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SUPERMAJORITY PROVISIONS, *GUINN* V. LEGISLATURE AND A FLAWED CONSTITUTIONAL STRUCTURE

Steve R. Johnson*

The constitutional crisis of 2003 was a defining event for Nevada and may prove instructive for the rest of the nation.¹ Among the prominent features in the topography of the crisis were (1) state constitutional provisions that required two-thirds legislative approval for tax increases² but only simple majority approval for spending increases³ and (2) the State Supreme Court's decisions in *Guinn v. Legislature*⁴ that ended the immediate impasse. Both are focal points of continuing controversy.

Criticism of the *Guinn* decision has exceeded praise of it – probably in frequency,⁵ certainly in passion and rhetorical exuberance.⁶ In my view, much of the criticism has been misplaced. At least equal criticism should

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¹ Although *Guinn* was decided fairly recently, it already has been the subject of several scholarly commentaries. E.g., Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 951-52 (2003); Jason Max Kerr, *Judicial Power: Use and Misuse*, FED. LAW., Mar./Apr. 2004, at 22; David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 ARK. L. REV. 519, 538-39 (2003); Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L. REV. 149, 150 n.3 (2003-2004); Comment, *Constitutional Interpretation – Nevada Supreme Court Sets Aside a Constitutional Amendment Requiring a Two-Thirds Majority for Passing a Tax Increase Because It Conflicts with a Substantive Constitutional Right – Guinn v. Legislature of Nevada*, 71 P.3d 1269, 117 HARV. L. REV. 972 (2004); Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1225-26 (2004).

In addition, the case has sparked popular interest nationwide. See, e.g., Rochelle Williams, *News in Brief: Nevada Governor Signs Tax Increase*, BOND BUYER, July 23, 2003, at 2; *Black Thursday: Supreme Court's Judgment Day Threatens Nevada's Future*, NEV. BUS., Aug. 2003, at 20, 23 [hereinafter *Black Thursday*] (reporting comments on *Guinn* by Pete Sepp of the National Taxpayers Union, Rush Limbaugh, and others); *Nevada's Judicial Dice-Throwers*, WALL ST. J., July 15, 2003, at A14.

² NEV. CONST. art. 4, § 18(2).

³ *Id.* § 18(1).

⁴ 71 P.3d 1269 (Nev. July 10, 2003) ("*Guinn I*"), *clarified & confirmed*, 76 P.3d 22 (Nev. Sept. 17, 2003) ("*Guinn II*"), *cert. denied sub nom.* Angle v. Guinn, 124 S. Ct. 1662 (2004). When I use the undifferentiated *Guinn*, I am referring to the two opinions taken together.

⁵ Compare Sylvia R. Lazos, *The Nevada Supreme Court: Are the Justices Goats or Heroes?*, LAS VEGAS REV.-J., July 22, 2003, at 9B (seeing *Guinn* as legitimate) with *Black Thursday*, *supra* note 1 (denouncing *Guinn*).

attach to the State's constitutional structure. The tension between the supermajority tax provision and the simple majority spending provision was a train-wreck waiting to happen.

I am not among the fans of the *Guinn* decision. I do not think the court made the best decision among the alternatives available to it. Rather, I should say, the court did not make "the least bad decision." That more precise phrasing acknowledges the following fact: there was no *good* alternative available to the court in the case. Because of the tensions internal to the State Constitution and the impasse into which the political branches of the State government had worked themselves, whatever decision the court made would have entailed harm to some portion(s) of Nevada's constitutional structure and values. When no good alternative exists, those with the responsibility to decide deserve more understanding and less rebuke.

Part I of this Article briefly describes the facts. Part II explains why, given Nevada's constitutional structure, the court had no good alternatives in *Guinn*. Part III considers the supermajority tax provision. It argues that focusing on taxes, instead of on spending, undercuts the educative role that politics can play and ultimately distorts the limited-government agenda the provision was intended to advance.

I. WHAT HAPPENED

Those of us who lived through Nevada's political events of 2003 will not soon forget them. For those who did not, here is an exceedingly condensed version of the key events.⁷

A. *The Prelude*

In 2001, the Nevada Legislature, at the prompting of Governor Kenny Guinn, created the Governor's Task Force on Tax Policy.⁸ The Task Force was charged with studying Nevada's tax structure and recommending ways to pro-

⁶ For example, in their petition to the United States Supreme Court for a writ of certiorari as to *Guinn*, two dozen Nevada legislators describe the decision as "an unvarnished usurpation of the authority of the Nevada Constitution, a shameful violation of the judicial oath, and a repudiation of the principle that Nevada's is a government of laws rather than men." *Angle v. Guinn*, No. 03-1037, Pet. for Cert., at 2 (Jan. 20, 2004), 2004 WL 113601; *see also id.* at 28 (the decision "generated 'public outrage' among Nevada's citizens, as well it should given the Court's contempt for its own citizens and the Constitution") & 29 (characterizing the decision as a "judicial insurrection").

⁷ More detailed recitations of the history – generally agreeing as to the events, though sharply diverging as to interpretations to be placed on them – appear in the pleadings and briefs of the parties, the proposed intervenors, and the amici in *Guinn*. *E.g.*, Brief of Amicus [sic] Curiae Nevada Taxpayers Ass'n et al. at 4-6, *Guinn I* (No. 41679); Supplemental Answer & Opposition of Respondent Barbara E. Buckley to Petition for Writ of Mandamus at 2-7, *Guinn I* (No. 41679). The factual recitations herein are drawn from the pleadings and briefs as well as from *Guinn I*, 71 P.3d at 1271-74, and the petition for writ of certiorari, *supra* note 6, at 5-9.

⁸ Nev. Assemb. Con. Res. No. 1 (2001). For an earlier analysis of Nevada's fiscal structure, see PRICE WATERHOUSE & URBAN INSTITUTE, FISCAL AFFAIRS OF THE STATE AND LOCAL GOVERNMENT IN NEVADA (Nov. 18, 1988).

mote an equitable and efficient tax structure. The Task Force issued its voluminous report in November 2002.⁹

At the start of the 2003 legislative session, Governor Guinn submitted a proposed budget. It included major increases in State spending and \$980 million in new revenues to be derived from a combination of new taxes and rate increases in existing taxes. During the Legislature's 120-day regular session, it approved appropriations in excess of \$3.2 billion for various purposes. That amount was covered by revenue that would be generated from Nevada's then-existing tax structure. However, none of the appropriations were for K-12 education, and no new taxes were approved.

Upon adjournment of the regular session, the Governor called a special session (the 19th Special Session) of the Legislature to consider taxes and education appropriations. There was sufficient support in both the Assembly and the Senate to pass tax and education bills by majority votes. However, the previously approved spending bills left only about \$700 million of expected revenue, far short of the \$1.6 billion proposed for school spending. There was simple-majority support in both the Assembly and the Senate for school appropriations at the \$1.6 billion level and for increasing taxes by the amount needed to meet such appropriations. However, the Assembly and the Senate disagreed as to the type(s) of taxes to be raised to cover the needed amount. And a two-thirds favorable vote on the requisite tax increase could not be achieved in the Assembly.¹⁰

With the Legislature unable to pass a balanced budget (as required by the Constitution¹¹) by the scheduled end of the special session on June 5, the Governor twice extended the deadline. When these extensions still produced no resolution, the initial special session was adjourned on June 12. Later, the Governor called the Legislature into an additional special session (the 20th Special Session) beginning on June 25. That additional special session continued without resolution of the impasse through July 1, 2003, the start of the State's 2004 fiscal year.

On July 1, the Governor filed a petition for writ of mandamus with the Nevada Supreme Court. The petition asked the court to (1) find the Legislature and its members in violation of their constitutional duties to fund the schools and approve a balanced budget for the next biennium, (2) direct the Legislature and its members to, by a time certain, make education appropriations and provide sufficient revenues therefor, (3) grant the Governor leave to seek additional remedies should the Legislature continue to fail to act, and (4) grant further relief as the court deemed proper.

On the same day, the court directed the Legislature to file an answer by July 7 and permitted the Governor to supplement his petition by the same date.

⁹ FINAL REPORT OF GOVERNOR'S TASK FORCE ON TAX POLICY IN NEVADA (Nov. 15, 2002). For reactions of two members of the Task Force to the 2003 budget deliberations and legislation, see Guy Hobbs, *An Opportunity Lost*, LAS VEGAS SUN, Aug. 17, 2003, at 30; Mike Sloan, *Taking Advantage of Us*, LAS VEGAS SUN, Aug. 31, 2003, at 30.

¹⁰ Throughout much of the labor, the Assembly was stuck at or near twenty-seven "in favor" and fifteen "against" on the various spending and tax bills. A switch of one vote to "for" would have produced the required two-thirds.

¹¹ NEV. CONST. art. 9, § 2.

The court directed the parties to address “the dynamic tension” among the constitutional provisions as to tax legislation, other legislation, enactment of a balanced budget, and education funding.¹² There followed numerous briefs and motions from the parties, amici, and proposed intervenors.

B. Guinn I

On July 10, 2003, the Nevada Supreme Court issued its *Guinn I* opinion. The court agreed that its intervention was “appropriate in this extraordinary circumstance.”¹³ It found that the Legislature was in “deadlock” as a result of which “Nevada’s public educational institutions are in crisis because they are unable to proceed with the preparations and functions necessary for the 2003-2004 school year.”¹⁴ The court saw the cause of the deadlock as “conflict among several provisions of the Nevada Constitution,” and it stated that the court, “in [its] role as interpreters of the Nevada Constitution, must reconcile the provisions which cause the present crisis.”¹⁵ Denying the petition as to the legislators individually, the court granted it as to

the Legislature as a body. We order the Legislature to fulfill its obligations under the Constitution of Nevada by raising sufficient revenues to fund education while maintaining a balanced budget. Due to the impasse that has resulted from the procedural and general constitutional requirement of passing revenue measures by a two-thirds majority, we conclude that this procedural requirement must give way to the substantive and specific constitutional mandate to fund public education. Therefore, we grant the petition in part and order the Legislature of the State of Nevada to proceed expeditiously with the 20th Special Session under simple majority rule.¹⁶

Six of the seven Justices of the court joined in this opinion. Justice Maupin dissented in part and concurred in part. His disagreement was less with the substance of the court’s action than with its timing. He would have deferred the relief “until it becomes evident that the constitutional mandate to fund education will not be satisfied in time for compliance with the statutory requirement for distribution of state funds to local school districts.”¹⁷ Thus, Justice Maupin would have given “the Legislature until July 28, 2003, to resolve the impasse before intervening and considering the relief afforded today, along with other possibilities.”¹⁸

C. Subsequent Events

Three days later, on July 13, the Assembly voted on Nevada Senate Bill 6 (to increase taxes by \$788 million). The measure gained a majority vote, but fell short of the two-thirds majority. The Speaker of the Assembly gavelled the bill passed.

¹² Order Directing Answer, *Guinn I* (No. 41679); see also Statement of Chief Justice Agosti from the Bench (July 1, 2003) (No. 41679).

¹³ *Guinn I*, 71 P.3d 1269, 1272 (Nev. July 10, 2003).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1277.

¹⁸ *Id.* at 1279. The suggested timing was based on NEV. REV. STAT. 387.124(1), which required the first of such distributions to be made “on or before August 1.”

On July 14, legislators and private groups opposing the bill filed suit in the federal district court in Nevada, contending that the Assembly's action violated several provisions of the United States Constitution: to wit, the Fourteenth Amendment's Due Process and Equal Protection Clauses and Article IV's Republican Guarantee Clause. After granting a temporary restraining order, the district court held on July 18 that it lacked jurisdiction. It lifted the restraining order and dismissed the suit.¹⁹ The district court's decision was appealed to the Ninth Circuit. A panel of that court heard oral argument on the appeal on April 15, 2004, and affirmed on May 12, 2004.

On July 19, the Assembly voted on Nevada Senate Bill 5, another tax-increase measure. Similar results ensued. The bill received a majority, but again fell short of the two-thirds vote. The Speaker gavelled it passed.

On July 21, the Legislature adopted a balanced budget, including school funding and tax increases of \$833 million. A two-thirds vote was achieved in the Assembly as well as the Senate after one Assembly member switched his vote from "no" to "yes" because of the new environment produced by *Guinn I*.²⁰

On July 21, legislators opposing the bill filed a petition with the Nevada Supreme Court requesting the court to withdraw *Guinn I*. On September 17, in *Guinn II*, the court (again by six to one) denied the request and dismissed the accompanying petition for rehearing.²¹ On January 20, 2004, the opposition legislators filed a petition for a writ of certiorari with the United States Supreme Court, again asserting federal constitutional issues.²² The Legislature as a whole opposed that petition, on the ground that a United States Supreme Court decision would be only "an advisory opinion on the abstract political question in a case with no actual, live controversy."²³ On March 22, 2004, the Supreme Court denied the petition for writ of certiorari.

The judicial phase of the controversy appears to be over. However, the controversy remains very much a live issue politically. In the aftermath of *Guinn* and the adoption of the budget, numerous actions were threatened or commenced. They included efforts to recall or impeach officials,²⁴ electoral challenges,²⁵ referenda to repeal the enacted tax increases,²⁶ and additional

¹⁹ *Angle v. Legislature*, 274 F. Supp. 2d 1152 (D. Nev. 2003), *aff'd per curiam sub nom. Amodei v. Nev. State Senate*, 2004 U.S. App. LEXIS 9407 (9th Cir. May 12, 2004).

²⁰ Assembly Member John Marvel. He acknowledged that *Guinn I* caused his switch. Ed Vogel, *Marvel's Tax Vote Decision Divisive*, LAS VEGAS REV.-J., Aug. 3, 2003, at 1B, 3B; see also *Guinn II*, 76 P.2d at 25 (noting the Legislature's acknowledgment that *Guinn I* facilitated the Legislature's getting to the two-thirds level of agreement).

²¹ *Guinn II*, 76 P.3d 22, 24 (Nev. Sept. 17, 2003) (per curiam opinion for the Court), 33 (Shearing, J., concurring) & 34 (Maupin, J., dissenting).

²² See *supra* text accompanying note 18.

²³ Sean Whaley, *High Court Urged to Back Off: Legislature Doesn't Want Ruling on Two-Thirds Vote Required for Tax Hikes*, LAS VEGAS REV.-J., Feb. 21, 2004, at 1B.

²⁴ K.C. Howard, *Activists to Target Six Justices*, LAS VEGAS REV.-J., July 18, 2003, at 1A.

²⁵ See, e.g., *Ignoring the State Constitution*, LAS VEGAS REV.-J., July 13, 2003, at 2E.

²⁶ See, e.g., Ed Vogel, *Seeking Signatures: Referendum on Tax Repeal in the Works*, LAS VEGAS REV.-J., Sept. 12, 2003, at 2B; *Editorial: Feel-Good Politics that Don't Work*, LAS VEGAS SUN, Aug. 24, 2003, at 2D. The board of directors of the Nevada Taxpayers Association voted overwhelmingly to oppose these referenda. Erin Neff, *Taxpayers Association Opposes Tax Repeal Effort*, LAS VEGAS REV.-J., Apr. 22, 2004, at 1B.

amendments to the State Constitution.²⁷ It is unclear whether a majority of Nevada's voters share the outrage felt by activists for limited government. We will see if such efforts sizzle or frizzle.

II. NO GOOD ALTERNATIVE IN *GUINN*

Nevada's constitutional provisions as to spending and taxing were workable before adoption of the supermajority tax provision. After that adoption, legislative impasse became a real possibility. Its occurrence was highly likely under the right (or wrong) budgetary and political scenario. That scenario was in place in 2003.

The *Guinn* court was firmly of this view. It saw the supermajority provision as being "[a]t the heart of this case" and the reason the Legislature was "unable to fulfill its constitutional duties."²⁸ Two months later, it averred: "The Legislative stalemate that was thrust upon us was the result of [the supermajority provision]."²⁹ As a practical matter, the court was right. Below, I recount the relevant constitutional provisions, then explain the tensions among them. As a result of those tensions, the court had no good choice available to it in *Guinn*. No matter what it did, some constitutional provision or value was going to be harmed.

A. Relevant Constitutional Provisions

At least the following features of the Nevada Constitution were implicated in the imbroglio of 2003:

(1) Since its adoption in 1864,³⁰ the Nevada Constitution has provided that "a majority of all the members elected to each house is necessary to pass every bill or joint resolution."³¹

(2) Before 1966, the above simple majority rule applied to all legislation. In 1993, the Legislature rejected a resolution to amend the State Constitution to require that two-thirds of each house, instead of simple majorities of each house, would be needed to increase existing taxes or impose new ones.

The supporters of the measure then took it to the people. In 1994, and again in 1996, the voters approved the supermajority tax provision by overwhelming margins of over 70% of the votes each year.³² As a result, the simple majority rule no longer applies to revenue measures. Instead, "an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes."³³

²⁷ See, e.g., Erin Neff, *Taking the Initiative*, LAS VEGAS SUN, Aug. 3, 2003, at 1D.

²⁸ *Guinn I*, 71 P.3d 1269, 1274 (Nev. July 10, 2003).

²⁹ *Guinn II*, 76 P.3d 22, 25 (Nev. Sept. 17, 2003).

³⁰ See OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA ASSEMBLED AT CARSON CITY JULY 4 1864 TO FORM A CONSTITUTION AND STATE GOVERNMENT 837 (Andrew J. Marsh, photo. reprint 1976) (1866).

³¹ NEV. CONST. art. 4, § 18(1).

³² One way the Nevada Constitution can be amended is by majority approval by the voters in two consecutive general elections. NEV. CONST. art. 19, § 2(4).

³³ NEV. CONST. art. 4, § 18(2).

(3) The Governor is responsible for proposing a State budget for the biennium and submitting it to the Legislature.³⁴ The Legislature is required to enact a balanced budget. Specifically,

[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.³⁵

The State's fiscal year begins on "the first day of July of each year."³⁶ "No money shall be drawn from the treasury but in consequence of appropriations made by law."³⁷

(4) The Legislature is to meet for no more than 120 days every two years.³⁸ However, the Governor has authority to convene the Legislature in special session after the expiration of the regular session. During such a session, "the Legislature shall transact no legislative business, except that for which they were specially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in Session."³⁹

(5) "The legislature shall provide for a uniform system of common schools."⁴⁰ Moreover:

[i]n addition to the other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.⁴¹

Some of the above constitutional provisions use the term "shall" or similar language. "Shall" connotes action that is mandatory, not permissive or discretionary.⁴² The Legislature "has unlimited law-making power" except that it "must obey the direct commands of the constitution, and submit to its express or necessarily implied prohibitions."⁴³

B. *Tension Among the Provisions*

From the start of *Guinn*, the Nevada Supreme Court perceived the core of the case to lie in the tensions between the supermajority tax provision and other constitutional provisions. Upon the filing of the Governor's petition for mandamus, the court issued an order directing the Legislative Counsel Bureau to file an answer on the Legislature's behalf and permitting the Attorney General to supplement the petition on the Governor's behalf. It directed the parties to "address the dynamic tension" between the simple majority provision for

³⁴ NEV. CONST. art. 4, § 2(3).

³⁵ NEV. CONST. art. 9, § 2(1).

³⁶ NEV. CONST. art. 9, § 1.

³⁷ NEV. CONST. art. 4, § 19.

³⁸ NEV. CONST. art. 4, § 2(2).

³⁹ NEV. CONST. art. 5, § 9.

⁴⁰ NEV. CONST. art. 11, § 2.

⁴¹ NEV. CONST. art. 11, § 6.

⁴² *E.g.*, *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 866 P.2d 297, 302-03 (1994); *Ewing v. Fahey*, 474 P.2d 347, 349-50 (1970); *Nevada ex rel. Chase v. Rogers*, 10 Nev. 250, 255-56 (1875).

⁴³ *Dunker v. Chedic*, 4 Nev. 378, 382 (1868).

spending legislation and the supermajority provision for tax legislation. The court directed the parties to address the impact of the tension “on the Legislature’s ability to fulfill its constitutional duties to approve a balanced budget by providing for necessary taxes and to appropriate public school system funds.”⁴⁴ In a related statement, Chief Justice Agosti announced that the court would invite the parties to “brief and suggest a resolution to the tension” among the Article 4, § 18(2) supermajority provision, the Article 9, § 2 balanced budget requirement, and the Article 4, § 18(1) simple majority provision for non-revenue measures.⁴⁵

The court and the Chief Justice were right to identify these tensions. Indeed, as I suggest in Part II.C, the tensions implicate even more constitutional provisions than those enumerated by the court and the Chief Justice.

The court did not say that the constitutional provisions are facially contradictory,⁴⁶ and indeed they are not. Simultaneous satisfaction of all the constitutional commands is not logically impossible. The supermajority provision became law in 1996, and Nevada in its 1997, 1999, and 2001 biennial budgets “was able to work within these new constraints without major difficulties.”⁴⁷

But those were good times. Nevada’s economy was strong. Despite strains on services imposed by substantial in-migration, the State increased program funding relatively slowly. The State had a budget surplus. The supermajority provision was not engaged because major tax increases were not required.⁴⁸

By 2003, though, the situation was very different. The nation had undergone a recession. Nevada’s tourism-driven economy – and along with it State revenues – had been seriously affected by the events and aftermath of 9-11. Demographic pressures continued to build, and it was becoming harder to ignore the resultant demands for additional schooling and other services and facilities.⁴⁹

In short, the interaction of the supermajority provision and the pre-existing constitutional provisions is unproblematic in “fat” years when no tax increase is colorably necessary.⁵⁰ It may also be unproblematic in years (may they never come) in which fiscal emergency is so obvious that consensus forms on spending and taxing priorities. The problems arise in years which are lean enough that many see the need for new revenues, but which are not so lean that all or nearly all will see that need. 2003 was such a year. Many parties – traumatized by 2003 – have pledged that tax increases will not be sought in 2005.⁵¹

⁴⁴ *Guinn v. Legislature*, No. 41679, Order Directing Answer 3-4 (July 1, 2003).

⁴⁵ Statement of Chief Justice Agosti from the Bench (July 1, 2003) (No. 41679).

⁴⁶ See *Guinn I*, 71 P.3d 1269, 1279 (Nev. 2003) (Maupin, J., dissenting) (“These provisions are not inherently in conflict”); see also Answer & Opposition to Cross-Petition for Writ of Mandamus & Other Extraordinary Relief of Legislature et al., at 5, *Guinn I* (No. 41679) (“The ‘dynamic tension’ created by the facts of the current situation is a factual tension and does not create a legal conflict between the constitutional provisions.”).

⁴⁷ *Guinn I*, 71 P.3d at 1273.

⁴⁸ *Id.* at 1273-74.

⁴⁹ *Id.* at 1274.

⁵⁰ There is no tension at such time, but neither is there a need for a supermajority provision.

⁵¹ See, e.g., *Nevada Governor Pledges No New Taxes at Next Session*, LAS VEGAS SUN, Aug. 17, 2003, available at <http://www.lasvegassun.com/sunbin/stories/sun/2003/aug/17>

Yet, as Nevada's population continues to grow, recurrence of 2003-like conditions cannot be ruled out.

C. No Good Alternative in Guinn

Early in *Guinn I*, the court refers to "reconcil[ing] the provisions which cause the present crisis."⁵² But, of course, the decision did not reconcile the supermajority provision to other constitutional features. Instead, it subordinated the supermajority provision to the conflicting provisions.

Guinn I did not formally invalidate the supermajority tax provision, but the practical effect of *Guinn I* – particularly when confirmed by *Guinn II* – moved far in that direction. Proponents of higher spending and higher taxes would need only to replicate the conditions of 2003: pass non-school spending first to absorb normally available revenue, precipitating a funding shortfall for education under which the "specific, substantive" right to schooling would trump the "general, procedural" supermajority provision.⁵³

There is a movement now to amend the State Constitution to require future legislatures to fund education first in the budget cycle.⁵⁴ Should that movement fail, nothing would prevent replays of the 2003 scenario, with an essentially permanent subordination of the supermajority provision. In short, *Guinn* did diminish the supermajority tax feature of the Nevada Constitution, certainly for the short-run, and perhaps even for the longer run.

Still, it is less than fair of *Guinn* critics to focus on that outcome in isolation. The fact is that one or more features of the Constitution would have been undercut no matter what the Supreme Court did in *Guinn*. The tensions in Nevada's constitutional order are such that every alternative open to the court in *Guinn* would have been damaging. Potential major alternatives that the parties, intervenors, or amici urged the court to consider are discussed below.

1. Declare Violation and Set Time Certain

The first relief sought by the Governor's petition was a finding that the Legislature and its members were in violation of their constitutional duties.⁵⁵ By itself, this would likely have had little effect. The legislators were already aware of their duties. Both sides in the dispute had settled into their publicly and privately held positions that any intransigence resided in their opponents. I do not deny that declarations by courts carry moral authority, but one may seriously doubt that the 2003 crisis would have been resolved merely by the requested declaration.⁵⁶ The fact that the Governor's petition requested permission to seek additional future relief was an acknowledgment of that doubt.⁵⁷

081710729.html?Nevadagovernorpledgesnewtaxesatnextsession (last visited June 20, 2004). It remains to be seen whether such pledges will be kept.

⁵² 71 P.3d at 1272.

⁵³ See Petition for Rehearing (on behalf of Lynn Hetrick et al.) at 12 & n.31, *Guinn I* (No. 41679).

⁵⁴ See Sean Whaley, *Initiative Petition: New Amendment Pushed*, LAS VEGAS REV.-J., July 13, 2003, at 1B.

⁵⁵ Petition for Writ of Mandamus at 10, *Guinn I* (No. 41679).

⁵⁶ *Guinn I*, 71 P.3d at 1277 (Maupin, J., dissenting in part & concurring in part).

⁵⁷ Petition for Writ of Mandamus at 10, *Guinn I* (No. 41679).

The Governor's petition also requested the court to set time certain by which the Legislature would be required to make education appropriations, provide requisite funding, and pass a balanced budget.⁵⁸ Such actions would not fit comfortably with the separation of powers doctrine. The Nevada Constitution defines the respective roles of the three branches of government,⁵⁹ and it vests the power to make laws in the Legislature.⁶⁰

Separation of powers "is fundamental to our system of government"⁶¹ and "probably the most important single principle of government declaring and guaranteeing the liberties of the people."⁶² The Legislature cannot compel the judiciary to perform its duties within a stated period of time,⁶³ and it is dubious that the judiciary can compel the Legislature to perform its duty within a stated period via a writ of mandamus.⁶⁴ At a minimum, attempting to do so would run counter to "[t]he disposition of the judicial branch of government [which] has always been to scrupulously refrain from encroaching in the slightest way into the legislative field of policy making where factual or economic factors require latitude of discretion."⁶⁵

There would have been another problem with acceding to the Governor's requested relief and with adopting any approach that involved extending the period for legislative action: it would have compounded the violation of the constitutional provision limiting the legislative session to 120 days. That provision had already been violated by the first and second special sessions.⁶⁶ Further delay would have cut another wound into the provision.

At first blush, that result might seem less than scary: 120 days, 150, 180 – who cares? I disagree. Beyond simply reducing expenses, there are at least two substantial purposes that the 120-day requirement rationally can serve.

First, Nevada has a limited-government, sometimes bordering on anti-government, tradition.⁶⁷ The quip that no one's property and liberty are safe while the Legislature is in session doubtless depicts the conviction of many Nevadans. The 120-day requirement may be a way of limiting the threat possessed by government by circumscribing the period within which the law-making branch sits.

Second, service in the Nevada Legislature does not pay a living wage or anything close to it. This would pose no problem for the independently wealthy, retirees, business owners, or others with significant control over their

⁵⁸ *Id.*

⁵⁹ NEV. CONST. art. 3, § 1.

⁶⁰ NEV. CONST. art. 4, § 1; *see also* Galloway v. Truesdell, 422 P.2d 237, 241-44 (Nev. 1967).

⁶¹ Dunphy v. Sheeham, 549 P.2d 332, 336 (Nev. 1976).

⁶² Galloway, 422 P.2d at 241.

⁶³ Lindauer v. Allen, 456 P.2d 851, 854 (Nev. 1969).

⁶⁴ *See, e.g.*, Kochendorfer v. Bd. of County Comm'rs, 566 P.2d 1131, 1133 (Nev. 1977).

⁶⁵ Zale-Las Vegas, Inc. v. Bulova Watch Co., 396 P.2d 683, 692 (1964).

⁶⁶ Article 5, Section 9 of the Nevada Constitution gives the Governor the authority to call special sessions. I view that as a remedy for the inability of the Legislature to complete its work within the constitutionally prescribed period, but not as a repudiation of the significance of the period itself. Indeed, from the standpoint of the policies above described, every occasion when a special session is called is a problematic event.

⁶⁷ However, that tradition may have weakened. Indeed, one way to read the events of 2003 is as a culture clash, a test of whether the tradition still fits Nevada.

schedules. It would pose a problem for others, such as employees. If legislative sessions extend for long, indefinite periods, it could become infeasible for large numbers of Nevadans to serve in the Legislature, which would be a substantial cost to that body's representativeness.⁶⁸ Multiple special sessions with no end in sight (for example, the 2003 experience) pose such a threat. So posed, traducing the constitutional 120-day rule emerges as more than a technical problem.

2. *Allow the Budget To Be Balanced Later*

Some opponents to the Governor's petition suggested that the court should allow the legislative process to run its course. They reasoned that, although the Constitution requires a balanced budget and prescribes a fiscal year beginning on July 1, the Constitution does not require that the budget be balanced by July 1.⁶⁹ This is so if the language is read literally. Yet the constitutional pattern is most harmoniously read as calling for a balanced budget by the start of the fiscal year. Indeed, the Attorney General testified that the Legislature was required to provide a balanced budget by July 1 and that the Legislature could not pass school appropriations without providing the revenue to support it.⁷⁰ The Legislative Counsel Bureau (legal counsel for the Legislature) opined to similar effect.⁷¹ At a minimum, budgetary uncertainty would undermine important programs, including constitutionally mandated education.⁷²

3. *Invalidate or Reopen Non-School Appropriations*

A frequent suggestion from groups opposed to higher spending and taxes was that the Nevada Supreme Court should declare invalid previously enacted appropriation legislation.⁷³ As an alternative, this group maintained that the court should direct the Governor to broaden the purposes of the special session to include "reopening" (*i.e.*, reducing) previously enacted appropriations.⁷⁴

But such suggestions are no less constitutionally objectionable than is the *Guinn* approach. The previous appropriations had been validly passed pursuant to the constitutionally mandated procedure: simple majority votes in each house.⁷⁵ If *Guinn* was dubious because it subordinated the supermajority tax provision to other provisions, the suggested alternative was dubious because it

⁶⁸ For discussion of the occupations of Nevada legislators and how they relate to the legislators' positions on taxing and spending, see *Lawmakers Face Their Own Tax Burdens*, LAS VEGAS SUN, July 13, 2003, at 1D.

⁶⁹ *E.g.*, Answer & Opposition to Petition for Writ of Mandamus (by Senators Terry J. Care & Mark E. Amodei) at 5, *Guinn I* (No. 41679).

⁷⁰ *Minutes of Meeting of Assemb. Comm. of the Whole*, 2003 Leg., 20th Spec. Sess. 2 (June 25, 2003) (statement of Attorney General Brian Sandoval).

⁷¹ Letter from Brenda J. Erdoes, Legislative Counsel, and Kimberly A. Morgan, Chief Deputy Legislative Counsel, to Assemblywoman Barbara E. Buckley (June 12, 2003) (on file with author).

⁷² See Brief of Amicus [sic] Curiae Clark County & Washoe County School Districts at 2-5, *Guinn I* (No. 41679).

⁷³ *E.g.*, Brief of Amicus [sic] Curiae Nevada Taxpayers Ass'n et al. at 18-19, *Guinn I* (No. 41679).

⁷⁴ *E.g.*, Brief of Amici Curiae Nevada Concerned Citizens at 3, *Guinn I* (No. 41679).

⁷⁵ NEV. CONST. art. 4, § 18(1).

subordinated the simple majority spending provision to the supermajority tax provision. Moreover, countermanding the Governor's exclusive constitutional authority to define the agenda of a special session offends the separation of powers doctrine no less than would countermanding the Legislature's law-making authority.

A possible response to my objections would involve rules of construction. It is frequently said that in Nevada, the same rules of construction used to interpret statutes also are used to interpret the Constitution.⁷⁶ One canon of construction is that, when provisions conflict, the later measure controls over the earlier.⁷⁷

However, there are three points to note. First, it is an uncomfortable proposition to establish a hierarchy or priority among constitutional rights.⁷⁸ That is a problem with *Guinn*, and it would be a problem with this alternative as well. Second, the canons of construction are notoriously variable, indeed, often inconsistent.⁷⁹ Against that backdrop, it is hard to make any important choice simply on the basis of one canon. Third, there is a countervailing theory of construction. One aspect of the judicial function is to fit new law into the landscape of the existing law.⁸⁰ From such a perspective, one should be slow to discard established constitutional provisions when, as is the case with the supermajority provision, the newer constitutional provision does not unambiguously repeal the former. Respected scholars have applied this approach to initiatives. They have argued that initiatives should be interpreted by the courts narrowly, in order to foster continuity in the law and minimize displacement of preexisting law.⁸¹

4. Refer Budget to Referendum

The "no" bloc in the Assembly suggested the possibility of the Legislature "enacting a budget with certain spending contingent upon passage in a referen-

⁷⁶ E.g., *Guinn I*, 71 P.3d at 1274; *Rogers v. Heller*, 18 P.3d 1034, 1038 n.17 (Nev. 2001); *State ex rel. Wright v. Dovey*, 19 Nev. 396, 399 (1887); *Nevada Mining Ass'n v. Erdoes*, 26 P.3d 753, 757 (Nev. 2001). For criticism of this canon, see William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution*, 5 Nev. L.J. (forthcoming Fall 2004).

⁷⁷ E.g., *Nev. Power Co. v. Haggerty*, 989 P.2d 870, 877 (Nev. 1999); *Marschall v. City of Carson*, 464 P.2d 494, 500 (Nev. 1970) (citing *State ex rel. Eggers v. Esser*, 129 P. 557 (Nev. 1913)).

⁷⁸ See, e.g., *Caplin & Drysdale v. United States*, 491 U.S. 617, 628 (1989); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

⁷⁹ See, e.g., Steve R. Johnson, *The Canon that Tax Penalties Should Be Strictly Construed*, 3 Nev. L.J. 495, 496-97 (2003); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

⁸⁰ See, e.g., WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 210 (1999).

⁸¹ E.g., Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477; Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995); see also Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. LEGIS. 281 (2003) (examining Frickey's and Schacter's proposals).

dum.”⁸² However, there is no provision in the Constitution for such a procedure. This contingent funding would rewrite the Constitution. Moreover, such a procedure would be very time-consuming. Finally, it would be in opposition to the constitutional provisions requiring a balanced budget and school funding.

5. *Replicate Prior Budget*

The same bloc suggested another alternative: “If the court issues a writ of *mandamus* and fashions a remedy to protect the public interest, the court should order the state to continue to operate under the budget approved for the fiscal year ending on June 30, 2003 [the prior year], until the Legislature enacts a balanced budget for the current biennium.”⁸³

Again, though, such an approach would traduce important constitutional principles. The court, not the Legislature, would be enacting the budget. This would not be exonerated by the fact that the court would be imposing a budget that once passed the Legislature. The previous budget was enacted by a previous Legislature. It is the current Legislature that has the right and the responsibility to enact the current budget in light of present needs and challenges.

Indeed, in one sense, this alternative would fracture the separation of power even more than *Guinn*. After *Guinn*, the Legislature did make the substantive decisions as to the budget albeit under procedures altered by the court. Under the alternative, the court would be making the substantive decision. That decision could be reversed by the Legislature, but a new dynamic would operate. Under the alternative, opponents of higher spending and taxes would already have won. They would have little incentive to agree to a new, higher budget which would undo the victory handed to them by default through continuation of the old budget.

6. *Fund Education First*

The same bloc also argued: “Had the Legislature passed [school] funding first, rather than after the general appropriation bill, then there would be no education crisis. To avoid this problem in the future, education must be funded first. The court must clarify that this is a requirement.”⁸⁴ Although not completely clear, it appears that this was advanced for future effect, not offered as a way of redoing 2003 legislation.

In any event, nothing in the present Constitution dictates that order. Indeed, the proffered ordering would again infringe upon the separation of powers because the judiciary would be dictating to the Legislature how the Legislature should conduct its business, precisely what critics complained of with *Guinn*. The invitation to the court to “clarify that this is a requirement” is a request that court rewrite the Constitution. There currently is an initiative effort under way to amend the Constitution to compel “education first.”⁸⁵ The

⁸² Supplemental Brief in Opposition to Governor’s Petition & Counter-Petition for a Writ of Mandamus & Other Extraordinary Relief by Assembly Members Hettrick et al. at 11-12, *Guinn I* (No. 41679).

⁸³ *Id.* at 20-21.

⁸⁴ Petition for Rehearing (on behalf of Lynn Hettrick et al.) at 12, *Guinn I* (No. 41679).

⁸⁵ See *supra* text accompanying note 54.

existence of that effort is an acknowledgment that the Constitution, as now written, does not require that ordering.

7. Summary

It is fundamental that constitutional and statutory provisions apparently in tension must be interpreted to give effect to them all as fully and as harmoniously as possible.⁸⁶ Indeed, the *Guinn* court acknowledged that desideratum.⁸⁷

By subordinating the supermajority tax provision, the *Guinn* court failed to achieve that goal. However, as this Part has shown, the goal was unattainable because of the tensions within the Nevada Constitution. There was no option available to the court that would have rendered fealty to all the features of the Constitution. It is appropriate, then, to excoriate the court less and to put more of the blame where it belongs: on an unworkable constitutional structure.

III. A "LIMITED GOVERNMENT" CRITIQUE OF THE SUPERMAJORITY PROVISION

Part II argued that the addition of the supermajority provision resulted in a situationally unworkable constitutional structure in Nevada. We turn now to additional problems with the supermajority provision.

Although the provision was approved by overwhelming majorities in two elections, it is not without its critics. Much of the reaction is predictable on ideological grounds: limited government advocates endorsing the provision, expanded government advocates decrying it.⁸⁸ But here I want to run contrary to that form. Specifically, I believe that the supermajority provision is problematic even from the standpoint of a limited government agenda.

Below, I make three arguments to that effect: (1) the supermajority provision aims at the wrong target: spending, not taxes, should be addressed; (2) the provision, although enacted by democratic means, has anti-democratic effects; and (3) the provision and the defense of it distort the limited-government message.

A. Wrong Target

Zealous advocates of limited government pay attention to both spending and taxes. In general, though, I think such advocates have looked and talked too much about taxes and too little about spending. That is surely true at the federal level,⁸⁹ and, in the case of the supermajority provision, it is true in Nevada as well.

⁸⁶ E.g., *Washington v. State*, 30 P.3d 1134, 1136 (Nev. 2001); *Bowyer v. Taack*, 817 P.2d 1176, 1177 (Nev. 1991); *State ex rel. Coffin v. Howell*, 64 P. 466, 466-69 (Nev. 1901).

⁸⁷ *Guinn I*, 71 P.3d 1269, 1275 (Nev. 2003).

⁸⁸ Of course, such behavior is not unique to Nevada. It is par for the national course. See Louis J. Sirico, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 639 (1980).

⁸⁹ Both the Reagan and the current Bush administrations secured passage of major tax reduction legislation but either sponsored or did not strongly oppose large spending increases. The result in both instances was huge federal budget deficits. See, e.g., Andrew Countryman, *Budget Trade Deficits Balloon to Record Levels*, LAS VEGAS REV.-J., Feb. 14, 2004, at 1 (the federal budget deficit is expected to hit a record \$521 billion this fiscal year).

The measure pushed in 1994 and 1996 created a supermajority provision as to tax increases. It did not seek a supermajority requirement as to spending increases. The reason for this choice is not hard to divine. Citizens (more to the effect, voters) like to receive money from the government. In contrast, citizens (voters) do not like paying taxes to the government.⁹⁰

Walter Mondale and others have discovered that pledging tax increases is not the passport to electoral success. There has been powerful voter resistance to tax increases in recent years.⁹¹ Thus, opposing taxes is the path of least resistance for those wanting to limit the ambit of government. Indeed, tax reduction has become perhaps the principal defining and unifying issue for the American conservative movement.⁹²

Thus, emphasizing taxes over spending is understandable politically. Nonetheless, I think it is ultimately unwise, even from the standpoint of a limited-government agenda. That is so for two reasons. First, at the risk of oversimplification, in a rational order, spending should drive taxes, not tax spending. Budgeting always is an algebraic operation. "How much spending do we need" is always balanced against "how much harm from taxes can we bear." Still, spending should be the dominant partner in the relationship. It would be strange to ask "how much taxes can we raise" and then find ways to spend up to that amount. It is better to ask "how much do our needs require us to spend" and then find revenue to support that amount.

Indeed, this relationship is suggested by the Nevada Constitution. It provides that "[t]he legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state,"⁹³ not that the Legislature "shall limit spending to the estimated amount of taxes." The Constitution further provides that "the legislature shall provide for levying a tax sufficient . . . to pay the deficiency [the excess of estimated spending over estimated revenue], as well as the estimated expenses of [the remainder of the biennium]."⁹⁴ Thus, Nevada's constitutional order contemplates that taxes will follow spending, not vice versa.

Second, spending limitations ultimately are of greater importance than are tax restrictions as government-limiting devices. Government becomes effectively immune from shrinkage when groups coalesce around government programs of which they are beneficiaries. It has been suggested: "A democracy cannot exist as a permanent form of government. It can only exist until a

⁹⁰ Oliver Wendell Holmes is supposed to have liked paying taxes because "[t]axes are what we pay for civilized society." *Compania Gen. De Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927). Even if Holmes' sincerity is accepted, his is distinctly a minority view.

⁹¹ See, e.g., John E. Petersen, *Changing Red to Black: Deficit Closing Alchemy*, 56 NAT'L TAX J. 567, 568 (2003); Brad Cain, *Oregon Tax Battle Being Watched*, LAS VEGAS REV.-J., Jan. 19, 2004, at 5B ("Opposition to tax increases is total at the national level," according to anti-tax activist Grover Norquist).

⁹² See Grover Norquist, *Step-by-Step Tax Reform*, WASH. POST, June 9, 2003, at A21.

⁹³ NEV. CONST. art. 9, § 2.

⁹⁴ *Id.*

majority of voters discover that they can vote themselves largess out of the public treasury.”⁹⁵

Taxes, of course, do not pose the same problem. Groups do not coalesce around paying taxes and fight to preserve and increase them. Lowering taxes will always be politically popular; lowering spending will not. Thus, the long-term success of efforts to limit government depends on constraining spending (and consequently government’s client populations) more than it does on constraining taxes. The supermajority provision on taxes addressed the wrong part of Nevada’s budget, even from a limited-government perspective.

B. Anti-Democratic Effects

The supermajority provision was enacted by democratic means.⁹⁶ Nonetheless, it entails effects which, directly or indirectly, are problematic for democracy. An initiative or referendum seems eminently democratic, a pure and direct shout of the “Voice of the People.” However, the rhetoric may be easier than the image is truthful. I will not rehearse matters already debated in detail elsewhere, but simply note that the extent of correspondence between the rhetoric and the reality is far from clear.⁹⁷

The level of concern rises when, as in Nevada’s case, the product of the initiative is a supermajority provision. Under a supermajority provision, legislators representing a minority of Nevada’s citizens can defeat the will of legislators representing the majority of Nevada’s citizens. As James Madison warned:

In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular circumstances to extort unreasonable indulgences.⁹⁸

A variety of distortions could occur – along age, class, ethnic, and geographical lines – since needs for additional governmental services are unlikely to be evenly distributed throughout the State and among its citizens.

⁹⁵ Alexander Fraser Tytler (Lord Woodhouselee) (speaking of the collapse of the Athenian Republic), quoted by Jeffrey L. Yablon, *As Certain as Death – Quotations About Taxes* (Expanded 2002 Edition), 95 TAX NOTES 395, 403 (2002).

⁹⁶ Not everyone would agree. There is lively debate and extensive literature addressing the democracy of initiatives and referenda. E.g., DAVID S. BRODER, *DEMOCRACY DERAILED* (2000); DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION*; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 66 OHIO ST. L.J. 399 (1999); Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002); Kirk J. Stark, *The Right To Vote on Taxes*, 96 NW. U. L. REV. 191 (2001).

⁹⁷ See, e.g., Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609 (1998); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395 (2003).

⁹⁸ THE FEDERALIST NO. 58, at 397 (James Madison) (Cooke ed., 1961).

I am more interested, though, in another effect: not the direct denial of democracy but the erosion of its quality. Democracy is healthy to the extent that political discourse within it is vibrant and effective. When limited-government advocates challenge spending proposals directly, such discourse occurs. When they focus only on taxes, the quality of debate suffers.

A striking and regrettable feature of Nevada's 2003 constitutional crisis was that the essential debate over spending never took place. The proposed multi-billion dollar budget afforded no dearth of targets for those opposed to expanded government. Ideally, those opponents would have carefully examined the spending proposals and mounted stiff challenges to those found unnecessary or excessive. Whether the challenges ultimately succeeded or failed, the resulting debate would have been beneficial. A polity clarifies its values and defines its directions by such thrust-and-parry.

Yet this opportunity was squandered, and its potential benefits were forfeited. The entire 120-day regular session of the Legislature came and went without serious scrutiny and discussion of spending proposals. The two special sessions dealt with the "macro" issues of the overall level of spending and the types of taxes to be used. Again, the need or lack thereof of specific spending proposals went largely undiscussed.⁹⁹ Indeed, some of the "no" bloc voted for spending increase proposals originally, before later demanding the reopening of approved measures for unspecified downward adjustments. No members of the bloc introduced bills to eliminate programs.¹⁰⁰

All of Nevada's citizens are poorer for the absence of such debate. That includes the proponents of limited government. By emphasizing taxes and the overall level of spending, they have left unrefuted the case for specific increases. Once embedded, public perceptions can be exceedingly hard to dislodge. A persistent belief that spending increases are needed makes it highly likely that those increases eventually will occur.

C. *Distortion of Limited-Government Message*

There is one more aspect of the case against the supermajority tax provision from a limited-government perspective. The provision, and the attempt to defend it in *Guinn* and related federal litigation, blurs and distorts the anti-government message, thereby weakening it.

Commonly,¹⁰¹ limited-government advocates espouse their preference for legislative dominance (in contrast to judicial dominance) and for decision-making through the states rather than the federal government. Thus, in the case of

⁹⁹ We were treated to repeated events of legislators demanding overall budget cuts of \$X or saying they could not support a budget of more than \$Y. Where did the proffered numbers come from? They appeared to be largely arbitrary numbers plucked from the air, supported by no stated or apparent rationale.

¹⁰⁰ Supplemental Answer & Opposition of Barbara Buckley to Petition for Writ of Mandamus at 3-4, *Guinn I* (No. 41679). The rationale seemed to be that it was up to the Governor to identify specific cuts (and so to take the political heat). In my view, this abnegates the Legislature's law-making responsibility.

¹⁰¹ Not invariably to be sure. There are cats of many different stripes on both the right side and the left side of the political menagerie.

Nevada's crisis, such advocates must have felt uncomfortable as to the nature of some of the positions they took.

First, the supermajority provision undercuts legislative authority and the ability of the Legislature to respond to the will of the people at the time budget decisions are being made. A minority bloc of one of the two houses prevented law-making desired by the representatives of the majority of the people of Nevada. One may argue that the frustrated legislators were not representing the true desires of their constituents. Again, this would repudiate the argument of limited-government proponents that we should prefer legislatures to courts.

Second, resort to the federal courts in the effort to overturn *Guinn* was anti-thematic. Not only were limited-government advocates now turning to the branch of government they trust the least, but they were also demanding that the federal government countermand the result that had issued from state processes and institutions.

I am not saying, of course, that the foregoing actions brand as hypocritical the opponents of *Guinn*. Proponents of limited government express a preference for legislatures and states but typically do not maintain that there is no legitimate role for courts or the federal government. My point is only that there are rhetorical costs to the actions that were taken. Each time opponents of limited government say "we need to ask the federal courts to ride to the rescue," they make it harder for themselves in future situations to argue credibly that their opponents are behaving illegitimately when they say or do the same.

IV. CONCLUSION

Guinn clearly had unfortunate effects. The fact, though, is that unfortunate effects would have ensued regardless of what the Nevada Supreme Court did in the case. Every alternative open to the court or suggested by various parties would have entailed derogation of some provision(s) of the Nevada Constitution.

My own choice, had I been charged with the duty to decide *Guinn*, would have been different from that made by the court. I would have held that the Legislature (though not its individual members) had violated the Constitution by not enacting, within the 120-day regular session, a balanced budget which included school funding. I also would have held that the violation was ongoing.

There I would have stopped, feeling restrained from more decisive action by the principle of separation of powers. I do not believe that an opinion crafted on those lines would have resolved the impasse. The deadlock probably would have continued into August at least. It may well be that the schools would not have opened on time or would have had to slash programs. In short, real harm would have been done to the people of Nevada.

But, in the end, that is probably what was needed. Striking and dismaying were the inertia (certainly) and apathy (perhaps) of the citizens of Nevada throughout the 2003 crisis. Popular rallies both for and against spending and tax increases were few and sparsely attended. The crisis should have been broken by an aroused citizenry forcefully demonstrating to Nevada's legislators

that it was angry and would be in a “throw the rascals out” mood¹⁰² when next at the voting booths. That would have resolved the impasse through the political process, which is the best way to resolve crisis in our system.

That condign wrath was absent. Perhaps it could only have arisen when theoretical harms became painfully real. I would have observed the constitutional punctilio even in the face of an expectation of genuine disruption because of a hope that such disruption might awaken popular reaction that had slumbered too long.

But the Nevada Supreme Court made a different choice. Though disagreeing with it, I respect it. The difference comes through a different calculus of pain and gain, and I am not so confident (or should I say arrogant) as to assert that my calculation is surely right and the court’s surely wrong.¹⁰³ The *Guinn* decision was premised on the critical importance of funding the schools. Based on this, it can be argued that *Guinn* is a legitimate act of judicial courage.¹⁰⁴

Above all, I hope that analysis of *Guinn* does not deflect attention from the central cause of the problem. The addition of the supermajority tax provision created powerful latent tensions in Nevada’s Constitution. Those tensions rendered the constitutional structure unworkable in the economic and political context that eventuated in 2003. That provision created the impasse, a steep price to pay when the provision is dubious even from the standpoint of a limited-government agenda. I hope, as time goes by, that our energies are spent less on excoriating our court than on fixing our Constitution.

¹⁰² Whichever faction might be viewed as being the rascals.

¹⁰³ On one point I am sure. Justice Maupin’s opinion in *Guinn I* held out the possibility (though not the guarantee) that he might have joined his six brethren and sistren if they held fire until July 28. *Guinn I*, 71 P.3d 1269, 1277 (Nev. July 10, 2003). It would have been wiser, I think, to have followed his lead. First, part of the criticism of *Guinn* came from the haste with which *Guinn I* was handed down, which unnecessarily contributed to the idea that the court had not behaved fully deliberatively. Second, the delay might have fostered the build-up of the popular political pressures that lamentably were absent. Third, had Justice Maupin actually joined the majority, the court would have been in a stronger posture. When a court’s holding is bound to be controversial in substance, it is highly desirable that the court’s decision be unanimous. The labors of the United States Supreme Court to achieve unanimity in *Brown v. Board of Education*, 347 U.S. 483 (1954), suggest that some delay might have been acceptable as part of the *Guinn* court’s effort to achieve unanimity.

¹⁰⁴ Cf. *Baker v. Carr*, 369 U.S. 186, 219 (1962) (interpreting *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), thusly: “A [contrary decision] would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.”).