

ANATOMY OF THE FEDERAL LITIGATION: CHALLENGING THE LEGISLATURE'S ACTIONS IN THE WAKE OF *GUINN* V. *LEGISLATURE*

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I. INTRODUCTION

The call came in about 4:30 on a Friday afternoon in mid-July. The caller, a member of the Nevada State Assembly, was a bit surprised to have reached me so late on a Friday afternoon in the middle of the summer. But there was more than surprise in the voice of Assemblywoman Sharron Angle. Frustration, even a hint of desperation, colored her tone. For twenty-four hours she had been contacting every lawyer she knew, and every lawyer they knew, to see if something could be done about the decision in *Guinn v. Legislature of Nevada*¹ that had been rendered by the Nevada Supreme Court the day before. The decision effectively voided a key structural provision of the Nevada Constitution that required a two-thirds vote of the Legislature before new or increased taxes could be imposed.² I had heard about the case the day before in news accounts, and had even briefly discussed it in the weekly radio debate I have with fellow constitutional law professor Erwin Chemerinsky.³ Nevertheless, I was a bit perplexed by Sharron's request. I am a member of the national executive committee of the Federalist Society's Federalism & Separation of Powers practice group⁴ and a staunch defender of federalism principles; indeed, the primary focus of both my scholarly research and public interest litigation has been to restore some semblance of the limits on the powers of the federal gov-

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¹ 71 P.3d 1269 (Nev. 2003) (*Guinn I*).

² NEV. CONST. art. IV, § 18, cl. 2.

³ Professor Chemerinsky, who teaches at the University of Southern California Law School, is also the author of one of the leading treatises on federal court jurisdiction. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* (4th ed. 2003). The weekly debate, addressing the latest developments in constitutional law, is hosted by Hugh Hewitt and broadcast nationally on over sixty radio stations via the Salem Radio Network. See <http://www.hughhewitt.com/pages/stations.htm> (last visited June 17, 2004).

⁴ See <http://fed-soc.org/Publications/practicegroupnewsletters/federalism/contacts.htm> (last visited June 17, 2004).

ernment envisioned by the framers of our Constitution.⁵ I told Sharron what she had already been told countless times before: as a general rule, a state Supreme Court has the last word on matters of state law, including state constitutional interpretation.⁶

I am not a Calhounian states-rights-at-all-costs devotee, however; for example, in previous publications,⁷ I have argued that the natural rights principles of the Declaration of Independence were actually codified in the Constitution in clauses that applied to the states, including the twin Article IV provisions guaranteeing a republican form of government⁸ and protecting the privileges and immunities of citizens.⁹ These arguments, coupled with the sense of despair in Sharron's voice, led me to promise that I would read the opinion to see if there was any possible avenue to pursue, and call her back in an hour.

What I read was extraordinary. The Nevada Supreme Court's opinion was no mere interpretative legerdemain. It did not, for example, hold that the 2/3 vote provision was invalidly enacted, that it violated some single-issue requirement of the State constitution, or that the provision had an implied exception for emergency funding.¹⁰ Any of these grounds, though questionable, would arguably have qualified as a state court merely interpreting a provision of its own state constitution, insulated from federal court review.

Instead, the Nevada Supreme Court held: (1) that the two-thirds vote provision was duly enacted and (2) that it was constitutional, but (3) that it was nevertheless inoperative as a check on the legislature when exercising powers granted elsewhere (and previously) in the State constitution.¹¹ In other words, the court essentially held that the people of the State of Nevada would not be permitted to amend their State constitution so as to restrict the taxing power of the legislature.

⁵ See, e.g., John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001), available at http://www.chapman.edu/images/userImages/bail/Page_4062/Eastman.pdf (last visited June 17, 2004); John C. Eastman, *Re-Entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J.L. & PUB. POL'Y 931 (2002). See also Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioner, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (No. 99-1178), available at http://www.claremont.org/static/pdf/agency_corps.pdf (last visited June 17, 2004); Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Respondents, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); Petition for Writ of Certiorari, *Rancho Viejo, LLC v. Norton*, cert. denied, 124 S. Ct. 1506 (Mar. 1, 2004) (No. 03-761), available at http://www.claremont.org/static/ranchoviejo_certpetition.pdf (last visited Apr. 30, 2004).

⁶ See, e.g., *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

⁷ John C. Eastman, *The Declaration of Independence as Viewed from the States*, in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 96, 114 (Scott Douglas Gerber ed., 2002).

⁸ U.S. CONST. art. IV, § 4.

⁹ U.S. CONST. art. IV, § 2.

¹⁰ See *Miller v. Quertermous*, 202 S.W.2d 389 (Ky. 1947). See also Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L.J. 149, 167 (2003).

¹¹ See *Guinn v. Legislature*, 71 P.3d 1269 (Nev. July 10, 2003) (*Guinn I*), clarified & confirmed, 76 P.3d 22 (Nev. Sept. 17, 2003) (*Guinn II*).

This was an extraordinary ruling; it undermined one of the very core principles of republican government: government *by the people*.¹² As such, the case presented a wonderful opportunity to take Justice O'Connor up on her suggestion in *New York v. United States*¹³ that some Republican Guarantee Clause claims might well be justiciable despite a century and a half of jurisprudence to the contrary.¹⁴ Furthermore, given the connection between the Republican Guarantee Clause and the natural rights principles of the Declaration of Independence, the principles at stake in *Guinn* were central to the mission of the Claremont Institute (whose Center for Constitutional Jurisprudence I direct). That mission is "to restore the principles of the American Founding to their rightful, preeminent authority in our national life."¹⁵ I called Sharron to tell her I would take the case.

II. CRAFTING A LITIGATION STRATEGY

Sharron advised me that the euphoric pro-tax crowd in the State Legislature had already scheduled a rare Sunday session of the Assembly. This house of the State Legislature had been unable to secure the required two-thirds vote for tax increase proposals during the first and second special sessions called by the Governor. Whether intended to hide the tax hike from public view, or merely to strike while the iron was hot (and before the Nevada Supreme Court could change its mind), scheduling the Sunday session meant that the Legislature imminently planned to raise taxes without the two-thirds vote specified by the Nevada Constitution. Any court action to forestall that possibility would have to come in short order.

My first call was to the apartment of four law student interns working at the time as Blackstone Fellows at The Claremont Institute. Two had already flown the coop to visit friends for the weekend. The other two¹⁶ responded heartily when I asked whether they wanted to act like real lawyers, not fully appreciating that, under the circumstances, this meant all-night research marathons at the frenetic pace of emergency-relief litigation.

I had a pretty good idea of the federal claims I wanted to raise: a violation of the Republican Guarantee Clause, vote dilution of both legislators and their constituents, and, perhaps, vote nullification and various due process claims as well. I set the Blackstone Fellows to work researching the specific elements of those claims, and then sent out some e-mails to assemble the rest of the litiga-

¹² Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* FAMOUS SPEECHES BY EMINENT AMERICAN STATESMEN 103 (Frederick C. Hicks ed., 1929).

¹³ 505 U.S. 144 (1992).

¹⁴ See, e.g., *Luther v. Borden*, 48 U.S. 1 (1849).

¹⁵ The Claremont Institute website is available at <http://www.claremont.org/> (last visited June 17, 2004).

¹⁶ Elizabeth Kim (New York University Law School) and Karin Moore (University of St. Thomas School of Law). By Sunday evening, they would be joined by Leah Boyd (Washington & Lee University School of Law) and Dina Nam (Brooklyn Law School). I wish to acknowledge my heartfelt thanks to all four students, not just for their terrific work on this litigation, but for their friendship as well. I also want to express my gratitude to the Alliance Defense Fund, which sponsors the Blackstone Fellows program, and to the Claremont Institute, which warmly received the Blackstone Fellows.

tion team. This included students working with the Liberty Clinic (sponsored by the Center for Constitutional Jurisprudence at Chapman University School of Law), a fellow former Supreme Court clerk with an active Supreme Court practice, and a couple of law firms, both regional and national in scope, ready to backstop the team if the litigation became unmanageable.

In the meantime, we had some questions to answer and some strategic decisions to make. Should we seek a rehearing before the Nevada Supreme Court? (Did that court's rules even allow for a rehearing on claims that had not previously been raised? Just what claims had been raised? Another research request went out to students; happily, all of the filings in the case were available on the Nevada Supreme Court's web site). Should we instead – or could we even – file an action in federal court? What were the jurisdictional issues? Did we need to be concerned with abstention doctrines? Did we need to seek emergency relief before the Legislature acted, or could we (and should we) wait until after it acted?

We also had some logistical issues to address. Who were my clients? About two dozen legislators had filed a separate counterclaim in the Nevada Supreme Court, but would they all be on board? I needed retention agreements. Could they all be reached over the weekend? What about other clients, such as citizens, voters, taxpayers, businesses, and various interest groups? Which of these would be helpful, even necessary, to the federal claims we wanted to raise? I assigned Sharron the task of securing necessary consent from her fellow legislators, identifying other potential plaintiffs for the case, and finding someone who would serve as local counsel.

By late Friday, the “conlawprofs listserve,” an e-mail discussion group for constitutional law professors, was beginning to heat up with commentary on the Nevada Supreme Court's decision. UCLA Law Professor Eugene Volokh, host of the list, had posted a brief summary and link to the case. He had posted a lengthier critique on his widely-read internet web log (or “blog”) the evening before, calling the decision “one of the most appalling” he'd ever seen. He urged Nevada voters to consider a “We really mean it” constitutional amendment (if one could be adopted in time), and suggested that voters impeach or recall the Nevada Supreme Court Justices from office, as permitted by the Nevada Constitution.¹⁷ Prior to accepting representation in the case, I had weighed in with a listserve posting of my own, asking whether there might be federal constitutional rights implicated by the decision. That generated a lot of traffic on the list, addressing the substantive merits of various claims and also the various jurisdictional problems that might arise.

At some point late Friday evening, someone on our litigation team raised the specter of the “enrolled bill doctrine.”¹⁸ What if the Legislature were to pass a tax increase without the necessary two-thirds vote, forward it to the Governor for signature, and then have it enrolled on the state's statute books before our litigation could be filed? Would the courts be precluded from looking behind the enrolled bill to the fact that it had not garnered the necessary

¹⁷ Professor Volokh's numerous posts on the subject are available at http://volokh.com/2003_07_06_volokh_archive.html (last visited June 17, 2004).

¹⁸ See explanation of bill enrollment, *infra* note 22.

two-thirds vote? Another research project e-mail, marked "urgent," went out. Key cases were quickly identified.

After reviewing the cases, I was of the view that the enrolled bill doctrine should not preclude an after-the-fact challenge to a tax increase passed without the necessary two-thirds vote, but there was enough room in the joints of the doctrine to make that a somewhat debatable position, not one on which I wanted to stake the case. Accordingly, we decided, to be ready with a complaint and request for a temporary restraining order by the next day, Saturday, July 12, 2003. We also decided to bring the case in federal court, rather than merely filing a petition for rehearing in the Nevada Supreme Court or filing a new case in state trial court. Both of the latter options seemed futile in light of the Nevada Supreme Court's decision, and to pursue them in lieu of a federal court challenge would all but guarantee that any subsequent federal court challenge would come *after* a bill had been passed and enrolled.

Thus, around midnight on Friday, we turned our sights to the federal courts. Quick check of the local District Court rules. Research the judges to determine whether to file in Las Vegas or in Reno. What about sovereign immunity issues? Be sure to name individual legislative officers as defendants, relying on *Ex Parte Young*,¹⁹ and, of course, include a request for injunctive relief. Abstention doctrines? Most did not apply, but there was clearly an issue with the *Rooker-Feldman* doctrine.²⁰ That is, if we filed a federal court action on Saturday, even one naming the Legislature and individual members as defendants (rather than the Nevada Supreme Court or its Justices), would it be interpreted as a *de facto* appeal from the Nevada Supreme Court decision? The doctrine was highly technical and the language in lower court opinions sometimes convoluted. This was going to require clearer heads than we had at 3:00 in the morning. Therefore, one of the Blackstone fellows was tasked with identifying the most thoughtful treatises and law review articles discussing the doctrine, while the rest of us turned in for some head-clearing sleep.

Our co-counsel on the East Coast was up early, and independently realized that there was a potential *Rooker-Feldman* issue. He picked up the research trail from the night before, and started looking at the law review articles and treatises that the Blackstone fellow had identified. I joined in a few hours later, and by mid-morning had come to the following conclusion: (1) We absolutely could not bring suit against the Nevada Supreme Court or its Justices; the *Rooker-Feldman* doctrine clearly barred challenges to actions taken in a judicial, rather than an administrative, capacity;²¹ (2) Even a suit naming the Legislature and/or individual legislators was problematic if filed on Saturday; the Legislature had not yet taken any action that violated federal rights, so quite apart from any potential *Rooker-Feldman* issues, there was also a ripeness concern. We decided to put the complaint on ice until the Legislature took some action contrary to the two-thirds vote provision of the Nevada Constitution.

That decision bought us a little breathing room to perfect the substance of the complaint and its developing causes of action, but it also made the litigation

¹⁹ 209 U.S. 123 (1908).

²⁰ See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923).

²¹ *Feldman*, 460 U.S. at 468 n.2.

a bit more complicated. Operating on the assumption that some court might find solace in the enrolled bill doctrine, we still wanted a request for a temporary restraining order (TRO) that, if granted, could prevent a bill from getting enrolled. Our clients were legislators, familiar with the Nevada legislative process, so I asked our lead client, Sharron Angle, to put together a chronology of a bill's progress through the legislature, the Governor, and ultimately to the statute books. We had no idea how quickly the Nevada District Court would issue the TRO (assuming it decided to issue one at all), or where in the process the tax bill would be at the time. Thus, we added to the complaint as defendants every legislative leader, employee, and executive branch official who had any formal substantive or ministerial role in the movement of a bill from introduction to passage to signature to enrolled status.

The Legislature as a whole was named as lead defendant, but each house of the Legislature was separately named, as were the leaders of the respective houses: Lorraine T. Hunt, President of the Senate (and also Lieutenant Governor), and Richard D. Perkins, Speaker of the Assembly. These two would ultimately affix their signatures to any bill passed by the Legislature before it got transmitted to the Governor. Jacqueline Sneddon, Chief Clerk of the Assembly, Diane Keetch, Assistant Chief Clerk of the Assembly, Brenda Erdoes, Legislative Counsel, and Claire J. Clift, Secretary of the Senate, all had an official hand in the passage of a bill through the Legislature,²² so all were named. Once a bill is passed by both houses of the Legislature, and the necessary signatures are affixed, it is sent to the Governor for signature (or veto, subject to a legislative override); thus, Governor Kenny Guinn was named. Once his signature is affixed, a bill gets transmitted to the Secretary of State, who adds it to the compilation of enacted statutes, so Dean Heller, Secretary of State, was likewise named. And, of course, collection of any taxes authorized by a tax bill is the responsibility of the Nevada Department of Taxation. Therefore, Charles E. Chinnoch, the Department's Executive Director, was also named.²³

With so many defendants, the magnitude of effecting service of an emergency, *ex parte* application became evident to me. It also reminded me that we had not yet secured local counsel. Sharron had identified several possible

²² Nevada Senate Bill 6 (SB 6), the tax bill that was scheduled for consideration by the Assembly on Sunday, July 13, 2003, had already passed the Senate and been forwarded to the Assembly. If it passed the Assembly, the Assistant Chief Clerk of the Assembly would certify on the bill cover that it had been passed by the Assembly, and then transmit the bill back to the Senate, together with any amendments approved by the Assembly. If the Senate were to concur in the Assembly's amendments, the Secretary of the Senate would forward the bill to the legal division for enrollment by the Legislative Counsel. The enrolled bill would then be printed, placed in a special bill cover designed for the appropriate signatures, and transmitted to the Senate for signature by the Secretary of the Senate and the Lieutenant Governor, in her role as President of the Senate. The signed bill would then be transmitted to the Assembly, where the signatures of the Speaker and the Chief Clerk of the Assembly would be affixed. The enrolled bill would then be delivered by the Chief Clerk back to the Legal Division for delivery to the Governor for his consideration. If the Governor were to sign the bill, it would be delivered to the Secretary of State for archival retention and the assignment of a chapter number in the compilation of the Statutes of Nevada.

²³ For an overview of the Nevada legislative process see The Nevada Legislature Website, How a Bill is passed, available at http://www.leg.state.nv.us/General/im_just_a_bill.cfm (last visited June 17, 2004).

leads, so I began calling to see who was at work on a Saturday afternoon in the middle of July. One prospect appeared to have a great many connections with our planned defendants, so I passed on him; he would eventually make an appearance in the litigation as *opposing* counsel. Others were unavailable. Finally I was able to contact a well-recommended solo practitioner in Reno, Jeffrey Dickerson, who agreed to join the team as local counsel. He was close enough to the court, and to the legislative and executive offices in Carson City, to be able to coordinate filing and service.

The bottom side of the complaint caption having taken shape, we still needed to finalize our list of Plaintiffs. Sharron had been working overtime to enlist a number of legislators. She had enlisted more than one-third in each house, which was a potentially critical number to establish standing for the legislative vote dilution claim.²⁴ However, because these legislators had all been parties to the action in the Nevada Supreme Court, this brought us back to the *Rooker-Feldman* issue.

By now, we had identified two well-established exceptions to the *Rooker-Feldman* jurisdictional bar: (1) it did not apply to claims that were not raised or decided in the State court;²⁵ and (2) it did not apply to parties who were not involved with the state court proceeding.²⁶ Our federal claims did not exist at the time of the state court proceeding. Indeed, they would not arise until the Assembly's action late Sunday night deeming as "passed" a tax increase without the requisite two-thirds vote. Thus, in our view, we qualified for the first exception.

But I wanted to be able to rely on the second *Rooker-Feldman* exception as well, and I wanted to raise federal claims beyond the legislative vote dilution claim. In *Michel v. Anderson*,²⁷ the D.C. Circuit recognized that a legislator's constituents have a derivative, though distinct, vote dilution claim when their legislator's vote is abridged. Thus, we identified individual voters and taxpayers who resided in districts represented by any one of our legislator plaintiffs.²⁸

We also included citizens who had voted for the statewide initiatives in 1994 and 1996, by which the two-thirds vote provision had been added to the Nevada Constitution.²⁹ Their votes were essentially nullified when the Nevada

²⁴ See *Raines v. Byrd*, 521 U.S. 811, 823 (1997) ("It is obvious, then, that our holding in *Coleman v. Miller*, 307 U.S. 433 (1939)] stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified").

²⁵ *Rooker*, 263 U.S. at 415; *Robinson v. Ariyoshi*, 753 F.2d 1468, 1469 (9th Cir. 1985), *vacated and remanded on other grounds*, 477 U.S. 902 (1986). See also *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 558 (7th Cir. 1999) ("an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings"); *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 994-95 (9th Cir. 2002) (*Rooker-Feldman* doctrine inapplicable when party does not bring claims in state court).

²⁶ See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. 2002); *Bennett v. Yoshina*, 140 F.3d 1218, 1224 (9th Cir. 1998).

²⁷ 14 F.3d 623, 625-26 (D.C. Cir. 1994).

²⁸ My favorite was a man by the name of Thomas Jefferson!

²⁹ Amendments made to the Nevada Constitution by initiative or referendum need to pass two consecutive elections. Nev. Const. art. 19 § 4 ("If a majority of such voters votes

Assembly disregarded the two-thirds vote provision. For good measure, we added “Nevadans for Tax Restraint” and “Nevada Concerned Citizens”³⁰ as plaintiffs, private associations whose members are Nevada taxpayers and voters devoted to protecting their rights as taxpayers and voters, respectively. Since none of these Plaintiffs had been parties to the Nevada Supreme Court proceeding, our federal case now qualified for the second *Rooker-Feldman* exception.

An additional federal claim that would arise at the end of a bill’s process through the legislature also occurred to me. Nevada Senate Bill 6 (SB 6), a bill that would impose a gross receipts tax on a host of Nevada businesses, was scheduled for consideration by the Assembly on Sunday, July 13, 2003. If SB 6 were to pass without the two-thirds vote required by the Nevada Constitution, the taxes imposed as a result would effectively be a taking of private property without due process of law. In other words, the bill would have gone through without the process that was due: the two-thirds vote of the legislature mandated by the Nevada Constitution. Accordingly, we added a due process claim and a couple of business trade associations as plaintiffs – the Nevada Manufacturers Association and the Retail Association of Nevada, whose members were targets of the proposed tax.

With both sides of the complaint caption now complete, we turned our attention back to drafting the complaint, the TRO, and a memorandum of points and authorities in support of the TRO. By 10:00 p.m. Saturday night, we had decent drafts of all three filings. More research would be done the next day to bolster our understanding of the various claims and jurisdictional hurdles, and to flesh out the irreparable harm portions of the TRO request, but the main task for Sunday was to wait and watch what the Assembly did.

It then occurred to me that if the federal court denied our request for a TRO, we would likely end up challenging an enrolled bill after the fact, even if the federal court granted an expedited hearing on our request for a preliminary injunction. Considering our options, I realized that we could bring another set of federal claims to challenge the validity of the Nevada Supreme Court decision itself. After all, the Nevada Supreme Court had granted a remedy that had never been requested by Governor Guinn, the petitioner in the case. It did so without an evidentiary hearing or even a briefing of the factual assumption on which its decision rested. Arguably, these represented some fundamental due process violations in their own right. Such claims had not been part of the original state court action, of course, because they did not arise until the Nevada Supreme Court issued its ruling on July 10, 2003. That would not necessarily preclude United States Supreme Court review, but the claims should at least be raised by way of a petition for rehearing if such rehearing were allowed by the Nevada court rules. Accordingly, I asked my East Coast co-counsel to start preparing a petition for a writ of certiorari to file in the United States Supreme Court, along with an application for emergency stay,

approval of such amendment, the secretary of state shall publish and resubmit the question of approval or disapproval to a vote of the voters at the next succeeding general election in the same manner as such question was originally submitted.”)

³⁰ For information regarding these groups, see <http://www.nevadansfortaxrestraint.com/> and <http://www.nevadaconcernedcitizens.org/> (last visited June 17, 2004).

while the Blackstone Fellows and I began looking at the Nevada Supreme Court rules for rehearing petitions.

By late Sunday afternoon, the Assembly was in session. Its proceedings were broadcast live over the internet, so our litigation team was able to listen in from various places around the country. SB 6 was called for a roll-call vote; it received twenty-six votes in favor and sixteen against—two votes short of the two-thirds vote required by the Nevada Constitution. Nevertheless, Speaker Perkins gavelled the bill “passed.” Lynn Hettrick, the Assembly Minority Leader, raised a point of order, noting that the bill had failed to garner the two-thirds vote required by the Nevada Constitution. The Speaker, in the Chair, overruled the point of order, asserting that the bill was “passed” by virtue of the Nevada Supreme Court’s decision in *Guinn*. Assemblyman Hettrick then appealed the Chair’s ruling, asking for a roll-call vote of the full body. After a brief discussion with legislative counsel, the Speaker refused to honor Hettrick’s call for a roll-call note on his point of order.³¹ The Assembly’s session was then gavelled to a close.

Although we had earlier obtained contact information from the federal court for emergency, after-hours filing, the Senate was not scheduled to consider SB 6 until Monday afternoon, so we decided to file our complaint and application for a TRO as soon as the District Court opened its doors Monday morning. We used the time to incorporate the proceedings of the Assembly into the complaint, to polish the allegations and causes of action, and to consider new issues that our ongoing research had uncovered. For example, was our complaint barred, in whole or in part, by the Anti-Tax Injunction Act?³² The two Blackstone Fellows who had been working with me since Friday night were now joined by their colleagues, back from a carefree weekend away from the law, and they were given this assignment.

III. THE FEDERAL COURT CASE

By 3:00 a.m. Monday morning, everything was in order and transmitted to local counsel, who stood ready to serve the pleadings on each named defendant and file them with the court once the courthouse opened. The case was initially assigned to Judge Howard D. McKibbin, who, in turn, referred the request for a TRO to Chief Judge Philip M. Pro for possible consideration by the full court, pursuant to the rarely-used procedure authorized by 28 U.S.C. § 46. Chief Judge Pro conferred with each active judge on the court and then “determined that the issues raised in Plaintiffs’ Emergency Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction should be considered in a comprehensive manner by the active District Judges of [the] Court sitting *en banc*.”³³

³¹ Rulings on points of order can be appealed to the full House. See ROBERT’S RULES OF ORDER NEWLY REVISED 247 (10th ed. 2000).

³² 28 U.S.C. § 1341 (2000) (“The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”).

³³ Temporary Restraining Order, *Angle v. Legislature* (July 14, 2003). The documents filed in *Angle v. Nevada Legislature* can be found on the Nevada Legislature website at <http://>

While the entire District Court was considering the request for a TRO, the Nevada Senate reconvened its session. The Senate went into Committee of the Whole to consider the Assembly's amendments to SB 6, the tax bill that had been "deemed" passed by the Assembly the evening before. Shortly after 4:00 p.m. on Monday, the District Court issued its ruling *granting* the temporary restraining order, setting Tuesday at noon as a deadline for responsive briefs by Defendants, and scheduling oral argument on the matter, to be conducted simultaneously, via closed circuit television, in the Las Vegas and Reno courtrooms on Wednesday.

Word of the TRO spread like wildfire via the media to the Capital, just as the Senate had concluded its deliberations and was rising from the Committee of the Whole to take up a formal vote on SB 6, as amended. Senate Majority Leader William Raggio asked the Legislative Counsel if she had received any "formal" notification of a TRO. When she responded in the negative, Senator Raggio directed the Senators to assemble for a vote on SB 6. Ten minutes later, the Senators now fully assembled, Senator Raggio again asked whether the Legislative Counsel had received any "formal" notification of the TRO. At that moment, our messenger entered the Senate chamber and personally served on the Legislative Counsel a copy of the TRO, which ordered that "Defendants are hereby temporarily restrained from giving effect to the action of July 13, 2003, by the Nevada Assembly deeming SB 6 as 'passed,' without the two-thirds vote required by Article IV, § 18(2) of the Nevada Constitution"³⁴

Astoundingly, Senator Raggio contemplated whether to ignore the federal court order and proceed to a vote on SB 6. After lengthy discussion with the Legislative Counsel and others, he apparently thought better of it, and adjourned the Senate for the day.

While waiting for the opposition briefs to be served, we began preparing hearing books for the en banc oral argument on Wednesday. We also prepared a draft emergency application for a stay pending appeal, to be filed in the United States Court of Appeals for the Ninth Circuit, just in case the en banc Court decided to lift the TRO at the close of the hearing.

The opposition brief from the Attorney General of Nevada (on behalf of the executive branch officials) was served electronically shortly after noon on Tuesday. Surprisingly, in this brief, the Governor expressly disclaimed the remedy that the Nevada Supreme Court had issued in response to his initial petition.³⁵ By 2:00, we were able to obtain a copy of the opposition brief filed by the Legislative Counsel from the Legislature's web site (on behalf of the Legislature and the individual legislators and legislative staff named as defendants).³⁶ After a quick review of the table of authorities, we added cases cited by defendants to our hearing books, as well as an amicus brief filed by the

www.leg.state.nv.us/TRO/list.cfm (last visited June 17, 2004) and on The Claremont Institute's website at <http://www.claremont.org/projects/jurisprudence/0030714nevada.html> (last visited June 18, 2004).

³⁴ Temporary Restraining Order, *supra* note 32.

³⁵ See Governor's Opp'n Br. at 6 (ER at 17) ("The Governor never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken). *Id.* at 2, 8.

³⁶ The Nevada Legislature web page is available at <http://www.leg.state.nv.us/TRO/list.cfm>.

ALF-CIO in support of the defendants. Then, the four Blackstone Fellows and I headed to the airport for a flight to Reno. On the plane, we parsed defendants' arguments and outlined areas of research for the evening. These included claims of legislative immunity, both qualified and absolute;³⁷ lack of irreparable injury; a challenge to our vote dilution claims; defendants' take on the *Rooker-Feldman* doctrine; as well as other arguments. We decided to prepare a reply brief for filing first thing in the morning, before the hearing. After a brief dinner with a number of our legislator clients, we holed up in a suite of cubicles that had been prepared for us, rolled up our sleeves, and set to work. By 5:00 a.m. Wednesday morning, we had a solid reply brief e-mailed off to our local counsel for filing when the Court opened. We had thoroughly researched every challenge to our complaint, both jurisdictional and substantive, that had been raised by defendants. We had final copies of two different versions of an emergency application for preliminary injunction pending appeal, should such be necessary. We even had time to grab an hour or two of sleep.

The courthouse was a flurry of activity. Picketers and news crews lined the front steps. Inside, the courtroom was already standing-room only. This meant that the only seats available for my students were with me at counsel table – a circumstance that did not trouble them in the least! A large video conference screen was set up to the right of the bench, depicting the courtroom in Las Vegas from which the Chief Judge and a majority of the court would be participating. Co-counsel Jeff Dickerson arrived with extra copies of the reply brief in hand. At 9:00, the two-city en banc hearing began.

The court was well-versed in the arguments and counter-arguments addressed in the various filings. Questions from both the bench and the video screen came in rapid succession, probing both the merits of the substantive claims and the various jurisdictional and immunity issues that had been raised. Perhaps most interesting was the direct question to counsel for the Legislature, asking for the Legislature's view of the Nevada Supreme Court's decision. His response was that he was not authorized to address the correctness of the decision.

Before the close of arguments, the court agreed to modify the TRO to bar the Legislature from giving effect to *any* tax bill that was deemed "passed" without the necessary two-thirds vote, not just SB 6. It then took the case under submission.

On Friday afternoon, just under a week since Sharron Angle had first called to ask that I review the case, the district court lifted the TRO and dismissed the case, holding that it was without jurisdiction to consider the claims

³⁷ Normally, a state legislator receives immunity from 42 U.S.C. § 1983 and other federal claims. *See, e.g.,* *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). However, legislative immunity does not apply where the legislator acts outside of his official duties. *Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir. 2002). *See also* *Thompson v. Ramirez*, 597 F. Supp. 730, 735 (D.P.R. 1984) (holding that legislators had no immunity where subpoenas issued by legislators had not been issued pursuant to authorized legislative resolution); *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116, 118-124 (1966); *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880); *Parker v. Merlino*, 493 F. Supp. 381 (D.N.J. 1980). *Cf. Jacobson v. Tahoe Reg'l Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979); *Ex parte Young*, 209 U.S. 123, 167-68 (1908).

of the legislator plaintiffs because of the *Rooker-Feldman* doctrine. It also held that *Rooker-Feldman* probably posed a jurisdictional bar to its consideration of the derivative claims of the non-legislator plaintiffs, which were without merit in any event because defendants were merely acting pursuant to the Nevada Supreme Court's order.

That afternoon, we filed our emergency application for a stay pending appeal with the Ninth Circuit, but it was denied that same evening. The Legislature was now free to adopt its tax increases "by simple majority vote," as decreed by the Nevada Supreme Court, but despite the two-thirds vote provision of the Nevada Constitution.

The Assembly leadership called a session for Saturday evening, at which it took up Nevada Senate Bill 5 (SB 5), another tax bill that had previously passed the Senate. As with SB 6 a week earlier, the Assembly failed to garner a two-thirds vote in support of the bill, but the Speaker nevertheless gavelled it "passed" over the point of order objection of Assemblyman Hettrick. The bill was then transmitted to the Senate. Then, a curious thing happened – the Senate refused to accept it. Senate leadership instead ordered that it be returned to the Assembly, apparently because the bill had failed to muster the necessary two-thirds vote. In other words, the Senate itself was now in contempt of the Nevada Supreme Court's order, refusing to consider a bill that had been passed "by simple majority vote," but in its contempt, the Senate honored the higher command of the Nevada Constitution.

IV. BACK TO STATE COURT

The following Monday, July 21, 2003, the Legislator Plaintiffs who had commenced the federal suit filed an emergency motion for a stay and a petition for rehearing with the Nevada Supreme Court. The motions specifically raised the claimed violations of federal constitutional rights that the court's decision had authorized. The emergency motion for a stay was held in abeyance until responsive briefs could be filed by the end of the week. In order to press their own federal claims, the non-legislator plaintiffs from the federal action filed a motion to intervene in the Nevada Supreme Court proceeding that same afternoon; their motion was denied by the court about an hour later. Later that evening, after two days of intense lobbying, one of the legislators who had opposed the tax bills switched his vote in order to avoid a "constitutional crisis."³⁸ This gave the necessary two-thirds vote to the largest tax increase ever adopted in the state of Nevada. Governor Guinn signed the bill into law the next day.

On Tuesday, the Legislators who had filed the petition for rehearing advised the Nevada Supreme Court of the new development and filed a motion to vacate the July 10, 2003 decision. A memorandum of points and authorities, in support of vacatur, followed two days later.

Two months later, on September 17, 2003 – Constitution Day – the Nevada Supreme Court denied the petition for rehearing, thereby reaffirming

³⁸ Statement on the floor of the Assembly, available at <http://leg.state.nv.us/20thSpecial/Journal/Assembly/Final/aj027.html> (last visited June 17, 2004).

its earlier ruling.³⁹ A petition for a writ of certiorari was denied by the Supreme Court of the United States in March 2004.⁴⁰ Oral argument in the federal action was heard at Stanford University before the United States Court of Appeals for the Ninth Circuit on April 15, 2004 – ironically, tax day. On May 12, the Ninth Circuit rendered its opinion holding that Assemblyman Marvel's switched vote in favor of SB 8 had rendered the case moot.⁴¹ At the time of this writing, a petition for rehearing remains pending before the Ninth Circuit Court of Appeals. To date, no court has considered the merits of the significant federal claims raised by the Legislative Plaintiffs in the federal court action, which are summarized in the next section (and drawn from the appellate brief filed in the Ninth Circuit).

V. THE SUBSTANTIVE FEDERAL CLAIMS

A. *The Legislator Plaintiffs' Vote Dilution Claim*

In *Coleman v. Miller*,⁴² the Supreme Court of the United States expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. In doing so, the Court held that state legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes."⁴³ At issue in the case was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the state was permitted to cast a vote in the event of a tie. As the Court noted, "the twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution."⁴⁴

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a State legislature's failure to comply with its own procedures may violate federal Due Process.⁴⁵ As the Fourth Circuit noted in *Richardson v. Town of Eastover*, "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation,"⁴⁶ not by legislation enacted in violation of the procedures mandated by the state constitution. "Legislative rules are judicially cognizable, and may therefore be enforced by the courts."⁴⁷ Moreover, the Supreme Court in *Bender v. Wil-*

³⁹ Guinn v. Legislature of Nevada, 76 P.3d 22 (Nev. Sep. 17, 2003).

⁴⁰ Angle v. Guinn, 124 S. Ct. 1662 (Mar. 22, 2004).

⁴¹ Amodei v. Nev. State Senate, 2004 WL 1109482 (9th Cir. May 12, 2004).

⁴² 307 U.S. 433 (1939).

⁴³ *Id.* at 438.

⁴⁴ *Id.* at 441. Cf. Skaggs v. Carle, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "[T]he harm worked by [a rule changing the amount of votes necessary to pass legislation] – diluting the Representatives' votes and diminishing their ability to advocate a position – is apparent, as is the command of the Constitution that we remedy that harm").

⁴⁵ See, e.g., Rea v. Matteucci, 121 F.3d 483, 485 (9th Cir. 1997) (quoting Atkins v. Parker, 472 U.S. 115, 130 (1985)); Conway v. Searies, 954 F. Supp. 756, 767 (D. Vt. 1997).

⁴⁶ 922 F.2d 1152, 1158 (4th Cir. 1991).

⁴⁷ Conway, 954 F. Supp. at 769 (citing Yellin v. United States, 374 U.S. 109, 114 (1963)); Christoffel v. United States, 338 U.S. 84 (1949).

liamsport Area School District expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a *federal* vote dilution claim that arises from violations of state law.⁴⁸ A legislator in such circumstances “would have to allege that his vote was diluted or rendered nugatory under state law,” and “he would have a mandamus or like remedy against the Secretary of the School Board.”⁴⁹

The hypothetical case described in *Bender* is identical to the Nevada case under consideration here. State law, in Article 4, § 18(2) of the Nevada Constitution, authorizes legislative action on tax increases “solely” by two-thirds vote. The disenfranchised legislators – the Legislator Plaintiffs who together provided enough votes to defeat the tax increase pursuant to the two-thirds vote requirement of Article 4 – claimed that they were legally entitled to protect the effectiveness of their vote. In their complaint, they alleged that their vote was diluted or rendered nugatory under state law. Accordingly, they sought to enjoin the clerk of the Assembly and the Secretary of the Senate, among others, from certifying as “passed” a bill that did not receive the necessary two-thirds vote. Under the provisions of the Nevada Constitution, the vote of a member of the State Assembly is one-fifteenth of the votes necessary to defeat a tax increase.⁵⁰ Under the procedure employed by the Assembly during the votes on SB 5 and SB 6, an Assemblyman’s vote was only 1/21 of the votes necessary to defeat a tax increase. This was a classic case of vote dilution in violation of the Due Process clause.

B. Voter Plaintiffs’ Derivative Vote Dilution Claim

The Supreme Court has also repeatedly recognized vote dilution claims by voters.⁵¹ That the dilution occurs after the voters’ representative is elected, and is therefore derivative of the legislator’s own vote dilution claim, is immaterial.⁵² As the D.C. Circuit noted in *Michel*: “It could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor.”⁵³ Depriving voters of the full weight of their representatives’ votes, guaranteed by the Nevada Constitution’s two-thirds requirement, is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

By operation of Article 4, Section 18(2) of the Nevada Constitution, Nevada voters are entitled to representation with a vote sufficient to block a tax increase unless supported by two-thirds of the legislature. The Assembly’s failure to abide by that constitutional provision, and to deem as “passed” a tax

⁴⁸ *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) (“if . . . state law authorized School Board action solely by unanimous consent,” a disenfranchised school board member “might claim that he was legally entitled to protect ‘the effectiveness of [his] vot[e].’”) (quoting *Coleman*, 307 U.S. at 438) (brackets in original).

⁴⁹ *Id.*

⁵⁰ 2/3 of 42 members of the Assembly equals 28 votes needed to pass tax legislation; thus 15 votes are needed to defeat tax legislation.

⁵¹ See *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

⁵² *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); see also *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997).

⁵³ *Michel*, 14 F.3d at 626.

increase that failed to garner the necessary two-thirds vote, diluted the representation to which such voters were entitled, and therefore deprived citizens of their right to vote. “The right of suffrage is ‘a fundamental political right, because preservative of all rights.’”⁵⁴ Infringement on the right to vote, including infringement by dilution, violates the First and Fourteenth Amendments of the United States Constitution.⁵⁵ “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” . . . If, however, ‘the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.’”⁵⁶

C. *The Voter Plaintiffs’ Effective Vote Claim*

The Voter Plaintiffs also alleged a federal constitutional claim centered on the effectiveness of the votes they cast in support of the Gibbons Constitutional Tax Initiative in 1996,⁵⁷ and by which they achieved an amendment to the State Constitution that was ignored by the Assembly’s actions. As the Supreme Court held in *Gray v. Sanders*,⁵⁸ the right to vote constitutes more than just the right to show up at a voting booth and cast a meaningless vote. It encompasses the right to have that vote counted and, if successful, to have the results of the vote given effect.⁵⁹

In deeming as “passed” a tax increase bill without the two-thirds vote required by the Nevada Constitution, the State Assembly essentially treated the successful vote for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Voter Plaintiffs were deprived of their right to an effective vote protected by the Fourteenth Amendment of the United States Constitution. In addition, the action by the State Assembly essentially gave greater – indeed dispositive – weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶⁰ As the Supreme Court noted in *Bush v. Gore*, “‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’”⁶¹

⁵⁴ *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), and *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 1012 (1982)).

⁵⁷ Codified at NEV. CONST., art. 4, § 18(2).

⁵⁸ 372 U.S. 368, 380 (1963).

⁵⁹ *Id.*; see also *United States v. Mosley*, 238 U.S. 383, 386 (1915).

⁶⁰ See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966)).

⁶¹ *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). See also *id.* at 107 (“[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government”) (quoting *Moore v. Ogilvie*,

D. Plaintiffs' Republican Guarantee Claim

Article IV, Section 4 of the United States Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances,⁶² in *New York v. United States*, Justice O'Connor noted "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."⁶³ "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances."⁶⁴ Several courts have acknowledged that the Republican Guarantee Clause might present justiciable questions in the wake of *New York v. United States*, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in those cases.⁶⁵

The *Guinn* case should qualify as one of the rare instances in which a Republican Guarantee claim is viable. The essence of the claim, drawn from *New York v. United States*, is whether a state's citizens may "structure their government as they see fit."⁶⁶ In *New York v. United States*, the Court dismissed the Guarantee Clause claim because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government."⁶⁷ By imposing, through a constitutional amendment, a two-thirds vote requirement for tax increases, the citizens of Nevada adopted a new structure for their government with a new method of functioning that made it more difficult to increase taxes. Actions that have a "realistic risk of altering the state's form of government," from what the citizens of the state have themselves adopted, have been held to be amenable to Republican Guarantee Clause claims.⁶⁸ Essentially, the federal courts are supposed to protect

394 U.S. 814, 819 (1969)). The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. See *Bush*, 531 U.S. at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

⁶² See *Luther v. Borden*, 48 U.S. 1, 46-47 (1849).

⁶³ 505 U.S. 144, 185 (1992).

⁶⁴ *Id.* at 185 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 398 (2d ed. 1988); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118, 122-123 (1980); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 287-89, 300 (1972); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70-78 (1988); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-65 (1962)).

⁶⁵ See *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995). But see *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997) (holding that Republican Guarantee claim is nonjusticiable).

⁶⁶ *Kelley*, 69 F.3d at 1511.

⁶⁷ *New York*, 505 U.S. at 186.

⁶⁸ *Texas*, 106 F.3d at 667; *New Jersey*, 91 F.3d at 468-69.

the structural preferences of a state's citizens, serving as a sort of "structural referee."⁶⁹

The Assembly's decision to ignore the governing structure imposed upon it by the State's citizens, via a constitutional amendment, is just the kind of violation of the Article IV guarantee of a Republican form of government that the federal courts have begun to entertain.

E. *The Taxpayer Plaintiffs' Due Process Claims*

Finally, had the tax bills unconstitutionally deemed by the Assembly as "passed" become law, the Taxpayer Plaintiffs would have their property taken without due process of law in the most basic meaning of that provision of the Fourteenth Amendment. Due process means, *inter alia*, some regular, settled, predictable rule of law.⁷⁰ "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*."⁷¹ "To be deprived of liberty or property without due process of law means to be deprived of liberty or property without authority of the law."⁷² "[T]he government operates with greater fairness, and thus greater legitimacy, when it does not change the rules midway through the game,"⁷³ particularly when those rules are mandated in the State's own Constitution.

Thus, the constitutional argument was simple and clear. Since 1996, the Nevada Constitution – the relevant "law of the land" for our purposes – specified the *process* by which new taxes can be raised: a two-thirds vote of each house of the Legislature was required.⁷⁴ Any tax increase that was adopted in derogation of that constitutionally-mandated process would amount to the taking of the property of Nevada citizens and businesses without the *process* that was due. Such a law would be enacted contrary to the clearly settled requirements of the Nevada Constitution and in violation of the Due Process Clause of the Fourteenth Amendment.

VI. A COMMENT ON THE NEVADA SUPREME COURT'S *GUINN* Decision

All of these federal claims turn on a certain assumption, of course: namely, that the state legislature was bound by the 2/3 vote provision of the Nevada Constitution despite the Nevada Supreme Court's order directing that it be ignored. Opponents of the federal claims contended that, when considered in light of the *Guinn* decision, there was no vote dilution, no vote nullification, no threatened due process violations, and most of all no undermining of a republican form of government because the people's constitution, as re-interpreted by the Nevada Supreme Court, had been followed. That the courts have

⁶⁹ *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).

⁷⁰ *Kent v. United States*, 383 U.S. 541, 553 (1966); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *L C & S, Inc. v. Warren County Area Plan Comm'n*, 244 F.3d 601, 602 (7th Cir. 2001).

⁷¹ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856).

⁷² *Rosaly v. Ignacio*, 593 F.2d 145, 150 (7th Cir. 1979).

⁷³ *Chambers v. Reno*, 307 F.3d 284, 296 (4th Cir. 2002).

⁷⁴ NEV. CONST. art. IV, § 18, cl. 2.

the key (perhaps the final or even the only) role in interpreting the law is a well-established proposition as old as *Marbury v. Madison* itself, according to the opposition.

Given the centrality of this challenge to the viability of the federal claims, it is important to add a brief comment about the *Guinn* decision itself – about what precisely it did and, as importantly, what it did not do.

The Nevada Supreme Court *did not* hold that the 2/3 vote provision violated some provision of the federal constitution – a position later advanced by the Nevada State Education Association in its *amicus curiae* brief before the Ninth Circuit. Although any such holding would have been hard to reconcile with existing precedent, it would arguably have been within the judicial power to issue such a holding.

Nor did the Nevada Supreme Court simply interpret an ambiguous provision of the Nevada Constitution. However misguided such an interpretation might have been, it, too, arguably would have been within the province of the judiciary. But the decision in *Guinn* was no mere state court interpretation of ambiguous state law, which, as a general rule, is beyond the purview of the federal courts.⁷⁵ Rather, the Nevada Supreme Court candidly admitted that the 2/3 vote provision was unambiguous, that it was validly enacted, and that it did not violate any command of the federal Constitution⁷⁶; yet it nevertheless ordered the Legislature to ignore the binding state constitutional amendment.

State courts simply do not have a free hand to interpret state law beyond what a “fair reading” would permit, without violating due process.⁷⁷ The Nevada Supreme Court’s decision went beyond what a “fair reading” of existing state law would permit in a number of ways.

A. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party

One of the most curious aspects of the Nevada Supreme Court’s decision was that no party ever asked the court to invalidate article 4, Section 18(2) of the State constitution or even to suspend its operation for the special legislative session then under way.⁷⁸ Justice Maupin, in dissent, expressly noted without contradiction that “none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today.”⁷⁹ The Governor, too, admitted during the parallel proceedings in the federal district court that he “never requested that the two-thirds legislative voting requirement

⁷⁵ See, e.g., *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000).

⁷⁶ See, e.g., *Guinn*, 71 F.3d at 1273.

⁷⁷ *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000).

⁷⁸ Although an *amicus* brief of the NSEA questioned whether this state constitutional provision violated the federal Constitution, the court did not decide the case based on the federal constitutional issues presented by those *amici*. To do so, moreover, would have been procedurally improper for a number of reasons. Even assuming the NSEA had been granted leave to file its brief, *amici* cannot raise new issues on their own. The parties were not called on to brief the *amici*’s points. Although the court ordered the Governor and other counter-respondents to respond to the counter-petition filed the same day as the *amicus* brief, no response was ordered to any issues raised by the *amici*.

⁷⁹ *Guinn*, 71 F.3d at 1276 (Maupin, J., dissenting).

of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken.”⁸⁰ The remedy was raised for the first time by the Nevada Court’s decision, without argument or hearing, contrary to the most basic precepts of due process.⁸¹

B. “Unconstitutional” Constitutional Amendments

The Nevada court also gave life to the old law-school hypothetical notion of “unconstitutional constitutional amendments.” The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended.⁸² Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, this was not the case. Unlike the examples typically used in the hypothetical context – separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments – the Nevada Supreme Court *rejected*, rather than protected, a structural provision in favor of a non-structural one.

C. Canons of Construction

The Nevada Supreme Court also ignored or misapplied a number of its own longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with “unclean hands.”

The Nevada Court’s utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them pushes the due process concerns well beyond the breaking point.

1. Last in Time Prevails

Nevada has long subscribed to the interpretative canon that “if there is an irreconcilable conflict between two statutes, the statute which was most recently enacted controls the provisions of the earlier enactment.”⁸³ Nevada

⁸⁰ *Angle*, Governor’s Opp’n Br., at 6.

⁸¹ See *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) (holding that parties need “to know the issues on which decision will turn and to be apprised of the factual material” so that they may rebut claims against them) (citing *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

⁸² See, e.g., Walter F. Murphy, *THE NATURE OF THE AMERICAN CONSTITUTION* (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 380 (1995).

⁸³ *Marschall v. City of Carson*, 464 P.2d 494, 500 (Nev. 1970) (citing, e.g., *State ex rel. Eggers v. Esser*, 129 P. 557 (Nev. 1913)).

applies the same rules of construction when construing constitutional provisions that it applies when construing statutes.⁸⁴ Indeed, in the context of constitutional provisions, the “last in time” principle is more than just an interpretive canon; it is compelled by the very nature of constitutional government and the recognition in the Declaration of Independence that governments are established by the consent of the governed.⁸⁵ As a result, the Nevada Supreme Court has given the principle particularly strong application in the context of constitutional provisions:

[I]t is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail.⁸⁶

That “oxymoronic” proposition is precisely the holding of the Nevada Supreme Court in *Guinn*. Although the Court did not go so far as to actually declare the 2/3 vote provision *unconstitutional*, as some of the *amici* had urged,⁸⁷ it did deprive the provision of any effect, which is even worse, for it effectively negated a duly-enacted act of the people without even the pretense of a holding of unconstitutionality: “Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties.”⁸⁸

2. *Specific Provisions Prevail over General*

The Nevada Supreme Court sought to avoid the clear import of the last-in-time rule by manufacturing a new rule of interpretation that “substantive” provisions trump “procedural” provisions of the Constitution. Although it attempted to portray that new rule as merely an application of the longstanding rule that general provisions must yield to specific provisions,⁸⁹ the court’s new dichotomy was actually a bastardization of the older rule, treating a core structural provision of the State’s Constitution as a mere “procedural” rule and treating as “specific” the very general provision that “the legislature shall provide for [the] support and maintenance [of at least one common school in each district] by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.”⁹⁰ Indeed, had the Nevada Supreme Court looked to the “specific” requirements of the education provisions, it would have been immediately apparent that the only obligation is to fund a limited number of schools for half a year; a requirement that could easily have been met with the approximately \$700 million already available in the

⁸⁴ Nevada Mining Ass’n v. Erdoes, 26 P.3d 753, 757 (2001).

⁸⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Nevada Enabling Act, 13 Stat. 30 (1864) (requiring conformity with the principles of the Declaration).

⁸⁶ Whitehead v. Nevada Comm’n on Judicial Discipline, 878 P.2d 913, 938 (Nev. 1994) (citing Schick v. United States, 195 U.S. 65, 68-69 (1904)).

⁸⁷ See *Guinn II*, 76 F.3d at 30.

⁸⁸ *Id.* at 32.

⁸⁹ *Guinn I*, 71 F.3d at 1275 & n.17 (citing *SIS v. Surman*, 741 P.2d 1357, 1359 (Nev. 1987)).

⁹⁰ *Id.*; NEV. CONST. art. 11, §§ 2, 6.

budget without need for further appropriations and without conflict with the exceptionally specific requirement that new taxes be approved by a 2/3 vote.

Under the court's new reasoning, other "procedural" provisions of the Nevada Constitution are just as susceptible to judicial nullification as was the 2/3 vote provision, including the requirement of bicameralism, presentment, the 120-day restriction on legislative sessions, and even the limitation on matters that can be considered in special session.⁹¹ The Nevada Supreme Court acknowledged that these provisions, too, contributed to the supposed conflict between the 2/3 tax provision, on the one hand, and the education funding and balanced budget provisions, on the other.⁹² These provisions are every bit as "procedural" and "general," in the Nevada Supreme Court's newly manufactured hierarchy of constitutional commands, as was the 2/3 vote provision. The Nevada Senate had already voted to approve the tax increase by the requisite 2/3 vote, so the bill could have been deemed as "passed" by the Nevada court without any Assembly input to avoid the "conflict" between the "general" and "procedural" bicameralism provision and the "specific" and "substantive" education funding provision. Indeed, the court could just as easily have ordered the Legislature to ignore the requirement of article 4, Section 19 of the Nevada Constitution, which bars the State Treasurer from releasing funds without a legislative appropriation.

Such absurdities are no different than the court's nullifying the 2/3 requirement for new taxes, which represents, more than anything else, an abandonment of constitutional government and a court run amok.

3. *Reconcile Conflicting Provisions*

Another long-standing interpretive canon followed in Nevada is that, whenever possible, courts are to interpret rules or statutes in harmony with other rules and statutes.⁹³ Indeed, the Nevada Court has frequently noted that it is "obligated" to reconcile conflicting provisions to the maximum extent possible.⁹⁴ Yet in *Guinn*, the Nevada Supreme Court disregarded several obvious means of reconciling the supposed conflict between the 2/3 vote provision, on the one hand, and the balanced budget and education funding provisions, on the other. It refused a request to remit the matter back the Governor, who possessed the power to expand his special session proclamation to permit the Legislature to consider spending reductions elsewhere in the budget, which very likely would have solved the impasse. It broadly read the education provisions to mandate a level of funding that necessitated a tax increase beyond the level for which there was the support of 2/3 of the Legislature, when nothing in those clauses remotely suggests any specific level of funding. Indeed, the only requirement is found in Article 11, § 2, which mandates only that the Legislature provide funding for one school in each district for a minimum of six

⁹¹ See NEV. CONST. art. 4, §§ 2, 18(1), 35; art. 5, § 9.

⁹² See, e.g., *Guinn II*, 76 F.3d at 27 (noting that other problems contributing to the conflict included the "abbreviated nature of the legislative session" and "policy disagreements between the Senate and Assembly").

⁹³ *Guinn I*, 71 P.3d at 1275 n.16 (citing *Bowyer v. Taak*, 817 P.2d 1176, 1177 (1991), and *People v. Anderson*, 493 P.2d 880, 886 (Cal. 1972)).

⁹⁴ *Id.*; *Weston v. Lincoln County*, 643 P.2d 1227, 1229 (Nev. 1982).

months each year – a mandate that was easily met without violating the 2/3 vote provision. Neither of these obvious ways of reconciling the supposed conflict was considered by the court,⁹⁵ which instead simply rendered nugatory the later-enacted 2/3 vote provision.

4. *Unambiguous Provisions*

Finally, the Nevada Court gave only lip service to a key restriction on the judicial role that it has in the past repeatedly applied:

Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.⁹⁶

Despite its own repeated treatment of the 2/3 vote provision as “clear on its face,” the Nevada Supreme Court looked beyond the clear text to other materials to try and ascertain a different voter intent, concluding, essentially, that the voters were too ignorant to have understood what effect the initiative would actually have on the functioning of state government.⁹⁷

5. *“Unclean Hands”*

The Nevada Supreme Court has long subscribed to “the well-established defense to equitable claims that litigants seeking equity must come with ‘clean hands.’”⁹⁸ The legislative standstill that led Governor Guinn to invoke the equity jurisdiction of the Nevada Supreme Court was (at least in part) of his own making, the result of his refusal to expand his special session proclamation to permit the Legislature to consider reductions in previously-approved appropriations. The counter-petition filed by several legislators, asking the Nevada Supreme Court not to consider the Governor’s petition because of the Governor’s unclean hands, was denied; the court inexplicably asserted that it had “no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse.”⁹⁹ Such faux concern for separation of powers was particularly bitterly ironic given the court’s ensuing disregard for Nevada’s Constitution.

In light of all these departures from customary canons of judicial interpretation, the Nevada Supreme Court’s decision was well beyond anything that a “fair reading” of existing law would have permitted. To discount the federal claims against the Legislature for violations of the Nevada Constitution by permitting the Legislature to seek cover behind such an unprincipled decision is not only circular, but would go far to end any notion of constitutional government. Unambiguous, validly-enacted, and perfectly constitutional amendments to a state constitution simply must be given effect. The people’s exercise of their ultimate authority via the amendment process, not the state court’s con-

⁹⁵ A third alternative, resort to article 4, Section 18(3), which specifically provides that tax increases failing to garner a 2/3 vote could nevertheless take effect if approved by a simple majority of the voters, was completely discounted by the court as “inadequate.” *Guinn I*, 71 P.3d at 1274 n.12.

⁹⁶ *Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 482, 485 (Nev. 2000).

⁹⁷ *Guinn II*, 76 P.3d at 26.

⁹⁸ *Tracy v. Capozzi*, 642 P.2d 591, 593 (Nev. 1982).

⁹⁹ *Guinn I*, 71 P.3d at 1274 n.9.

trary view, set the baseline against which both the procedures and substance of the Legislature's action must be measured.

VII. CONCLUSION

Well-established federal claims of vote dilution, and violations of the due process and/or equal protection clauses, were implicated by Nevada Assembly actions, which deemed as "passed" tax increases without the two-thirds vote mandated by the Nevada Constitution. Less-established – indeed, long dormant – are claims that the Nevada Assembly's actions, and those of the Nevada Supreme Court upon which it relied, violated the Article IV guarantee of a republican form of government. In many ways, this claim is the most interesting; it directly challenges the circular defense that no claim had been stated because all actions had been authorized by the Nevada Supreme Court. At its root, the guarantee of a republican form of government means that the people are the ultimate masters of their fate. They are the ultimate decision-makers as to the form of government under which they will live, through the constitutions they choose to adopt. A state court can no more "authorize" the state legislature to ignore the clear commands of a valid constitutional provision than the legislature can choose to do so on its own. Either action displaces the rule of the people with the rule of their agents, and replaces a republican form of government with a tyrannical one.