

2003

## Erlandson v. Kiffmeyer: Minnesota's Absentee Voting Laws Following the Sudden Death of Incumbent Candidate Paul Wellstone

Elizabeth M. Brama

Follow this and additional works at: <http://open.wmitchell.edu/wmlr>

 Part of the [Law and Society Commons](#), [Politics Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Brama, Elizabeth M. (2003) "Erlandson v. Kiffmeyer: Minnesota's Absentee Voting Laws Following the Sudden Death of Incumbent Candidate Paul Wellstone," *William Mitchell Law Review*: Vol. 30: Iss. 2, Article 2.  
Available at: <http://open.wmitchell.edu/wmlr/vol30/iss2/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Open Access.

***ERLANDSON V. KIFFMEYER:***  
**MINNESOTA'S ABSENTEE VOTING LAWS**  
**FOLLOWING THE SUDDEN DEATH**  
**OF INCUMBENT CANDIDATE PAUL WELLSTONE**

Elizabeth M. Brama<sup>†</sup>

I.	INTRODUCTION .....	397
II.	BACKGROUND.....	401
	<i>A. Historical Comparisons</i> .....	401
	<i>B. Minnesota's Approach</i> .....	404
III.	<i>ERLANDSON V. KIFFMEYER</i> .....	410
IV.	ANALYSIS.....	417
	<i>A. Right versus Privilege: Are Minnesota's Absentee Voting</i> <i>Statutes Now Entitled to Rational Basis Deference or</i> <i>Subject to Stricter Scrutiny?</i> .....	418
	<i>B. Fallout: Legislation Proposing Changes to Minnesota's</i> <i>Absentee Voting Mechanism</i> .....	419
V.	CONCLUSION.....	424

I. INTRODUCTION

On October 25, 2002, incumbent United States Senator and reelection candidate Paul Wellstone, his wife, daughter, and five others were flying on a chartered Beechcraft King Air A100 from St. Paul, Minnesota to Eveleth-Virginia Municipal airport to attend a friend's

---

<sup>†</sup> J.D. *magna cum laude* University of Minnesota Law School; B.A. *summa cum laude* University of St. Thomas. Ms. Brama is an associate attorney with Briggs and Morgan, P.A., in Minneapolis and Saint Paul, Minnesota. Prior to joining Briggs, Ms. Brama served as Legal Counsel to the 2001-02 Minnesota Special Redistricting Panel, where she advised the five-judge panel regarding congressional and legislative redistricting, election processes, and demographic issues.

funeral.<sup>1</sup> At 10:22 a.m., the airplane crashed approximately two miles southeast of the Eveleth airport, killing everyone on board.<sup>2</sup>

At the time of the crash, Wellstone and former St. Paul mayor Norm Coleman were locked in a tight race for one of Minnesota's United States Senate seats.<sup>3</sup> But Wellstone's death created a vacancy on the ballot with only eleven days until the general election.<sup>4</sup> Therefore, on October 31, 2002, Minnesota's Democratic-Farmer-Labor Party (DFL) designated former Vice President Walter Mondale as the replacement candidate.<sup>5</sup> Per Minnesota law, county election officials immediately began preparing official supplemental ballots, substituting Mondale's candidacy for Wellstone's.<sup>6</sup>

By that time, however, thousands of Minnesota voters had already cast absentee ballots in the senate election.<sup>7</sup> At least some of those persons expressed a wish to change their vote after they learned of Wellstone's death.<sup>8</sup> Many absentee voters—especially those traveling or temporarily living out-of-state—were not able to cast a substitute ballot

---

1. Tony Kennedy, *Wellstone Plane Was Flying Too Slowly, Investigators Say*, STAR TRIB. (Minneapolis), March 27, 2003, at 3B; Tony Kennedy et al., *The Wellstone Crash: Reexamining the Accident that Killed Sen. Paul Wellstone and Seven Others the Morning of October 25, 2002*, STAR TRIB. (Minneapolis), Feb. 22, 2003, at 1A. The others on board were Wellstone's wife, Sheila; daughter Marcia Wellstone Markuson; members of Wellstone's campaign staff Mary McEvoy, Tom Lopic, and Will McLaughlin; and pilots Richard Conry and Michael Guess. Paul McEnroe et al., *Senator Dies in Crash*, STAR TRIB. (Minneapolis), Oct. 26, 2002, at 1A.

2. National Transportation Safety Board Fact Report, Docket No. DCA03MA008 (June 25, 2003), available at [http://www.nts.gov/ntsb/brief.asp?ev\\_id=20021025X05386&key=1](http://www.nts.gov/ntsb/brief.asp?ev_id=20021025X05386&key=1) (last visited Nov. 28, 2003).

3. Jim Moore of the Independence Party, Ray Tricomo of the Green Party, and Miro Drago Kovatchevich of the Constitution Party were also on the ballot, but as of an October 15, 2002 poll, Wellstone was in the lead with 46% of the vote compared to 37% who preferred Coleman. Eric Black, *Independence Candidate to Join the Senate Debate*, STAR TRIB. (Minneapolis), Oct. 15, 2002, at 4B. Ten percent of voters surveyed remained undecided, and the poll's margin of error was 4.5%. *Id.*

4. See MINN. STAT. § 204B.13, subd. 1(a) (2002).

5. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 727 (Minn. 2003); Mark Brunswick, *Mondale Starts His Run; Says He Will Debate*, STAR TRIB. (Minneapolis), Nov. 1, 2002, at 1A.

6. MINN. STAT. § 204B.41 (2002).

7. Brian Bakst, *Some Counties Fail to Report Wellstone Votes*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 20, 2002 (noting that Wellstone's votes as of November 20, 2002 totaled 11,381, "presumably by people who voted for him by absentee ballot and didn't submit a new one in time"); Conrad deFiebre, *Ballot Procedures Spark Partisan Controversy*, STAR TRIB. (Minneapolis), Oct. 28, 2002, at 12A.

8. *Id.*; Brief for Petitioners at 2, *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003) (No. C7-02-1879).

by appearing at the polls on Election Day.<sup>9</sup>

Furthermore, Minnesota law prohibited election officials from sending supplemental ballots to persons who already had cast an absentee ballot.<sup>10</sup> Even if this obstacle had not existed, the short time between Wellstone's death, Mondale's nomination six days later, and the election five days after that, prevented many voters from requesting, receiving, and returning substitute ballots by mail in time for the election.<sup>11</sup> And, the DFL party identified an additional potential problem for its candidate: votes for Wellstone would count for Wellstone even though he could not be elected, while votes cast for Coleman at any time were effective votes for Coleman.<sup>12</sup>

In an effort to ensure that absentee votes for Wellstone were not "wasted," a group of citizens representing DFL interests filed suit in the Minnesota Supreme Court.<sup>13</sup> The petitioners asked the court to (1) void all senate votes cast before Mondale's nomination; (2) allow the counties to send supplemental ballots upon request; (3) allow county officials to provide supplemental ballots by facsimile, internet, and commercial mail in addition to regular mail and in person; or (4) approve a combination of the above.<sup>14</sup>

The Minnesota Supreme Court conducted oral argument on

---

9. Brief for Petitioners at 2, *Erlandson* (No. C7-02-1879).

10. MINN. STAT. § 204B.41 (2002) ("Official supplemental ballots shall not be mailed to absent voters to whom ballots were mailed before the official supplemental ballots were prepared.").

11. Hank Shaw, *Counties Must Offer New Absentee Ballots*, ST. PAUL PIONEER PRESS, Nov. 1, 2002, at 1A. As explained by one county election official:

[M]any absentee voters will not have time to revote before Tuesday's election . . . .

Pam Heeren, the auditor in Hubbard County, told the Associated Press that she ordered ballots Tuesday morning—guessing the court would order new ones. She expected to get them Friday afternoon and have them mailed Saturday to people who ask for them.

"If people call, we will mail them Saturday, which means they will probably go out Monday morning. Is there time to get to where they need to go and back? I doubt it," Heeren said. "I understand what they are trying to do, but there's so little time."

*Id.*

12. See MINN. STAT. § 204B.41 (2002) ("Absentee ballots that have been mailed prior to the preparation of official supplemental ballots shall be counted in the same manner as if the vacancy had not occurred.").

13. Brief for Petitioners at 2, *Erlandson* (No. C7-02-1879).

14. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 728-29 (Minn. 2003). Petitioner Mike Erlandson was the chair of the state DFL party at the time of election; respondent Mary Kiffmeyer was the secretary of state.

October 31, 2002 and issued an order the same day.<sup>15</sup> The court did not void previously cast absentee votes, but did direct county election officials to send replacement ballots to voters upon request, regardless of whether they had already voted via regular mail.<sup>16</sup> Without explaining its reasoning, the court directed officials to count only the ballot with the latest date on it, and affirmed absentee voters' right to cast replacement ballots in person, at the polls, on Election Day.<sup>17</sup>

Shortly thereafter, Republican candidate Norm Coleman defeated Walter Mondale in the general election by obtaining approximately 49.53% of the votes to Mondale's 47.34%.<sup>18</sup> Although 11,381 votes were cast and counted for Wellstone, the difference between Coleman and Mondale was over 49,450 votes.<sup>19</sup>

On April 17, 2003, the supreme court issued a full opinion explaining its earlier order.<sup>20</sup> Finding no rational basis for the statutory prohibition on mailing replacement absentee ballots upon request, the court concluded that the prohibition violated the equal protection rights of absentee voters who were unable to appear in person.<sup>21</sup> But the *Erlandson v. Kiffmeyer* court expressly noted that its decision "is limited to the particular circumstances presented in this case and affects only one sentence of section 204B.41."<sup>22</sup>

Despite the court's limitation, the *Erlandson* decision is likely to have a greater impact than its language indicates. History shows that candidates frequently die or withdraw in the last weeks of a campaign, invariably calling election procedures into question—especially when it comes to counting absentee ballots cast before the vacancy occurred.<sup>23</sup> Moreover, the *Erlandson* decision should presage changes in Minnesota's absentee balloting laws.

This article addresses the legal and practical effects of Senator

---

15. *Id.* at 727.

16. *Erlandson v. Kiffmeyer*, No. C7-02-1879 (Minn. Oct. 31, 2002) (order), available at <http://www.lawlibrary.state.mn.us/archive/supct/0210/c7021879.htm> (last visited Nov. 28, 2003) (hereinafter "Erlandson Order").

17. *Id.*

18. Minnesota Secretary of State's Statewide Results for U.S. Senator, available at <http://electionresults.sos.state.mn.us/ElecRslts.asp?M=S&Races=0103> (last updated Jan. 10, 2003) (last visited Nov. 28, 2003).

19. *Id.* Coleman garnered 1,116,697 votes to Mondale's 1,067,246. *Id.* A total of 59,315 votes were also cast for Tricomo, Moore, Kovatchevich, and write-in candidates. *Id.*

20. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 724 (Minn. 2003).

21. *Id.* at 733-34.

22. *Id.* at 732 n.7.

23. See *supra* Part II.A.

Wellstone's death and the court's absentee ballot decision in *Erlandson v. Kiffmeyer*. Part II discusses other, surprisingly common, instances when a candidate has died or withdrawn close to an election, and examines Minnesota's approach to pre-election vacancies. Part III explores the *Erlandson* decision and the facts giving rise to it. Part IV then analyzes the court's decision and the legislature's reaction to it. Finally, Part V concludes that if the state has an acknowledged goal of enfranchising absentee voters even after an unexpected, catastrophic event, then state law must be amended to better achieve this goal.

## II. BACKGROUND

### A. Historical Comparisons

The death of a political candidate in the weeks before an election is more common than one might think. Before the 2002 election cycle, at least four congressional candidates alone died in airplane crashes in the weeks leading up to an election and were elected posthumously.<sup>24</sup> In just the last two congressional elections, two Senate candidates—Senator Paul Wellstone and Governor Mel Carnahan of Missouri—have died in the weeks preceding the general election.<sup>25</sup> Candidates also withdraw their candidacy at the last minute for other reasons, often involving scandal.<sup>26</sup> Such incidents provide a backdrop for Minnesota's 2002

---

24. Michael G. Adams, *Missouri Compromise: Did the Posthumous Senatorial Election of Mel Carnahan and Subsequent Appointment of Jean Carnahan Compromise Federal or State Law?*, 29 N. KY. L. REV. 433, 436 (2002); *Missouri's Senate Race Spurs Unusual Questions*, KANSAS CITY STAR, Oct. 28, 2000, at A1 ("American electoral history is replete with examples of candidates—including congressmen—dying before election and still winning a majority.").

25. Additionally, in Hawaii, Representative and reelection candidate Patsy Mink, age 74, died of viral pneumonia one week after the primary election and two days after Hawaii's deadline for declaring a vacancy on the ballot. *Congressman to Embark on Two-Week Work Schedule in Hawaii*, ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 13, 2003. Mink remained on the ballot and was elected posthumously. *Id.* The seat was declared vacant after the election, and Democratic interim Senator Ed Case was chosen in a special election to fill Mink's seat. *Id.* See also *Howard v. Holm*, 208 Minn. 589, 591, 296 N.W. 30, 31 (1941) (describing circumstance in which senator not up for reelection died ten days before the primary election).

26. In Minnesota, for example, the 1990 gubernatorial campaign was turned upside down when Republican nominee Jon Grunseth withdrew his candidacy nine days before the election, amid scandal. See *infra* Part II.A.2. In 2002, reports of scandal prompted New Jersey senate candidate Robert Torricelli to withdraw thirty-six days before the general election. Jan Crawford Greenburg & Evan Osnos, *High Court Refuses a Replay of Florida; GOP Fails in Bid to Keep Democrat off Ballot in N.J.*, CHI. TRIB., Oct. 8,

election.

*1. Senatorial Candidate Mel Carnahan Dies in a Plane Crash  
Three Weeks Before the 2000 General Election*

On October 16, 2000, U.S. Senate candidate and Missouri Governor Mel Carnahan died when his twin-engine airplane crashed on the way to a debate with Carnahan's opponent, incumbent Senator John Ashcroft.<sup>27</sup> Within seven hours, Lieutenant Governor Roger Wilson was sworn in to serve as governor for the three months remaining in Carnahan's term.<sup>28</sup>

Missouri law required that Carnahan's name remain on the Senate ballot because he died after the fourth Friday before the election.<sup>29</sup> In the event of Carnahan's posthumous election, Governor Wilson had the power to appoint an interim replacement to serve until the next general election two years later.<sup>30</sup> With about two weeks left before the election, Wilson announced that he intended to appoint Carnahan's widow, Jean Carnahan, if Mel Carnahan was elected over Senator Ashcroft.<sup>31</sup> On

---

2002, at 1A. Former Senator Frank Lautenberg was selected as his replacement, despite state law that prohibited replacing a candidate less than fifty-one days before a general election. *Id.* Holding that election law should be broadly interpreted to "allow parties to put their candidates on the ballot, and most importantly, to allow the voters a choice," the New Jersey Supreme Court allowed the replacement. *N.J. Democratic Party Inc. v. Samson*, 814 A.2d 1025, 1027 (N.J. 2002). Lautenberg went on to win the election and, ironically, now sits at Wellstone's former desk on the Senate floor. Doug Grow, *Dayton Says He Plans to Pump Up the Volume; Calling Himself "No Shrinking Violet," He'll Try to Fill Part of Wellstone Void*, STAR TRIB. (Minneapolis), Jan. 12, 2003, at 2B.

27. Tim O'Neil, *Carnahan Crash Saddened State, Pressed Widow into Job*, ST. LOUIS POST-DISPATCH, Oct. 27, 2002, at A12.

28. Adams, *supra* note 24, at 433.

29. MO. REV. STAT. § 115.373.1 (2001).

30. MO. REV. STAT. § 105.040 (2001) ("Whenever a vacancy in the office of senator of the United States from this state exists, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected and qualified according to law."). Minnesota's governors have a similar privilege when a vacancy in office occurs, but the effect is quite different when the vacancy occurs immediately before an election. U.S. CONST. amend. XVII, cl. 2; MINN. STAT. §§ 351.02, 351.06 (2002). Because Minnesota does not allow a deceased person to remain an electable candidate, the governor-appointed interim senator serves only until the replacement candidate or his opponent is elected and sworn in. *Id.* Thus, Minnesota Governor Jesse Ventura was able to appoint Dean Barkley as interim senator after Wellstone's death, but Barkley's term lasted only until Senator Coleman was sworn in three months later. When a candidate dies but is elected posthumously in Missouri, the governor appoints a replacement to serve until the next special or general election—in Carnahan's case, a total of two years. MO. REV. STAT. § 105.040 (2001). At that point, the appointed senator can seek reelection or not, as he or she chooses.

31. Associated Press, *Carnahan's Widow Could "Win" Nov. 7*, CHI. TRIB., Oct. 25,

October 30, Jean Carnahan announced she would serve if her husband was elected and she was appointed.<sup>32</sup> On November 7, Mel Carnahan defeated Ashcroft in a narrow, posthumous victory.<sup>33</sup> Jean Carnahan was appointed in his stead and served until she lost a reelection bid to Jim Talent, the unsuccessful 2000 gubernatorial candidate.<sup>34</sup>

Because Mel Carnahan's name remained on the ballot, there was no absentee balloting issue. But Governor Wilson's pre-election announcement of his intent to appoint Jean Carnahan nonetheless raised questions about the propriety of Missouri's election laws: Did Governor Wilson effectively "rig" the election by disclosing his intent in advance? Does Missouri law contravene federal law by allowing the election of a deceased person who was neither a United States "citizen" nor a Missouri "inhabitant" at the time of election?<sup>35</sup> While Missouri's candidate replacement system has changed little in the wake of Mel Carnahan's death, its efficacy has been called into question.<sup>36</sup> As we will see, this is not uncommon following unusual electoral circumstances.

## 2. *Scandal Undermines Minnesota Gubernatorial Candidate Jon Grunseth Weeks Before Election Day*

In 1990, Republican gubernatorial candidate Jon Grunseth was in a heated race with vulnerable incumbent Governor Rudy Perpich to become Minnesota's next governor. On October 15, 1990, Grunseth's campaign "went into a tailspin" after allegations that he invited four teenage girls to swim with him, naked, at a 1981 party.<sup>37</sup> Grunseth's runner-up in the Independent-Republican primaries, Arne Carlson,<sup>38</sup> began a write-in campaign when the allegations surfaced.<sup>39</sup>

---

2002, at 12A.

32. Adams, *supra* note 24, at 434; O'Neil, *supra* note 27, at A12.

33. Adams, *supra* note 24, at 435.

34. See The Biographical Directory of the U.S. Congress, Jim Talent (R-Mo.), available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000024> (last visited Nov. 28, 2003).

35. Adams, *supra* note 24, at 442-43 (citing U.S. CONST. art. I, § 3, cl. 3 (stating the qualifications for a U.S. senator)).

36. *Id.* at 450-51.

37. Debbie Howlett, *Minn. Nominee Quits Gov's Race*, USA TODAY, Oct. 29, 1990, at 3A.

38. *State-by-State Reports of the Key Races and Issues*, LOS ANGELES TIMES, Nov. 7, 1990, at A20.

39. Associated Press, *GOP Candidate Quits Minnesota Race*, CHI. TRIB., Oct. 29, 1990, at A4.



On October 27, 1990, new Minneapolis newspaper reports alleged that Grunseth had an extramarital affair during his first marriage, and possibly during his second.<sup>40</sup> Admitting the new allegations in part, Grunseth withdrew from the race on Sunday, October 28—only nine days before Election Day.<sup>41</sup> On October 30, the Republican committee nominated Carlson and his running mate as Grunseth's replacement.<sup>42</sup> After a brief battle in the Minnesota Supreme Court as to whether Carlson's running mate should replace Grunseth's on the ballot, new ballots were prepared less than a week before Election Day.<sup>43</sup>

Carlson won the election.<sup>44</sup> Interestingly, he won by 15,000 votes out of about 1.5 million votes cast, or 50.1% to Perpich's 49.9%.<sup>45</sup> Approximately 11,000 absentee votes were cast for Grunseth—probably because there was no time to cast a replacement ballot—and were not counted for either Carlson or Perpich.<sup>46</sup> Because Carlson won and the number of votes cast for Grunseth was smaller than Carlson's margin of victory, the absentee ballots would not have changed that election's outcome. However, the Grunseth situation foreshadowed the issues that resulted from Wellstone's untimely death in 2002.

### B. Minnesota's Approach

Before turning to the Minnesota Supreme Court's decision in *Erlandson*, it is helpful to review Minnesota law providing the backdrop for that opinion. Two major areas are relevant: Minnesota's statutory scheme for addressing vacancies on the ballot in partisan elections, and Minnesota's past characterization of absentee voting as a privilege rather than a right.

---

40. *Id.*; Jane Brissett, *Death Creates Havoc for Voters*, DULUTH NEWS-TRIB., Oct. 29, 2002, at A1.

41. Howlett, *supra* note 37, at 3A.

42. See Debbie Howlett, *In Minnesota, Muddled Governor's Race*, USA TODAY, Oct. 30, 1990, at 8A.

43. *Clark v. Growe*, 461 N.W.2d 385, 385 (Minn. 1990) (affirming, on November 1, 1990, then-Minnesota Secretary of State Joan Growe's decision to print supplemental ballots naming both Arne Carlson and his running mate, Joanel Dyrstad, as the Independent-Republican candidates in place of Arne Carlson and Grunseth's running mate, Sharon K. Clark).

44. Brissett, *supra* note 40, at A1.

45. *Id.*

46. *Id.*

### 1. *Minnesota's Statutory Scheme for Vacancies on the Ballot*

In Minnesota, a vacancy on the ballot occurs when a major political party's candidate dies or files an affidavit of withdrawal.<sup>47</sup> When a vacancy occurs, the affected political party is charged with nominating a replacement candidate according to procedures in the party's governing rules.<sup>48</sup> A nomination certificate for the replacement candidate must be filed within seven days of the vacancy's occurrence or before the fourteenth day prior to the general election, whichever is earlier.<sup>49</sup> When the vacancy is the result of a candidate's death or sudden illness, the nomination certificate must be filed within seven days of the vacancy's occurrence, but no later than four days before the election.<sup>50</sup> In other words, no matter what the cause of vacancy, a replacement candidate cannot be nominated any later than four days before the general election.<sup>51</sup>

Nonetheless, vacancies obviously can and do occur in the last days before a general election. If a candidate withdraws for reasons other than catastrophic illness after the sixteenth day before the election, that

---

47. MINN. STAT. § 204B.13, subd. 1(a) (2002). While there are an array of reasons a candidate might intentionally withdraw, Minnesota's statutes divide these reasons into two categories: (1) withdrawal due to catastrophic illness and (2) withdrawal for any other reason. MINN. STAT. § 204B.12, subd. 2(a) (2002). A candidate for constitutional office may withdraw for any reason until 5:00 p.m. on the sixteenth day before the general election. *Id.* at subds. 2(a), 3. A candidate may withdraw after that deadline only if he or she is suddenly diagnosed with a catastrophic illness that will permanently incapacitate the candidate, and accompanies the affidavit of withdrawal with a certificate signed by at least two physicians. *Id.* at subd. 2(b). Minnesota law also sets forth a deadline for withdrawing before the primary election: no later than two days following the deadline for filing one's candidacy for that office. *Id.* at subd. 1.

48. MINN. STAT. § 204B.13, subd. 2 (2002).

49. *Id.* at subd. 2(b). These deadlines were, no doubt, a reaction to the problems, especially with absentee ballots, created by Jon Grunseth's withdrawal from the race only nine days before the 1990 general election. *See supra* note 41 and accompanying text; *see also* 1991 Minn. Laws ch. 320, §§ 8-12 (codified at MINN. STAT. § 204B.13, subd. 2(b) (2002)) (changing the timelines for replacing a candidate in the legislative session immediately following the 1990 election). As an interesting side note, the newly elected Governor Carlson attempted to veto these changes, which were passed through a largely DFL Minnesota legislature, but did not do so in the time provided by law. MINN. STAT. ANN. § 204B.13 (West 2002). Accordingly, the changes became law. *Id.*

50. *Id.*

51. Following the 2000 Grunseth/Carlson/Perpich gubernatorial race, special laws were enacted to ensure that a replacement gubernatorial candidate could select a new running mate as well. *See* 1991 Minn. Laws ch. 320, §§ 8-12 (codified at MINN. STAT. § 204B.13, subd. 5 (2002)). This relatively new statute has little relevance to other offices, but indicates that the state legislature can be responsive when unusual political situations indicate a need for changes in the law. *Id.*

candidate's name is removed from the ballot and no replacement candidate is named.<sup>52</sup> But if a candidate dies or withdraws due to illness up to four days before the election, election officials must blot that race's candidates from the originally prepared ballots and prepare an "official supplemental ballot," including all original candidates' names but replacing the deceased or withdrawn candidate's name with the replacement candidate's name.<sup>53</sup> The voter then fills out the original ballot for all races except the one in which the vacancy occurred, marking his or her vote for that race on the supplemental ballot instead.<sup>54</sup>

Because supplemental ballots may become necessary up to four days before the general election<sup>55</sup> but absentee ballots may be cast weeks in advance,<sup>56</sup> there may be some overlap. In other words, some voters may receive the original ballot and cast their votes days or weeks before the vacancy occurs. In that situation, absentee ballots mailed before the vacancy arose must be counted as though no vacancy occurred.<sup>57</sup> And, election officials could not mail official supplemental ballots to "absent voters to whom ballots were mailed before the official supplemental ballots were prepared."<sup>58</sup> Under this scheme, then, absentee votes cast before the vacancy occurred counted toward an unelectable candidate, but absentee voters were denied the opportunity to vote for a viable candidate via replacement mail ballots. The result was the possible disenfranchisement of thousands of absentee voters.

## 2. *Absentee Voting: Historically, a Privilege*

Whether the disenfranchisement of absentee voters is actually a problem depends on the extent of one's "right" to vote in absentia. If

---

52. MINN. STAT. § 204B.13, subd. 6 (2002). A special election presumably would be necessary if the candidate were elected posthumously, but Minnesota law is not specific on this point. *Id.*

53. MINN. STAT. § 204B.41 (2002).

54. *Id.*

55. *See supra* notes 41, 49 and accompanying text.

56. *See* MINN. STAT. § 203B.081 (2002) ("An eligible voter may vote by absentee ballot during the 30 days before the election in the office of the county auditor . . ."); MINN. STAT. § 203B.04, subd. 4 (2002) (allowing voters to submit an application for an absentee ballot "at any time not less than one day before the day of that election"); MINN. STAT. § 203B.06, subd. 3 (2002) (directing election officials to hold and file all absentee ballot applications received before absentee ballots are ready for distribution, and mail the ballot "as soon as absentee ballots are available," without stating a date before which absentee ballots cannot be mailed).

57. MINN. STAT. § 204B.41 (2002).

58. *Id.*

casting an absentee ballot is as important as the general right to vote, disenfranchisement is a problem indeed. But if absentee voting is merely a privilege, such that laws limiting absentee votes are accorded significant deference, then disenfranchisement in unusual circumstances may be a lesser concern. Thus, the level of deference accorded absentee voting laws turns on the Minnesota Supreme Court's legal characterization of absentee voting.

When a candidate dies so near the election that some absentee ballots have already been cast, absentee voting rises to the forefront of public attention.<sup>59</sup> But the nature and extent of citizens' rights to cast absentee ballots has been questioned in Minnesota in other situations as well. For example, in *Wichelmann v. City of Glencoe*, twenty-six absentee ballots made the difference between the adoption and rejection of a special election ballot question.<sup>60</sup> Because the twenty-six absentee voters did not file verified ballot applications with the city clerk before the election, the district court concluded that the ballots were invalid.<sup>61</sup> The supreme court agreed, concluding that the absentee voters' failure to comply with statutory absentee voting procedures forfeited their "privilege" or "special right" to submit a vote in absentia.<sup>62</sup>

---

59. See *supra* note 46, *infra* notes 63-70, and accompanying text.

60. 200 Minn. 62, 63, 273 N.W. 638, 638 (1937).

61. *Id.*

62. *Id.* at 65-66, 273 N.W. at 639-40. In fact, the court went to great pains to describe absentee voting as a privilege, in comparison to the general right to vote in person:

Laws relating to the registration of voters, secrecy of the ballot, and counting and returning the results of elections, are designed to give the fullest expression to the will of the electorate at the polls and at the same time to prevent illegal voting, frauds, and dishonesty in elections which frequently have defeated the will of the voters.

...

The Absent Voters Law provides a way for voting by mail in cases in which the voters are absent from the district or are physically unable to go to the polls in person. The lawmaking power, being fully cognizant of the possibilities of illegal voting, frauds and dishonesty in elections, prescribed many safeguards in the Absent Voters Law to prevent such abuses. While the purpose of the statute is to extend the privilege of voting, its provisions clearly indicate an intention not to let down the bars necessary for honest elections. *Absentee voting is an exception to the general rule and is in the nature of a special right or privilege which enables the absentee voter to exercise his right to vote in a manner not enjoyed by voters generally.*

...

The supreme court later confirmed that absentee voting is a privilege rather than a zealously-guarded right.<sup>63</sup> In a 1975 election contest, one of the questions, as in *City of Glencoe*, was whether absentee voters who failed to follow ballot completion requirements were still entitled to have their votes counted.<sup>64</sup> The supreme court concluded that absentee voters were not so entitled because absentee ballot laws “are not designed to insure a vote, but rather to permit a vote in a manner not provided by common law.”<sup>65</sup> Hence, the court affirmed the legislature’s right to take broad precautions to prevent voter fraud, even at the expense of legitimate absentee voters.<sup>66</sup> As a result, absentee voting has historically been considered a privilege rather than an absolute right in Minnesota.<sup>67</sup>

---

If an elector decides to exercise the privilege of absentee voting, he can register and vote, by the terms of the law, only “by complying with the provisions” thereof. Section 496.

*Id.* (emphasis added). Thus, the court concluded not only that absentee voting is a privilege rather than a right, but that concerns about voter fraud give the legislature very broad leeway to enact procedural safeguards. *Id.* If the absentee voter fails to comply with those safeguards for whatever reason, the absentee voting privilege is lost. *Id.*

63. *Bell v. Gannaway*, 303 Minn. 346, 356, 227 N.W.2d 797, 804 (1975).

64. *Id.* at 354, 227 N.W.2d at 803.

65. *Id.* at 352-53, 227 N.W.2d at 802. The court elaborated on this conclusion, quoting *City of Glencoe* extensively and also reiterating:

It is important, at the outset, to consider the nature of absentee voting in the election process. The opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than a right. Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures of such voting.

*Id.* (citing *Wichelmann v. City of Glencoe*, 200 Minn. 62, 273 N.W.2d 638 (1975); *Ragan v. Burnett*, 305 S.W.2d 759 (Ky. 1957); *De Flesco v. Mercer County Bd. of Elections*, 129 A.2d 38 (N.J. Super. Ct. App. Div. 1957); *Frink v. State ex rel. Turk*, 35 So. 2d 10 (Fla. 1948); *Miller v. Mersch*, 42 N.W.2d 652 (Neb. 1950)). Accordingly, “absentee voter statutes, so far as the acts and the duties of the voter are concerned, must be held to be mandatory in all their substantial requirements.” *Id.* at 354, 227 N.W.2d at 803.

66. *Id.* at 353, 227 N.W.2d at 803.

67. To varying degrees, the same is true of other states because absentee voting, unlike the general right to vote, is a creature of statute created in derivation of the common law. 29 C.J.S. *Elections* § 210(1) (“Absentee voting is a privilege conferred by statute. Authorities differ as to whether statutes conferring and regulating the privilege should be strictly or liberally construed.”); *State ex rel. Hand v. Bilyeu*, 346 S.W.2d 221, 225 (Mo. Ct. App. 1961) (“The casting of vote by absentee ballot in any election is not a matter of inherent right. It is a special privilege conferred and available only under certain circumstances.”); *see also Hale v. Goble*, 356 S.W.2d 33 (Ky. 1961); *State ex rel. Van Horn v. Lyon*, 173 P.2d 891 (Mont. 1946); *Arends v. Whitten*, 109 N.W.2d 363 (Neb. 1961); *Portmann v. Bd. of Elections of Stark County*, 19 N.E.2d 531 (Ohio Ct.

This is not to say that absentee voting is thought unimportant, either in Minnesota or elsewhere. Absentee voting dates back to the Civil War, when soldiers needed a means of casting their votes without returning home in the midst of battle.<sup>68</sup> Given this laudable initial goal, the ever-expanding ability of voters to travel, and the increased focus through the years on the importance of voting rights, states' provisions for absentee voting have grown and expanded since the Civil War.<sup>69</sup> In many states, absentee voting statutes are no longer strictly construed; instead, absentee ballots are counted as long as they are in "substantial compliance" with the controlling statute.<sup>70</sup> Thus, absentee voting is gaining recognition as an important means of ensuring suffrage for those unable to go to the polls on Election Day. All of these considerations set

---

App. 1938); *Brown v. Dakota Pub. Serv. Co.*, 299 N.W. 569 (S.D. 1941); *Hilliard v. Park*, 370 S.W.2d 829 (Tenn. 1963); *Garza v. Salinas*, 434 S.W.2d 153 (Tex. Civ. App. 1968); *Clapp v. Joint Sch. Dist. No. 1*, 124 N.W.2d 678 (Wis. 1963); *Fugate v. Mayor of Buffalo*, 348 P.2d 76 (Wyo. 1960). Furthermore, absentee voters voluntarily risk disenfranchisement when they choose to be absent on Election Day, as many do. Associated Press, *Wellstone's Death Spurs Review of Vote-by-Mail Trend*, ASSOCIATED PRESS & LOCAL WIRE, Nov. 18, 2002 ("You accept the risk when you're gone from the precinct," says [Secretary of State Mary] Kiffmeyer, Minnesota's top election official.).

68. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) ("Absentee voting began during the Civil War as a means of providing soldiers the ability to vote. Vermont became the first state to accord absentee voting privileges to civilians in 1896. States have continued to provide for and expand absentee voting since.") (footnotes omitted); *see also De Flesco v. Mercer County Bd. of Elections*, 129 A.2d 38, 40 (N.J. Super. Ct. App. Div. 1957).

69. *Voting Integrity Project*, 259 F.3d at 1175. Even though methods and procedures for voting traditionally are set by the states, Congress has gone so far in recognizing the importance of absentee voting as to require states to offer it in presidential elections. *Compare United States v. Classic*, 313 U.S. 299, 311 (1941) (noting that the Elections Clause of the United States Constitution gives states the right to "exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.") with 42 U.S.C. § 1973aa-1 (1999) (finding that "the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote" and declaring the necessity of establishing "nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections."); *see also Bush v. Gore*, 531 U.S. 98, 105-06 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

70. 29 C.J.S. *Elections* § 210(1) ("Under other authority, the absentee voting laws should be liberally construed in aid of the right of suffrage and in order to effectuate their aims and purposes, as in determining the elections to which they apply . . .") (citing case law in Indiana, Maine, Mississippi, Missouri, Nebraska, New Jersey, New York, Pennsylvania, Rhode Island, Texas, West Virginia, and Wisconsin); *see also Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999); *Mittelstadt v. Bender*, 210 N.W.2d 89 (N.D. 1973).

the stage for the absentee ballot issues arising in *Erlandson v. Kiffmeyer*.

### III. *ERLANDSON V. KIFFMEYER*

When Senator Paul Wellstone, Minnesota's Democratic-Farmer-Labor candidate for the United States Senate, died on October 25, 2002, the election was only eleven days away.<sup>71</sup> His death created a statutory vacancy on the ballot late in the campaign period.<sup>72</sup> That vacancy was filled on October 31, 2002, when the DFL party filed a certificate naming former Vice President Walter Mondale as its new nominee.<sup>73</sup>

Questions arose almost immediately regarding the proper way to conduct the election and draw up, distribute, and count supplemental ballots.<sup>74</sup> These questions were especially pressing in light of state absentee balloting procedures.<sup>75</sup> On October 29, 2002, three individuals brought an action in the Minnesota Supreme Court,<sup>76</sup> alleging that the secretary of state was about to commit a variety of errors and omissions when conducting the upcoming election.<sup>77</sup> While certain issues regarding the form of the supplemental ballots and the like were resolved informally, questions remained about "the treatment of regular absentee

---

71. See Kennedy, *supra* note 1.

72. MINN. STAT. § 204B.13, subd. 1 (2002) (stating that vacancy occurs when a major political party candidate who was nominated at a primary dies or withdraws).

73. Erlandson Order, *supra* note 16, at 2; see also MINN. STAT. § 204B.13, subd. 2 (2002) (setting forth procedures for filling a vacancy on the ballot).

74. Press Release, *Secretary of State Mary Kiffmeyer Explains "Supplemental" Ballot, Options for Absentee Voters Upon Death of Senator Wellstone*, Oct. 26, 2002, available at <http://www.sos.state.mn.us/office/press%20release%20AB%20options1.doc> (last visited Nov. 28, 2003); see also Answer and Memorandum of State of Minnesota at 17, *Erlandson* (No. C7-02-1879) ("The circumstances resulting from Senator Wellstone's death have resulted in a variety of legal issues, as set forth above. The State welcomes the Court's guidance on these issues.").

75. Petition for an Order to Show Cause Pursuant to MINN. STAT. §204B.44, Exhibit B at 2, *Erlandson* (No. C7-02-1879). As previously discussed, thousands of absentee ballots already had been mailed and absentee voters were unsure of the effect of their votes following Wellstone's death. See Bakst, *supra* note 7.

76. MINN. STAT. § 204B.44 (2002) provides that a petition alleging errors or omissions in the drafting of ballots or the conduct of an election "shall describe the error, omission or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the supreme court in the case of an election for state or federal office . . ." Here, the petition was filed October 29, 2002, the court issued an order requiring all responses to be filed by 1:00 p.m. on the following day, and oral argument was scheduled for the morning of October 31, 2002. *Erlandson*, 659 N.W.2d at 726.

77. *Erlandson*, 659 N.W.2d at 726. Although the petition initially named only the secretary of state and county auditors/treasurers as defendants, members of the Republican Party filed a motion to intervene for the purpose of opposing certain proposals set forth by the petitioners. *Id.* The motion to intervene was granted. *Id.*

ballots cast before the vacancy occurred and distribution of supplemental ballots to voters to whom regular absentee ballots had already been sent.”<sup>78</sup>

Specifically, petitioners argued that there were fundamental due process and equal protection problems with Minnesota's candidate replacement system that specifically affected absentee voters.<sup>79</sup> Petitioners argued that one such problem was Minnesota Statutes section 204B.41, which prohibits mailing supplemental ballots to absentee voters who previously requested a regular ballot.<sup>80</sup> Furthermore, section 204B.41 provides that votes cast for Wellstone would be counted for Wellstone rather than his replacement, even though Wellstone could not serve if elected.<sup>81</sup> Petitioners contended that these provisions created

---

78. *Id.* at 728.

79. *Id.*

80. *Id.*; see also MINN. STAT. § 204B.41 (2002) (“Official supplemental ballots shall not be mailed to absent voters to whom ballots were mailed before the official supplemental ballots were prepared.”).

81. *Erlandson*, 659 N.W.2d at 728; see also MINN. STAT. § 204B.41 (“Absentee ballots that have been mailed prior to the preparation of official supplemental ballots shall be counted in the same manner as if the vacancy had not occurred.”). In other words, the law provides that all votes, including those for the deceased candidate, will be counted toward the election of that candidate. The problem, however, is that Paul Wellstone, unlike his opponents, was no longer an eligible candidate for election. Accordingly, all absentee votes cast for Coleman, Moore, Tricomo, or Kovatchevich could aid in their election, while votes for Wellstone neither elected Wellstone nor aided in the election of the DFL party's alternate candidate, Walter Mondale.

This dichotomy caused some consternation in the political community. “‘It's very difficult to say it's a fair election,’ said [Minnesota Governor] Jesse Ventura, ‘when they've already said that anyone that voted absentee with the name ‘Paul Wellstone’ won't be counted, and anyone who voted absentee with the name ‘Norm Coleman’ will be counted.’” Tom Blackburn, *You Can Vote Early—And Awful*, PALM BEACH POST, Nov. 4, 2002, at 22A; see also Jim Ragsdale, *Ballot Troubles Anticipated; Ventura Says Absentee Vote Counting Unfair; He Predicts a Challenge to Senate Election*, ST. PAUL PIONEER PRESS, Oct. 29, 2002, at A1 (reporting same quote from Governor Ventura *supra* and noting Ventura's concluding remark: “That, to me right there, creates an unfair election.”).

Political pundits across the country debated the fundamental fairness of the unfortunate turn of events. *Interview by Sean Hannity and Alan Colmes with former Senator Larry Pressler (D-S.D.) and former Labor Secretary Robert Reich*, FOX NEWS (Oct. 31, 2002), available at 2002 WL 2789202:

Colmes: [O]ne of the issues that they dealt with today in Minnesota was the issue of absentee ballots. It seems like the Republicans wanted the Wellstone ballots not to count but all the absentee ballots, you know, for Coleman to count. That wouldn't be entirely fair, would it?

Pressler: Well, this is not entirely true. This is a very difficult issue



two due process and/or equal protection problems: (1) for no good reason, absentee voters could not get supplemental ballots that would enable the voter to choose a candidate who could be elected; and (2) votes cast for Wellstone would not count toward an electable candidate, while votes cast for any other candidate would count.<sup>82</sup> The implication was that this system gave the living candidates and their parties—especially the candidate who was closest in the polls—a distinct and unfair advantage.

To remedy the situation, petitioners proposed three alternative courses of action:

(1) Order replacement ballots, including supplemental ballots, sent to all persons who had requested an absentee ballot or would request one before the election. Discard all Senate votes cast before Wellstone's death regardless of whom the voter selected, and count only the replacement ballots.

(2) Order replacement ballots sent to all persons who had requested an absentee ballot or would request one before the election. Count regular ballots for those who did not return a replacement ballot and all replacement ballots.

---

when you have absentee votes that have already been cast. But what has been set up is fair, I think. People can still get a ballot in.

...

Colmes: But now they're going to—Secretary Reich, they're going to—people can write in, and they have to get—but they may not get it in time. It seems unjust to me.

Reich: Oh, it's completely unfair, Alan . . . .

Colmes: So now a lot of people are saying they can send in and get ballots back. They may not get them in time. So—but the ones who will be disenfranchised will be the Democratic voters, especially those who can't get to the polls, who need absentee ballots.

*See also* Ronald Brownstein, *Choice of Wellstone's Successor May Determine Senate Control: Minnesota Democrats Face Key Decision, with Insiders Focusing on ex-VP Walter Mondale*, LOS ANGELES TIMES, Oct. 26, 2002, at A14 ("Los Angeles attorney Fred Woocher said that [Minnesota law] leaves open the question of whether absentee ballots cast for Wellstone will be discarded or assigned to the Democratic replacement. 'There's a real problem in either of these two options. One gives the obvious advantage to the Republican candidate; the other assumes the voter's intent to vote for the Democratic nominee and not for the individual candidate himself or herself,' Woocher said."); *Special Report with Brit Hume*, FOX NEWS, Oct. 29, 2002, available at 2002 WL 5585387 (discussing absentee voters' dilemma that while votes for Wellstone will be "wasted" unless absentee voters can go to the polls to change their votes, absentee voting, by definition, occurs because the voter cannot get to the polls).

82. *Erlanson*, 659 N.W.2d at 728.

(3) Order replacement ballots sent only to those who specifically request or requested replacement ballots, and count those replacement ballots if returned by Election Day.<sup>83</sup>

At oral argument, petitioners acknowledged that, as a result of the short time until the election, even these remedies might be insufficient to give all absentee voters a reasonable opportunity to cast replacement ballots.<sup>84</sup> Accordingly, petitioners further asked the court to require absentee ballots to be sent by means faster than regular mail, including facsimile, the internet, e-mail, and commercial overnight mail.<sup>85</sup>

Respondents and intervenors contested most of petitioners' proposed remedies for a variety of reasons.<sup>86</sup> Interestingly, however, all parties agreed that, at a minimum, the court should require county election officials to send replacement ballots to absentee voters who requested them—even if the voter previously received a regular ballot.<sup>87</sup> In other words, all parties essentially agreed that the prohibition in Minnesota Statutes section 204B.41 was infirm; in fact, when the attorney general, representing the state, was asked at oral argument to provide a rational basis for the prohibition, he responded that he could not.<sup>88</sup>

The court released its initial order, without opinion, later the same day.<sup>89</sup> The order required election officials to prepare an official supplemental ballot and mail both a replacement regular ballot and the supplemental ballot to all absentee voters who requested them, section 204B.41 notwithstanding.<sup>90</sup> If the voter previously cast a ballot, election officials were directed to count only the ballot with the later return date.<sup>91</sup> And if the voter cast only an original absentee ballot but not a replacement or supplemental ballot, the court directed such ballots to be counted “in the same manner as if the vacancy had not occurred,”

---

83. *Id.* at 729.

84. Audio Tape, Oral Argument in *Erlandson v. Kiffmeyer*, No. C7-02-1879 (Minn. Oct. 31, 2002), held by Minnesota Supreme Court Commissioner's Office.

85. *Id.*

86. *Id.* Intervenors in particular argued that votes cast before Wellstone's death should not be discarded and that voters should be able to get regular ballots until replacement ballots were available. *Erlandson*, 659 N.W.2d at 734. The stated goal was maximizing absentee voters' access to the ballot. *Id.*

87. Audio Tape of Oral Argument, *supra* note 84.

88. *Id.*; *Erlandson*, 659 N.W.2d at 734.

89. *Erlandson* Order, *supra* note 16.

90. *Id.* at ¶ 2.

91. *Id.* at ¶ 3.

per section 204B.41.<sup>92</sup>

The court's opinion explaining its order was issued in April 2003.<sup>93</sup> After weeding out the issues rendered moot before oral argument, the court first rejected petitioners' claim that it was fundamentally inequitable to count all regular absentee ballots as if no vacancy occurred.<sup>94</sup> Although the court noted the apparent unfairness of this approach to the replacement candidate, petitioners cited no legal authority for abandoning the plain language of section 204B.41.<sup>95</sup> The court further concluded that the unfortunate disenfranchisement of some Wellstone voters did not justify also disenfranchising persons who voted for a living candidate.<sup>96</sup>

The court next turned to petitioners' statutory and constitutional arguments for mailing replacement ballots to absentee voters despite the section 204B.41 prohibition.<sup>97</sup> Petitioners' statutory argument was that an absentee ballot cast with a vote for Wellstone was spoiled by the fact of Wellstone's death; thus, under Minnesota law, a second absentee ballot could be mailed.<sup>98</sup> The court rejected this argument, concluding that there is no statutory or judicial definition of "spoiled," and the spoliation statute implies a ballot is spoiled only when the voter errs or marks the ballot inappropriately.<sup>99</sup> Because a vote for Wellstone carefully cast before his death was not mistaken or improper, the ballot

---

92. *Id.* at ¶ 4. The court required that clear directions accompany all mailed replacement ballots. *Id.* at ¶ 2. It also provided additional direction for elections being conducted by mail and for absentee voting for health-care-facility residents. *Id.* at ¶¶ 6-7, 9.

93. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 724 (Minn. 2003).

94. *Id.* at 731. Mondale stood to lose absentee votes previously cast for Wellstone, which may have been recast for Mondale given sufficient time.

95. *Id.*

96. *Id.* Like Wellstone voters, voters for other candidates might have lacked sufficient time to cast a replacement ballot. It would obviously disenfranchise more voters to throw out all original absentee ballots than to require only those voters wanting to change their vote to cast a replacement ballot. Thus, the court chose minimizing the number of disenfranchised voters over the arguably more "fair" solution—to the political parties if not the voters—of requiring all absentee voters to start from scratch.

97. *Id.* at 731-32.

98. *Id.* at 731; *see also* MINN. STAT. § 203B.06, subd. 3 (2002) (authorizing election officials to mail a second absentee ballot, despite section 204B.41's prohibition, "when a replacement ballot has been requested by a voter for a ballot that has been spoiled or lost in transit").

99. *Erlandson*, 659 N.W.2d at 732; *see also* Brief for Respondent at 7, *Erlandson* (No. C7-02-1879) (noting that Minnesota laws use the term "spoiled" "to describe situations where a ballot has been subject to unlawful or inappropriate conduct by the voter"); MINN. STAT. §§ 203B.12, subds. 3-4, 204C.17 (2002).

2003] CANDIDATE DEATHS AND ABSENTEE VOTING 415

was not spoiled.<sup>100</sup>

After rejecting petitioners' statutory argument and declining to define the term "spoiled,"<sup>101</sup> the court addressed petitioners' constitutional argument that section 204B.41 differentiates between absentee voters solely on their ability to vote in person on or before Election Day.<sup>102</sup> Here, the court found an equal protection violation.<sup>103</sup> There was no dispute that a person who cast an absentee ballot could cast a replacement ballot by picking up a replacement ballot in person, or by going to the polls on Election Day.<sup>104</sup> But section 204B.41 prohibited those who did not have these options from casting a replacement ballot, thereby treating them differently.<sup>105</sup> The only question was which level of constitutional scrutiny applied—strict because this was a voting rights issue, or rational basis because *absentee* voting has traditionally been cast as a privilege rather than a right.<sup>106</sup>

Without determining the exact standard,<sup>107</sup> the court concluded that

---

100. *Erlandson*, 659 N.W.2d at 734.

101. *Id.* at 732. The court noted its general practice to avoid a constitutional ruling when it is possible to decide an issue on statutory grounds, but determined that deciding this case on statutory grounds would be the more dangerous route. *Id.* at 732 n.7 (worrying that defining "spoiled" here "could have broad ramifications in a variety of other electoral circumstances"). The court therefore issued its decision on constitutional grounds because such a decision would have "narrow impact" and would be "limited to the particular circumstances presented in this case and affect[] only one sentence of section 204B.41, which section itself is only applicable to the unusual circumstances of a vacancy created by the death or catastrophic illness of a candidate after the 16th day before the general election." *Id.*

102. *Id.* at 732. It also came out at oral argument that some county auditors had decided to send absentee replacement ballots despite section 204B.41's prohibition. Audio Tape of Oral Argument, *supra* note 84. As a result, residents of some counties had earlier access to absentee ballots than residents of counties whose auditors declined to send replacement ballots. There was some suggestion at oral argument that this differential treatment violated equal protection by distinguishing between voters based solely on their county of residence. *Id.* This argument was not addressed in the court's opinion. One can only speculate that it would become an issue after the election if the votes counted for Wellstone might have affected the election's outcome.

103. *Erlandson*, 659 N.W.2d at 732.

104. *Id.* at 734.

105. *Id.*

106. *Id.* at 733-34, 33 n.8; see *supra* Part II.B.2.

107. The court recognized that rational basis scrutiny has typically been applied when the ability to cast an absentee ballot, rather than the general right to vote, is at issue. *Erlandson*, 659 N.W.2d at 733, 733 n.8 (citing *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969); *Bell v. Gannaway*, 303 Minn. 346, 354, 227 N.W.2d 797, 802 (1975)). But the court also noted that where the withholding of an absentee ballot was "wholly arbitrary," the level of scrutiny was unimportant. *Id.* at 733-34 (citing *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974)).

the prohibition failed even the lowest level of scrutiny.<sup>108</sup> None of the parties offered even a rational basis for the differential treatment, and the issue of potentially greater ballot fraud or voter confusion related to duplicate mailed ballots was summarily raised and rejected.<sup>109</sup> The court therefore held that the prohibition on mailing replacement absentee ballots violated the Equal Protection Clause<sup>110</sup> and necessitated the court's earlier order to send replacement ballots to those who requested them.<sup>111</sup>

Justice Page concurred in part and dissented in part.<sup>112</sup> While he agreed that the prohibition against sending replacement absentee ballots was unconstitutional, he argued that the court erred in concluding that ballots cast before the vacancy occurred "shall be cast in the same manner as if the vacancy had not occurred."<sup>113</sup> Because the issue was not briefed and was raised for the first time at oral argument, Justice

108. *Erlandson*, 659 N.W.2d at 734.

109. *Id.* Focusing instead on the importance of preventing disenfranchisement, the court spent little time discussing the potential rationale for the statutory prohibition on mailing replacement ballots:

Because voters who mailed in their regular absentee ballots could obtain a replacement ballot in person either at their local election official's office or at the polls, the state's interest in not mailing replacement ballots cannot be based on concern about people voting twice or controlling voter fraud. Intervenors suggested at argument that the purpose for the prohibition may be to prevent voter confusion, but the risk of confusion from mailing a replacement ballot with appropriate instructions seems no greater than providing one to the voter in person.

*Id.*

110. *Id.* Specifically, the court concluded:

In the total absence of any rational explanation, allowing some absentee voters to revote with replacement ballots but denying that opportunity to the very group for which absentee voting is designed by prohibiting the mailing of replacement absentee ballots is a denial of equal protection that requires remedial action. Hence, our October 31, 2002, order was based on the conclusion that equal protection required election officials to make an effort to enfranchise absentee voters who previously cast their regular absentee ballots and were unable to obtain a replacement ballot in person either before or on election day.

*Id.*

111. *Id.* at 734 n.9; *Erlandson* Order, *supra* note 16, at ¶ 2. The court noted that even the spoiled-ballot statute does not require replacement of a spoiled ballot until the voter requests a new ballot, and declined to impose the substantial burden on election officials of requiring a mass ballot mailing even to voters with no interest in revoting. *Erlandson*, 659 N.W.2d at 734 n.9.

112. *Id.* at 735.

113. *Id.* (quoting MINN. STAT. § 204B.41 (2002)).

Page concluded it was not properly before the court.<sup>114</sup> More directly, Justice Page found fundamental problems with the court's implied conclusion that disenfranchising some voters was inevitable, and that it was acceptable to have some absentee votes but not others count toward an electable candidate.<sup>115</sup> Overall, then, the court agreed that access to absentee ballots is an important means of preventing voter disenfranchisement.<sup>116</sup> The full implications of this conclusion have yet to be seen.

#### IV. ANALYSIS

There are at least two reasons why the court's decision may have broader impact on future elections than the opinion initially suggests. First, as previously noted, it is not uncommon for candidates to die in the weeks preceding elections. Given the age of some politicians seeking reelection, that candidates must engage in an extraordinary amount of travel in the weeks before Election Day, and increased media scrutiny of candidates' past indiscretions, it is unfortunate but likely that situations like Wellstone's, Grunseth's, and Carnahan's will reoccur. Even if it does not happen at the federal level, Minnesota's state balloting laws apply to local, state, and federal candidates alike.<sup>117</sup> The Missouri experience illustrates that if it does not occur in a national election, it may well occur at the local level.<sup>118</sup>

Second, Wellstone's death and its implications in the 2002 election illuminated larger issues for absentee voters. A late-election candidate

---

114. *Id.* at 735 (citing *Morrow v. LaFleur*, 590 N.W.2d 787, 796 n.15 (Minn. 1999)). Justice Gilbert joined in Justice Page's concurrence and the majority's opinion, but not Justice Page's dissent. *Id.* at 736. Justice Gilbert agreed that addressing issues raised for the first time at oral argument was improper, and expressed concern toward petitioners' proposal to discard all regular absentee ballots cast in the Senate race. *Id.* He found the court's resolution more equitable, as it disenfranchised fewer voters than the petitioners' proposal. *Id.*

115. *Id.*

116. *Id.* at 735-36.

117. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

118. *Name of Town Mayoral Candidate Who Died Will be on Ballot*, ST. LOUIS POST-DISPATCH, Apr. 1, 2001, at D7. Tom Miller, a candidate for mayor of the Missouri town of Kearney, died of cancer in late March 2001 with the mayoral election scheduled for April 3, 2001. *Id.* As with Carnahan, Missouri law continued to require that Miller's name remain on the ballot after his death. *Id.* At least one author considered it likely that the same problem will continue to occur. See Adams, *supra* note 24, at 451-52.

replacement can wreak havoc on the absentee voter's plans, regardless of the reason for the replacement. If appearing in person or obtaining a replacement ballot by regular mail are the absent voter's only options, he or she may have no real opportunity to cast a new ballot late in the election.<sup>119</sup> This is true regardless of whether the voter originally voted for a deceased candidate or anyone else.<sup>120</sup> The question, then, is how important it is to ensure a voter's true wishes are registered after general election candidates are finally established.

A. *Right versus Privilege: Are Minnesota's Absentee Voting Statutes Now Entitled to Rational Basis Deference or Subject to Stricter Scrutiny?*

While declining to reopen the right-versus-privilege question in *Erlandson*, the court quoted past Minnesota and United States Supreme Court decisions that absentee voting laws need only survive rational basis review, but hinted that statutes tending to altogether deny absentee ballot access might be subject to stricter scrutiny.<sup>121</sup> As a result, the amount of deference accorded to laws restricting absentee voting is uncertain. Does the legislature still have broad authority to limit absentee voting—for instance, by retaining strict registration procedures or by requiring the use of regular United States mail even late in the election?<sup>122</sup>

---

119. This is not solely a problem arising from vacancies on the ballot. Even where an election proceeds as intended, no doubt some voters are unexpectedly called out of town for a variety of reasons, including sudden business trips and family emergencies. When the only options are obtaining a ballot in person or by United States mail, those people are equally without a means of casting their vote.

120. As the argument goes, a person who chose Coleman over Wellstone might ultimately prefer Mondale over either of them. Conversely, a person who chose Wellstone over Coleman might prefer Coleman to Mondale. The replacement of one candidate could therefore conceivably change any voter's preferences regardless of the person's political affiliations or original vote.

121. *Erlandson*, 659 N.W.2d at 733-34 (noting that the court "need not resolve whether strict scrutiny or rational basis review is the proper standard").

122. Another question determined by the rights-versus-privilege issue is whether a voter must comply with the strict letter of absentee ballot statutes; in other words, is "substantial compliance" sufficient? States focusing on absentee voting as a privilege will tend to reject absentee ballots that do not follow statutory voting requirements to the letter. See *supra* notes 60-67 and accompanying text. Those states focusing more closely on the importance of enfranchising all voters, including those in absentia, consider substantial compliance sufficient. See *supra* notes 68-70 and accompanying text. The properly-cast ballot issue comes into play in any close election—from the *Bush v. Gore* dispute following the 2000 United States presidential election to narrow contests between state legislators. See, e.g., *Bush v. Gore*, 531 U.S. 98, 105 (2000). Indeed, there was

While the answer is not clear, the *Erlandson* decision offers some hints as to what Minnesota's high court will and will not permit. A number of themes are evident: First, absentee voting is extraordinarily valuable, so long as it does not place too great a burden on election officials under the circumstances.<sup>123</sup> Second, a statute with the probable, if unintended, effect of disenfranchising voters is likely to face something more than mere rational basis scrutiny.<sup>124</sup> Finally, the court concluded that enfranchising absentee voters outweighed concerns about voter fraud in at least one statute,<sup>125</sup> paving the way for legislation allowing additional means of casting absentee ballots in the future. In other words, to the extent that the legislature passes a reasonable statute designed to expand rather than contract access to absentee ballots, it probably has little to fear in the way of constitutional challenges in Minnesota's courts.

*B. Fallout: Legislation Proposing Changes to Minnesota's Absentee Voting Mechanism*

A further result of the absentee ballot issues surrounding Wellstone's death and the related Minnesota Supreme Court decision was the introduction of bills in the Minnesota legislature proposing additional methods of absentee voting. A bill introduced in the state house of representatives and senate proposed a trial period for absentee

---

some speculation before Minnesota's 2002 senatorial election that absentee votes would be closely scrutinized for compliance with voting laws (if those laws were deemed valid) if the election's outcome was affected by the number of absentee ballots cast. Hank Shaw, *Minnesota a Cold Florida?*, ST. PAUL PIONEER PRESS, Nov. 2, 2002, at A1. Fortunately, the election was not that close and the issue was never presented in litigation. But when the issue *is* presented to a Minnesota court, as it undoubtedly will be at some point, the lower court will likely be looking to the *Erlandson* decision for some guidance as to the "rights" of absentee voters versus the deference accorded to the legislature in enacting absentee voter laws. The Minnesota Supreme Court's implied decision that enfranchising voters was more important than searching for ways to uphold a legislative limit on absentee voting may well sway the court to determine that "substantial compliance" by the voter will sustain the vote's validity, rendering "strict compliance" unnecessary.

123. *Erlandson*, 659 N.W.2d at 734 n.9.

124. *See supra* notes 104-06 and accompanying text.

125. *Erlandson*, 659 N.W.2d at 734 (concluding that voter fraud concerns do not provide even a rational basis for section 204B.41's prohibition on mailing replacement absentee ballots, and determining that the prohibition "disenfranchises the very people the absentee voter laws are intended to benefit"—those who cannot get to the polls or an election office in person).



voting by facsimile or electronic transmission.<sup>126</sup> Other bills expanded the class of people who may vote by absentee ballot.<sup>127</sup> The most aggressive bill affected the counting of absentee votes rather than the means of casting them; it provided that a voter who received an absentee ballot before supplemental ballots were prepared, voted for a candidate who died or withdrew because of illness, and did not request a supplemental ballot, would be recorded as having voted for the replacement candidate chosen by the same political party.<sup>128</sup>

However, no bill was introduced to change procedures for the election itself.<sup>129</sup> In all proposed bills, the deadline for filling a vacancy on the ballot remains four days before the election and the procedures for nominating a replacement are unchanged.<sup>130</sup>

---

126. H.F. 68, 83rd Leg., Reg. Sess. (Minn. 2003) and S.F. 1016, 83rd Leg., Reg. Sess. (Minn. 2003) (bills allowing voter registration and absentee ballot requests, receipt, or transmission by the internet or facsimile).

127. S.F. 7, 83rd Leg., Reg. Sess. (Minn. 2003) and H.F. 92, 83rd Leg., Reg. Sess. (Minn. 2003) (referencing the same bill introduced in both chambers). This bill amended section 203B.02 of the Minnesota Statutes so that any person who expects to be unable to visit his or her polling place on election day may cast an absentee ballot, regardless of the reason for absence. *Id.* at § 1. The bill would also permit the transmission of absentee ballots and absentee voting by commercial mail at the voter's expense, or by facsimile under certain circumstances. *Id.* at §§ 4, 6. With the apparent goal of minimizing voter fraud, the proposed law would direct county auditors to reject ballots when it was impossible to verify that a facsimile ballot was returned by the same voter who requested it. *Id.* at § 6. Finally, the bill deleted the prohibition on mailing supplemental ballots to voters who received the original ballot, providing instead that supplemental ballots must be delivered to any absentee voter who requests one. *Id.* at § 8.

128. H.F. 1220, 83rd Leg., Reg. Sess. (Minn. 2003). The same bill deleted language in Minnesota Statutes section 204B.41 prohibiting the mailing of replacement ballots and requiring absentee ballots mailed before preparation of supplemental ballots to be counted as if no vacancy occurred. *Id.* at § 1. This is an interesting, if problematic, approach. It assumes voters place more importance on a candidate's political party affiliations than on the identity of the candidate. It also rules out the possibility that a voter might choose a different original candidate over the replacement candidate. Because a vacancy on the ballot could conceivably realign a voter's thinking altogether, a system allowing voters to choose a particular person is probably preferable, even where time is limited.

129. The closest was a bill extending the deadline for returning absentee ballots via an agent from 3:00 p.m. on Election Day to 5:00 p.m. on Election Day. H.F. 60, 83rd Leg., Reg. Sess. (Minn. 2003). This bill made it through committee in late January 2003, but little further action was taken until the bill was returned to the House Committee on Governmental Operations and Veterans Affairs in May 2003. *Report of Disposition of Bills Upon Adjournment*, Journal of the Minnesota House at 4443 (May 19, 2003), available at <http://www.house.leg.state.mn.us/cc/journals/2003-04/jsupp2003.htm#4443> (last visited Nov. 28, 2003).

130. The reason for this may be a fear of expanding the possibilities for special elections. If a candidate dies, cannot be replaced, and is elected posthumously, one of

In any case, although some speculated that at least one of these absentee voting bills would pass in the wake of the *Erlandson* Order and subsequent opinion,<sup>131</sup> the predictions did not prove prescient. None of the bills proposed in the 2003 regular legislative session made it out of committee.<sup>132</sup> The precise reason is not clear, but it may be related more to overwhelming state budget issues than to any political disinclination to expand absentee voter rights.<sup>133</sup> But even assuming there is a consensus that Minnesota's absentee voting laws should be amended, there is significant disagreement as to how they should be changed.<sup>134</sup>

---

two things must happen: either the state governor appoints a replacement (possibly creating the Missouri problem); or a special election occurs, requiring citizens to go through the election all over again. *See supra* Part II.A.1; *Wellstone's Death Spurs Vote-by-Mail Trend*, ASSOCIATED PRESS STATE AND LOCAL WIRE, Nov. 18, 2002 (quoting Minnesota State Representative Jim Rhodes as decrying special elections in case of vacancies, noting, "Then the public would say: 'My God, we're going to go through all the commercials again.'"). Special elections are nonetheless contemplated in many states, including Oregon and Hawaii, and become more likely as the window of opportunity to nominate a replacement candidate before the election grows smaller. *See id.*

131. Brian Bakst, *Justices Explain Ruling on Senate Election Ballots*, ST. PAUL PIONEER PRESS, Apr. 18, 2003, at 3B ("Thursday's opinion might renew focus on efforts to change the absentee ballot law. 'We will be cleaning up the law to put it in line with the Supreme Court decision,' said Secretary of State Mary Kiffmeyer, a Republican. She is backing a law change that makes clear new ballots can be mailed to voters who request them when a candidate dies or suffers a catastrophic illness. Others want to go further, but haven't made much progress.").

132. *See* Status Reports for H.F. 68, S.F. 1016, H.F. 92, S.F. 7, and H.F. 1220, *supra* notes 126-28.

133. After all, none of the attorneys representing political parties in *Erlandson*—whether representing Republicans or DFL'ers—was willing to argue that absentee voting is merely a privilege or to defend the legislative prohibition on mailing replacement ballots. *See supra* notes 88, 109 and accompanying text; Shaw, *supra* note 11, at 1A. Even the attorney general, who appeared on behalf of the state and is charged with defending state statutes under attack, did not offer justification for the prohibition or argue that it was entitled to significant deference. Audio Tape of Oral Argument, *supra* note 84.

134. *See supra* notes 126-28 and accompanying text (describing different bills introduced to change absentee voting laws); *see also* Bakst, *supra* note 131. Bakst quotes Republican Secretary of State Mary Kiffmeyer as stating the law would be "cleaned up" to allow the mailing of replacement ballots when a candidate dies or withdraws due to catastrophic illness. *Id.* Bakst also quotes DFL Party Chairman Mike Erlandson, who favors a broader change to authorize a blanket mailing of replacement ballots to all absentee voters in the event of a candidate's death and lobbies for a grace period allowing absentee ballots to be counted even if they arrive a few days after the election. *Id.* Various other political party representatives and affiliates similarly disagree with each other's ideas. Hank Shaw, *Changes Likely in Absentee Balloting*, ST. PAUL PIONEER PRESS, Jan. 12, 2003, at 1B (discussing argument between DFL Minnesota Senator John Marty and Chief Counsel to the State GOP Tony Trimble as to whether voting by fax

At the least, Minnesota laws should be amended to avoid disenfranchising voters left with insufficient time to cast a new vote by mail following a candidate's late death or withdrawal. On the other hand, any new law also should avoid the Missouri problem of permitting the governor to name a replacement before the election, thereby allowing voters to vote for one candidate (Mel Carnahan) knowing their vote will actually count toward a person not even on the ballot (Jean Carnahan). Nor does it seem particularly democratic to subject voters to the governor's appointee for months, if not years. The question, then, is how to resolve these problems without creating significant new ones.

Either of two solutions may resolve the states' dilemmas. First, the states might establish earlier deadlines for selecting a replacement candidate, giving absentee voters sufficient time to request, receive, and submit replacement ballots. If a candidate dies or otherwise withdraws between the replacement deadline and Election Day, that person's name should remain on the general election ballot<sup>135</sup> and a special election should be held afterward if the deceased or withdrawn candidate is elected. This solution combines the approaches of a number of different states and resolves both the Missouri problem (allowing the governor to choose the candidate) and the Minnesota problem (not enough time to submit replacement absentee ballots).<sup>136</sup> It also is in accord with the

---

"leaves too much room for fraud").

135. Arguably, that affected office's election could be delayed altogether, but Election Day is set by federal statute and explicitly includes elections for the U.S. House, Senate, and President. 2 U.S.C. §§ 1, 7 (2000); 3 U.S.C. § 1 (2000); *see also* Adams, *supra* note 24, at 451 ("Congress decided there were advantages to a federal standard, such as parity in seniority of members of Congress elected to the same Congress, and, particularly in the case of presidential elections, an interest in assuring that no state should have disproportionate influence in the selection of the chief executive."). Although there are a variety of reasons for maintaining a single Election Day, parity of seniority appears to be a nonissue so long as elected persons are sworn in within a few weeks of each other, at least according to Senator Coleman's experience. Coleman initially proposed his appointment to fill the vacancy created by Wellstone's death so that he would be sworn in a few weeks before the freshman class of senators, and therefore have slightly greater seniority. Greg Gordon, *Coleman Is Learning Ropes, Risks*, STAR TRIB. (Minneapolis), Dec. 6, 2002, at 1A. This proposal became moot, however, when it was determined that the few extra weeks would make little difference. Kevin Diaz, *Barkley Says He Won't Leave Senate Early to Accommodate Coleman*, STAR TRIB. (Minneapolis), Dec. 19, 2002, at 8A.

136. While the thought of a second, special election can be distasteful to voters tired of election propaganda and candidates tired of campaigning, it is arguably better than disenfranchising voters altogether or forcing upon them a representative who was a governor's choice rather than their own. It is also the option chosen by many states. *See supra* note 130 and accompanying text.

repeatedly affirmed “American rule” that the candidate remains on the ballot so voters choose whether to elect a living candidate, or to press for a special election by electing the deceased candidate posthumously.<sup>137</sup>

Alternatively, if the timing of elections and deadlines for replacing candidates are to remain unchanged, then absentee voters must have quicker options for casting replacement ballots. Alaska, Hawaii, Indiana, and Montana currently allow, under certain circumstances, absentee voters to register to vote or cast their ballots via facsimile.<sup>138</sup> Similarly, today’s technology makes voting by commercial overnight mail, the

---

137. See *Evans v. State Election Bd. of Okla.*, 804 P.2d 1125, 1129 (Okla. 1990) (“[I]n accord with the majority rule, there is sound basis to hold that persons who voted for a candidate knowing that he was dead were voting against the other candidate and voting for the creation of a vacancy in the office so that this vacancy might later be filled in the manner set out by law.”). The majority rule discussed in the oft-cited *Evans* case is known as the “American rule.” *Id.* The minority rule, known as the English rule, renders a vote for a deceased candidate altogether void. *Id.* at 1129-30.

138. ALASKA STAT. § 15.07.050 (2003); HAW. REV. STAT. § 15-5 (2002); IND. CODE § 3-11-4-6 (2003); MONT. CODE ANN. §§ 13-13-277 (2003). The Montana State legislature specifically set forth its reasoning for allowing facsimile voting by “overseas electors”:

The legislature finds that the increased use of facsimile transmissions and the internet has encouraged the possibility of absentee voter registration and the sending and receiving of absentee ballots by facsimile and electronically through the internet. The legislature also finds that while federal law encourages but does not require the use of facsimile transmissions and the internet in federal elections, there is sufficient reliability in facsimile and internet technology and sufficient evidence that absentee facsimile and internet voting would be of benefit to electors in the United States service to provide for absentee registration and voting by facsimile and electronically through the internet. It is the purpose of 13-13-276 through 13-13-278 to allow for absentee voter registration and voting by facsimile and electronically through the internet for overseas electors in the United States service, while recognizing that state and local election officials have the responsibility to maintain the accuracy, integrity, and secrecy of the election process and the individual election ballot.

MONT. CODE ANN. § 13-13-276 (repealed 2003). Although this specific provision was repealed, Montana law still allows absentee balloting by facsimile or the internet. MONT. CODE ANN. §§ 13-13-277 (2003). See also Uniformed & Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff, (2003); see also Sam Hananel, *Thousands to Cast Ballots by Web in 2004*, ASSOCIATED PRESS ONLINE, July 12, 2003, available at 2003 WL 59741600 (“Thousands of people serving in the military and Americans living abroad will have that option next year in the nation’s most extensive Internet voting experiment, viewed by some as a step toward elections in cyberspace. The Secure Electronic Registration and Voting Experiment, which began as a tiny demonstration project in the 2000 general election and involved just 84 voters, could give 100,000 voters the chance to cast absentee ballots online in next year’s presidential primaries and general election.”).

internet, and e-mail faster, easier, and possibly less expensive (at least as to the latter two options) than relying on votes by mail. It hardly needs to be said that such legislation must be drafted with great care to prevent fraud. However, the Minnesota Supreme Court's conclusion that mailing second ballots creates no greater fraud concerns than allowing voters to cast in-person replacement ballots arguably foreshadows other means of voting in absentia, with few worries about legal challenges to these statutes on the grounds of potential fraud.<sup>139</sup> Moreover, if other states can make these voting methods successful, so can Minnesota.

Minnesota is not alone in its need to prepare for a variety of election contingencies. In the circumstances surrounding Senator Wellstone's death, there was no time to amend the laws limiting absentee voting for replacement ballots. Nor would it have been appropriate for the state court to rewrite the state's "vacancy in nomination" statute or the means by which an absentee voter can cast his or her ballot. Time has passed, however, and we are between elections. The legislature has the opportunity to make prophylactic changes now.

#### V. CONCLUSION

Judging by the arguments of political party representatives with differing ideas, the court's decision in *Erlandson*, and growing state support for absentee voting as a means of enfranchising citizens,<sup>140</sup> there appears to be a consensus that it is important to facilitate absentee voting regardless of whether such voting is a right or privilege. While the Missouri approach of leaving the deceased candidate's name on the ballot obviates the absentee voter problem, it creates a new problem

---

139. After all, the legislature has greater expertise than the courts in setting forth election procedures. See *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 311, 92 N.W. 4, 5 (1902) ("The right to vote and the right to hold office are declared to be co-ordinate. The methods by which these rights shall be protected and enforced are, of necessity, left to legislative action; but we shall readily assume that it is an inherent right of citizenship that only such a system of regulation be provided for as will be just and reasonable, and operate in its application to all voters and to candidates equally."). Interestingly, in *McCarthy* the court went on to note: "That any system will accomplish absolute equality in all things must not and cannot be expected. Under the previous methods of voting there were many defects . . . but no plan will ever place all candidates on a perfectly similar footing." *Id.* Clearly, "absolute equality" continues to be an elusive but coveted aspiration more than 100 years after *McCarthy* was decided. See *Erlandson*, 659 N.W.2d at 735 (Page, J. concurring and dissenting).

140. See Audio Tape of Oral Argument, *supra* note 84 (noting that even the attorney general declined to defend the state's decision to prohibit the mailing of a replacement ballots to requesting absentee voters).

2003] CANDIDATE DEATHS AND ABSENTEE VOTING 425

because the voters might not select the senator who will ultimately serve them and cannot replace the governor-appointed senator for two years. As a result, some commentators have suggested adopting a process akin to Minnesota's: remove the candidate's name from the ballot and designate a late pre-election deadline for nominating a replacement candidate. But, this approach obviously has its own problems given Minnesotans' experience; in the 2002 election, thousands of votes for Paul Wellstone, though ultimately not determinative, were applied to an ineligible candidate, while early votes for other candidates made a difference for those candidates. Under current Minnesota law, there simply was insufficient time for any other result.

The only solution, then, is to change the law. Expanding absentee voting to account for voting by commercial mail and facsimile is the first and most obvious solution, and would likewise expand absentee voting options for all eligible persons—whether or not an unexpected vacancy occurs. But if the legislature believes this option creates too significant a risk of voter fraud or other problems, then Minnesota's entire vacancy-on-the-ballot scheme must be revisited.