INTERPRETING CONFLICTING PROVISIONS OF THE NEVADA STATE CONSTITUTION

William D. Popkin*

Guinn v. Legislature of State of Nevada[1] placed the Supreme Court of Nevada squarely in the middle of a political battle between the executive and legislative branches of state government. At issue was the interaction between two provisions of the state constitution – Article 11, sec. 6, an old and venerable provision dating back to 1864, which requires that "[i]n addition to other means provided for the support and maintenance of [the state] university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund,"[2] and Article 4, sec. 18(2), a constitutional amendment adopted in 1996 through the initiative process requiring a two-thirds vote in the legislature (instead of the usual majority vote) to "increase[ ] 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."[3] The legislature had failed to fund education during the regular legislative session and in two special sessions primarily due to a deadlock over how to raise the necessary revenue. Consequently, the Governor petitioned the court for a writ of mandamus against the state Legislature. Despite the political and inter-branch nature of the litigation, the court asserted that its task was routine: "When construing constitutional provisions, we apply the same rules of construction used to interpret statutes."[4] It then held that the earlier constitutional requirement mandating financial support of public schools controlled and issued a mandamus to the legislature to proceed under a simple majority rule.[5]

But that was not the only time the court spoke about the merits of the controversy. Twenty legislators filed a petition for a rehearing on July 21, 2003, which the court denied as moot in a September 17, 2003 decision, because the legislature had acted to approve revenue-raising legislation to fund public schools by a two-thirds majority.[6] Along with the denial, however, the court provided further justification for its prior interpretation of the state Constitution favoring the earlier funding requirement. This second opinion had a

* Walter W. Foskett Professor Emeritus of Law at Indiana University, School of Law Bloomington. I would like to thank Professor Steve Johnson for his helpful comments on an earlier draft of this article. Editor's note: Professor Popkin originally presented a version of this article as part of the *Guinn v. Legislature* Symposium held at the William S. Boyd School of Law in April of 2004.

[1] 71 P.3d 1269 (Nev. 2003).

[2] *Id.* at n.3 (citing NEV. CONST., art. 11, § 6).

[3] NEV. CONST., art. 4, § 18(2).

[4] *Guinn*, 71 P.3d at 1274.

[5] *Id.* at 1276.

[6] Guinn v. Legislature of Nev., 76 P.3d 22 (Nev. 2003) (per curiam) (en banc).

very different tone from the first. There is nothing suggesting that the court's task was a routine application to the constitution of the rules dealing with statutory construction. Indeed, contrary to the first opinion, the court decided that interpreting a constitutional provision amended through the initiative process raised special problems and that these problems required an exercise of judicial discretion that was anything but routine.

The court's decisions raise the following two questions about interpretation: (1) Do statutory and constitutional interpretations call for the same approach; and (2) Did the court reach the right result when interpreting the potentially conflicting constitutional provisions dealing with education and raising revenue? In my discussion, I accept the court's conclusion, for which it cites *Marbury v. Madison*, that it was required to decide the case "constitutional construction is purely a province of the judiciary."[7] I note only that separation of powers considerations – filtered through either the political question doctrine or denial of standing to one political official to sue another in a political dispute[8] – might have allowed the court to avoid deciding the case. Indeed, it is something of a puzzle that the court did not look for ways to avoid becoming embroiled in a hot-button political issue, especially in a state where judges run for office in contested elections and are subject to recall. It is widely believed that Chief Justice Agosti, who wrote the July 10th opinion, did not stand for reelection because of the media firestorm that characterized the opinion as an unacceptable arrogation of judicial power.[9] Perhaps the answer to the puzzle lies in a propensity of state court judges to be comfortable with deciding political disputes, because they come from a more political background than federal judges. In any event, I leave further speculation about why the court took on this burden is left to others more acquainted with the Nevada political and judicial culture.

The remainder of this article critiques the two decisions. I will argue that the July 10, 2003 decision was incorrect when it explicitly stated that constitutional and statutory interpretation are the same and that the decision was a routine application of these interpretive principles, but that the result the court reached was correct, because it implicitly recognized an important difference between interpreting constitutions and statutes and exercised the judicial discretion to make the difficult value judgments its rhetoric seemed to deny. I will argue further that the September 17th decision got the reasoning right when it explained why constitutional and statutory interpretation might differ and made an explicit choice between the values embodied in the two conflicting constitutional provisions – viz., the funding of public education and the supermajority requirement to raise revenue. I hope in the process to explain not only something useful about interpretation but also about writing judicial opinions.

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[7] Whether the court has the *exclusive* judicial power to interpret the constitution is contested in a recent article. *See* Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

[8] *Cf.* Raines v. Byrd, 521 U.S. 811 (1997) (rejecting the congressional standing doctrine).

[9] While the author does not rely on citable sources for this position, it was the clear consensus of the participants in the symposium on this issue held at The Boyd School of Law on April 23, 2004.

I. THE JULY 10TH DECISION

A. *Different Types of Documents; Same Interpretive Approaches?*

The court's statement in the July 10th decision that the same rules of construction apply to both statutes and the constitution raises a fundamental question – whether determining the meaning of texts is independent of the kind of document in which they appear. More generally, is the interpretation of wills, contracts, statutes, constitutions, and treaties (let alone poems, novels, epics, and the Bible) approached through the same interpretive lens? Or does the weight of various interpretive criteria – such as text, likely specific intent, general purpose, substantive values in the legal landscape, and institutional considerations regarding which institution should decide what issues – vary with the type of document?

For example, consider the following differences among documents which might call for different interpretive approaches: a will is a document whose text has a single author but no audience entitled to rely on the text;[10] a contract typically has two authors who bargain to a result but no audience other than the parties to the contract;[11] a statute has an author and an audience, although there might two authors (legislative committees and the entire legislature) and two audiences (the historical and the contemporary audience); a constitution, as the polity's most fundamental document, is meant to endure over time, more so than a statute, and may have multiple authors (considering amendments). Moreover, different kinds of statutes might call for different approaches – a grant-in-aid statute might be like a contract;[12] model or uniform statutes may or may not be like other legislation;[13] and a statute that is part of a pattern of legislation setting forth a fundamental political principle might be more like a constitution.[14] Treaties might also vary – some like contracts, some like typical statutes, and some like constitutions.[15] There may, as well, be different kinds of constitutional provisions – some detailed, some more general; some easy to amend, and some hard; and some that are amended through the initia-

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[10] *See* Zechariah Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 398-400 (1941) ("the relative importance of [the writer's] intention varies considerably with the type of document under consideration. It is most important in a will . . . . It is less important in a contract . . . . Intention is even less important . . . in the interpretation of a statute . . . .").

[11] *See generally* Stephen S. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998).

[12] *See* Bennett v. Ky. Dep't. of Educ., 470 U.S. 656, 669 (1985) (rejecting argument that grant-in-aid program similar to a bilateral contract).

[13] *See* Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993 (1995); Robert E. Scott, *The Politics of Article 9*, 80 VAND. L. REV. 1783 (1994).

[14] *See* William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

[15] *See* Lisbeth Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments*, 62 NW. U.L. REV. 701 (1967); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953 (1994); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L. LAW 281 (1988); Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L. & COMP. L. REV. 611 (1997).

tive rather than the more traditional legislative-referendum process;[16] indeed, state constitutions may differ from the federal Constitution in precisely these ways, suggesting that state constitutions might be expounded differently from the federal (to the extent any generalizations are apt).[17] The general point – to borrow a literary phrase – is that different genres of writing may be interpreted differently. And, if that is so, the Supreme Court of Nevada may have been too casual in assimilating constitutional and statutory interpretation.

This is not the place to explore interpretive criteria for all types of legal documents, but some comments about constitutional versus statutory interpretation are in order. There are at least three potential differences. First, the standard understanding of Marshall's familiar statement that "it is a constitution we are expounding"[18] is that the meaning of a society's fundamental political document, unlike legislation, can evolve over time. Although this understanding may be historically suspect (Marshall might have meant only that the Constitution granted Congress broad power to deal with changing circumstances), it has gained widespread acceptance,[19] and is often contrasted with statutes, whose meaning is considered less capable of evolution. Second, constitutions are considered more purposive and less anchored to their text than statutes. This characteristic of the U.S. Constitution was a major concern for those who opposed its ratification,[20] and an important theme in Hamilton's writings.[21] In the same

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[16] *See* Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Philip Frickey, *Interpretation on the Borderline: Constitutions, Canons, Direct Democracy*, 1996 N.Y.U. ANN. SURV. AM. L. 477; Jane Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

[17] I am grateful to Professor Sylvia Lazos (William S. Boyd School of Law) for raising this point.

[18] McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[19] *See* Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 409 (1993); Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 857-58 (1995).

[20] Brutus Anti-Federalist pamphlets make the point: "By [equity the judges] are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." BRUTUS NO. XI (Jan. 31, 1788) *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO: JANUARY TO AUGUST 1788, at 131 (Bernard Bailyn ed., 1993). "[T]his [Supreme] court will be authorized to decide upon the meaning of the constitution, . . . not only according to the natural and obvious meaning of the words, but also according to the spirit and intention of it." BRUTUS NO. XV (Mar. 20, 1788), *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra*, at 375. Because the constitutional preamble referred to a "more perfect union," reliance on the "spirit and reason" of the Constitution would tend toward enhancing the power of the general government in accordance with Federalist views. BRUTUS NO. XII (Feb. 7, 1788, Feb. 14 1788) *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra*, at 173. The Supreme Court was vested with a "power of giving an *equitable* construction to the constitution." BRUTUS NO. XV (Mar. 20, 1788) *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra*, at 372.

[21] Although Hamilton's tendentious remarks in response to Brutus stated that "there is not a syllable in the plan which *directly* empowers the national courts to construe the laws according to the spirit of the constitution . . . ." THE FEDERALIST No. 81, at 412 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987), Hamilton's confidential opinion to President Washington on the constitutionality of the national bank was much more forthright about the equitable interpretation of the constitution than the Federalist Papers. In response to the

vein, Marshall clearly embraced a purposive approach to constitutional interpretation,[22] but asserted that early 19th Century statutes were less subject to equitable (purposive) interpretation than earlier legislation. Third, constitutional texts tend to be more open-ended than statutes and therefore more able to incorporate evolving and purposive meanings.

These contrasts between the evolutionary, purposive and open-ended characters of constitutions and statutes are controversial. Some oppose the view that constitutions are inherently evolutionary and rely instead on historical intent. Conversely, at least some statutes seem capable of an evolving meaning – viz., "family" might include a gay family and a gay individual might be able to adopt a partner's child.[23] Moreover, purposivism lays a strong claim to be the preeminent interpretive criterion for statutes as well as for constitutions, especially during the first half of the 20th Century. And at least some constitutional texts may be as precise as many statutes, just as some statutes may be more open-ended and constitution-like. Nonetheless, the differences between constitutions and statutes occur often enough to call into question any casual assumption that they should be interpreted the same way.

A different criticism of this generalization is that such generalizations about interpretation are often unhelpful. The particular context of the specific statutory or constitutional document tells us far more about how it should be interpreted than any generalized assumptions. A related point is that generalizations may be of little relevance in explaining what courts really do. Judges frequently make black letter generalizations about interpretation which pay lip service to traditional doctrine (often at the beginning of an opinion), but then appear to disregard these statements when they get in the way, precisely because interpretation is so context-specific.[24] This suggests that even misleading generalizations about constitutional and statutory interpretation may pose little risk, especially when of the more or less innocuous and easily ignored "rebuttable presumption" variety – although we cannot completely discount the possibility of "ghosts that slay"[25] haunting judges in later cases where context requires an interpretation different from what the presumption indicates.

Attorney General Randolph's argument to "construe[ ] with greater strictness" a federal rather than a state constitution, Hamilton stated that the "reason of the rule" was otherwise. ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 105 (Harold C. Syrett ed., 1965) [hereinafter "HAMILTON, PAPERS"]. And, in his notes for a response to the Attorney General's opinion on the bank, Hamilton observed:

> There is a real difference between the rule of interpretation, applied to a law and a constitution. The one comprises a summary of matter, for the detail of which numberless Laws will be necessary; the other is the very detail. The one is therefore to be construed with a discreet liberality; the other with a closer adherence to the literal meaning.

Id. at 48.

[22] *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 55-57 (3d ed. 2001).

[23] *See, e.g.*, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) ("family" includes gay couple); *In re* Jacob, 660 N.E.2d 397 (1995) (same-sex adoptions).

[24] The Supreme Court of Nevada's July 10, 2003 holding in *Guinn* is as good an example of this behavior as you can find.

[25] Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1008 (1923-1924).

My reading of the July 10th decision in *Guinn* suggests that courts get it right despite generalities about interpretation.[26] As the next section explains, the Nevada Supreme Court listed interpretive criteria that it claimed were common to constitutional and statutory interpretation but then paid them little heed, reaching its conclusion based on quite different considerations.

B. Critiquing the Court's Interpretive Approach

The court initially lists four interpretive criteria that is says are applicable to both constitutional and statutory interpretation: (1) ascertain the intent of those who enacted the law and adopt an interpretation that best captures their objectives; (2) give words their plain meaning unless that violates the spirit of the provision; (3) where possible, construe provisions in harmony with each other; and (4) the specific prevails over the general.[27] References to the first two criteria often introduce an opinion in one form or another, and then play little role in deciding an actual case, in part because appeals to intent, spirit, and text and are often contradictory in practice. In any event, the court seems to pay no further attention to these two criteria in the rest of the opinion.

The third criterion listed by the court – harmonize provisions where possible – is clearly relevant to the decision, given the need to make sense out of apparently conflicting constitutional rules.[28] The difficulty with this criterion is that it provides little guidance because the problem is always *how* to produce harmony out of discordant provisions. There are many subsidiary "rules" in the judge's interpretive tool kit attempting to answer this question – later law prevails, no implied repeal (which has the opposite effect of later law prevailing), and the specific over the general. The *Guinn* Court chose – as its fourth interpretive criterion – to cite only the specific-over-the-general rule.[29]

Failure to cite the "later law prevails" rule is hardly surprising, given the court's decision that the earlier constitutional provision favoring funding of schools was the law. The failure to cite the "no implied repeal rule" is more difficult to understand because that is the common judicial route to favoring the earlier of two laws. The court apparently preferred to rely on the "specific-over-general" canon as the technique for choosing the earlier constitutional provision because it has a textualist ring to it that appears to minimize the exercise of judicial discretion. Indeed, some judges argue that the "no implied repeal rule" should be limited to cases where a later general rule appears to conflict with an earlier more specific text.[30] But policy conflicts exist between two legal documents whether or not one text is more specific than another and consideration of the "no implied repeal rule" is the more direct way of confronting this conflict because it requires the judge to consider whether the policy in the prior law is a more important part of the legal landscape.[31] Moreover, a more purposive application of the "specific-over-general canon" would recognize

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[26] *See generally Guinn*, 71 P.3d 1269.

[27] *Guinn*, 71 P.3d at 1274-75.

[28] *Id.* at 1274.

[29] *Id.* at 1275.

[30] Watt v. Alaska, 451 U.S. 259, 280-81 (1981) (Stewart, J., dissenting).

[31] Radzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (Stevens, J., dissenting).

that, like the "no implied repeal canon," its goal is to prevent accidental and uninformed repeal of prior law.

The court also lists a fifth introductory interpretive principle – avoid absurd consequences and public mischief – and then says that this principle is applicable to "constitutional provisions."[32] This last criterion perhaps best characterizes the court's effort to come to grips with the reality of making policy choices, although the reference to "constitutional provisions" is puzzling on two grounds. First, it suggests this principle is *in*applicable to statutory construction, despite an earlier claim that interpretive approaches to constitutions and statutes are the same. Second, the absurdity[33] and mischief[34] tests are, in fact, venerable statutory interpretation principles.

So much for the court's introductory interpretive credo. What did the court do? In my reading, the court chose the earlier policy favoring public school funding for reasons that cannot be captured by citation to the conventional "specific-over-general rule." If any interpretive generalizations fit the court's decision, it is that there are potential differences rather than similarities between constitutional and statutory interpretation.

First, the later law was an amendment to the Nevada Constitution adopted through the initiative process. Although conventional doctrine asserts that initiatives are to be interpreted in the same way as legislation, there is good reason to adopt a different approach.[35] One reason (not relevant here) is that the initiative is more likely than legislation to appeal to emotional bias without opportunity for compromise because of the all-or-nothing nature of the vote. A second reason, relevant to this case, is that the public is often unaware of the complex legal environment in which the initiative would operate. Explanations of initiatives that are provided to the voters are often too complex to be understood, and public media advertising oversimplifies its legal content. The July 10th decision contains only a bare hint of the defects of the initiative process, suggesting that the public may have been insensitive to its breadth because of the surpluses in the state treasury during the period when the initiative was under consideration. Indeed, this point was mentioned only in the court's statement of facts,[36] not in the legal reasoning later used to support its conclusions. The amendment requiring a two-thirds vote to raise revenue might, therefore, have been adopted with insufficient attention to the constitutional requirement that the legislature fund education, because the public voted on the initiative during fat budgetary years. Rather than illustrating a pervasive rule that a specific text prevails over the general, the decision (if not the opinion) seemed sensitive to the fact that using the initiative process to amend the constitution was a reason why the later general rule requiring a two-thirds legislative majority to raise revenue should yield to the earlier funding rule.

Second, the policy underlying the prior law was especially strong. As I said earlier, the decision whether later law prevails or prior law survives an

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[32] *Guinn*, 71 P.3d at 1275.

[33] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

[34] *See generally* S.E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 U. ILL. L. REV. 202 (1936).

[35] *See* Schacter, *supra* note 16; Frickey, *supra* note 16.

[36] *Guinn*, 71 P.3d at 1273-74.

implied repeal always occurs in the shadow of a policy coherence analysis that weighs the policies of the two laws. That is how many of the substantive canons of interpretation operate (though not without controversy) – such as the canon requiring narrow interpretation of statutes in derogation of the common law, the rule of lenity, and the protection of states from encroachment by federal law. It is also how concern with absurd results and public mischief enter into statutory interpretation – viz., a result that is "absurd" or that leads to public mischief will not be inferred absent a clear statement in a later law. But when the policies of prior and later law are closely balanced, a court is not likely to choose which law prevails on policy grounds,[37] and will instead defer to the political choice in the later law.

Consistent with this approach, the July 10th decision by the Nevada Supreme Court suggests that the policies of prior and later law were nowhere near in equipoise, referring to the prior constitutional commitment to fund education as a "basic right,"[38] and stating that the "Constitution's framers strongly believed that each child should have the opportunity to receive a basic education."[39] But then the decision tries to minimize the exercise of judicial discretion in favor of funding education by stating that the later constitutional rule requiring a two-thirds legislative majority to raise revenue was procedural and therefore entitled to less deference than the earlier substantive mandate to fund education.[40] This line of analysis is reminiscent of the reliance on the distinction between procedure and substance when deciding whether a statute should be interpreted to have retroactive effect and is just as questionable. Downplaying the requirement of a two-thirds vote to raise revenue as procedural misses the significance of the supermajority rule in protecting private income from being taken by the government for public purposes chosen by the legislature, which is surely a fundamental substantive value establishing a relationship between the individual and the state. (The older and now probably defunct canon that statutes burdening taxpayers should be narrowly construed also reflects that view). Although the two-thirds vote can technically be described as a procedural requirement, the use of that label as a tool of analysis elides the question of which policy deserves greater protection – the supermajority rule or funding public education, so that every child would have the opportunity to receive a basic education.

II. SEPTEMBER 17TH DECISION

What was merely a hint or suggestion in the July 10th decision was explicit in the September 17th opinion.[41] First, regarding the initiative process for amending the state constitution, the court noted explicitly:

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[37] Sorenson v. Sec'y of Treasury, 475 U.S. 851, 864 (1986) ("It is impossible, however, for us to say that these goals outweigh the goals served by the subsequently enacted [law] . . . .").

[38] *Guinn*, 71 P.3d at 1275.

[39] *Id.*

[40] *Id.*

[41] Justice Maupin's dissent in the September 17th decision took explicit issue with the majority's concerns that the initiative process was flawed. *Guinn*, 76 P.3d at 34.

> [N]either the ballot question [that resulted in the adoption of the initiative] nor its explanation in the voter pamphlet informed voters of the likelihood of legislative paralysis and its effect on the state's fiscal and educational integrity. Indeed, even the initiative's prime sponsor was unsure of the consequences of reposing within a small group of legislators the power to block majority-approved appropriations. And, in 1993, he represented to the Assembly that the supermajority requirement "would not hamstring state government or prevent state government from responding to legitimate fiscal emergencies."[42]

Moreover, "[t]he voters were not privy to the Assembly's concerns that culminated in . . . legislative rejection [of the supermajority requirement], and the requirement's proponents failed to address those concerns when presenting the initiative."[43] In other words, where the July 10th opinion explicitly asserted that there was nothing special about constitutional interpretation, but implicitly relied on the special circumstances surrounding adoption of the constitutional initiative, the September 17th opinion explicitly relied on concern about the public's inadequate understanding of the substantive implications of its vote in the initiative process.

Although my primary focus is on the way the court wrote its opinion, I cannot resist commenting on two omissions from the court's discussion of the initiative procedure. First, the court might have discussed the fact that there was another provision on the 1996 ballot besides the supermajority requirement amendment. That other provision stated that:

> [S]tate law would require each house of the Nevada Legislature to consider and approve twice any bill that imposes or increases a tax or assessment. Additionally, the measure would require a period of 10 calendar days to elapse between the first and second votes in each house on any such bill. . . . The proposed amendment, if approved, will become effective . . . only if a majority of the voters reject Question no. 11 [which was the supermajority proposal].[44]

Arguably, the presentation to the public of two ballot proposals about raising taxes, one of which made it harder to raise taxes than the other, might have alerted the voters to the policy implications of any rule that made it more difficult for the state to obtain revenue.

The second issue the court could have discussed was the fact that it had the power under state legislation to review whether the explanation of the initiative to the public could be easily understood.[45] Arguably, a court might be

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[42] *Id.* at 30.

[43] *Id.*

[44] This proposal for a statute requiring two legislative votes to raise taxes passed 255,607 to 164,600, but did not become effective because the supermajority proposal passed by a 301,191 to 125,876 vote.

[45] NEV. REV. STAT. 293.250(5) (1996). In *Nevada Judges Ass'n. v. Lau*, 910 P.2d 898 (Nev. 1996), the court stated:

> We recognize that it might be impossible for the Secretary of State to explain all the conceivable implications of every initiative placed on a ballot. However, most voters would assume that judicial terms under the proposed amendment would be the usual six years, and requiring the explanation on the ballot to make clear that under certain circumstances the terms would be a much shorter period of time is clearly appropriate under NRS 293.250(5). The failure to explain these ramifications of the proposed amendment, combined with the initiative's failure to in any way distinguish the judiciary from other branches of government, renders the initiative and its explanation potentially misleading. As noted above, term limits have been exclusively applied to

less willing to consider procedural shortcomings as part of the interpretive process in states were there is the possibility of judicial review of those procedures, although I am unaware of any court having considered this possibility.

The Nevada Supreme Court was not only far more thorough in its critique of the initiative process in its September 17th decision, but its opinion was also much more explicit about the need to choose between competing values, avoiding any suggestion that the issue was a routine application of interpretive canons.[46] What little it said in its introductory comments about interpretation suggested that the canons provided no guidance, hinting that intent could not be determined and that, in any event, absurdity and conflicting provisions forced judges to make choices. Then, in explaining those choices, the court explicitly embraced a bold "weighing" and "balancing" approach. It stated:

> 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.[47]

And:

> 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.[48]

The court then explicitly affirmed the importance of education as "nothing less than the constitutional mandate to fund public education,"[49] citing *Brown v. Board of Education* for the proposition that:

> [E]ducation is perhaps the most important function of state and local governments . . . . [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[50]

Unlike the July 10th decision, the court did not rely primarily on historical "framer" intent, but stressed a contemporary commitment to education. Its conclusion stated that:

> This statement [about education's importance] is *equally pertinent today*. "No other governmental service plays such a seminal role in developing and maintaining a citi-

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> the executive and legislative branches, and no such limitations have ever been imposed on the judiciary. We have the real concern that a casual reader will not understand that the proposed limits apply to judges and not just to officers elected to the political branches of government. Some voters who want term limits for "politicians" may actually prefer a career judiciary.

910 P.2d at 903. *See also* Stumpf v. Lau, 839 P.2d 120, 123-24 (Nev. 1992) (an initiative's failure to inform voters as to its nature and effect was sufficient ground to remove the initiative from the ballot; however, the failure in this case was extreme – not specifying whether a statute or the constitution was being amended).

[46] *Guinn*, 76 P.3d at 31-32.

[47] *Id.* at 31.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 31-32.

> zenry capable of furthering the economic, political, and social viability of the State." Our State Constitution's framers explicitly and extensively addressed education, believing strongly that each child should have the opportunity to receive a basic education.[51]

A striking feature of the second opinion is that it was technically unnecessary for the court to re-explain the grounds for its earlier decision. Indeed, a concurring opinion objected to the court going out of its way to "answer public criticism" of the prior decision.[52] But the fact that the court did this suggests something interesting about writing judicial opinions. It is often said that a court writes opinions as though cases are decided by abstract legal principles rather than controversial political choices. In *Guinn*, public criticism appears to have been the catalyst for a more forthcoming opinion about the real choices the court made to reach its initial decision. That first opinion, written in the dry seemingly uncontroversial language of interpretive canons, did not satisfy or persuade and the court took advantage of the fortuitous opportunity afforded by a motion for rehearing to give a second, more persuasive, explanation of why it interpreted the constitution the way it did.

This raises a question. If the public was more persuaded by explicit recognition of the complexity of judicial choices – passing judgment on the shortcomings of the initiative process and choosing public education over protecting taxpayers from revenue increases – why didn't the court write the opinion that way in the first place? Perhaps the public is more ready for judges to reveal how they actually make decisions than judges think they are. Clearly, the court thought that its more forthcoming explanation for why it did what it did would attract greater public support than its formalistic and overly simplified discussion of interpretive canons had in its earlier opinion. Its use of the per curiam style of presenting its September 17th decision seems more motivated by a desire to stress the unanimity of the five judges who signed the opinion, rather than an effort to insulate the judicial author of the opinion from public criticism (which, in any event, would have been too late).

III. Conclusion

The Nevada Supreme Court, once it decided to become involved in the political dispute between the governor and the legislature over school funding, tilted in favor of the values embodied in an older pro-education constitutional provision rather than a newer constitutional initiative making it harder for the legislature to impose taxes. Instead of illustrating the routine application that constitutional and statutory interpretation are similar, the court's approach was concerned about the use of the initiative process to amend the constitution and with protecting the values embodied in the earlier constitutional provision This approach, hinted at in the initial July 10th decision, was made explicit in the later September 17th ruling, in which the court went out of its way to provide a more forthright explanation for its decision. So why not be more forthright in the first place?

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[51] *Id.* at 32 (emphasis added).

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