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The Most Rational Branch: Guinn v. Legislature and the Judiciary's Role as Helpful Arbiter of Conflict

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THE MOST RATIONAL BRANCH: *GUINN V. LEGISLATURE* AND THE JUDICIARY'S ROLE AS HELPFUL ARBITER OF CONFLICT

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I. INTRODUCTION

When the Nevada Supreme Court decided *Guinn v. Legislature*,[1] one would have thought from reading the popular press accounts that the court had forcibly displaced the State Legislature by means of a violent coup d'etat. Newspaper accounts of the decision referred to it as a usurpation of power in violation of clear constitutional language, belittling the court in language sometimes more appropriate to the baseball bleachers than to serious editorial commentary.[2] Following suit, politicized elements of the citizenry began a recall effort (seemingly unsuccessful as of this writing) directed at the court as well as

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[1] *See* Guinn v. Legislature, 71 P.3d 1269 (Nev. July 10, 2003) ("*Guinn I*"), *aff'd on reh'g*, 76 P.3d 22 (Nev. Sept. 17, 2003) ("*Guinn II*") (The litigation in *Guinn* was commenced by the governor of Nevada, Kenny Guinn, who filed a petition for a writ of mandamus declaring the Nevada Legislature in violation of the State constitution for failing to pass a balanced budget.).

[2] *See, e.g.*, Editorial, *Nevada's Judicial Dice-Throwers*, WALL ST. J., July 15, 2003, at A14 (stating "the quickie divorce, legalized prostitution and gambling" are "downright respectable" compared to the Nevada Supreme Court); Cari Geer Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, LAS VEGAS REV.-J., July 12, 2003, at 1A (discussing some legal scholars' reactions to the decision, reporting UCLA law Professor Eugene Volokh's description of the opinion as "just awful"); Richard Lake, *Talk Radio Scorns the High Court Decision*, LAS VEGAS REV.-J., July 15, 2003, at 8A (Rush Limbaugh, in effect, accused the justices of being outlaws, arguing that they took "the law into their own hands just like the Old West when the outlaws decided that if a law didn't appeal to them, they're just going to do away with it . . ."); and Editorial, *Compounding the error: Nevada High Court Won't Reconsider*, LAS VEGAS REV.-J., Sept. 18, 2003, at 10B (accusing court of "earlier error" that had taken away "the integrity of the voter initiative process in the Silver State"; *Guinn II* was a "poorly reasoned and defensive decision"; *Guinn I* "set aside the constitutional amendment of mandating a two-thirds majority vote from both houses of the Legislature for any tax increase" and "demonstrated disdain for the validity and integrity of the constitutional initiative process"; court's purported conflict between different sections of the State Constitution is "pure fiction"; *Guinn II* court "had the audacity to claim that voters were too stupid" to appreciate consequences of supermajority requirement; *Guinn II* opinion was "nonsense").

joining the chorus of criticisms.[3] Some of this criticism of the court apparently extended to quite non-judicial forums. Threats of physical harm were directed at some of the Justices, and the children of at least one Justice were subjected to bullying at school as a result of the decision.[4]

If some of the attacks on the court had not taken such an ugly tone teetering on the brink of violence, the criticisms would be almost comical. The thought of the seven-member Nevada Supreme Court forcibly displacing the Legislature is more the stuff of *Doonesbury* than of real political threat, particularly in a state with an elected judiciary.[5]

Essentially, the court merely decided a case presented to it in an adversarial posture by two antagonists. To be sure, the identity of the antagonists – the Executive and Legislative Branches of the Nevada government – distinguished the case from the run-of-the-mill tort or contract dispute.[6] In addition, greater-than-usual electoral interest was present because one of the constitutional provisions under review was originally enacted by popular initiative.[7] But perhaps more important for purposes of explaining the semi-hysteria that accompanied the decision is that the *Guinn* decision was portrayed as being a tax *increase* decreed by the judiciary. As I will explain, that oversimplified explanation is not entirely accurate. Most important, *Guinn v. Legislature* was

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[3] *See Quality Candidates are Needed*, LAS VEGAS REV.-J., Nov. 16, 2003, at 2E (53% of respondents to the *Review-Journal*'s Nevada Daily Poll said that they would oppose the recall of Justice Agosti). On the heels of the decision, the group "Nevadans for Tax Restraint" stated that it was considering pursuing a recall of the six justices who made up the majority. *See* Cy Ryan, *Justices "Bold Step" Signals the End to Deadlock: Leaders Expect to Approve Funding Plan Early Next Week*, LAS VEGAS SUN, July 11, 2003, at 1A; Cari Geer Thevenot, *Experts Discuss Ramifications of Ruling Against Two-Thirds Majority Vote to Raise Taxes*, LAS VEGAS REV.-J., July 12, 2003, at 1A.

[4] In the interests of not exacerbating this sort of already existing invasion of the private lives of the Justices, I will not provide a formal citation in this footnote. One Justice related to me several instances of the Justice's children being subjected to ridicule and verbal attacks at school relating to the *Guinn* decisions and press criticism of the court. Although this sort of thing is not the end of the world so long as the attacks do not escalate (schoolchildren may be specialists in being cruel to one another on a regular basis), it illustrates the degree to which undue emotion surrounded the *Guinn* decisions. Even United States Supreme Court Justices and their families appear not to be subjected to this kind of behavior except in the most high profile and socially charged cases, such as Roe v. Wade, 410 U.S. 113 (1973) and Brown v. Board of Education, 347 U.S. 483 (1954). To me, the incidents reflect the degree to which public reaction to the *Guinn* decisions exceeded the ordinary bounds of reflective discussion.

[5] In general, the conventional wisdom posits that elected judges are less likely to take unpopular positions or oppose powerful political or economic interests because the elected judge is more vulnerable to retaliation from these other powerful interests. The system of judicial elections prevailing in Nevada makes the Court, if anything, unduly likely to be too responsive to the popular sentiments and political pressures of the moment. *See* Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003); Conference, *Judicial Selection and Evaluation*, 4 Nev. L.J. 61 (2003); Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L. J. 107 (2003).

[6] *Guinn I*, 71 P.3d 1269.

[7] Gibbons Tax Restraint Initiative, Nevada Ballot Question 10 of 1994 and Question 11 of 1996. *Guinn II*, 76 P.3d at 29.

a legitimate case, no more collusive than common social action litigation or inter-business contract disputes.

In the hurly-burly of criticizing the decision itself, this important factor has been overlooked and even distorted. The charge of courts is to decide cases, no matter what the identity of the parties, the subject matter of the dispute, or the likely political fallout of the dispute. When presented with a case or controversy (and in this case, quite a controversy), courts generally have an "unflagging obligation" to exercise jurisdiction[8] rather than to avoid decision. Although prudential doctrines have developed under which courts may, in principled, non-partisan fashion, avoid or postpone certain decisions on non-justiciable political questions,[9] they are the exception rather than the rule.

Although it may serve the political and rhetorical ends of *Guinn*'s critics to characterize the case as an unprecedented extension of judicial power or a wholly irrational approach to the questions presented by the case, this sort of description is inaccurate, unfair to the court, and detrimental to the type of reasoned deliberation that would better serve Nevada in addressing fiscal issues of governance.

Particularly disturbing is the degree to which the discussion surrounding the *Guinn* decision has failed to appreciate the inevitable degree to which courts make choices when deciding cases. Courts are not software programs that inflexibly produce particular results in response to specific inputs, although perhaps the *Guinn* critics would prefer such a world. Rather, Courts are adjudicatory bodies that make decisions based on a variety of contextually based factors. In the course of so doing, courts are free – and should be free – to make choices among a range of permissible approaches and outcomes in order to reach a "best," "better," or "least bad" result. The mere fact that a court has made a choice disliked by many hardly makes the decision illegitimate.

Rather, *Guinn v. Legislature* is more correctly viewed as an example of a court attempting to assist coordinate branches of government and the citizenry in resolving pressing and divisive issues in a rational manner that minimizes disruption to the State of Nevada. In effect, the court saved the Legislature from itself and saved its citizens from an instance of unintended consequences of superficially or ephemerally popular political ideas. Although this is perhaps "result-oriented," it was a permissible choice for the court that followed from permissible legal analysis. Although the *Guinn* result was not the only legitimate outcome the court could have decreed in the case, and its methodology, particularly that of *Guinn I*, is subject to criticism, the decision was clearly a proper exercise of judicial authority meted out in an effort to faithfully discharge the court's function. It was not the rampaging, rogue judicial activism portrayed by critics of the decision.

Guinn v. Legislature was, of course, distinguished from the average case because of its undeniable fiscal impact and its seeming refusal to follow an arguably clear Nevada constitutional provision stating that revenue could be raised only by a two-thirds vote of the Legislature.[10] The court's critics viewed the *Guinn* decision as judicial misfeasance because it ordered the Legislature to

[8] *See* Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 821 (1976).
[9] For a discussion of those principles see Baker v. Carr, 369 U.S. 186 (1962).
[10] *See* Editorial, *The Republican Gray Davis*, WALL ST. J., July 2, 2003, at A10.

consider increasing taxes to fund public schools under a simple majority standard when the Legislature itself had been unwilling to do so by the required two-thirds majority.[11]

Viewed in this manner, it is understandable why critics of the *Guinn* decision have regarded it as judicial legislation that the State Constitution had committed to the Legislature and which required a legislative supermajority.[12] The result preferred by *Guinn* critics – a holding that the two-thirds supermajority required for raising revenue was sacrosanct – was an equally permissible approach to resolving the dispute. This sort of "two-thirds means two-thirds and that's that" legal analysis would have played well to Nevada's "taxes are the enemy always" crowd. But this was not the only reasonable means of addressing the legal question that confronted the court. In addition, cleaving only to the text of this one constitutional provision could well have resulted in paralysis or crisis if public school systems were required to curtail or even cease operations. Some pro-education, pro-government liberals might even have preferred this sort of *Guinn* result, believing that it would have acutely framed the issue of lack of school funding and its consequences; perhaps this would prompt the electorate to realize the perils of anti-tax literalism and punish legislators at the polls who were unwilling to fund the schools.[13]

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[11] *See e.g.*, Timothy Sandefur, *Throwing Out the Rules: The Nevada Supreme Court Tries Legislating*, THE NAT. REV. ONLINE, July 14, 2003, *at* http://www.nationalreview.com/comment/comment-sandefur071403.asp (last visited June 19, 2004) (stating that the court had decided when tax increases are "acceptable" contrary to the commitment of that function to the legislature).

[12] *See, e.g.*, Recent Cases, *Constitutional Interpretation – Nevada Supreme Court Sets Aside a Constitutional Amendment Requiring a Two-Thirds Majority for Passing a Tax Increase Because It Conflicts with a Substantive Constitutional Right* - Guinn v. Legislature of Nevada, *71 P.3d 1269 (Nev. 2003)*, 117 HARV. L. REV. 972, 979 (2004) (arguing that the "*Guinn* court's departure from its canons of constitutional interpretation poses a serious threat to the separation of powers").

[13] I am grateful to Professor Bret Birdsong for making this point at a Boyd School of Law faculty discussion concerning *Guinn v. Legislature*. Professor Birdsong noted that the mid-1990s budgetary extremism by Newt Gingrich and his disciples lost support when it led to a stoppage of federal government services. The public, in the abstract, supported much of the budget-cutting rhetoric that led Gingrich to the Speakership when the GOP gained control of the House of Representatives as a result of the 1994 elections. However, much of this support melted when voters were forced to face cuts in specific programs they favored or were inconvenienced by cessation of government operations.

What I will henceforth refer to as the "Birdsong Doctrine" (at least as I interpret it) argues that social progressives favoring significant government programs would perhaps be better off if the "bluff" of tax and budget-cutting anti-government forces were "called" by allowing the proposed brave new world of leaner government to actually take effect. Professor Birdsong suggests that the center of the electorate will, when faced with this situation, swing to the side of those supporting reasonable government programs rather than to the side of those attempting to "starve the beast" by refusing to fund programs or raise revenue.

The Birdsong Doctrine may indeed be correct on a political level. It also has arguable intellectual support on a judicial level. Supreme Court Justice Felix Frankfurter once suggested that courts construe unwise legislation literally as a form of "judicial blackmail" that would force the legislature to confront the defects of the law and logically to amend it. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing and criticizing Frankfurter's suggestion). Liberals, at least, would presumably view the two-thirds supermajority requirement for raising revenue as an unwise law that promotes tyranny by a conservative minority more than it vindicates majority rule or protects the public fits.

I am relatively agnostic as to the best public policy outcome in this ongoing political debate (but somewhat happier that the *Guinn* court kept the state functioning smoothly rather than forcing the hand of those legislators willing to risk public school shut-down). My point for purposes of addressing the jurisprudential aspects of the *Guinn* decision is simply this: regardless of whether one likes its rationale or result, the decision fell within the mainstream of proper judicial activity. The sort of isolated textual literalism advocated by many critics[14] of the Court, one that would have permitted continued legislative stalemate, was not the only permissible legal analysis of the problem presented by Nevada's fiscal crisis of 2003. Neither was the Court required to avoid the issue altogether, as suggested by some.[15] Rather, in this Article, I consider the *Guinn* decision as an act of judicial power and find it a clearly proper exercise of such power. It reflects a court taking a measured, moderate, even cautious approach to a difficult legal issue and vexing social problem.

To be sure, the *Guinn* decision can be criticized as a matter of interpretative technique. One can argue that the *Guinn* court gave insufficient deference to the textually clear language of a relatively recent amendment of the Constitution that presumably reflected the sentiments of a current majority of Nevada voters. Although this perspective is justified (if overstated by some critics of *Guinn*), it is not the "only" legitimate approach to the issue and probably is not the fairest means of viewing and characterizing the *Guinn* decision. Rather, the sounder view of *Guinn v. Legislature* is that it was the act of a judiciary attempting to fairly discharge its role as arbitrator of disputes and its duty to provide helpful interpretation of disputed provisions of the law. In doing so, the court also attempted to disrupt daily life in Nevada as little as possible.[16]

Under the Frankfurter approach, even a court of raving liberal judges might enforce the supermajority requirement to the letter in order to create the tension that would perhaps force legislative and electoral reconsideration of the supermajority provision.

In this Article, I am not attempting to evaluate the wisdom of this approach versus other approaches to framing the issue. Rather, I am merely suggesting that the approach of literal construction of a privileged legal provision, such as the revenue supermajority requirement, is simply one permissible of adjudication of the *Guinn v. Legislature* controversy. The resolution of arguably conflicting constitutional provisions performed by the Nevada Supreme Court is another permissible adjudication of the dispute. As such, the court's actual legal analysis in *Guinn* is entitled to respect as one permissible approach to the problem presented.

[14] *See* Steve Sebelius, *A Bad Ruling*, LAS VEGAS REV.-J., July 13, 2003, at 3E (maintaining that "by recklessly, arbitrarily and capriciously ignoring part of the constitution, the justices have done great violence to the law").

[15] *See* Steve Sebelius, *The Right Thing*, LAS VEGAS REV.-J., July 20, 2003, at 3E (calling the federal district court's dismissal of a group of taxpayers' and legislators' suit regarding the *Guinn* ruling an instance of "judicial restraint" in contrast to the *Guinn* court's decision as an example of "judicial insanity").

[16] This implicit principle of "non-tumult" is longstanding in the law, even if seldom discussed. Obviously, the avoidance of disrupting daily life cannot be the chief aim of the judiciary or judgments would not be well and expeditiously enforced. If a criminal is convicted, he usually goes to jail rather than continuing to run an energy-trading company or sell crack on the street. But even in the extreme case of criminal activity, the non-tumult principle is strong. Consider bail and sentencing that permits probation or modified incarceration so that convicted defendants may continue to work or attend to family matters. Former Enron executives Andrew and Lea Fastow engaged in plea bargaining that provided that their sentences not overlap because of their desire to ensure that one parent is at home at all times for their young children. *See* Editorial, *Plea Deals: Justice for the Children?*, WASH.

Just as a court in more ordinary circumstances must decide whether plaintiff ran the red light or defendant was speeding, the *Guinn* court was required to determine whether the Governor or the Legislature had properly framed the question concerning constitutionally imposed obligations to fund education and constitutional limits on revenue-raising. Just as a court in a contract dispute must resolve tensions between seemingly inconsistent terms, the *Guinn* court was required to decide whether the Governor's preference for the constitutional language requiring education funding trumped the Legislature's preferred portion of the constitution limiting revenue-raising.

In its decision, the Nevada Supreme Court was not acting lawlessly or imperialistically. Nor did it disregard or disrespect the views of the electorate, or engage in reckless "judicial activism" or judicial legislation.[17] Instead, the court was acting in the finest tradition of the judiciary in discharging its obligations as an adjudicatory branch of state government. Although reasonable minds can differ over whether the *Guinn* court's resolution of the dispute was the optimally correct interpretation and adjudication, there should be no serious dispute that the court was acting properly in making the adjudication under the circumstances of the perceived executive-legislative "gridlock" that threatened to paralyze Nevada's public educational system. Rather than engaging in doomsday rhetoric about the *Guinn* decision, critics would better serve the legal system and the body politic by addressing *Guinn v. Legislature* on its own terms: as a dispute over constitutional meaning that was presented to the courts in a form appropriate for judicial resolution. Far from being an example of judicial misfeasance, *Guinn v. Legislature* is instead an example of the judiciary discharging its duties in considerably better fashion than the Legislature, the press, or elements of the public.

POST, Jan. 16, 2004, at A18; Dana Calvo & Nancy Rivera Brooks, *Fastows Plead Guilty to Enron Charges*, L.A. TIMES, Jan. 15, 2004, at C1.

Even where case decisions bring dramatic change, the immediate impact of the decision on defendants or the public is often salved by the court's final decree. For example, an interpretation of a statute is often given only prospective effect and does not apply to past decisions. When the Supreme Court declared parts of the 1978 bankruptcy law unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 459 U.S. 1094 (1982), the Court stayed the effect of its decision for six months in order to give Congress and the courts time to respond. The famous *Brown v. Board of Education* decision (*Brown II* regarding relief), 349 U.S. 294 (1955), was criticized for using the phrase "all deliberate speed" by those who thought that the Court was giving segregationist states too much slack. Although the critics may have been right, the Court was also within its prerogatives in attempting to make its historic *Brown I* (347 U.S. 483 (1954)) decision, striking down segregation, less disruptive than it would have been had the *Brown II* Court ordered integration overnight. Ironically, regardless of whether the *Brown* approach was too solicitous of *de jure* segregated systems, it now appears that public schools in Southern states are more integrated than their Northern counterparts. *See generally* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001) (describing background of *Brown*, including litigant strategy, decision itself, and aftermath of decision).

My point as applied to *Guinn v. Legislature* is simply this: when faced with "big" decisions affecting government operations or social behavior, courts are within their prerogatives deciding close cases and implementing their decrees in a manner that minimizes the decision's potential for disruptive impact.

[17] *See supra* notes 11-12.

II. NEVADA'S 2003 TAX IMBROGLIO AND THE *GUINN V. LEGISLATURE* LITIGATION

Nevada's Legislature only meets in alternate years.[18] When the legislature convened in 2003, the State faced serious financial burdens, a situation referred to as a "crisis" by some.[19] In essence, state revenue was comparatively low in relation to the state government's funding commitments due to the sluggish pace of the state and national economy.[20] In addition, the aftermath of the September 11 terrorist attacks had resulted in reduced air travel and tourism in Nevada.[21] Nevada does not have a personal or corporate income tax and is consequently dependent on revenue raised from sales and use taxes levied on transactions.[22] When tourism, gaming, construction, entertainment, or other economic activity declines, the state's revenue correspondingly declines, creating the potential for fiscal difficulty. More conservative politicians and voters might attribute the problem to excessive government spending, but the effect is the same: too little government revenue in comparison to the government's funding obligations.

As the 2003 legislative session began, Governor Guinn requested $980 million in new revenue for the 2003-2005 biennium, which was to begin July 1, 2003.[23] As the *Guinn* court observed:

> Over the four-month regular session, the proposed budget was reduced by approximately $135 million. However, philosophical differences still permeated the final days of the regular legislative session. Consequently, by the June 3 conclusion of the 2003 regular session, the Legislature did not complete its constitutional duty to approve a balanced budget, but it appropriated $3,264,269,361 for various government functions and the Governor signed these appropriations into law.

The Legislature further failed in its constitutional duty to appropriate funds for Nevada's public school system. This funding dilemma apparently resulted from a confluence of factors, including the abbreviated nature of the regular legislative session; the need to address the comprehensive mandates of the new federal No Child Left Behind Act; and policy disagreements between the Senate and Assembly in regard to consolidating certain childhood educational programs, implementing class-size reduction programs, earmarking money for textbooks and other instructional materials, and encouraging experienced teachers to work in at-risk schools or schools designated as needing improvement and, of course, the revenue shortfalls.[24]

Under the arrangement struck by the Governor and the Legislature, most Nevada governmental functions were slated to continue without interruption on

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[18] NEV. CONST. art. 4, § 2.

[19] *See e.g.*, Ray Hagar, *Nevada's Budget Crisis*, RENO GAZETTE-J., May 1, 2003, at 1A.

[20] *See Guinn II*, 76 P.3d at 27.

[21] *See* Rod Smith, *Win by Casinos Declines in April*, LAS VEGAS REV.-J., June 7, 2003, at 1A (discussing the economic circumstances that have led to declining gaming revenues).

[22] *See* George F. Will, *A Cure for Nevada's Growing Pains*, WASH. POST, Sept. 25, 2003, at A33.

[23] *See* Valerie Richardson, *Nevada's Gov. Guinn Faces Recall over $1 Billion in Taxes*, WASH. TIMES, Sept. 1, 2003, at A9.

[24] *See Guinn II*, 76 P.3d at 27-28. *See also* No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 et seq. (2000).

July 1, 2003 but there remained the very large problem of a public school budget that was unfunded because only a majority of the Legislature (rather than the two-thirds required by the State Constitution) supported raising the required additional revenue to fund the school budget.[25] When Nevada's regular legislative session ended, Governor Guinn ordered a special session of the legislature for the purpose of appropriating funds for public education and "providing a tax plan sufficient to pay for the state's services and balanc[ing] the final budget."[26] The special session failed to produce legislative agreement on these matters.[27] So, too, did a second special session that ended in late June.[28] Thus, with the beginning of the new budget biennium only days away, Nevada had failed to fund its public education budget.

The Guinn Administration commenced the *Guinn v. Legislature* litigation as a petition to the Supreme Court seeking a writ of mandamus:

> declaring the Legislature to be in violation of the Nevada Constitution [art. 11, § 6 requiring provision of support for public education], and compelling the Legislature to fulfill its constitutional duty to approve a balanced budget – including an annual tax to defray the state's estimated expenses for the biennium beginning July 1, 2003, and appropriations to fund public education during that fiscal period – by a time certain.[29]

III. THE NEVADA SUPREME COURT'S ANALYSIS

The Court granted the Governor's petition for mandamus, finding that such extraordinary relief was justified under the compelling circumstances of the Nevada budget shortfall, executive-legislative impasse, and State constitutional requirement that education be funded.[30] The Court held that the Legislature was in violation of Article 11, Section 6 of the Nevada Constitution, which required the Legislature to provide for the support and maintenance of the state public school systems "by direct legislative appropriation from the general fund."[31] The court found this provision and other portions of the Constitution to require adequate funding of education and the education budget.[32]

In its July 10 decision, the *Guinn I* court also acknowledged that Article 4, Section 18(2) of that same Constitution requires a two-thirds vote of both the Nevada Senate and the Nevada Assembly "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates."[33] However, the court viewed this as a "procedural" requirement for enacting a revenue raising provi-

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[25] *Guinn II*, 76 P.3d at 27.
[26] *Id.*
[27] *Id.* at 27-28.
[28] *Id.* at 28.
[29] *Guinn I*, 71 P.3d at 1272.
[30] *Id.* at 1273 n.3.
[31] *Id.* at 1272-73. *See also* NEV. CONST. art. II, § 6.
[32] *Guinn I*, 71 P.3d at 1272-73.
[33] *Id.* at 1273. *See also* NEV. CONST. art. 4, § 18(2).

sion that must yield to the more forceful "substantive" command of Article 11 that the Legislature adequately support public education.[34]

In retrospect, the Guinn Administration had made a shrewd bargain with the Legislature by separating public education funding from other government spending so that the spending at issue before the court was supported by a provision of the state constitution, thereby setting up the conflict with the supermajority provision.[35] The Governor may have even "hornswaggled" or "sandbagged" his opponents in the Legislature, many of whom shared his Republican affiliation, even if they did not share his views on public spending. Because it was public education funding that was at issue before the *Guinn* court, and because public education funding enjoys special constitutional protection on the face of the document,[36] the Governor and his counsel had cleverly choreographed a situation in which the two-thirds supermajority requirement was now in arguable conflict with another constitutional provision of similar stature and seeming clarity. Although courts may not legislate or decree policy from whole cloth, even judicial conservatives accept that a court may (or even must) decide cases; incidental political effects of cases are simply part of the judicial process.[37] The Governor succeeded in framing his political differences with a minority of state legislators as a judicial controversy. Perhaps more important, he subsequently prevailed on the issue of whether education support provisions of the Constitution trumped the tax supermajority requirement.[38]

At its core, *Guinn v. Legislature* was an interpretative decision in which the Nevada Supreme Court attempted to resolve what contracts scholars term "contextual" ambiguity, the uncertainty that results when different provisions of a contract are in tension with one another.[39] Although the notion of ambigu-

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[34] *Guinn I*, 71 P.3d at 1275-76. The *Guinn I* Court's use of a "substance over procedure" canon arguably created new, unprecedented, incorrect law out of whole cloth. Academic commentators, even those generally sympathetic to the difficulties faced by the Court, have criticized the "substantive constitutional provisions trump procedural substantive provisions" maxim as wrongheaded and at odds with mainstream constitutional theory. *See, e.g.*, William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution*, 5 NEV. L.J. (forthcoming Fall 2004) (text accompanying notes 17-23); Steve R. Johnson, *Supermajority Provisions,* Guinn v. Legislature, *and a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 502 (2004); Note, *Guinn v. Legislature*, *supra* note 12, at 978-79. However, these same commentators also suggest *Guinn I*'s holding was defensible on other grounds, particularly the accepted canon of interpretation giving more weight to specific provisions over general provisions. *See* Popkin, *supra*, text accompanying notes 17-23; Note, *Guinn v. Legislature*, *supra* note 12, at 979.

[35] *See* Editorial, *Nevada's Judicial Dice Throwers*, WALL ST. J., July 15, 2003, at A14.

[36] *See* NEV. CONST. art. 11, § 6.

[37] For example, consider Bush v. Palm Beach Canvassing Bd., 531 U.S. 1004 (2000), *cert. granted, sub nom.* Bush v. Gore, 531 U.S. 98 (2000), for which the judicially conservative Justices Rehnquist, Thomas, and Scalia granted certiorari.

[38] *Guinn I*, 71 P.3d at 1276.

[39] *See* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939 (1967) (classifying types of contractual uncertainty as vagueness, ambiguity of term, ambiguity of syntax, and contextual ambiguity). *See also* ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25A (3d ed. 2002) (adopting Farnsworth's classification of types of contractual uncertainty); JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS §§ 3.10-3.17 (5th ed. 2003) (same).

ity analysis is most developed in contract jurisprudence (particularly the law of insurance contracts), it is a concept readily and frequently transferred to issues of statutory and constitutional interpretation.[40] In making its assessment, the *Guinn I* court portrayed itself as simply deciding the question as one of doctrine by applying various canons of construction.[41]

The *Guinn I* court also resolved the perceived constitutional conflict by viewing the two-thirds supermajority for tax increases as a merely "procedural" requirement that held less weight and import than the "substantive" constitutional command that education be adequately funded.[42]

> The two-thirds majority requirement is a procedural requirement. It is a process requirement by which legislative action is accomplished and decisions that weigh the public interests are accounted for. In the area of taxation this means that the Legislature must agree by a two-thirds majority as to which mechanisms will be employed to generate revenue. Without a two-thirds majority, revenue measures may not be enacted. This general constitutional provision does not purport to say what the substance of the revenue measure ought to be, only that whatever they be, they are acceptable to two-thirds of the elected members of each house of the Legislature.

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[40] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, Ch. 7 (2d ed. 1994) (non-textual factors should be used to resolve unclear statutory meaning); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987) (interpretation in complex cases cannot be a matter of simply reading text or applying maxims of construction); Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (suggesting that "private-regarding" special interest legislation be construed narrowly, with doubts resolved in favor of public interest, unless unambiguous text requires a different result); Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) (statutory interpretation cannot be appropriately done through mechanical formula or "unimaginative adherence to well-worn professional phrases"); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47-48 (1928) (Supreme Court, in an opinion by Justice Holmes, consults legislative history to determine "what a statute means"); Shine v. Shine, 802 F.2d 583, 588 (1st Cir. 1986) (court construes bankruptcy statute in manner to "effectuate its beneficent purposes" so that spouse receives benefits that, under literal language of the bankruptcy provision, might otherwise go to debtor's estate for benefit of creditors, a resolution similar to construing ambiguity in favor of non-drafting party) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)); Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 615 (1949) (creating mythical case in which stranded cave explorers killed and ate a member of the party in order to survive; mythical court struggles with resolution of ambiguity of seemingly clear criminal statute applied to unusual circumstances). The "rule of lenity" in construing criminal statutes narrowly to protect defendants from the power of the state is similar to the contract law maxim of construing unclear contract terms against the drafting party. *See* ESKRIDGE & FRICKEY, *supra* at 655-75.

[41] *See Guinn I*, 71 P.3d at 1274-75:

> When construing constitutional provisions, we apply the same rules of construction used to interpret statutes. Our task is to ascertain the intent of those who enacted the provisions at issue, and "to adopt an interpretation that best captures their objective. We must give words their plain meaning unless doing so would violate the spirit of the provision." Whenever possible, we construe provisions so that they are in harmony with each other. Specific provisions take precedence over general provisions. Finally, constitutional provisions should be interpreted so as to avoid absurd consequences and not produce public mischief. *Id. citing* Nevada Mining Ass'n v. Erdoes, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001).

[42] *Id.* at 1275.

> In contrast, the Constitution requires specifically, as a matter of substantive constitutional law, that public education be funded. . . . If the procedural two-thirds revenue vote requirement in effect denies the public its expectation of access to public education, then the two-thirds requirement must yield to the specific substantive educational right.[43]

The court was nearly unanimous in the *Guinn I* decision of July, perhaps a surprising result considering how newsworthy and controversial the case became.[44] Justice Maupin was the lone member dissenting in part and concurring in part.[45] He appeared to agree with the court's assessment that the case ultimately required resolution of competing, even inconsistent, constitutional provisions and a balancing of interests.[46] He also appeared to agree that in a battle between the education funding edict and the anti-tax supermajority limitation, the former must win.[47] However, he disagreed as to the appropriate judicial remedy in such a situation.[48]

> I would decline the Governor's invitation to intervene in the legislative budgetary process – a process that represents the discretionary authority of a co-equal branch of the state government – *at this time*. In this, I would note that none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today. I also note that the legislative response to the petition acknowledges the Legislature's constitutional obligations concerning the budget.
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> Accordingly, I would defer the relief afforded by today's majority until it becomes evident that the constitutional mandate to fund education will not be satisfied in time for compliance with the statutory requirements for distribution of state funds to local school districts.
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> * * *
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> [The education funding and supermajority tax requirement] provisions are not inherently in conflict; they only conflict in the event education funding is prevented by an inability to balance the budget with sufficient funding mechanisms. That is the current state of affairs, as described by the majority.
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> * * *
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> [I]t is not evident that the totality of fiscal problems facing Nevada will be solved in the near term. What is evident is that our schools must, as a matter of constitutional law, be funded on or before August 1, 2003.[49]

In addition, the *Guinn I* court more subtly noted that it was faced with consequences that had not been foreseen by the State's electorate when it had enacted the two-thirds supermajority requirement for tax increases at the urging of certain legislators, most notably then-Assemblyman (and current U.S. Con-

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[43] *Id.* at 1276.
[44] *See* Editorials, *supra* note 2.
[45] *See Guinn I*, 71 P.3d at 1276-80 (Maupin, J., dissenting in part and concurring in part).
[46] *Id.* at 1276-77.
[47] *Id.* at 1279 ("In the absence of an education budget crafted and funded in time to effect statutory distribution of funds to the county school districts, we could appropriately declare the impasse at an end because time then would truly be of the essence.").
[48] *Id.* at 1278.
[49] *Id.* at 1276-80. (Maupin, J., dissenting in part and concurring in part).

gressman) Jim Gibbons.[50] *Guinn II* addressed this point at greater length, noting in more detail the history of the supermajority requirement, which began as a legislative proposal, hit an impasse in the Legislature that included some uncertainty about its operation, and then was successfully marketed to the voters via the initiative process.[51]

> The voters were not privy to the Assembly's concerns that culminated in the requirement's legislative rejection, and the requirement's proponents failed to address those concerns when presenting the initiative. Because the voters were not informed of the problems the amendment would cause if a minority of legislators disagreed with the majority over the level of services to be provided to Nevada citizens, we could not determine how the voters intended to resolve such a conflict.[52]
>
> . . . A simple majority is necessary to approve the budget and determine the need for raising revenue. A two-thirds supermajority is needed to determine what specific changes would be made to the existing tax structure to increase revenue. Consequently we rejected the counter-petitioners' interpretation and dismissed the counter-petition.[53]

Thus, the court in *Guinn II* refused to alter the *Guinn I* result even though it was under significant pressure to do so as a means of "saving face" or cooling the bubbling recall movement. The *Guinn II* court maintained its continued belief that the *Guinn I* decision was an acceptable resolution of the conflicts and uncertainties presented by the ambiguity of the supermajority requirement, the conflict between the supermajority requirement and other constitutional provisions, and the budget impasse "crisis" facing Nevada.[54]

In *Guinn II*, the court took time to say more about the perception of its own duties when faced with cases posing governmental intra-branch conflict and political overtones.[55]

> In his initial pleadings, the Governor cited to law in other jurisdictions with similar educational constitutional provisions. Courts of those states had assigned high priority to these provisions when their legislatures failed to fulfill their constitutional duties to fund public education. Some amicus briefs urged us to declare the two-thirds majority requirement unconstitutional, as it interfered with the Legislature's ability to fulfill its duty to fund education and balance the budget. At the very least, those amici urged the court to suspend operation of the two-thirds requirement in this session. Other amicus briefs argued against this proposition. Because the impasse was substantial, impairing educational functions, and because we discerned that the supermajority requirement was not created to avoid the Legislature's constitutional

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[50] *See Guinn II*, 76 P.3d at 25-27, 29-30.

[51] *Id.*

[52] *Id.* at 30. In footnote 27 following this sentence, the *Guinn II* court elaborated:

> As we noted in our prior opinion, the initiative measure included a provision that permits a majority of the Legislature to refer any proposed new or increased taxes for a vote at the next general election. The voter information [accompanying the initiative], however, did not indicate that this language was included to resolve a budget impasse. Nor could this provision, Article 4, Section 18(3), realistically resolve a budget impasse. As the Legislature meets every other year in odd-numbered years for only 120 days, and general elections are held only every other year in even-numbered years, the voters could not intervene for sixteen months. *See* NEV. CONST. art. 4, §§ 2(1), 2(2); NRS 293.12755.

[53] *Id.* at 30.

[54] *See id.* at 31.

[55] *See id.* at 30-32.

> duties to fund public education and balance the budget, we considered these arguments.
>
> When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must, if it can, strike a balance between the provisions. Conflict avoidance and resolution measures employed in *First and Sixth Amendment* jurisprudence demonstrate this fact. For instance, tension is continually present between the Establishment Clause and the Free Exercise Clause of the *First Amendment*. One clause prohibits actions that might constitute the establishment of religion, while the other clause guarantees the right of all to be free to follow their religious preferences. Rather than rigidly enforce either provision, the United States Supreme Court has found in the constitutional machinery "play in the joints" in an effort to strike a balance between them.
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> * * *
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> In reconciling the competing provisions of Nevada's constitutional requirements to fund education and balance the budget with the supermajority requirements for changing the tax structure, we believed that the appropriate analysis required weighing the interests protected by each provision, under the specific facts of this case, to determine whether the net benefit that accrued to one of those interests exceeded the net harm done to the other. The essential issue was whether the supermajority requirement could be improperly used by a few to challenge the majority's budget decisions, thereby preventing the Legislature from performing its other constitutional duties.
>
> The primary interest supported by permitting the Legislature to suspend the supermajority requirement in this case was nothing less than the constitutional mandate to fund public education.
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> * * *
>
> Against public education, the democratic process and fiscal interests, we balanced the interests fostered by the supermajority requirement. The two-thirds requirement was intended, according to the information supplied to the voters in the 1994 and 1996 elections, to limit the influence of special interest groups, ensuring that one group would not control changes in the tax structure. The voter pamphlet also indicated that the amendment might promote more efficiency in government. These interests are legitimate and important, but they do not outweigh the need to fund education or abide by the majority rule mandated by Article 4, Section 18(1). To avoid an impasse harmful to public education, we determined that the supermajority provision could not be improperly used to avoid majority rule on budget appropriations. Accordingly, we held that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget.[56]

Justice Shearing concurred in the result of *Guinn II* but would have "simply den[ied] the petition for rehearing" on the ground that the petition merely re-argued previously-made contentions and that petitioners "have not demonstrated to the court that the court has overlooked or misapprehended any material fact or material question of law."[57] In addition, Justice Shearing disagreed

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[56] *See Guinn II*, 76 P.3d at 30-32 (italics in original; footnotes omitted). The *Guinn II* court then discussed the importance that even primacy courts have attached to the educational mission of government. *Id.* at 31.

[57] *Id.* at 33-34 (Shearing, J., concurring).

with the court's use of the rehearing petition as an occasion for explaining the *Guinn I* decision and shoring up its argumentation.

> I do not agree that it is appropriate, in responding to a petition for rehearing, for this court to attempt to answer public criticism of this court's decision or to criticize the constitution or laws of this state. We must accept the duly enacted constitution and laws of this state, whether they are well advised or ill advised; the court's duty is to decide the cases brought before it. Often that duty involves trying to reconcile provisions that, in practical application, produce results that are incompatible with one another. The court has accomplished that reconciliation in this case. That should end the matter.[58]

Justice Maupin dissented in *Guinn II*, essentially on the same grounds as in *Guinn I*, but updating his position in light of intervening developments:

> First the Nevada State Legislature completed its work without resort to the remedy afforded by this court in the writ. It ultimately complied with the Nevada Constitution as written by appropriating funds for the state educational system and creating the new revenue sources to pay for the appropriations by a two-thirds vote. Second, the perceived crisis the majority sought to address in the writ was averted by the legislative action just mentioned. Third, the majority now indicates that the original decision had discrete application to the limited circumstances of the 2003 legislative sessions; thus a need for precedent for future sessions does not exist. Accordingly, the entire matter is moot.[59]

IV. THE ROLE OF COURTS FOR INTRA-BRANCH GOVERNMENTAL CONFLICTS

The role of courts, at the most basic level, is to decide cases and render adjudicative decisions with some reasonable degree of finality. In a democracy, the court's judgment and order may not be the ultimate word on the controversy. A legislature may revise a statute or implement constitutional change. A governor may revise budgets or make changes in the composition of a court at appropriate times in an apt manner. The electorate may similarly make changes. But absent this sort of aftermath in the wake of a judicial decision, the decision should serve to conclude the legal portion of the case and ideally should also serve to resolve the underlying political, social, or personal conflicts that spawned the case.

Few would disagree with these basic axioms of the judicial role, at least where the conflict spawning the case arises from a dispute between private parties. In my view, where the dispute is one between government entities, there is no difference: a conflict is a conflict, a controversy is a controversy, and a case is a case. Unless certain well-established judicial doctrines preclude consideration of the case, the court should decide the matter notwithstanding that the plaintiff is the governor and the defendant is the legislature.

For plaintiff to have standing, there must be "concrete adversity" between plaintiff and defendant and the case must be presented in a form traditionally capable of judicial resolution.[60] In *Guinn*, the first part of standing doctrine appears satisfied in view of the protracted, real conflict between the Governor

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[58] *Id.* at 34.
[59] *Id.* at 34 (Maupin, J., dissenting) (footnote omitted).
[60] *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

and the Legislature. The second prong of standing doctrine – that the case be apt for judicial resolution – is more problematic, depending on one's view of whether the court exceeded its boundaries in "ordering" the Legislature to fund education. For reasons discussed below, though the *Guinn* court's remedial activity may be subject to criticism, it is not so far outside acceptable boundaries as to preclude the Court from considering the case.

Justiciability doctrine essentially restates that part of the standing doctrine that requires the case to be one capable of "adjudication" rather than one acting as a springboard for broad policymaking by the court.[61] Although critics of the *Guinn* decision may disagree, there is no doubt that the Nevada Supreme Court was being asked to decide a controversy that sufficiently resembled an ordinary case permitting judicial involvement. To be sure, the case was more important than many that come before the court (particularly in a state that lacks an intermediate court of appeals for trial court error correction), but *Guinn v. Legislature* was nonetheless a justiciable controversy, one which the Nevada Supreme Court decided on the basis of rational analysis. Although other legal analyses may have led to a different outcome, this hardly makes the *Guinn* holding irrational or illegitimate. Many of the cases adjudicated in America could reasonably be decided in favor of either party. Although the legally correct view is clear in most cases, there are many instances in which the legal questions presented are close and difficult. Reasonable observers – both lay observers and legal professionals – may disagree. Seldom is one side's view of such cases clearly correct.

Seen in this light, *Guinn v. Legislature* was permissible adjudication by the Court. Even if some observers think the Court erred, the most aggressive criticisms of *Guinn* – that it was a judicial power grab, excessive activism, government by judiciary, usurpation of the Legislature, or displayed condescension to the citizenry[62] – cannot be taken seriously. The Nevada Supreme Court, a collection of rational human beings with approximately 200 years of collective legal experience[63] was presented with a controversy brought to it by a Governor recently re-elected by more than a sixty percent vote.[64] The court was presented with a case record and attorney argument on behalf of the Governor, the Legislature, and many other interested groups (more than fifteen attorney appearances are reflected in the case report). It then came to what is essentially a unanimous decision on the ultimate merits of the case (education funding constitutional provision versus tax increase supermajority requirement).[65]

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[61] *Id.*

[62] Professor John C. Eastman, counsel for the anti-*Guinn* group in the continuing litigation surrounding the *Guinn* decision, even called the court's decision "so out of left-field, so contrary to any established law, that it violates due process." Vin Suprynowicz, *Trying to Restore Constitutional Government*, LAS VEGAS REV.-J., Dec. 28, 2003, at 2E.

[63] *See* ASSEMBLY MEMBERSHIP AND LEADERS, *at* http://www.leg.state.nv.us/72nd/legislators/Assembly/index.cfm (last visited June 19, 2004); and NEVADA SENATE, *at* http://www.leg. state.nv.us/Senate/index.cfm (last visited June 19, 2004).

[64] *See* Valerie Richardson, *Nevada's Gov. Guinn Faces Recall over $1 Billion in Taxes*, WASH. TIMES, Sept. 1, 2003 at A9.

[65] *See Guinn I*, 71 P.3d 1269.

If *Guinn* is impermissible judicial activism, so was *Brown v. Board of Education*.[66] Unless the hard-core critics of *Guinn* are prepared to say courts must also stand idle in cases like *Brown*, their critique collapses from internal inconsistency. If *Guinn*'s "meta-critics" think that both *Brown* and *Guinn* are impermissible exercises of judicial power, they must also wish to so circumscribe the judicial role that courts would not be able to act as either a check on excessive government power or as helpful arbiters of intra-government disputes.[67]

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[66] Brown v. Bd. of Educ., 347 U.S. 483 (1954). One must be careful about placing too much weight on court unanimity as an indicator of the soundness of decision. Some unanimous decisions can be pretty poorly reasoned. But the "clearly wrong but undoubted" decision is, in my experience, much more common with three-judge panels of appellate courts. In the larger setting of a seven-member or nine-member state Supreme Court, or an en banc federal appeals court, an erroneous or highly problematic decision usually has more than one dissenting jurist. *Guinn v. Legislature* lacked even this much dissent. Justice Maupin's position on the scope of permissible remedy and the timing of the remedy is well worth considering, and perhaps applying, in future similar cases. But he did not disagree with the *Guinn* majority on the ultimate interpretive issue and the ultimate reach of judicial authority. *Guinn I*, 71 P.3d at 1276. *Guinn* was, in that sense, like *Brown*: unanimous. Similarly, in United States v. Nixon, 418 U.S. 683 (1974) the Supreme Court was united in its conclusion that, although the President possesses some degree of executive privilege, it is not absolute. But that case was decided in the midst of the Watergate controversy and helped lead to the Nixon resignation. Would the opponents of *Guinn v. Legislature* be willing to also argue that the United States Supreme Court had no business deciding *Nixon* or *Brown*? One hopes not, but if that is the position of the *Guinn* critics, we should be highly suspicious of both their analysis and their partisanship.

Compare the *Brown* and *Guinn* situations to those of other controversial cases. For example, the much more problematic *Bush v. Gore* was a 5-4 decision. 531 U.S. 98 (2000). Yet, many of the *Guinn* decision's harshest critics are staunch supporters of George W. Bush and do not question his legitimacy as President, notwithstanding the fact that Gore received more of the popular vote while Bush prevailed in the Electoral College, the result of which is marred by alleged voting irregularities in Florida and judicial intervention far beyond that taking place in *Guinn v. Legislature*. The other "most controversial" decision of the late twentieth century is probably Roe v. Wade (410 U.S. 113 (1973)), which had two dissenting Justices (Rehnquist and White, J.J., dissenting). In the thirty years since *Roe*, the Court has continued to revisit the issue of abortion, often rendering 5-4 decisions on topics such as the legality of waiting periods, consent requirements, and permissible restrictions on abortion methods (*See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992). Whether one is pro-life or pro-choice, it appears that there is much more division within the judicial mainstream regarding the legal issues attending abortion than there exists regarding the role of courts assessing executive-legislative divisions over education funding and tax increases.

[67] On one level, such an antipathy for judicial power is consistent with certain conservative or libertarian tenants, in that it is a general restriction on government power, with courts, an entity generally disliked by conservatives and libertarians, simply being another part of government. On another level, however, attacks on judicial power are quite inconsistent with the desire of many libertarians and conservatives to keep executive and legislative government "off their backs." In this part of modern law and politics, it is often the courts that protect conservatives, libertarians, businesses, and other entities from what might be deemed excessive regulation, restrictions on speech, or limitations on political or commercial activity. Sauce for the goose should be sauce for the gander. If the conservative critics of *Guinn* were to succeed in limiting the judicial role because of *Guinn* (*e.g.*, through changes in court membership, intimidation of the existing court, or changes in legal doctrine), this also holds the potential for making courts more passive than desired when conservatives ask courts to prevent legislative limitations on commercial conduct or perceived excesses of executive policing of economic or social activity.

V. THE PERMISSIBLE LIMITS OF JUDICIAL REVIEW OF LEGISLATIVE AND ELECTORAL DECISIONS

Justice Maupin's second dissent, like his first, garnered praise from the Court's critics because of its more restrained view of the use and timing of judicial remedies directed against a coordinate body of government (the Legislature) and the view that, since the crisis had abated, *Guinn I* should essentially be excised as precedent.[68] Justice Maupin's opinions, particularly *Guinn II*, also expressed considerably more optimism about the initiative process and the state of representative government in Nevada.[69] Justice Maupin's jurisprudential views in *Guinn I* are as sophisticated and nuanced, if not more so, as the *Guinn I* majority analysis. Maupin's opinion in *Guinn I* might well serve as a blueprint for future litigants seeking to persuade courts to impose prudential limits on their judicial authority without resorting to the more extreme view that certain topics are off limits for the judiciary. Although Justice Maupin's dissent in *Guinn II* also presents a reasonable view of a difficult issue, it is less persuasive because it implicitly discourages frank judicial discussion about different aspects of modern democracy. It also reflects a Pollyannish view of the initiative process that is at odds with the conclusions of most sophisticated scholars in the area.

Justice Shearing's *Guinn II* concurrence and dissent took a different path.[70] She believed the court should not engage in any "apologies" for *Guinn I* or provide extensive discussion of the politics of the case (and by "politics," I do not mean partisan alignment or personality, but merely the overall political framework surrounding the case).[71] Although Justices Shearing and Maupin have quite different perspectives on the case, both are united in seeing *Guinn* as a case "writ small." Justice Shearing's analysis requires no macro-political discussion, while Justice Maupin's analysis becomes moot because post-decision events removed the impending imbroglio that initiated the case.[72]

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[68] *See, e.g., Nevada High Court Won't Reconsider*, *supra* note 2, at 10B (describing Justice Maupin, somewhat misleadingly, as the "lone dissenter in both decisions" when he had concurred in *Guinn I* as well; and saying "Amen" to Justice Maupin's argument in favor of granting the rehearing petition in *Guinn II* and vacating the *Guinn* I decision). I will overlook the Editorial's odd use of religiously loaded terminology in praising Judge Maupin's *Guinn II* dissent.

[69] *See* Guinn II, 76 P.3d at 34 (Maupin, J., dissenting):

> I most strongly take issue with the court's comments on rehearing that the supermajority initiative was flawed from its inception and that the Nevada electorate twice approved it without an understanding that a stalemate between appropriations and taxes could eventuate. The initiative was vetted through two elections and we should not from this vantage point presume to say what the voters of this state knew or did not know. In any case, the potential for such a conflict was inherent in the proposal and the people of this state had every right to make it more onerous for the Legislature to create new revenue streams for the operation of government. Nothing in this constitutional construct prevents the Legislature from crafting a balanced budget and, as noted, the Legislature ultimately complied with the super-majority requirement.

The Maupin dissent in *Guinn II* then quoted the Declaration of Independence language about government powers flowing from the consent of the governed, consent Justice Maupin saw favoring the anti-tax supermajority more than the continued vitality of *Guinn I*. *Id.*

[70] *Id.* at 33-34 (Shearing, J., concurring).

[71] *Id.*

[72] *Compare id.* at 33-34 *with. id.* at 34-35.

Both the Maupin and Shearing perspectives are perfectly reasonable and respectable, even insightful, viewpoints. Indeed, a primary thesis of this Article is that *Guinn v. Legislature* was enough like a "regular" case that the court was properly empowered to decide the case like a regular case, even if it meant some degree of "bossing" the Legislature around. However, the *Guinn II* majority's per curiam opinion, providing more explanation and an examination of the difficulties of constitutional revision by initiative, is also a perfectly reasonable and respectable mode of judicial response to the rehearing petition.

If anything, *Guinn II* did not engage in as much candor and depth on this topic as it might have (although *Guinn II* clearly went much further down this path than *Guinn I*). In the coordinate systems of state government prevailing in America, courts have an important role to play in "smoothing out the rough edges" of democracy where the court has proper legal jurisdiction, the judicial analysis is not precluded by clear positive law or legal rules, and the analysis is not inconsistent with established doctrine. In *Guinn*, the controversy was properly presented to the Nevada Supreme Court as a justiciable case. Nor was there any clear text of positive law (e.g., constitutional provision or statute) that barred the *Guinn I* result. The closer question is whether traditional doctrines of judicial restraint precluded consideration by the court of the practical impact of certain political structures. The *Guinn II* court resolved that question in favor of taking pains to explain why *Guinn I* was particularly correct in light of certain aspects of the initiative process.[73] This reflection by the Court was not only proper but could have been more extensive.

Guinn II spent a good deal of effort chronicling whether proponents of the anti-tax supermajority had considered the impact that the requirement would have.[74] Because of its uncertainty, and perhaps because of other impediments to legislative enactment, the proposed supermajority was not passed by the Legislature or reviewed by the Governor.[75] Rather, the supermajority requirement for raising taxes was enacted by turning to the initiative process to obtain passage of the measure by popular vote.[76]

As the *Guinn II* court noted, this route to enactment meant that the voters of Nevada had little or no opportunity to comprehend and appreciate the uncertainties presented by the proposed anti-tax supermajority: Would it override a budget passed by majority vote? Would the budget vote take precedence? What if the supermajority provision came into conflict with other constitutional provisions such as the mandate for education funding? What concerns should voters have about possible future changes in economic circumstances?[77] Notwithstanding the Maupin and Shearing analyses,[78] I find the *Guinn II* majority's willingness to address these issues refreshing. It is also helpful in understanding the degree to which the judiciary may, in some circumstances, work to assist executives, legislatures, and the citizenry in preventing laws from having negative, unintended consequences.

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[73] *See Id.* at 33.
[74] *See Id.* at 27-30.
[75] *See Id.* at 30.
[76] *See Id.*
[77] *See Id.*
[78] *See Id.* at 33-35.

Admittedly, there are some situations in which the clarity of a foolish positive law (constitutional or statutory) compels application and judicial enforcement because there are no conflicts with other positive laws. In *Guinn*, however, sufficient conflict between the anti-tax supermajority requirement and the education funding requirement did give the court the authority to prevent unbridled application of the supermajority requirement. Using its role to prevent mechanical application of a supermajority requirement from potentially crippling government functions, the court acted with courage, integrity, and wisdom.

In essence, the *Guinn* court was attempting to make Nevada law work as well as possible. The *Guinn* court provided both the Executive and the Legislature with a "way out" of an impending crisis and gave these political entities and their constituents a chance to take a "hard look" at the relationship between restrictions on revenue-raising and government obligations that are either legally or practically imposed.[79] In taking this course, the *Guinn* court did not

[79] Some constitutional provisions, such as the education funding requirement, are sufficiently clear and commanding in tone, in light of the subject matter at issue, to justify a court's view that it is now a legal requirement that such activities be adequately provided by a government. Other functions of government do not enjoy the same textual support of the positive law (e.g., they are not mentioned in the Constitution or are mentioned only in a precatory manner that seems less textually commanding) but are, as a practical matter, viewed as essential government functions in the modern world.

For example, state highways in Nevada might become impassible due to disrepair, even though such repairs are provided for in the budget, because one-third of one house of the legislature refuses to approve a tax increase to repair the roads. In such a case, would the Supreme Court be justified in ordering a funding of the road repair budget based on reasoning similar to *Guinn I*? In my view, the correct answer is "yes," even if the roads do not enjoy the same constitutional protections as do the schools. To be sure, a court would be making an assessment of whether the roads are really all that bad and whether the political process has failed. But courts are entitled to make such assessments. They do so constantly in adjudicating "regular" cases and should be entitled to do so in intra-governmental dispute cases as well.

This "impassable roads" example caused perhaps even more consternation to Professor John C. Eastman, a strong critic of the *Guinn* decisions, than did other portions of my analysis (nearly all of which conflicts with Professor Eastman's analysis). Although I understand his concern that courts not become self-appointed saviors of decadent society, I continue to believe that, in such extreme cases of dysfunction in the coordinate branches of government, courts have some authority to act to force the Executive and Legislature to face civic responsibility. As the United States Supreme Court famously put it, the constitution "is not a suicide pact." *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). At some point, the common sense of doing the obviously right thing must take precedence over the technical niceties of constitutional structure and desired judicial restraint.

Admittedly, my road repair example is pushing the limits of this sort of judicial license and begs a number of questions that can only be resolved in the context of the real world: How bad are the roads? What is the impact? Is the legislature completely abdicating its responsibilities? Is there an ulterior motive (e.g., allowing a vested interest to profitably operate a private toll road as an alternative)? In the real world of politics, where voters are likely to complain and take action over something with substantial effect on their daily lives, the scenario is admittedly far fetched (but perhaps not; consider the overall decay of much of America's infrastructure occurring during the same era as the anti-tax, limited government movement of the late twentieth century) and largely subject to correction through the political processes. But what if there was no seeming political solution and trade was grinding to a halt or highway fatalities were skyrocketing? Would a state supreme court really then be powerless to order the legislature to appropriate highway funds responsibly?

undermine the Legislature, but instead gave it an opportunity to resolve a substantial problem.

In addition, the *Guinn* court provided a graceful escape route to legislators who may have felt politically trapped into an anti-tax position due to peer or constituent pressures, prior statements, or other political factors separate from the merits of the proposed budget and its necessary appropriation. Although critics of *Guinn* would probably reject this as a legitimate role for courts, I do not. Courts may, in apt situations, give governmental officials the support they need to embrace a correct, but unpopular, position. If individual elected officials remain unconvinced of the court's reasoning, they also remain free to refuse to vote for a tax increase. To be sure, this is pressure on the Legislature from a relatively small group (a seven-member Supreme Court). But it is equally true that with a supermajority requirement for raising revenue, a relatively small group of legislators can thwart the will of the vast majority of Nevadans. Supermajority requirements may occasionally make sense for government or other bodies. For example, because of the long-lasting impact of bylaws, many corporate charters require a supermajority vote to amend them. Most constitutions can only be altered by supermajority for the same reason. Tenure approval or faculty hiring at most institutions of higher education also requires a supermajority vote because of the long-lasting impact of the decision (a so-called "job for life"). The institution may also desire to increase the chances of a correct decision when the decision on the merits (regarding a candidate's teaching, scholarship, and service) may be muddied by the personal friendships the candidate develops in a collegial university setting with the very people who must evaluate the candidacy.

But the anti-tax supermajority requirement of the Nevada Constitution[80] goes one step further. It may have been enacted properly as a constitutional amendment, but it imposes a supermajority requirement for non-constitutional matters. The American political system seldom requires a supermajority for decisions regarding government operations even though these are presumably just as important as revenue matters. Most legislative policymaking is done by a majority vote.[81] The case for requiring a supermajority to raise revenue (but not a supermajority to cut taxes, even if the tax cut is highly regressive or favorable to special interests) is an exception to the general rule that only makes sense if one is against all government. In effect, the supermajority requirement in Nevada places the value of tax limitation on a pedestal above other government values. This leads to bad, poorly reasoned, public policy.

Although courts have no power to strike down statutes or constitutional amendments on grounds of foolishness, inconsistency, or because they privilege a particular ideology, neither must courts always defer to such laws in the face of conflicting considerations. Put another way, not all positive law is created equal.[82] Some laws are wiser than others. In addition, some laws, regard-

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[80] NEV. CONST. art. 4, § 18(2).

[81] *See* NEV. CONST. art. 4, § 18(1), which requires only a majority for all other legislation.

[82] I use the term "positive law" in the sense of the philosophy of legal positivism, not in the sense that a "positive" law is necessarily a "good" law. Positive law, as the term is generally understood by lawyers, means law made by the duly constituted sovereign. A constitutional provision, a statute, a court decision, or an administrative ruling may all be positive law

less of whether wise or foolish, are more clearly the product of considered deliberation that represents what society "really thinks" about a matter. For example, I have no trouble giving great deference to the United States Constitution, even provisions I dislike, not only because it was ratified by the states, but also because it is the product of considerably sustained thought by people like James Madison, Alexander Hamilton, and Benjamin Franklin. Contrast this to the sort of "law" that results when a lobbyist and a pliable legislator sneak a provision into an appropriations bill a minute before midnight to resolve a legislative impasse. This kind of law is not as worthy of deference as law that results from years of study, public hearings, legislative committee consideration, and the vote of the full legislature, with review and signing by the executive.

The anti-tax supermajority requirement epitomizes what I call "lower echelon law." It was passed by initiative,[83] which means that the people voting for it ordinarily were not in as good an evaluative position as are legislators considering ordinary statutes or delegates considering constitutional provisions at a convention. The nature of the process restricts the inquiry of the average voter and makes for limited information, at least as compared to "regular" legislation. Initiatives can create bizarre microlaws of constitutionalization. For example, one amendment to the Florida Constitution "banned the confinement of pregnant pigs in small cages."[84] In addition, as discussed below, the initiative process is vulnerable to electioneering and "sound bite" argumentation fought out in a mass media context. Not surprisingly, the group with the most money to spend on thirty-second advertising usually prevails in matters of voter initiative and referendum.

In a complex and difficult dispute, wiser laws are entitled to more deference than foolish laws, and courts that follow this principle should be commended rather than condemned. At the risk of betraying my liberal leanings, I think a constitutional provision mandating adequate educational expenditures is a much better idea than a constitutional provision permitting one-third of one legislative chamber to undermine public policy values and goals embraced by a majority of the state's elected representatives, including an extremely popular, ideologically moderate Governor.

Without doubt, the supermajority requirement – especially when imposed on both houses of the Legislature – can give rise to tyranny of the minority. A comparatively small group of state senators or assemblypersons may prevent a tax increase that enjoys wide popular support and is perceived by most reasonable persons as wise and necessary. Even worse, the minority empowered by the anti-tax supermajority requirement is hardly the type of discreet, insular, historically disadvantaged minority group (e.g., blacks, Hispanics, religious groups) that may need constitutional protection from oppressive measures

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depending on the situation. This is distinguished from "natural law" which is thought to be derived from immutable first principles of legal thought (by secular natural lawyers) or from divine precepts (by religious natural lawyers). *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 49-50, 158-68 (1994).

[83] *See supra* note 7.

[84] *See* Abby Goodnough, *Florida Legislators Take On a Voter Right*, N.Y. TIMES, April 26, 2004, at A14, col. 4.

favored by the majority. Taxation opponents are often the most well-heeled and powerful of political interests. They need special constitutional protection about as much as Britney Spears needs more publicity.

Global restrictions on revenue raising are particularly troubling because they are acontextual. In the abstract, no one likes taxes. Unless the decisionmaker knows something about the tradeoffs involved in either raising taxes or failing to fund certain government activities, support for tax restrictions has a certain "mom, home, apple pie, and American flag" quality. No one can reasonably be against tax restraint, but bars to revenue-raising may have other drastic consequences that are not contemplated at the time a legislature or electorate adopts a global limitation on future revenue-raising.

Justice Oliver Wendell Holmes once famously observed that taxes are the price one pays for a civilized society.[85] Society is dynamic rather than static. Its needs change, perhaps requiring new or expanded government activity (or

[85] Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). As this Article was being completed, the *New York Times* ran week-long series of articles featuring Las Vegas. *See generally*, *American Dreamers: The Lure of Las Vegas*, N.Y. TIMES, May 30 through June 4, 2004. *See, e.g.*, Dean E. Murphy, *Desert's Promised Land: Long Odds for Las Vegas Newcomers*, N.Y. TIMES, May 30, 2004, at A1, col. 3 (Article No. 1, *The Budget Suites*); Patricia Leigh Brown, *Keeping Up with Classes in the Boom and Whirl of Las Vegas*, N.Y. TIMES, May 31, 2004, A1, col. 2 (Article No. 2, *The Teacher*) ; Charlie LeDuff, *A Las Vegas Juvenile Judge Finds His Test Case at Home*, N.Y. TIMES, June 1, 2004, A1, col. 2 (Article No. 3, *Judge Hardcastle*); Sarah Kershaw, *A Life as a Live! Nude!, Girl! Has a Few Strings Attached*, N.Y. TIMES, June 2, 2004, A1, col 3 (Article No. 4, *Trixie*).

The general tone of all the *New York Times* stories is that life in Las Vegas is a lot like Hobbes description of life – nasty, brutish, and short. The stories dwell on the hard, unsatisfying lives of those profiled and the essential absence of core community, culture, and commitment to education in Las Vegas. In short, the Las Vegas portrayed by the *New York Times* seems a bit, well, uncivilized. Although one can certainly argue (and demonstrate) flaws in the *New York Times'* overly negative assessment (and failure to touch upon most of what many of us regard as the real Las Vegas that does not habitually involve people and families on the edge), the articles have a kernel of truth verified to a degree by the social indicator statistics mentioned in the articles. Las Vegas is high on transience (although folks move here in astounding numbers, they also leave in high numbers), high on less respectable business endeavors (e.g., Gentleman's clubs), low on education, low on women in managerial positions, and high on teen suicide.

Although not even a die-hard liberal would assert an absolute correlation between government infrastructure and social well-being, die-hard conservatives must face the distinct possibility that many of these social ills stem from Nevada's historic aversion to taxes and government infrastructure. Nevada and the other states traditionally bringing up the rear on social indicators such as education, physical health, mental health, and violent crime are generally states with limited government and a less progressive tax structure (e.g., Mississippi). States scoring higher in the indicators of social well-being tend to be states with a tradition of greater government infrastructure and progressive taxation (e.g., Massachusetts and Minnesota).

Perhaps Nevada is the laboratory that proves Holmes's dictum – and perhaps Nevada is getting the civilization for which it is willing to pay. Of course, a court cannot change the world and probably should not substitute its judgment for that of the populace. If the body politic of Nevada thinks that the absence of a state income tax or a constitutional inhibition on tax increases is more important than more government programs, a Supreme Court cannot displace this sentiment with its own views. But a Supreme Court can and should work toward effecting wiser law and public policy in its adjudication where this option is available to the court because of a need to resolve conflicting provisions in the law.

perhaps requiring a move toward privatization and market-based incentives, depending on the time, topic, and context). But a global restriction on taxes, especially one imposing a supermajority requirement only to raise revenue but not to reduce it, is inconsistent with the dynamism of society and its evolving needs.

The voter initiative process is similarly problematic. Critics of the *Guinn* decision like to portray it as a Court of pointy-headed elitist intellectuals treating the voters as morons who were too dumb to realize what they were doing when enacting the supermajority restriction on tax increases.[86] But this attack is not only unfair to the court but unrealistic. This "let the people decide" argument assumes that voters understand initiative questions well. The opposite is probably true, and this has nothing to do with the intellect of the voter. It is the process that is problematic. Even the most intelligent of voters is unlikely to know as much about an initiative question as the dullest of legislators voting on the same issue as part of ordinary lawmaking.

The reason for this disconnect arises inevitably from the modern social division of labor. A legislator, even one in Nevada's alternate year, short session system, is a professional. He or she devotes three or four months of total immersion into the process, assisted by staff, counsel, and lobbyists. By comparison, the average voter (even one with an IQ of 200) is a mere amateur. Faced with the burdens of daily life, the average voter simply cannot be as well-informed on an issue as the average legislator. The problem is compounded because popular press coverage of voter initiatives, like its coverage of lower visibility public office, is usually not very thorough. The voter who wants to be informed about a question will need to work very hard to gain this expertise.

In addition, voters (and legislators as well) are subject to limitations of human cognition that make both global restrictions on taxes and policy-making by initiative quite problematic. People characteristically make analytic errors in assessing issues because of innate tendencies.[87] Of key importance, people are short-term maximizers who have difficulty envisioning possible future scenarios.[88] This is related to the abstract consideration problem of tax restrictions. If a voter or legislator is asked now whether he or she supports a restriction on taxes, an affirmative answer is likely. In the abstract, and without concrete future context, almost anyone would rather have lower taxes than higher taxes. But the voter's assessment might change if the voter knew that a tax restriction meant: no foreign language classes in school; no sports or extracurricular activities for her children; no after-school programs; reduced lunch programs; no field trips; potholed roads; fewer police and fireman; reduced park maintenance, etc. The initiative process and global tax restrictions both

[86] An attorney with the Pacific Legal Foundation, which filed an amicus brief in the case, said the *Guinn* court "ignore[d] the will of the people"; the President of the Nevada Taxpayers Association said that voters had called her complaining that the result of the decision was that their vote "didn't matter." Ryan *supra* note 3; Jim Gibbons accused the Supreme Court of "willfully ignoring the wishes of more than 70 percent of Nevadans" and of "denigrat[ing]" the State Constitution. Erin Neff, *Ruling Gives Political Cover to All*, LAS VEGAS SUN, July 11, 2003 at A1.

[87] *See generally* CASS SUNSTEIN, BEHAVIORAL LAW AND ECONOMICS 1-10 (2000).

[88] *Id.*

seek voter decisions stripped of context. But contextual decision-making is normally sounder decision-making.

And then there is the money. In voter initiative campaigns, even more than ordinary electoral campaigns surrounding legislative seats, it is usually the side that spends more that wins. This is unsurprising both because most voters lack sufficient information to adequately filter and evaluate advertisements, but also because with initiatives the voters are deprived of the normal cues they receive from political parties. Further, the initiative question normally lacks the past record of an actual human candidate who can be evaluated by the voter.

As a result of all these infirmities, scholars generally are critical of both voter initiatives and global, acontextual tax or budget restrictions.[89] The Nevada anti-tax supermajority requirement is both. Thus, it was proper for the *Guinn* court to approach the supermajority requirement with suspicion when weighing it against the education funding mandate. In doing this, the *Guinn* court was not acting in an *ultra vires* or reckless fashion. Rather, it was making an informed decision, solicitous of the greater interests of other governmental branches and the people, rather than woodenly applying specific textual language of the positive law.

V. CONCLUSION

Rather than reflecting an out-of-control state Supreme Court, *Guinn v. Legislature* reflects a court sensitive to its mission and the greater needs of its larger constituency. If anything, the *Guinn* court could have said more, rather than less, about the occasional drawbacks of certain types of lawmaking. Although trumpeting the anti-tax supermajority position as "the will of the people" has a certain rhetorical force, the actual facts of lawmaking by initiative and legislation generally are considerably messier. In a real world of interest group politics and economic power, the *Guinn v. Legislature* approach better serves the public than the sanitized approach of eighth grade civics that *Guinn*'s critics invoke to attack the court. Rather than decrying *Guinn*, Nevadans should be thankful that the state Supreme Court is reflective, sophisticated, and courageous.

Forty years ago, the conservative legal scholar Alexander Bickel famously referred to the judiciary as the "least dangerous branch," invoking the characterization made by Alexander Hamilton in the *Federalist Papers*.[90] Hamilton and Bickel, two authorities worth some deference, saw courts as less likely to abuse power than the lawmaking legislature or the armed executive.

In addition, courts are, by nature, the most reflective and rational branch of government. This is not to say that executives and legislators are not very smart, but only to say that the nature of their work is different. The executive and the legislature must work quickly and under substantial political constraints in effectuating public policy. By contrast, courts have the comparative luxury of taking time for sustained evaluation and reflection on a topic (even when

[89] *See* ESKRIDGE, JR. & FRICKEY, *supra* note 40, Ch. 5.

[90] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); and THE FEDERALIST NO. 78 (James Madison).

presented with emergency litigation). Further, courts are less subject to the political pressures and economic pressures of the moment. As a result, the judicial branch normally can give more substantively rational and dispassionate analysis to certain questions. Although the public may not always respond favorably to the outcomes of the judiciary's substantive rationality, we should all be thankful and a bit humble before attacking courts that render controversial decisions.