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LEGALIZING MIDWIFERY IN MISSOURI

By Michael A. Wolff

NOTE: This is an unpublished draft based upon interviews with those involved in the legislative process and contemporaneous materials developed in advancing and opposing the legislation, and on court filings, decisions, and the author's memory. Corrections, comments and suggestions are welcome: Michael.Wolff@slu.edu.

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PART I: MASTERING THE LEGISLATIVE GAME WITH STEALTH AND FAITH

Mary Ueland Walsh, Midwife-lobbyist

Mary Ueland was 12 years old in 1994 and having a what-do-you-want-to-do-with-your-life conversation with her mother. I think I want to be a midwife, she told her mother. One of Mary's friends had told Mary that she wanted to be a midwife; Mary and her friend had a romanticized view of what was involved.

Well, her mother responded, do you want to end up in jail? Midwifery is illegal in this state.

Perhaps, Mary's mother suggested, she should move to a state where midwifery is legal. In Missouri practicing midwifery without a license was a

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felony, a law the legislature upgraded from minor offense to felony in 1982, the year Mary was born. Mary said she wanted to stay in Missouri and she hoped she would not go to jail. Well if you do decide, Mary's mother said, I hope and pray you stay out of jail.

Mary Ueland was born at home, as were eight of her 10 siblings. Mary was the second child, born when the family lived northwest of Minneapolis in Anoka County, Minnesota, in a home where her mother's cousin Garrison Keillor, founder of public radio's *A Prairie Home Companion*, was born. Some of the small-town oddball characters in Keillor's tales of Lake Wobegon are based on our relatives, Mary's mother told her.

Mary's mother, Dorcas Ueland, told Mary she wanted to study math and science and as a young woman had no interest in having children. When she married, all that changed. She wanted births at home and she could not find a midwife or someone qualified to do home birthing in Minnesota. So she gave Mary's father, a carpenter, a book to read on birthing. Mary's parents did the home births themselves.

When Mary was two years old, her father – having grown weary of Minnesota's zoning and construction regulations that came with the Twin Cities metropolitan area's expansion into rural Minnesota – moved the family to a rural home near in southwest Missouri near the small town of Mansfield, where Laura Ingalls Wilder wrote her "Little House" books. The Uelands were determined to live off the land, waste little, live frugally and healthfully, and help other people as

much as possible, Mary told me. Throughout all of her growing up years the family had various troubled or disabled people living with them and her mother spent a lot of time taking care of them and counseling them along with taking care of her own many children.

When the family first moved to Missouri, the Uelands' third and fourth children were born in a hospital because her mother thought there was something amiss in the pregnancies. After the fourth child's birth, the rest of the 10 children were born at home. Mary remembers as a small child the birth of other siblings at home in Missouri, at first with the help of a labor and delivery nurse who came for the birth to be available if something went wrong. She saw her father slip some cash into the nurse's purse. Her father explained: I can't pay her directly by giving it to her in person, but I want to pay her. Eventually the nurse got nervous and told Mary's parents she was not going to be there for the last baby. Her parents did it alone.

By the time she was 16, her family knew two direct-entry midwives – as lay midwives had come to be called – practicing in the Springfield area. Mary wrote letters to them asking to help them – sweeping the floors, doing dishes, whatever needed to be done at a home birth – but all she got was a suggestion that she read a book.

A year or so later she was invited to a friend's home birth in Rockford, Illinois. There she met Judith (Jude) Wrzesinski, a Certified Nurse-Midwife who has a home birth practice. Wrzesinski had worked for 20 years with a physician-

based home birth practice in Chicago before moving to Rockford to establish her own nurse midwifery practice. Mary described her as “eccentric ... she is a Christian, a liberal, a hippie, all at once.” After Mary worked with her for some months, Wrzesinki told Mary she would be an excellent midwife and encouraged her to get education and training.

Mary Ueland enrolled in a distance-learning course of study offered by the Midwifery Institute of America, which provided the academic learning needed to pass the test and be certified as a professional midwife by the North American Registry of Midwives (NARM). For certification as a Certified Professional Midwife, NARM also requires substantial experience working with a certified midwife as preceptor.

By 2005 Ueland was working with two local midwives who later became Certified Professional Midwives. Along with helping clients of her preceptors, she was developing clients of her own and was doing home births. Her preceptors were in Springfield and in the West Plains – Poplar Bluff areas, so she was covering home births in an area with a radius of about 250 miles. She felt she was sufficiently trained though she did not do the paperwork to show that she had met all of the NARM requirements to be a Certified Professional Midwife (CPM). Certified or not, her practice of midwifery was illegal.

When I started on my own, Ueland told me, I knew there was risk but I was helping women and their families who might otherwise have done the birth at

home without professional help as her mother did. From a Christian perspective, she asked, should I let my neighbor do this by herself or should I help?

Her initial clients she describes as much the same as Cheryl Southworth's clients some 25 years earlier – conservative Christian homeschoolers, Amish and Mennonites, hippies, and regular middle class folks. I represented lay midwife Cheryl Southworth in the early 1980s when the state Board of Registration for the Healing Arts sued her seeking an injunction in Phelps County Circuit Court in Rolla in the early 1980s, and on appeal in the Missouri Supreme Court, where the court affirmed the judgment that Ms. Southworth's practice of midwifery was illegal. 704 S.W.2d 219 (Mo banc 1986).

Because CPMs were not legally recognized and therefore illegal, Ueland felt no urgency to complete the certification. She did need some education and training in doing Pap smears, treating sexually transmitted diseases and doing gynecological care. She spent several months working at the Swope Community Health Center in Kansas City in 2009 prior to taking her NARM examinations for certification. She values the very different experience she had at Swope, an inner city program where many of the patients were and poor and fragmented. Ueland was accustomed to home birth families where, in rural Southwest Missouri, the families were intact although some were poor.

In 2005 in the midst of her midwifery training Ueland started lobbying. She was active in Friends of Missouri Midwives, for which she was grassroots

coordinator, and the Missouri Midwives Association where she volunteered to be legislative director.

Deborah Smithey, Midwife-lobbyist

Ueland teamed with another Missouri Midwives Association officer and activist, Deborah Smithey, a home-birth mom who lived outside Rockville near the western edge of Missouri.

Smithey had come to midwifery in her early adult life in the 1990s with the birth of her first child in 1993. She got to know a rural midwife, Sandra Mountjoy, who took the name Sandra MorningStar. MorningStar had a spiritual as well as a well-trained approach to midwifery. She and Smithey shared Native American heritage; both were descendants of the Cherokee Nation, and Smithey also had a Lakota forebear. Unlike most Cherokees in this part of the country, Smithey's Cherokee forebears came to Missouri from the Carolinas to be farmers; they were not in the infamous "Trail of Tears" forced removal from the Carolinas to Oklahoma in the 19th century. Smithey and MorningStar shared a spiritual belief in midwifery. MorningStar would later become Smithey's preceptor as well as her midwife.

But when it came time to attend the birth of Smithey's child in 1993, MorningStar was in jail in Kansas, along with two other midwives who were arrested after attending the stillbirth of a baby in the rural community of Edgerton, Kansas. The midwives were charged with practicing the healing arts without a license. A rural Kansas jury, apparently seeing no connection between the

stillbirth and the lack of a medical license, acquitted them after less than an hour of deliberation.

Despite her brush with the law, MorningStar became an international leader in improving the acceptance and outcomes of midwife-assisted childbirth; for more than 10 years she worked with an organization in Mexico that built a small maternity hospital and ran the first government-recognized midwifery education program. Later in the 1990s she became a hermitess and a Catholic mystic who lived a contemplative life in the Missouri Ozarks. The community she founded, MorningStar Community, offers spiritual retreat, yoga, and instruction on living the simple life, which includes simplifying the process of childbirth. She later referred to herself as a retired midwife.

Deborah Smithey and Mary Ueland came to midwifery from different perspectives and motivations. What they shared was a passion to bring midwifery out of the shadows and to gain legal recognition. What they also had in common was that neither of them had taken the examinations needed to become Certified Professional Midwives. Why bother, they both asked -- it would make no difference to the state of Missouri, which made it a felony to engage in the practice of midwifery without a license, which was unavailable.

They rented an apartment in Jefferson City and spent a few days a week in the Capitol during the legislative session. Together they spent hundreds of hours talking to legislators about midwifery, family choices, and the need for legal recognition.

What they shared in 2005 and succeeding years was the enormous investment of time and the accompanying stress of lobbying – while struggling to maintain their lives and work back home. Their time and emotional energy were investments that looked like long shots. The American legislative process was designed by our country’s founders to make lawmaking difficult. For 20 years, midwives had learned that lesson in every session.

A Shift in Political Control

Smithey and Ueland were lobbying for midwifery in the Capitol a few years after the Republicans took control of both houses of the legislature in 2002 for the first time in decades. While midwifery advocates had found some solid supporters among the Democrats during their reign, there were many more supporters in the new Republican majority. Over just a few years, Republican representatives and senators had replaced Democrats throughout the state, particularly in the rural areas. When I came to Missouri in 1975 I became well acquainted over the years with Missouri politics and politicians. Aside from the most urban areas of Kansas City and Saint Louis, the Democrats were the most conservative I had ever seen, and the Republicans were even more so compared with Republicans from elsewhere. The changeover in rural areas following the 2002 election was not at all surprising. To me it seemed that many rural people woke up after a long slumber to discover that they really were not conservative Democrats but conservative Republicans all along, including some Democrats-turned Republicans who were descendants of the Confederacy.

Aiding the partisan changeover were many evangelical Protestant ministers in rural areas who preached against many of the values that came to be associated with the Democratic Party – abortion, gay rights, and affirmative-action preferences. Many rural ministers shared a dream. It was more an Old Testament dream, where one’s enemies were smited or smoted, than Martin Luther King’s New Testament dream of peace and reconciliation.

The midwives’ organizations and their predecessors had been trying for more than 20 years to pass a bill to license midwives. Their first sponsor was Democratic Rep. David Rauch, a minister whose Democratic colleagues were vaguely sympathetic but they were not going to license midwives. In the late 1980s and early 1990s, Rep. Carol Jean Mays of Independence worked hard to get a bill passed. She did not succeed, but she came back to testify and to lobby for the bill even after her legislative career was over.

After the Republican takeover, their main sponsor in 2005 was Rep. Cynthia Davis, a conservative Christian who had seven children by caesarian section. To her supporters, Rep. Davis was very devout; some of her colleagues, however, described her as a bit flaky. Despite being named by a prominent liberal cable-television show as “worst person in the world” for suggesting that childhood hunger was a powerful motivator, Davis was a likeable and persistent lawmaker. Near the end of her legislative career and later, Davis ran for other offices, including state senate and governor, but did not have enough organizational support to be much more than a statistical footnote when ballots were counted.

Nevertheless in the House Davis got her midwifery bill passed in 2005. She had a surprising ally – the Speaker of the House, Rep. Rod Jetton. The midwives never had had such a prominent ally. Jetton, it turns out, grew up in Marble Hill with one of Dr. David Stewart’s sons. Stewart, author of *The Five Standards for Safe Childbearing*, was an expert witness in the Southworth trial in 1985. Jetton’s mother was a midwife. With Jetton’s help in rounding up votes, Davis’ midwifery bill passed in the House.

The victory in the House may have been less significant than it seemed. In the Senate there was a firewall for the medical associations – senators who would threaten a filibuster, or actually filibuster, so the bill never would come to a vote. House members could freely vote for Davis’ midwifery bill knowing that the bill would never pass in the Senate. Davis’ 2005 bill never came to a vote in the Senate.

After the 2005 session, Smithey and Ueland hit the road. They had midwives supporters organize meetings in the home districts of a various senators, some who were supporters and some who were undecided. One of the first meetings was held in the summer of 2005 in Smith’s Restaurant, a gathering place along the highway in the middle of nowhere in Sen. Delbert Scott’s district in southwest Missouri. When Ueland, Smithey and Scott came into the restaurant they headed to the back room where private parties are held. The crowd was overflowing. We thought we were in the wrong place, the midwives recalled. Well over 100 of their supporters had turned out.

That scene was repeated in a dozen other districts, with overflowing crowds in most. These shows of support by senators' actual constituents – as distinct from the lobbyist who hang around the Capitol – were impressive. Sen. Scott, already a supporter, was noticeably more respectful and supportive in sessions to come. When the midwives turned out an overflow crowd in Sen. John Cauthorn's rural district around Mexico, Missouri, he agreed to sponsor their bill in the senate.

Cauthorn, a farmer, had no particular interest in midwifery – he just liked them and wanted to help. The midwives considered him a grandfather figure. When they discussed home birth with Cauthorn, the senator got it. When an animal is birthing, I know when she is in trouble and when I have to call the vet, he told them. You don't have to call the vet every time.

That was close enough for the midwives. Though they considered Cauthorn to be grandfatherly, they discovered that he could be particularly blunt in critiquing them and their supporters. He was determined to make them acceptable. When the legislators returned to the Capitol in January, Cauthorn summoned Ueland and Smithey to his office and closed the door. He had seen the TV news report in the fall on a rally in Columbia for midwives. The crowd was large but the camera focused in on a pregnant woman dancing in the street wearing a long paisley skirt with her hair braided in dreadlocks.

Isn't that great? We finally got on TV, the midwives said. No it was not great, Cauthorn responded. He hated the image of an alternative lifestyle, and as sponsor of their bill he decreed that the midwives and their supporters must

observe a dress code, phrased roughly as this: No hippies. No paisley skirts. Wear panty hose. Put your hair in a bun. Wear deodorant, and not that natural stuff.

Senator Mike Gibbons, president pro tem of the Senate – the senate’s top official – agreed with Cauthorn, and added: No nursing of children in Senate committee hearings.

The midwives retreated to the duplex that they rented several blocks from the capitol. They ranted and raved and vented. And then they went to a thrift store and bought some used suits. Then to the drug store for panty hose and deodorant. Smithey, who was in her early 40s with skin coloring that showed her Native American heritage, and Ueland, who was in her early 20s with fair Nordic complexion, found business suits and other conservative outfits for a few dollars each that matched the standards Cauthorn demanded.

They also bought a *Glamour* magazine and cut out pictures to tape to their walls with notes telling their supporters how to dress for success in the Capitol.

Their sartorial changes did not go unnoticed. When several of the midwives and their supporters were sitting at a table in the Capitol’s third-floor rotunda having lunch one day, a male college student who was working as a reporter for a journalism class came by and asked to join them. When they told him they were supporters of midwifery, he said he had just heard something interesting. The young journalist had heard that the midwives must have hired professional models, instead of their usual supporters, in order have attractive people lobbying for their bill. The thrift-store transformation apparently was working.

In the 2006 session, the midwives made a painful decision about the House sponsor of their bill. They took the advice of various legislators who were not fans of Rep. Cynthia Davis. Even though Davis got the bill passed in the House, her public statements equating her in-hospital birth experiences with being raped struck many members as unduly extreme. The midwives opted to have Rep. Charles Portwood, a chiropractor from St. Louis County, as their sponsor. Davis remained a friend and supporter, but the midwives could tell that she felt hurt. Portwood did not get as far as Davis had in the previous year.

The midwives were building support in the 2006 session, but no bill passed. Cauthorn, whose term-limited service would come to an end that year, gave the bill to Sen. John Loudon to introduce in the 2007 session. In Loudon the midwives got a sponsor with clout. One difference in the switch to Republican dominance a few years earlier was that supporters of midwifery had influence – they were committee chairs, they actually had passed significant legislation.

Loudon was a religious conservative from the western suburbs of St. Louis County. He was first elected to the House in 1994 and after three terms, was elected to the state Senate in 2000 and 2004. Loudon's career as a Missouri senator would end after the 2008 election because Missouri senators are limited to two four-year terms. He was chair of the Senate Small Business, Insurance and Industrial Relations Committee. Because his senate career was nearing its end, Loudon ran in the 2006 primary election for state auditor. He lost the primary

election in August and returned to the Senate for the remaining two years of his term.

Senator Loudon Commits

More importantly than his influence as a senator was the personal debt he felt to Mary Ueland, midwife. Loudon and his wife Dr. Gina Loudon, a psychologist who later became a nationally known conservative television commentator, suffered a miscarriage in 2005. Loudon described the problem to Ueland, who was sympathetic and was helpful in discussing the possible complications of pregnancy that may have led to the miscarriage.

When Loudon returned for the 2006 session, Ueland visited and asked about Gina Loudon. He said Gina was pregnant again and on bed rest because of her previous miscarriages. He was very worried; Gina had had six pregnancies and three miscarriages. After listening to his description of the problem, Ueland told him that she thought Gina had a blood-clotting problem and that she should have her obstetrician check this out by ordering a panel of blood tests. Ueland suggested that Gina take aspirin, vitamin B12, vitamin E, progesterone and black haw tea (black haw tea is considered a remedy for menstrual cramps).

When Gina Loudon told her obstetrician about this advice, the doctor, a specialist in high-risk pregnancies, said the advice was crazy – and perhaps midwives in general were, too. Gina Loudon's obstetrician said he thought it was highly unlikely to be a blood-clotting problem and he was unwilling to do the test that he considered expensive and unnecessary. Gina and John Loudon called

Ueland again. She recommended that they demand a blood panel. Ueland's advice presented the Loudons with a dilemma – do they go with the doctor, whose advice had not been working, or do they try the midwife's advice? The blood tests would resolve the issue with no risk to Gina Loudon but some expense to their insurer. So they insisted, and the doctor relented and ordered the tests.

The blood panel test results came back and the doctor said he did not understand because the numbers just don't add up, according to John Loudon. There was a blood-clotting anomaly that, if untreated, could have led to another miscarriage. The supplements Mary Ueland recommended for blood thinning and the instructions that she gave them seemed appropriate. Once the doctor realized from the blood panel tests that Gina Loudon had a clotting problem, he put her on prescription medication to thin her blood during the pregnancy. Gina Loudon soon was off bed rest and the pregnancy proceeded normally.

This good news came just as their planned adoption of a Downs Syndrome child from Florida was coming to fruition. The Loudons were deeply committed pro-lifers and adopting a special needs child was consistent with that commitment. So now the Loudons would be adding two babies to their family.

The Loudons had a healthy birth, a son Robert, in August 2006. Senator Loudon told me that he attributed this to the advice that Ueland had given him early in the 2006 session. He also had made the same comment to news media following the session.

You know what this means, don't you? John recalls Gina Loudon saying after her pregnancy problem resolved: You're going to do that bill for the midwives.

Loudon sponsored a bill to legalize midwifery. Early in the session, the Senate's General Laws Committee gave the bill a hearing and reported it to the Senate floor with a "do pass" recommendation. When the bill came up for consideration on the Senate floor, Senator Chuck Graham of Columbia, whose district includes the University of Missouri medical center, filibustered once again. Senator Charlie Shields, the majority floor leader, was an employee of a major health system in St. Joseph. More importantly he did not want to waste floor time on a filibuster. So the bill was shelved. In a word: dead.

Exploring the Alternatives

But Loudon was determined to succeed in legalizing midwifery. He needed to get midwifery legalization language in some health-related bill. Ueland and Smithey asked Loudon if they could craft a really short, simple version of their licensing bill so that he could get it attached to another bill that had a chance of passing.

But the Senator Chuck Graham problem was not going away.

Loudon invited Ueland and Smithey to a meeting in the Senate side gallery with Senate President pro tem Mike Gibbons, the Senate's top leader. Gibbons, a lawyer from Kirkwood in suburban St. Louis County, was well liked in the Senate and had been elected president pro tem by his Republican colleagues for his skills

at accommodating various views, for his affability and good humor. Gibbons had served in the House with Loudon for several years before being elected to the Senate. Like Loudon, Gibbons was term-limited and in his final term in the legislature.

The midwives asked Gibbons how he thought they could get midwifery legalized with their own bill – Loudon’s bill – blocked. Gibbons appeared to be neutral on the issue. The Senate leader was a suburban legislator whose constituents were not vocal on the issue, but as an accomplished politician who knew the state as a whole, he understood the importance to many people especially in rural Missouri. Gibbons had plans to run for statewide office in 2008. He did not need to be either obstructive or overly helpful on midwifery. As Senate leader he obviously did not want any major bills that were sailing through the Senate to become controversial, and perhaps get killed, because of midwifery language.

The midwives said they questioned Gibbons indirectly: Is there anything we *cannot* do?

You are limited only by your imagination, he replied, and by your ability to craft language.

Gibbons asked his majority caucus policy director, Misty Snodgrass, to help them. Snodgrass suggested that they make the provision as short as possible so it would be less likely to be noticed.

The words that inevitably would be noticed were “midwifery” or “midwives,” so Smithey and Ueland thought they should look for another word that meant the same thing, a “camouflage” rather than a “red flag.”

The challenge of finding an existing bill to amend can be especially daunting. The state constitution limits this practice; it says: “No bill shall contain More than one subject which shall be clearly expressed in its title....” This provision, called the “single subject” rule, appears in Article III, section 23 of the Missouri Constitution (but, unfortunately, does not appear in the U.S. Constitution, which allows the federal Congress to pass bills that are hodge-podges of unrelated subjects).

The “single subject” rule is intended to prevent lawmakers from hijacking a bill by inserting unrelated provisions that their fellow legislators would fail to catch. The question frequently comes to the courts, where an affected person claims a provision of a law is invalid because the challenged provision was not the same subject as the bill as described in its title. But discerning whether something is of the same subject often is difficult. The midwifery advocates would need a bill about medicine, health care or public health, for sure, but would midwifery legalization fit the same subject as a bill on health insurance or health care delivery?

And, of course, they needed a word other than “midwives” or “midwifery” but what word?

Help From the Greeks

The midwives were not sure which bill they should try to get it in as an amendment. Deborah Smithey already had written a one-sentence version of their amendment when she and Ueland were working on a longer amendment, condensing their licensing bill to a page or two. They were working in Loudon's senate office. The one-sentence challenge started as a game, to "blow off steam," as Smithey described it, or to keep themselves "from going crazy," to use Ueland's words. They were down to a single sentence, but they needed the right word for midwifery.

The answer came from a 16-year-old homeschooled student from Ava, Missouri, who had come to the capitol the year before as part of legislative workshop for homeschoolers. Her name was Sarah Greek. She had told Mary Ueland she was interested in politics and lobbying – and issues such as midwifery – and wanted to tag along. When Sarah asked about tagging along, Ueland could not really say no – remembering her own rejection at that age when she wanted to accompany midwives and learn about their work.

Sarah was an energetic and attractive young woman who was a devout member of a Christian sect called "Messianic Jews." Her obvious religiosity allayed her elders' fears that she would be prey in the predatory environs of the seat of government – an environment where interns were subjected to sexual harassment. In her first year in the Capitol she was not of much use – hardly anyone is useful when they first arrive in that weirdly byzantine place – but Sarah

was a quick study, learned her way around the Capitol, and by the 2007 sessions seemed to be a member of the midwifery team.

Sarah Greek had been at a meeting with the midwives and Misty Snodgrass of Gibbons' staff where they discussed the challenge of finding a word other than midwifery for the amendment they were writing. Sarah had been studying weekly vocabulary tests on her computer preparing for the Scholastic Aptitude Test (SAT) college entrance exam. Sarah told the midwives that she remembered a word in her vocabulary list – a Greek word, appropriately – that referred to midwifery but she could not remember what the word was. They urged her to find it.

Sarah phoned her younger sister at home and asked the sister to check her SAT vocabulary word list on her computer for a word that refers to midwifery. The word the sister came back with was “tocology.” The dictionary definition of tocology was just right: “The science of childbirth; midwifery or obstetrics.” From the Greek word “tokos.” Not a word commonly used outside of college-entrance tests. Not a word that Senator Graham was likely to have heard of.

For help in crafting the right words, they sought out David Klarich, a former senator who was a lobbyist for various interests including the Missouri Association of Trial Attorneys and, significantly, the Christian Home Educators Fellowship, later known as Family Covenant Ministries.

Klarich was a kindred spirit, with a sense of humor and adventure that belied his devout upbringing. He grew up in conservative Republican politics in western St. Louis County where his mother was an influential committeewoman

allied with then-Governor John Ashcroft. After graduation from the University of Missouri, Klarich went to law school at Regent University in Virginia, the school founded by televangelist Rev. Pat Robertson. Shortly after law school graduation Klarich won a seat in the Missouri House in 1990 and was elected to the Missouri Senate in 1994 and served two terms until 2002. As a senator he was quite influential and was chair of several key committees. I worked closely with Klarich and a few other senators when I was special counsel for Gov. Mel Carnahan, a Democrat, in 1997 and 1998 when Democrats controlled the legislature. The legislation I worked on was a bill to reform and provide funding for urban education and set the stage for settling the long-running desegregation cases in Kansas City and St. Louis. Klarich and two of his Republican colleagues promised to support the bill if we included provisions for establishing charter schools. Gov. Carnahan was deeply skeptical of charter schools but he faced a serious problem – some members of his own Democratic party were more conservative than some Republicans, depending on the issue, and in the case of the desegregation bill, the governor needed Republican votes to pass the bill in the Senate. Having counted votes, I told Carnahan he could not get a bill passed without charter schools, but including charter schools would bring the votes of Klarich and two or three of his Republican colleagues. Klarich and his colleagues got charter schools and Gov. Carnahan got his 1998 urban education bill. With the bill in place the desegregation cases were settled the next year, and charter schools now dot the educational landscapes of St. Louis and Kansas City.

Klarich as senator was used to finding creative ways to accomplish his objectives, and what made him effective was his willingness to do so without fanfare and without taking credit for himself. These characteristics also made Klarich an effective lobbyist when he went to full time law practice in St. Louis and lobbying in Jefferson City after his term ended in 2003.

Klarich had an interesting spiritual connection with the midwives – he had delivered his own children at home. All five of his children were homeschooled as well. Two of them are twins, and he delivered them. Klarich was especially proud to have accomplished all of this with his wife, who had grown up as an Irish Catholic Democrat in Massachusetts.

Although he was willing to give the midwives some clues, Klarich did not want to be associated with this effort. The language the midwives needed, Klarich suggested, should include a citation to a federal statute or regulation. Legislators were used to seeing references to federal laws in Missouri bills because there are many provisions that are included to make Missouri law consistent with federal law. That was not the purpose of the provision the midwives were planning, but it was a great technique for hiding the ball.

Go figure it out, Klarich said; find something in the U.S. Code. They googled “U.S. Code” to find out what that was. Further googling had them looking for a federal law that described childbirth or midwife services. They found a reference in a federal Medicaid statute, a definition in 42 U.S.C.1396 R-6 (B)(4)

(E) (ii) (I). This definition refers to “services related to pregnancy including prenatal, delivery, and postpartum services.”

They had seen citations like that to federal laws in bills that were introduced in the Missouri legislature. Klarich had told the midwives that no one looks up the U.S. Code. The citation to the federal definition would be camouflage.

The midwives language could not simply be to legalize the practice of “tocology,” for that would stand out in any sentence and cause even a casual reader to ask what tocology meant.

So they decided the concept they were looking for was a certification to provide services, another common subject of legislation. The midwives had been around the Capitol long enough to get a flavor for the legislative language, and they picked out some phrases.

“Notwithstanding any law to the contrary,” Smithey had scribbled when the one-sentence challenge was just a game. Now it was for real, and she and Ueland needed to find words that referred to certification of midwives without using the word midwives. “Certified Professional Midwife” would not do, nor would using “North American Registry of Midwives,” which established standards for certified professional midwives.

In their research they discovered NOCA – the National Organization for Competency Assurance. NOCA is a private organization that develops standards related to credentialing, licensing, personnel certification, education and training;

it grants accreditation to organizations that certify professionals as competent in a variety of fields. One of the organizations that NOCA accredits is the North American Midwives Registry (NARM), which grants the Certified Professional Midwife credential. With those words and references in a single sentence, the provision would allow practice by Certified Professional Midwives.

To their opening phrase “Notwithstanding any law to the contrary,” they added: “any person who holds current tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C.1396 R-6 (B)(4) (E) (ii) (I).”

Camouflage indeed.

A Long Shot

They showed their sentence to Senator Loudon. Perfect, he said, and then he started thinking about where to put it and how to improve it. The tactic was a long shot, but the one-sentence amendment had captured his imagination.

The trick was to find a bill still pending, and likely to pass, on which he could add an amendment. He said he would try to add it to Senator Delbert Scott’s bill relating to occupational licensing. To be on the safe side, Mary Ueland went to see Senator Scott in his office and she inquired about his bill. It was an omnibus licensing bill and she wanted to know whether he would be agreeable to Senator Loudon adding an amendment to it. The bill was in committee, and because Scott thought it was likely to pass, various lobbyists and senators were adding related provisions on licensing to the bill. Scott thought it was a bad idea

to add midwifery to the bill, even though he was a supporter of midwifery. He was afraid that the provision would result in his bill being killed. When she got this information, Mary texted Senator Loudon saying that Senator Scott did not like it.

Loudon himself had a bill on health insurance, a bill that was a priority for Republican Gov. Matt Blunt and the Republican majority. Loudon had worked on the bill before the 2007 session after he lost the August primary for state auditor. The bill in its early stages had an unexciting title: “An act to repeal sections 376.961, 376.962, 376.964, and 376.989 RS MO, and to enact in lieu thereof 19 new sections relating to portability and accessibility of health insurance.”

When Loudon was working with staff and lobbyists before the 2007 session on the bill on “portability and accessibility of health insurance,” Rep. Doug Ervin, chair of the House Insurance Committee, showed up and insisted that the bill should be introduced as a House bill with Ervin as the sponsor, rather than starting in the Senate with Loudon as sponsor. Loudon, who already had a fairly impressive track record of success in sponsoring bills, was willing to give his less experienced counterpart from the House the go-ahead to introduce the measure as a House bill. Loudon, as chair of the relevant Senate committee, would handle the bill after it passed the House and was sent to the Senate.

Months later, in the waning days of the legislature’s session, Loudon’s generosity to Ervin, his House counterpart, would pay a big dividend for the midwives.

Ervin's bill, HB 818, had provisions important to pro-life and Christian interests. One key provision allowed a tax deduction for amounts paid to a "health care sharing ministry." The bill also included a provision inserted by Loudon, who was ardently anti-abortion, that was designed to discourage parents who had received a prenatal diagnosis of Down's Syndrome from seeking to terminate the pregnancy – the provision required the health care provider to give the parents information about the accuracy of the test results, the resources available for families with Down's Syndrome babies, and referrals for services from providers such as the Missouri Alternatives to Abortion Services Program. The bill also gave hospitals and doctors access to income tax refunds to collect medical bills.

House Bill 818 passed the House easily. Loudon gave the bill a hearing in his Senate Committee; various committee members and others offered amendments inserting various provisions totaling about 80 additional pages. Because so many new provisions had been added, the title of the bill was amended to list 20 sections of Missouri statutes that it would repeal, and "to enact in lieu thereof forty-nine new sections relating to health insurance, with an effective date for certain sections." The Constitution's requirement is "No bill shall contain More than one subject which shall be clearly expressed in its title...." The amended title omitted the limiting words "portability and accessibility of health insurance" and broadened the bill's scope simply to "health insurance."

Loudon was wary about putting the "tocological" language in HB 818. The bill, with its health sharing ministry and other pro-life features, was a priority for

the Republican caucus and for the Republican governor Matt Blunt. Loudon fretted to Smithey and Ueland about whether he would put this provision in this bill, which really was his own bill.

The bill was nearly ready to go before the full Senate for approval. If passed, the bill would go back to the House because there were changes and additions that the Senate made. These changes either would have to be approved by the House or, failing that, the bill's different versions could be sent to a conference committee consisting of members of both Senate and House. The conference committee's task would be to assemble an agreed-upon version to be voted on in both houses.

Loudon told the midwives that he was reluctant to mess up his own bill, and he asked that the midwives give him a day or two to think and pray about it. He wanted to keep it clean so that it would pass. On the other hand, there did not appear any other bill available for the "tological" amendment. Senator Scott's licensing bill already had passed.

Answering Prayers

They were in the second to last week of the session. Loudon, the midwives observed, was tense. After a few days, Senator Loudon's prayers – and the midwives' – were answered. On Wednesday night, May 9, 2007 – the second week before the May 18 end of session – Loudon decided to put the amendment on his own bill, the Senate substitute for Ervin's House Bill 818.

Loudon added another word to divert attention: “ministerial.” This fit nicely, he told me years later, because of the bill’s language on health sharing ministries and because legislators were used to seeing exemptions for faith-based practices, usually done at the behest of Christian Scientists. The final version of the language would read:

“Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C.1396 R-6 (B)(4) (E) (ii) (I).”

But there was an error in the handwritten sentence. The Senate research staff had gotten the sentence Thursday morning but they could not find the section of the federal Medicaid law that it referred to. The original handwritten version of the provision was in Mary Ueland’s briefcase.

But around 2 a.m. Thursday, May 10, Ueland got called away because one of her clients was in labor in Springfield. She immediately drove two and a half hours from Jefferson City to the expectant woman’s home. After a few hours, when labor progressed to where the woman was pushing to deliver, Ueland’s phone rang; she clicked to avoid the call. It was Debbie Smithey; Smithey rang again, and again, then several times more. Finally Ueland decided to step out of the room where the birth was to take place – by this time there was another person there to assist – and returned Smithey’s call.

Mary Ueland's briefcase was out in the car in Springfield at the site of the home birth. She ran out to the car, found the paper, called Smithey back and gave her the correct number and then went back in the home. The baby's head was crowning – the baby about to be born. Ueland helped with an uncomplicated birth, and then realized that her phone was dead.

When matters had settled down after the birth, she went to a neighbor's house and asked the neighbor if she had a phone charger, and left her phone there to be charged.

When her phone was charged, she called Smithey who informed her that the language was now in the bill. With various additions in Senator Loudon's committee, Ervin's bill had grown from 50 pages to 130 pages, and the Senate was going to take it up that evening.

In recounting the episode several years later, Loudon told me that he was very apprehensive that some Senate colleague would ask him to explain the "tocological" reference when the bill was being considered. He was determined not to lie to his colleagues – he was hoping and praying he would not be asked.

He said he prayed a lot.

When the bill was up for consideration by the Senate, Senator Chuck Graham was in and out of the chamber, at one point giving a tour to some people from his district, and at another point he was in his office and the microphone in the Senate malfunctioned and he missed part of the debate. When he returned to the Senate floor Graham asked Loudon if there was anything "we should know

about” in an amendment being discussed on the floor, Loudon said “no,” because the amendment being considered at the moment had nothing to do with the tocological provision. Graham may have asked the right question, but not about the right provision of the bill.

Senate research staff, who the night before had found that the federal law citation was incorrect, traditionally have an ethic of confidentiality – they do not give senators or their staffs or anyone else information about bills or amendments that they write or research for other legislators. The tradition of confidentiality prevailed.

On the Senate floor, no one asked about the “tocological” language and the bill passed the Senate overwhelmingly. The Senate then adjourned until the following week and the bill was sent to the House where it would be on the calendar the next day, Friday.

After the birth of the baby in Springfield, Ueland drove back to Jefferson City and arrived at 12:30 a.m. Friday. She and Smithey were sure that one of the Missouri State Medical Association (MSMA) lobbyists, Tom Holloway, Jeff Howell, or someone from the osteopathic physicians association or the hospital association, must have stayed up late at night reading the bill. They were sure the MSMA lobbyists – or perhaps some other health care lobbyist – would find the tocological sentence. If so the midwives’ adversaries would try to get the House to strip out the provision.

I thought we'd be begging friends in the House not to strip the wording out, Ueland told me. We were sure they'd all find out.

If so, the bill would go to conference committee after passing the House that day.

When the midwives walked into the Capitol on Friday morning before the House session convened, medical association lobbyists Tom Holloway and Jeff Howell greeted them warmly. As Ueland described it, "they seemed all smug and happy when they asked: How are you doing?"

After the lobbyists had passed them, the two midwives looked at each other. Do you think they haven't read it? They asked each other.

Rep. Doug Ervin, the House sponsor of the bill, was a supporter of midwifery. But did he know the "tocological" provision was in the bill he was now handling that morning on the floor of the House after it passed the Senate the previous night?

Ueland went to Ervin's office to talk to him about it before the House session opened, but he was busy, and then rushed out to the session. They did not get a chance to talk. Ueland left Ervin's office.

Reversing course, the midwives decided there was a chance that no one knew that "tocological" was in the bill. Because of that chance, they decided that it would be a good idea to stay out of the House visitors' gallery, because the medical association lobbyists might start wondering why the midwives were there and so interested in a health insurance bill.

They went to the office of their friend Rep. Cynthia Davis and listened to the discussion and debate on the House sound system. Also listening in Davis' office was pro-life lobbyist Kerry Messer, president of the Missouri Family Network and a representative for the Missouri Baptist Convention and Americans United for Life. There was something in the bill he cared about. The midwives did not want Messer to know that they were interested in the "health insurance" bill so they chatted about unrelated matters. Messer snapped: Can you ladies be quiet?

They heard Rep. Margaret Donnelly, a pro-choice Democrat get up to complain about a provision related to crisis pregnancy centers. Donnelly said there was something about this crisis pregnancy centers language that she did not understand and that she did not know all of the other things that might be in this Senate-expanded bill. Donnelly urged the House leadership and the House itself to amend the bill so as to send it to a conference committee; in committee it could be examined closely and the differences between the House and Senate versions would be worked out.

They listened as Ervin answered Donnelly. Ervin had a different goal than Donnelly. He wanted to pass the bill in exactly the form that it came from the Senate so that it would not have to go to a conference committee and it would go directly to the governor's desk, a major accomplishment for the bill's sponsor.

I Have Read This Entire Bill

Ervin, the sponsor, assured his colleagues there was nothing to worry about: I have read this entire bill, and we do not need a conference committee. The House Republicans, believing Ervin, ignored Donnelly's plea and passed the bill exactly as it had come over from the Senate. Because the bill passed the House with the same language as the senate version, the bill was "truly agreed to and finally passed" – the standard phrase indicating final legislative approval of wording that passed both houses– and was sent to Gov. Matt Blunt.

Many of the public often seem surprised when they hear that many legislators do not bother to read the bills on which they are voting. They assume that someone would notice a provision such as the "tocological" section that legalized midwifery. But if anyone had noticed, they said nothing.

Someone had noticed. Rep. Tom Villa, a Democrat, was "old school." He was the son of the legendary St. Louis alderman, Albert "Red" Villa, the city's longest serving alderman who represented his neighborhood from his headquarters in his saloon, The Cottage Inn, in the Carondelet area of south St. Louis. Tom was elected to the legislature in 1974 at age 29 and rose to be majority floor leader in the early 1980s. Tom Villa left the House in 1985 after losing a race for state treasurer in 1984. He later served on the board of alderman, was president of the board, and ran unsuccessfully for mayor in 1993. He won election as state representative in 2000 and served four more terms. Tom was "old school" in that he knew that as a member of the minority party he had little or no influence on legislation. But he diligently read many of the bills that he was asked to vote on.

The former high school teacher noticed the “tocological” provision, quietly looked it up, and said nothing. Being “old school” means that when your adversaries are about to make themselves look foolish, don’t stop them. After the voting was over, Rep. Villa said to a few of his fellow Democrats still in the vicinity of his desk on the floor: I think we just legalized midwifery.

Someone else may have noticed. After the bill passed, Representative Shannon Cooper, a Republican who never had been supportive, saw the two midwives in the Capitol hall and asked suggestively: What did you ladies do? At that point, the midwives decided they should get out of the Capitol and they left. Rep. Sam Page, a physician from St. Louis County, saw the “tocological” language and began alerting colleagues, but it was too late. The bill was “truly agreed and finally passed” and the House had adjourned until Monday. The bill would no longer be in either house of the legislature; it was on its way to the governor’s desk.

Someone else took notice and he was not happy – Senator Mike Gibbons, the president pro tem. Ueland had not left Jefferson City before she got a call from Senator Loudon. The Senate had adjourned on Thursday night and none of the senators seemed to be around on Friday when the bill passed the House. Loudon said that Senator Gibbons had just called him and he was really angry. He gave me a tongue lashing, Loudon said. Apparently his advice to the midwives – use your imagination – was not entirely serious, or perhaps he had forgotten, or both.

You should go see him, and let him yell at you, rather than yelling at the press, Loudon said. So the midwives went to Gibbons' office and waited for an hour or so. He was not there, the Senate was dark, and the House had adjourned after the passing HB 818, the health insurance bill that was soon to become notorious.

On Monday morning the press and the television were all over the midwifery-tocology story. The legislative leadership and the sponsors knew that Governor Blunt was going to sign the bill because he wanted the health insurance provisions in law. Their only chance was to pass a clean bill without the midwifery language, or to amend a pending bill to repeal the tocological language.

A Senator's Crucial Block

Because this was the last week of the session it was too late to introduce a new bill, so the medical association and its allies had to find a bill still pending that had a chance of passing that week. The only bill related in any way to health that the midwives could find was a bill sponsored by Senator Chuck Purgason, an independent-minded rural Republican from Caulfield, a small town near West Plains in south central Missouri. Purgason, who served eight years in the House beginning in 1997, was elected to the Senate in 2004.

Ueland, back in the Capitol early on Monday, went to talk to Senator Purgason. He was a supporter of midwifery and he did not like people telling him what to do, a fact that he was to prove beyond doubt when he ran in the U.S.

Senate primary in 2010 against Congressman Roy Blunt, who went on to win the U.S. Senate seat that year. Roy Blunt is the father of Gov. Matt Blunt.

Ueland told Senator Purgason that she had been hearing rumors that Purgason's Senate colleagues would amend his bill to insert a provision repealing the "tocological" language. She told Purgason that his bill was the only one still alive that related to health.

If the medical association lobbyists could not amend Senator Purgason's bill, they were out of options – the deadline for introducing new bills was long past, and the constitutional requirement that a bill contain only a single subject meant that they had to find a bill related to health in some way.

If they do that to my bill, I will kill my own bill, Purgason promised. That is the prerogative of a bill's sponsor – if the bill is amended in a way that he does not like, the sponsor can withdraw the bill, effectively killing it. Purgason was not a fan of the Republican establishment; but more importantly, Purgason by reputation was a man who, when he gave his word, kept it.

That Monday morning was a bad way for Senator Loudon to start the last week of the session. There was a torrent of criticism in the press from his colleagues and from doctors. Senator Gibbons, president pro tem of the Senate, stripped Loudon of his chairmanship of the Senate's Small Business, Insurance and Industrial Relations Committee. Ervin, the House sponsor, accused Loudon of deceiving him, saying that the legislation was an agreed-upon package and that Ervin never would have brought the bill to a vote if he had known that midwifery

was in it. So much for his assurance to colleagues that he had read every word of the bill and that it was all okay, no need for a conference committee review.

Likewise, Sen. Charlie Shields, the majority floor leader who decides which bills the Senate is to consider, said he would not have brought the bill to a vote in the Senate if he had known that midwifery was in it.

Loudon, however, was defiant, and the midwives unapologetic. Loudon told a newspaper that loss of his leadership position “was worth it.” He added that there’s not much he wouldn’t do to make sure people get this critical freedom to decide how and where to give birth to their children. “It’s not like I enriched a donor or set child molesters free; I put a new freedom for people into a bill,” he told the newspaper.

To reporters Loudon credited a midwife – Mary Ueland – with offering advice the previous year that saved the life of his wife Gina and their newborn baby, Robert, who had been born healthy in August.

In the press Ueland rejected criticism of the tactic. She pointed out that legislators, lobbyists, and the public had several hours to review the bill and notice the language. Midwifery supporters fully expected that someone would pick up on their motive, she said. Nobody lied, nobody was dishonest, and nobody asked any questions, she told an Associated Press reporter.

Senator Graham, the would-be filibuster champion, said Loudon had deceived the entire Senate. At least one senator did not mind. Republican Senator Chris Koster, who later would win the Attorney General’s job running as a

Democrat but even later in 2016 would lose the race for governor, called Loudon and pronounced the tactic “genius,” a description that may well have been preceded by a vulgar present participle.

The pledge that legislative leaders made to the press – to put in a repealing provision in a pending bill – already had been foreclosed by the midwives’ commitment from Senator Purgason. Senator Gibbons told the press the Senate would pass such a bill in the next session. The Senate was to consider such a bill in 2008.

When one examines the press reports from a distance of a few years’ time, however, it is difficult to find any groundswell of criticism from the public. A few doctors were upset and wrote letters to the editor; the medical associations denounced the provision. But regular people seemed not to have noticed or were not upset enough to complain to the newspapers.

It was a stunning victory for the midwives, but it came with costs and risks. For Deborah Smithey her years in the Capitol, 2004-2009 were a real civics education that imposed real costs. Legislating was not like what she saw in “Schoolhouse Rock,” the popular children’s television “short” that ran nearly 27 years starting in the 1970s. The show’s civics segment “I’m Just a Bill” showed how Congress considers, debates, amends, and votes on the merits of bills that are introduced. For five years she was a continual presence in the Capitol during the legislature’s sessions, with plenty to do when the legislature was not in session.

She lost her health and struggled to regain it. She lost time with her children. As an unpaid citizen-lobbyist, “It cost me a lot,” Smithey told me.

The cost to Ueland, also an unpaid citizen lobbyist, was in time, time away from her developing practice, and time away from Ben Walsh, whom she later would marry and with whom she would begin a family.

But the costs were not complete. A court challenge to their legislative handiwork would cost real money and further stress.

PART II THE PHYSICIANS GO TO COURT, THE MIDWIVES “LAWYER UP”

When Governor Matt Blunt signed the bill after the close of the legislative session, the law would take effect August 28, 2007 unless a court were to strike down the “tocological” section. Almost immediately a group of physician organizations – the Missouri State Medical Association, the Missouri Association of Osteopathic Physicians and Surgeons, the Missouri Academy of Family Physicians, and the St. Louis Metropolitan Medical Society – sued the state of Missouri to invalidate the “tocological” provision.

The associations’ claim was that the provision related to midwifery was unrelated to the subject of the rest of the bill, health insurance, and was therefore invalid under the Missouri Constitution.

In addition to their claim that the provision violated the constitution's "single subject" requirement, the physicians complained that the provision had been inserted through legislative trickery.

The physicians' case came to the courtroom of Presiding Judge Patricia Joyce of the Cole County Circuit Court in Jefferson City, where most cases challenging legislative enactments are heard.

A number of midwifery organizations and individuals involved as midwives, clients, and a physician who worked with midwives, intervened on the side of the state. In such cases, the reason that organizations and individuals intervene is to assure themselves that their position will be presented zealously. Often these interventions result where the interested parties are not sure that the state will pursue their interests to the hilt, including appealing an unfavorable judgment.

The lawsuit was designed to move fast, and in short order there was a hearing before Judge Joyce on August 2, 2007, three weeks before the new law was to take effect.

Mary Ueland was fearful. Lawyers had weighed in, advising the midwives that their legal position was weak. It would be hard to argue that midwifery legalization and "health insurance" could be a single subject, they said. The lawsuit was not about whether midwifery was a good thing or bad, or how the midwives conducted their practices. It was, quite simply, a question of whether the

following provision was of the same subject – health insurance – as the rest of the bill:

“Notwithstanding any law to the contrary, any person who holds current ministerial or tocological certification by an organization accredited by the National Organization for Competency Assurance (NOCA) may provide services as defined in 42 U.S.C.1396 R-6 (B)(4) (E) (ii) (I).” (The provision is now part of the Revised Statutes of Missouri listed as section 376.1753.)

The medical associations were well lawyered up for the August 2 arguments before Judge Joyce, a hearing that would take just two hours. Harvey Tettlebaum, a veteran lawyer who specialized in health care issues, put it simply, according to newspaper accounts: Senator Loudon’s amendment, he said, “was not germane to the subject, it went beyond the purpose of the bill.” The original subject, Tettlebaum said, was insurance. In this case, insurance was all it covered until Loudon came along and added his amendment.

At Klarich’s suggestion, the midwives association had hired Jim Deutsch, a longtime Jefferson City practitioner and named partner in Klarich’s St. Louis-based firm, Blitz Bardgett and Deutsch. An assistant attorney general, John McManus, defended the law on behalf of the state.

The purpose of the legislation was to increase access to health services, McManus told the judge. According to Missouri Supreme Court cases, “health”

and “health insurance” are related, McManus said. Midwives services are related to “health insurance,” McManus argued, because the purpose of the bill was to increase access to health care. In order to increase services, McManus said, the first step is to authorize the service itself.

McManus’s argument was creative. Compared with other arguments I have heard about the “single subject” rule, his reasoning was not especially far-fetched.

Tettlebaum complained that Loudon unfairly “snuck” his amendment into the bill without explaining it to the Senate. But Deutsch responded that Judge Joyce should not rule against the law just because Loudon’s colleagues don’t like how the amendment was adopted.

“They don’t need this court to referee clever legislators,” Deutsch said. Deutsch argued that legislators could have easily figured out what “tocological” meant. He said: “I googled it. That was available. This was not concealed.”

The midwives’ worst fears came true later in August when Judge Joyce declared that the tocological-midwifery provision was not germane to the subject of the bill, which was health insurance, and ordered the provision stricken under the Missouri Constitution’s single-subject rule.

Should They Appeal?

Now the midwives and their supporters were in a real bind. The midwives had intervened in the lawsuit and so they could appeal even if the state did not. They had an estimate that the cost of being represented on appeal would be somewhere around \$30,000.

Most of the supporters considered it to be a waste of money because they thought for sure they would lose. The predominant feeling was that the midwives association and friends of midwives should save their money for further efforts in the legislature.

What money? The midwives organizations had no money.

Further efforts in the legislature? Only someone who has not experienced the vagaries of the legislature day by day could say that, Ueland thought. Deborah Smithey was out of the country, volunteering at a maternity hospital in Mexico and checking emails every few days at an internet café. Ueland at first was the only dissenter from the majority who wanted to skip an appeal. She insisted it was worth a shot. Legislating is not like “Schoolhouse Rock.” It is difficult, and next time it will be impossible, she argued.

As the legislative liaison, Ueland told the midwifery supporters she knew “full well” that they would never again be this close to getting a bill passed legalizing midwifery. Smithey, from Mexico, agreed with Ueland and together they got consensus from the midwives to move forward with the appeal. The legal analysis from various lawyers was that Judge Joyce probably was right. Even though the legal analyses said the appeal was a long shot, the midwives and their supporters had confidence in Ueland and Smithey.

Smithey signed a personal guarantee for the Blitz Bardgett & Deutsch legal bills. “Let the bake sales begin,” she said.

Heading for the Supreme Court

Smithey and Ueland contacted organizations from around the country to get some *amici curiae* (friends of the court) briefs to be written for the Missouri Supreme Court appeal. Amici briefs were filed on behalf of Citizens for Midwifery; Midwives Alliance of North America; National Association of Certified Professional Midwives; *Our Bodies, Ourselves* – The Boston Women’s Health Collective; and National Birth Policy Coalition.

One of the *amici* brief volunteer lawyers was Georgetown law professor Jane Aiken, who assigned a group of students to research and write an *amicus curiae* brief. One of the law students, Megan Hall, insisted they should raise the “standing” issue. Standing is the doctrine that requires that a person bringing a lawsuit show that the person has suffered or will suffer an actual injury that the court can compensate or prevent. Organizations such as the Missouri State Medical Association must show that their members will be injured if the court does not act. Both the Deutsch lawyers and Professor Aiken thought raising the standing issue was a waste of time. So the midwives associations’ brief did not challenge the standing of the Missouri State Medical Association and other physician organizations to bring the lawsuit to strike down the provision.

Despite the midwives’ worries about the attorney general’s office representation, John K. McManus, the young assistant attorney general who had argued the case in Judge Joyce’s court, did raise the issue of standing in the state’s brief. He argued in the first portion of his brief that the organizations did not show

the kind of injury to the organizations' members that would show they had a legal interest that would be affected by a judgment in their favor.

The midwives' brief was completed; another lawyer in the firm, Thomas Rynard, was assigned to argue the midwives' position. McManus divided the state's 15 minutes with Rynard. The senior lawyers on side of the midwives, Jim Deutsch and the leadership of the Attorney General's office, left the actual oral argument to other lawyers. To me, that sometimes is a sign that the veterans did not want to be too closely associated with a losing case. (I have on occasion been that loser lawyer.) When victory is more certain, and the cause worthy, seniority in law firms and government agencies often will dictate who is to make the arguments. But on the other side, there also was a replacement – veteran health lawyer Harvey Tettlebaum was replaced by an able young associate in the firm, Robert Hess, who several years before had served as a law clerk for former Missouri Supreme Court Judge Duane Benton.

I was one of the seven judges on the Supreme Court of Missouri when the case was docketed for argument for March 5, 2008. Because this case challenged the validity of a state law, the Constitution required that the Supreme Court, the state's highest court, hear the appeal directly from the circuit court, by-passing the intermediate Court of Appeals.

When I started reading the briefs, I realized that the case was about the legality of midwifery, a position – but not the same issues – that as a lawyer I had argued on behalf of client Cheryl Southworth some 30 years before. As a matter

of judicial ethics, I considered whether I should recuse myself from hearing the case because of some involvement I had before becoming a judge. But it would be unusual to do so – many lawyers who become judges sit on cases that raise issues similar to those that the judge had litigated as a lawyer. If a party to the case had been my client, I would have taken myself off the case, but I was unfamiliar with the Certified Professional Midwives whose legality was at stake and did not know what a Certified Professional Midwife was. The real questions for me as a judge always were these: Can I decide this case either way, based on the law, or is there something about the parties to the case or the issues involved that would lead me not to consider both sides of the case in reaching a decision? Or, do I have a financial or other important interest in the outcome of the case? The answer to the first question was yes; the second question I answered no. I stayed in the case.

On reading the briefs I thought the question of whether the “tocological” language was included in the subject of the bill was close, as was the question whether the bill’s title fairly included the subject of midwifery. There was some support in previous cases, as Assistant Attorney General McManus argued, that “health” and “health insurance” were the same subject. But in some cases, the title might be so broad as to include everything and actually describe nothing. Such was the situation in a case in the 1990s of a 200-page law that the Missouri Supreme Court struck down; the bill’s title was simply “economic development” – a subject that might logically include almost anything the government might be doing. “Health insurance” would at least limit the range of topics that the bill

could contain, even though it could be a fairly broad range of barely related provisions.

It did not matter to me – or, more importantly, to the law – whether a legislator had “snuck” a provision in a bill or how the tocological provision got there. The law tends to favor Deutsch’s position that the courts will not referee the antics of clever legislators.

If legislators actually read what they were voting on, there undoubtedly would be few such problems. By one estimate years ago there were more than a hundred such “tucks” in each modern-day legislative session.

During the oral argument the judges’ questions probed both sides on the question of whether the midwifery provision was included in the bill’s subject and whether the title adequately gave notice of what was in the bill.

I had paid scant attention to the standing issue when reading the briefs. The state attorney general had raised standing as his first issue, but my lack of focus on the issue comes from an instinctive urge to get to the merits of a case rather than to dwell on doctrines that block litigants from the courthouse door.

When Assistant Attorney General McManus opened his oral argument by asserting that the medical associations had no standing to challenge the tocological provision, I felt the need to clarify the issue. I asked McManus whether the state medical association claimed any *economic* injury from the legalization of midwives. In other words, were the midwives competitors whose practices damaged the doctors financially?

No, McManus replied, the medical associations never claimed an economic injury but simply claimed they were suing to protect the public. The lawyer for the medical association later was asked the same question, and he did not base his claim on an economic injury – the doctors’ organizations were simply suing to protect the public.

The doctors did claim that they could be subject to discipline, and thereby suffer injury, if they collaborated with unlicensed midwives, but that was hard to take seriously because of the “tological” provision’s broad statement of legality: “notwithstanding any other provision of law.” The doctors also argued they had standing to represent the health interests of patients, but that is a hard argument to make when the patients – at least the parents – are choosing midwives. It would be a considerable stretch to say the doctors were representing the babies’ interests in opposition to their parents’ choices.

When the oral arguments were completed Mary Ueland felt discouraged. Many observers of court proceedings feel this way because judges’ questions often are not a reliable guide to how the judges are leaning. I listened years later to a recording of the oral argument, and I could not tell from the judges’ questions which way the judges would decide the case. Ueland told me she had not been impressed with the arguments of the assistant attorney general when she attended the oral argument. At the time, and on reviewing the recording, I thought otherwise – McManus did a fine job with the hand he had been dealt. He was especially astute to raise the standing issue.

Ueland also worried about the costs to the midwives and their supporters – the full bill for the representation for the Missouri Midwives Association would come to \$130,000, not \$30,000 that they originally thought. That’s a lot of bake sales.

After the appeal was heard, and uncertainty prevailed, the position that Ueland forcefully advocated – that the association should appeal – was looking like a disaster. It would take centuries of bake sales to raise that kind of money.

If the appeal were to be successful, Ueland believed the cost would be worth it. She did believe that it was crucial that the Missouri Midwives Association had intervened in the case, because otherwise she feared that the attorney general’s office might not have appealed Judge Joyce’s order. The state of course did appeal Judge Joyce’s decision; it would be difficult to know whether the office would have done so in the absence of the intervening midwives association. My own assessment is that the attorney general’s office would have appealed to seek clarity in the law regarding the “single subject” requirement. Moreover, as in most states, the Attorney General is elected and if Attorney General Chris Koster, an able politician, had chosen not to appeal, he might stand accused of caving in to pressure from doctors. When he appealed, on the other hand, he left it to the courts to decide the ultimate fate of the bill, not himself. To complete the political calculation, it is doubtful that making an appeal would subject the Attorney General to the charge that he was succumbing to political pressure from the midwives because what clout did they have, really?

The Supreme Court's Decision

When the arguments were completed that morning of March 5, 2008, the judges convened in private conference to discuss and take a tentative vote on each of the four cases we heard that morning. We had, as I recall, a spirited discussion, and I am constrained by the confidentiality of the Court not to give an account of the positions taken by my colleagues and me in that conference. There are many cases in the last two decades on the “single subject” constitutional provision and its related questions about a bill’s title and purpose. Sometimes the careful reader will have a hard time discerning how the precedent cases produce a consistent and coherent interpretation of the law. The question, as Judge Richard Teitelman noted in the oral argument that morning, seems a bit like the U.S. Supreme Court’s longstanding struggle to define pornography, which was best described by a Supreme Court justice who said “I don’t know how to define it, but I know it when I see it.”

That’s how I felt most days, as a judge, about the single subject standard – I knew it when I saw it. By that standard, I thought the “tocological” provision could be included in the subject of the bill. This conclusion was helped by precedent cases that say a court should try to uphold legislative acts, not strike them down. In these kinds of cases, if there is a “tie,” that is, evenly split between whether the provision fits the single subject, the precedent cases say in effect that the tie went to the legislature and we should uphold its enactment against the technical challenge.

On the single subject and related issues, the judges took a tentative vote. The case then was assigned to the judge in the majority who had the next turn at preparing an opinion. What follows that assignment is that the judge works with his or her law clerks and prepares a draft opinion and circulates it to the other judges. If one or more judges disagree with the reasoning or the result, the potential dissenters can ask the author of the opinion to modify it, or potential dissenters can prepare their own separate opinions. Occasionally a dissenting opinion will be circulated and will gain the support of a majority; when that happens, the case is re-assigned to the dissenter to write the decision the other way.

Judge Stephen N. Limbaugh Jr., an appointee of Governor John Ashcroft had been serving on the Court since 1992, wrote an opinion for the majority. Limbaugh is a conservative but not a ranting conservative like his cousin Rush Limbaugh who graces the nation's radio waves. He is a serious jurist well liked by colleagues of various ideological leanings, including me.

When Limbaugh circulated his opinion, I was surprised to read that he had dodged the "single subject" question entirely and decided the case on "standing" saying that the physicians' organizations did not have standing to challenge the law. (Limbaugh's opinion, and the dissenting opinion of Judge Price and Breckenridge, are in *Missouri State Medical Assn. v. State*, 256 S.W.3d 85 (Mo banc 2008).)

I thought that the state's and the midwives' position on the "single subject" rule would prevail in light of our checkered precedents and the favorable

presumption we should bring to examining legislative acts. But, on second thought, I quickly came to think it was wise for Limbaugh to decide the case on the “standing” issue. The “single subject” claim was unusual and certainly not clear-cut. An extensive discussion of the single-subject issue probably would not have enhanced anyone’s understanding of the topic regardless of which way the court decided the issue.

By contrast, “standing” was fairly easy. The doctors, after all, had not based their claim to have “standing” on any particular injury to themselves but rather on the amorphous concept of protecting the public. This usually is the rationale for occupations that use licensing as a means of organizing a legal cartel to keep out competitors. In a strict legal sense, how did doctors get to act as protectors of the public? Legislators can protect the public with laws – that is their role. But doctors are not empowered to invoke the courts’ jurisdiction to protect the public. The key point for me was that the doctors’ organizations declined to raise their economic interests – as competitors – to justify their “standing” to bring the suit. Without a claim of economic injury it was hard to see how they had a real interest in the case.

Judge Limbaugh’s opinion for the Supreme Court majority rejected the doctors’ contention that they could be subjected to discipline for cooperating with unlicensed practitioners. The doctors’ argument, he said, “overlooks the fact that section 376.1753 overrides these disciplinary provisions to the extent they apply to midwifery. Section 376.1753 expressly legalizes the services of certified

midwives and does so “[n]otwithstanding any law to the contrary.” The doctors also asserted that they could represent the interests of patients, a kind of standing the U.S. Supreme Court recognized in cases challenging abortion restrictions. Limbaugh’s majority rejected the notion that the concept could be applied outside the area of abortion rights. In a nicely phrased understatement, Limbaugh said: “Those who are inclined to engage the services of certified midwives under section 376.1753 would have no interest in contesting the validity of section 376.1753.”

What about the argument that the doctors could represent their own economic interests? The doctors never made that claim and Limbaugh was polite enough not to have mentioned it.

Judge William Ray Price, joined by Judge Patricia Breckenridge, dissented both on the issue of standing and on the merits of the doctors’ challenge. On the question of standing he accepted the doctors’ position that patients would be worse off with midwives, and that doctors would be required to provide treatment in high-risk situations. “The legalization of midwives is alleged to have an adverse affect on women's and newborn infants' ability to receive safe and quality healthcare” Price opined. “Physicians are in the best position to effectively advocate their patients' rights because of their expertise in this area and familiarity with the risks of the procedures and because they will ultimately be called upon to actually participate in the care of mothers and infants in instances of error or unforeseen complications. In fact, in this situation, the physicians may be the

only party able to challenge this statute, especially relative to yet to be born infants.”

Price’s opinion accepts the argument that midwife-assisted births are more dangerous than those attended by physicians. That generalization relies upon the notion that physicians’ expertise and skills are more appropriate than the knowledge and skill of certified midwives, a proposition that is debated by many prospective parents when choosing the person to attend them in childbirth.

More significant, of course, is the fact that five of the seven judges of the Missouri Supreme Court were unwilling to base the question of standing on a supposition of superior expertise claimed on behalf of undereducated patients. A claim of economic injury might have been more persuasive.

The decision of the Court was based solely on the conclusion that the physicians’ organizations did not have standing to bring the case. If anyone else did have standing, the time was nearly up. Missouri law allows challenges to the legislative process to be brought within one year of the law’s enactment. When that time period expired, the only avenue for those who wanted certified professional midwives to lose their legality or be restricted in their practices would be to get another bill passed.

Reaction to the Supreme Court decision was surprisingly muted, coming mainly from the contestants on the issue of midwifery. BNA’s Health Care Daily Report carried reaction from participants. A lawyer for the National Birth Policy Coalition, which had filed a friend-of-the-court brief, wrote: “Today’s victory over

Big Medicine is a real shot in the arm to the growing campaign to legalize midwives across the nation.” Missouri State Medical Association President Jeffrey L. Thomasson, by contrast, called the decision “a setback for the health and well-being of Missouri mothers and their babies,” adding on the association’s web site that the law legalizing midwifery is “dangerous” and “deceptive.”

Senator Gibbons promised to revisit the topic in the 2008 session.

With the victory in hand, Smithey and Ueland realized they had legalized the practice of midwifery for about five midwives, not including themselves. That was their estimate of the number of Missouri midwives who had NARM certification in 2008. Ueland, Smithey and most other trained but unlicensed midwives had completed the requirements to become “Certified Professional Midwives” but had not filled out the application for certification because in Missouri it would have made no difference.

They immediately set out to do so. The midwives had removed the biggest legal barrier to their practice, for however long that would last. Every year they would have to watch the allies of the medical profession in the legislature to guard against a reverse “tological tuck” that would put them out of business.

The reverse “tuck” has not arrived. Midwifery, which the legal and regulatory system never did put out of business in the intervening 13 years, survives.

