

Setting a Precedent

The effect of *Naegeli v. The Presbytery of San Francisco* and *Bierschwale v. The Presbytery of the Twin Cities Area* on *Maxwell v. The Presbytery of Pittsburgh*

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YOU'VE RECEIVED THIS PAPER from *The Faith and Polity Project*. You may be reading it carefully, or you may be just flipping casually through its pages. Obviously you have some interest in the way in which we Presbyterians govern ourselves, or you wouldn't be looking at it at all. But, you may also suspect that the subject isn't all that interesting. Well, you're in for a surprise. In and of itself, the polity of our church may not be the most exhilarating of topics, but it is the source of never-ending debates and arguments. And, we all know how interesting debates and arguments can be. One historian has gone so far as to say that there is "blood on every page" of our church's Constitution. That's because it reflects the historic and ongoing struggles of a people trying to be faithful to the message of the gospel.

The Bible, of course, is our highest authority. But, in our Constitution we attempt to say clearly "who we are," "what we believe," and "what we intend to do." Because these are such important subjects, additions or amendments to the Constitution are made only by a careful process. Once made, however, they need to be interpreted and applied. Most often, this happens when conflicting understandings of the meaning of the Constitution are argued before a church court. Decisions by General Assembly's Permanent Judicial Commission (PJC) are considered to be Authoritative Interpretations of the Constitution.¹

One of the more interesting considerations of the last fifty years, and one that has been the subject of any number of court cases and General Assembly actions, is the question of the degree to which a person who is seeking to be ordained to church office may be allowed to disregard a particular constitutional standard on the basis of a deeply held personal conviction. In "Presbyterian-ese," such a conviction is often called a "scruple."

While the debate over scrupling has a long and complicated history in our church, it came to the attention of Presbyterians again in 1974 when the Presbytery of Pittsburgh voted to ordain Mr. Walter Wynn Kenyon as a Minister. During his examination for ordination, Kenyon stated that for reasons of conscience he was unable to participate in the ordination of women. In spite of this "scruple," the presbytery sustained his examination, and voted to proceed to his ordination. However, the Rev. Jack Maxwell appealed the presbytery's action, and Kenyon's ordination was stayed. Maxwell held no animosity toward Kenyon, but felt that an important principle of Presbyterian governance was at stake – whether a presbytery has the authority to release an ordinand (i.e. a person seeking ordination to church office) from a responsibility that our constitutionally mandated ordination vows require.

The PJC of the Synod of Pennsylvania-West Virginia heard Maxwell's concern and overturned the presbytery's decision to ordain Kenyon. Synod's decision was then appealed to the General As-

sembly's PJC by the presbytery, and was upheld. In coming to its conclusion, the GAPJC made two seminal points:

1. A candidate's clearly stated refusal to comply with the requirements of the Constitution constitutes a negative answer to the fifth ordination question, "Do you endorse our Church's government, and will you honor its discipline?"
2. Neither a synod nor the General Assembly has any power to allow a presbytery to grant an exception to an explicit constitutional provision.

The principles set forth in the Maxwell decision have become key to the church's ongoing effort to define "who it is," "what it believes," and "what it intends to do." *Maxwell* authoritatively interprets the Constitution to say that a candidate for ordination may not be ordained if, during his/her examination, he/she states clearly that he/she intends to disregard or disobey any provision of the Constitution.²

It appears, however, that *Maxwell* did not settle the matter. As our culture has become more accepting of homosexual relationships, many in our church believe that the time has come to allow presbyteries to ordain candidates who publicly scruple the Constitution's ordination standard of "fidelity and chastity" (G-6.0106b). So, *Maxwell* is now being tested both in the governing bodies, and in the courts of our church.

For example, the Presbytery of San Francisco recently conducted a "final assessment" of the readiness of Ms. Lisa Larges for ordination to the office of Minister of Word and Sacrament.³ At that time, Larges stated that for reasons of conscience she would refuse to comply with the provisions of G-6.0106b. Even so, the presbytery voted to certify her ready for ordination.

Convinced that the presbytery's decision was unconstitutional to the degree that it violated *Maxwell*, the Rev. Ms. Mary Naegeli and others filed a complaint with the Synod's PJC. Naegeli argued that like Kenyon's scruple, Larges' stated refusal to comply with G-6.0106b constituted a negative answer to the fifth ordination question, "Do you endorse our Church's government, and will you honor its discipline?"

As is often the case, however, with judicial commissions, the Synod's PJC avoided ruling on the substance of Naegeli's complaint by ruling, instead, on a procedural matter. The PJC found that Larges' statement did not constitute a refusal to comply with the Constitution because *it was not made in the context of an examination*.⁴

About the same time of Larges' "final assessment," the Presbytery of the Twin Cities Area met to restore Mr. Paul Capetz to the office of Minister of the Word and Sacrament. Capetz had previ-

ously been released from the exercise of ordained office because he objected to the provisions of G-6.0106b. Sometime later, believing that the political and theological tide was turning in the Presbyterian Church, he requested to be restored to office. In his written application for restoration, he stated that while he affirms “the Constitutional Questions asked of (him) at (his) ordination,” he would not affirm either G-6.0106b or the position of the PCUSA relative to the morality of homosexual relationships. He also stated that he refused “to take a vow of celibacy.”

Notwithstanding his clear refusal to comply with the Church’s Constitution, the Presbytery of the Twin Cities Area voted to restore Capetz to office. Believing that Capetz’s candid statement constituted “a negative answer to the fifth ordination question,” the Rev. Mr. David Bierschwale (and others) filed a complaint with the Synod’s PJC. The complaint asked that the action of the presbytery to restore Capetz be set aside.

However, before the complaint could be heard by the Synod’s PJC, the PJC’s Moderator dismissed it. He stated that the relief requested by Bierschwale (i.e. the setting aside of the presbytery’s action to restore Capetz) would unconstitutionally nullify Capetz’s ordination. He reasoned that once restored, Capetz’s ordination could be removed only as the result of a disciplinary proceeding.

Bierschwale appealed to the General Assembly’s PJC, but, as it did in *Naegeli*, the PJC ignored the substance of his complaint, and ruled only on process—upholding the decision of the Moderator of Synod’s PJC.⁵

The effect of the Bierschwale decision is twofold:

1. Persons requesting reinstatement to church office are apparently not subject to the requirements of *Maxwell*. During their examination they may, without necessary consequence, “scruple” provisions of the Constitution.
2. General Assembly’s PJC, however, made it absolutely clear that actual obedience to the Constitution is never optional for church officers, and that a presbytery has no power to waive such obedience. Therefore, all ministers, even those who may have stated a scruple in their examination for reinstatement, remain subject to disciplinary action if they actually violate the standards of their office.

So, *Maxwell* set the standard. It found that a candidate’s clearly stated refusal to comply with the requirements of the Constitution constitutes a negative answer to the fifth ordination question, “Do you endorse our Church’s government, and will you honor its discipline?” However, for a number of years, *Maxwell* has been under unremitting attack—primarily by those who desire relief from the Constitution’s standard of “fidelity and chastity.” So far, every effort to enforce *Maxwell* has been sidestepped by the courts. Instead of ruling on the substance of the issue, they have focused only on narrow procedural questions. And, in doing so, they have doubly injured the Church: they have left serious matters unresolved, and they have encouraged even more contentious litigation in the future.

In the metaphor of the constitutional historian referenced earlier, there is clearly more ecclesiastical blood to be shed.

But, there is one more complication.

Early in 2008, the 218th General Assembly received an overture from the Presbytery of John Knox asking for a new Authoritative Interpretation (AI) relative to the issue of scrupling, and the General Assembly responded with an affirmative vote. One of AI’s key provisions allows presbyteries the discretionary power, when examining candidates, to permit them to scruple any and all ordination standards—be those standards matters of faith or matters of practice.

For the time being, the new AI effectively voids *Maxwell*. It is likely, however, that its constitutionality will quickly be tested. If the new AI is overturned, *Maxwell* will remain the standard for ordination examinations. However, if it is upheld, there will be absolutely nothing to prevent a presbytery from allowing a candidate to be ordained who has openly and candidly stated that she/he intends to violate either the letter or the spirit of the Constitution.⁶

If that happens, it will plunge the Church into a constitutional crisis of unprecedented proportions. Therefore, it is incumbent upon all of us who love the Church to remain vigilant and attentive to the decisions of General Assembly’s Permanent Judicial Commission, and to be prepared to respond appropriately.

Notes on “Precedent”

1. An Authoritative Interpretation is an interpretation of *The Constitution of the Presbyterian Church (U.S.A.)* that carries the authority of the General Assembly and is binding on the governing bodies of the church. According to G-13.0103r in the *Book of Order*, these interpretations are made by the action of a General Assembly upon the advice of the Advisory Committee on the Constitution (ACC), or “through a decision of the Permanent Judicial Commission of the General Assembly in a remedial or disciplinary case. The most recent interpretation of a provision of the *Book of Order* shall be binding.”

2. Should this principle ever be overturned, the church would fall into an institutional contradiction in which it would be able to allow that which it does not permit, and to permit that which it does not allow. The ensuing constitutional crisis would surely devastate the church’s peace, unity and purity.

3. While the candidate’s name does not appear in the decision that ensues, neither party sought to hide the candidate’s identity which has been widely and publicly disseminated.

4. If you are interested in knowing more about this issue, read *Bush v. the Presbytery of Pittsburgh*. The Bush decision may be found at <http://www.pcusa.org/gapjc/decisions/pjc21810.pdf>. You should also note that since the Naegeli decision, Larges has again stated her refusal to comply with the Constitution—this time in an examination for ordination. Therefore, as I write, the matter is once again before the church’s courts.

5. For those of you who are legal “wonks,” let me invite you to follow me down a rabbit hole. In my opinion, the GAPJC made a cardinal error in the Bierschwale decision by making a distinction between a decision to reinstate ordination and a decision to ordain. In both cases membership in a presbytery is at stake, and in both cases the presbytery MUST examine the person’s fitness for membership – not just in the case of an ordination. Under G-6.0600a, the presbytery was required “[to] delete (Capetz’s) name from the appropriate roll.” Therefore, his application for restoration (which under G-6.0600c the presbytery must approve) should have included an examination for membership in the presbytery. So, the important issue is not whether a person has previously been ordained, but whether a presbytery has the responsibility to grant membership only to those who after an appropriate examination are found constitutionally to be qualified. Think about it, should Capetz, sometime in the future, request that his ordination be transferred to another presbytery, the receiving presbytery will be obligated to examine him. Then, should he again state a refusal to comply with any constitutional requirement, he would, under *Maxwell*, be ineligible for membership. Therefore, he should have been found ineligible for reinstatement by the Presbytery of the Twin Cities Area.

6. Actual disobedience will still be subject to disciplinary action.