REV. 15 (1996).

122 Nebraska Coalition for Ed. Equity v. Heineman, 273 Neb. 531, 546, 731 N.W.2d 164, 176 (2007).

123 State ex rel. Johnson v. Gale, 273 Neb. 889, 903-904, 734 N.W.2d 290, 303(2007).

124 State ex rel. Stenberg v. Moore, 258 Neb. 199, 211, 602 N.W.2d 465, 474 (1999).

125 Pony Lake Sch. Dist. v. State Comm. For Reorg., 271 Neb. 173, 187, 710 N.W.2d 609, 622 (2006).

126 *See supra* notes 80-121 and accompanying text.

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