The Nevada Gambit: Is Republican Government Still Guaranteed?

*By John C. Eastman**

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of two-thirds of the Members of each house of the Legislature.[2] Tax measures that do not receive the necessary two-thirds vote may still be adopted, but they must be submitted to the voters for approval before they can take effect.[3]

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn proposed to the Legislature a budget which included a $980 million tax increase,[4] by far the most massive tax increase in the State's history. Unable to garner the two-thirds vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution.[5] Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a few education funding bills.

Because the Nevada Constitution mandates a balanced budget,[6] and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature (assuming it was anywhere near the amount proposed) was going to require a tax increase of $800 to $900 million.[7] The Legislature did not have the option to consider reductions elsewhere in the budget as an alternative to a tax increase—the Governor's special session proclamation did not give the Legislature such authority. Moreover, the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved.[8]

During the course of two special sessions, the Nevada Assembly was unable to muster a two-thirds vote for any of the tax increases that reached the Assembly floor, although it was widely believed that a smaller tax increase would receive the necessary two-thirds vote.[9] Within minutes of midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn brought suit against the Nevada Legislature and every one of its Members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase. His apparent goal was to balance the budget and fund education by the means he had proposed, but for which he had been unable to obtain the constitutionally-required level of support among state legislators.

A group of legislators filed a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could consider reductions in the spending increases that had been approved earlier in the year.[10] Roughly fifty different organizations and individuals filed nearly a dozen *amicus curiae* briefs either in support of or in opposition to the Governor's petition.

On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "*simple majority rule*" rather than the two-thirds vote required by Article 4, § 18(2) of the Nevada Constitution,[11] unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation.[12] The court acknowledged the constitutional validity of the two-thirds vote provision of Article 4, § 18(2), but then found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. Despite the fact that the two-thirds vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education."[13]

Three days later, on Sunday, July 13, the Nevada Assembly conducted a floor vote on Senate Bill 6 ("SB 6"), a bill that sought to increase taxes in the State by $788 million. Although the bill failed to garner the two-thirds vote required by Article 4, § 18(2), the Speaker of the Assembly gaveled the bill "passed." The next morning, several members of the Nevada legislature (a number of Assemblymen and Senators sufficient to defeat the tax increase under the two-thirds vote requirement of the Nevada Constitution), joined by individual citizens, taxpayers, trade groups

and tax policy organizations, filed suit in the United States District Court for the District of Nevada. Their petition contended that the Assembly's action amounted to vote dilution and vote nullification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment[14] and ignored the structural commands of the Nevada Constitution in violation of the Republican Guarantee Clause of Article IV, § 4 of the United States Constitution.[15] The District Court, sitting *en banc*, granted plaintiffs request for a temporary restraining order that same day,[16] but by week's end it had dismissed the action, holding that it was without jurisdiction to consider the legislators' claims under the *Rooker-Feldman* doctrine.[17] The District Court suggested that the *Rooker-Feldman* doctrine also barred the claims of the non-legislators, but dismissed those claims under Rule 12(b)(6), without prejudice to re-filing in state or federal court.

Late in the evening of the next day, a Saturday, with the TRO lifted, the Nevada Assembly proceeded to consider another bill raising taxes, Senate Bill 5 ("SB 5"). SB 5 also failed to garner a two-thirds vote, but the Assembly Speaker nevertheless deemed the bill "passed," this time over a point of order objection that — in violation of parliamentary procedure — he refused to submit to a requested roll-call vote of the body.[18]

The following Monday, July 21, 2003, the group of legislators filed a Petition for Rehearing with the Nevada Supreme Court requesting that the court reconsider its ruling and recall its writ of mandamus. Their petition argued that the Nevada Supreme Court's ruling had effectively authorized the Nevada Legislature to violate federal rights under the Due Process, Equal Protection, and Republican Guarantee Clauses of the U.S. Constitution.[19] The group of legislators also filed an application for an emergency stay,[20] which the court set over for additional briefing and did not decide until summarily denying it nearly two months later on September 17, 2003 (ironically, Constitution Day).[21] The citizens and taxpayers who had joined them in the federal action filed a motion to intervene on July 21, 2003, seeking to present their federal claims to the Nevada Supreme Court as well. That motion was denied less than an hour later, in an order hurriedly signed by only four of the court's seven Justices.[22]

Late that evening, by its own account because of the changed dynamic in the Legislature produced by the Nevada Supreme Court's writ of mandamus, the Nevada Legislature adopted tax legislation by a two-thirds supermajority, in conformity with the Nevada Constitution.[23] The group of legislators who remained opposed to the tax increase then filed a motion to vacate the Nevada Court's original decision on the Nevada equivalent of *Munsingwear* grounds,[24] but the Nevada Supreme Court refused the request. Instead, it denied the petition for rehearing as moot and summarily denied the motion to vacate on September 17, 2003.[25] Justice Maupin, dissenting from the court's decision, noted that he would have granted the petition for rehearing, dissolved the mandamus, and vacated the prior majority opinion.[26]

The following March, the Supreme Court of the United States denied a petition for *certiorari* from the state court judgment.[27] In May 2004, the Ninth Circuit Court of Appeals affirmed the District Court's dismissal of the federal court action. The court did not rely upon the *Rooker-Feldman* ground as the District Court had, but instead held that the claims for injunctive and declaratory relief had become moot. It further held that the plaintiffs' unlawful vote dilution claims were not viable because the Assembly's action that deemed a tax bill "passed" without the necessary two-thirds vote had not actually led to the imposition of an unconstitutional tax.[28] At the time of this writing, a petition for writ of *certiorari* to review the Ninth Circuit's decision remains pending. If the Supreme Court denies the petition, a key, admittedly constitutional structural provision of the Nevada Constitution, recently enacted by overwhelming majorities of the citizens of Nevada as a restriction on government itself, will have been rendered a dead letter.

Of course, as a general matter, a state supreme court is the last word on matters of state law, including state constitutional law. But there are times when the state court's "interpretation" of state law is so far removed from existing precedent and canons of construction that federal rights might be implicated, rights under the Due Process Clause, for example, or even the Republican Guarantee Clause.

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in this Union a Republican Form of Government."[29] Claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances,[30] but recent court statements suggest that this view might be open to discussion. Justice O'Connor noted in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[31] "Contemporary commentators," she

noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances."[32] Since the Supreme Court's decision in *New York*, several lower courts have acknowledged that the Republican Guarantee Clause might present justiciable questions in certain circumstances, but thus far all have found that the Clause had not been violated in the particular circumstances at issue in the cases.[33]

The extraordinary actions taken by all three branches of the Nevada government to nullify a constitutional restriction imposed by the people of the State should lead to a reconsideration of the nonjusticiability of the federal guarantee of a republican form of government. Other states are already beginning to follow Nevada's lead, with great risk to the idea of self-government and the rule of law. In California, the Superintendent of Public Instruction threatened to file his own "Nevada-type litigation" in response to a standoff in that state's budget battle.[34] In Kentucky, the Governor has for the past two years taken it upon himself to write budgets in order to end-run a legislative stalemate.[35] In Arizona, an appropriations bill comprehensively covering all aspects of governmental operations *except education* was introduced, apparently in an attempt to set up a Nevada-style nullification of the restrictions on taxation in that state's constitution. And in Massachusetts, the Legislature unconstitutionally refused to forward to the people a proposed constitutional amendment confirming the historical, one-man/one-woman status of marriage. Its abdication of duty set the stage for the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health*,[36] which altered the definition of marriage by judicial fiat, ignoring not only the long-standing existing law but also the people's thwarted effort to confirm that law. In each of these cases, state governmental officials have altered the method by which state government functions, making fundamental decisions not only without the input of the people but also in direct defiance of the people's will.

The Tenth Circuit noted in 1995 that the essence of the federal constitutional guarantee of a republican form of government is the right of a State's citizens to "structure their own governments as they see fit."[37] Chief Judge J. Harvie Wilkinson, writing in *Brzonkala v. Virginia Polytechnic Institute and State University*, stated that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee[ ]."[38] In *New York* itself, the Supreme Court dismissed the Guarantee Clause claim only 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."[39]

In Nevada, the joint efforts of the Governor, Supreme Court, and Legislature permitted the imposition of a tax despite a failure to comply with the structural command of the Nevada Constitution. Their actions altered "the method" by which the Legislature functions when undertaking to impose new or increased taxes. The constitutional "method" for approving budgets in Kentucky is through the legislative process, not by proclamation of the Governor. And in Massachusetts, decisions about the nature of civil marriage are, by constitutional design, limited to the Legislature and the Governor, not the courts. In each of these states, therefore, the method by which the people have authorized their government to govern has been altered or ignored.

If there is anything to the federal guarantee for government by consent, these actions by state government officials, which have thwarted the will of the people, invite a reinvigoration of that guarantee.

*Professor of Law, Chapman University School of Law. J.D., The University of Chicago; Ph.D., M.A., The Claremont Graduate School; B.A., The University of Dallas. Dr. Eastman served as lead counsel in *Angle v. Legislature of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003), *aff'd sub nom*. Amodei v. Nev. State Senate, 2004 U.S. App. LEXIS 9407 (9th Cir. 2004), and as Counsel of Record in *Angle v. Guinn*, 124 S. Ct. 1662 (2004). He gratefully acknowledges the able assistance of Leah Boyd, Elizabeth Kim, Karin Moore, and Dina Nam, the Claremont Institute's 2003 Blackstone Fellows, who provided assistance at the emergency TRO phase of the litigation; Chapman Law School students Angelica Arias, Mackenzie Batzer, Charlene Chen, Amy Duncan, Karen Lugo, Elise O'Brien, Flint Stebbins, Brooks Travis, and Karl Triebel, who likewise provided able research during the initial phases of the litigation and beyond; local counsel Jeff Dickerson; co-counsel Eric Jaffe and Steven Imhoof; and the amicus support of John Findley, Gregory Broderick, and Timothy Sandefur of the Pacific Legal Foundation; University of Kentucky Law School Professor Paul Salamanca for the National Taxpayers Union (among others); and John Taylor and Jeremy Rosen, on behalf of the Initiative and Referendum Institute.

Footnotes

[1] Nev. Const. art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The two-thirds vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections. *See, e.g.*, Jim Gibbons, *Your Turn Jim Gibbons*, Reno Gazette-J., June 6, 2003, at 11A (discussing the Gibbons Tax Restraint Initiative and relating the 1994 and 1996 election results).

[2] Nev. Const. art. 4 § 18(2).

[3] *Id.* § 18(3).

[4] Guinn v. Legislature of Nev., 71 P.3d 1269, 1273 (Nev. 2003) ("Guinn I"), *opinion clarified and reh'g denied*, 76 P.3d 22 (Nev. 2003) ("Guinn II"), *cert. denied sub nom.* Angle v. Guinn, 124 S. Ct. 1662 (2004).

[5] *See id.*

[6] Nev. Const. art. 9, § 2.

[7] *See, e.g.*, Ed Vogel, *Guinn Says Threat to Close Some Schools Not Hollow*, Las Vegas Rev.-J., June 14, 2003, at 2A (noting the $1.6 billion education budget proposal, along with the need for a $ 860 million tax increase to pay for it).

[8] *See* Nev. Const. art. 5, § 9 ("[T]he Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened."); *see also Guinn II*, 76 P.3d at 27.

[9] *See Guinn II*, 76 P.2d at 28 ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase.").

[10] Supplemental Brief in Opposition to the Governor's Petition and Counter-Petition for a Writ of Mandamus and Other Extraordinary Relief at 25, *Guinn* (No. 41679). Filings in the case can be found on the Nevada Supreme Court's website: http://nvsupremecourt.us/decisions/dec_sc41679.html.

[11] *Guinn I*, 71 P.3d at 1276; *see also* Petition for Rehearing at 1, *Guinn* (No. 41679).

[12] *See* Petition for Rehearing at 5, *Guinn* (No. 41679).

[13] *Guinn I*, 71 P.3d at 1272.

[14] Angle v. Legislature of Nev., 274 F. Supp. 2d 1152, 1154 (D. Nev. 2003).

[15] *Id.*

[16] *See id.* at 1156.

[17] *Id.* at 1154-56.

[18] *See Assembly Standing Rules*, Nevada State Legislature, *at* http://www.leg.state.nv.us/70th/astdrule2.cfm (last visited Sept. 19, 2004) ("The presiding officer shall declare all votes, but the yeas and nays must be taken when called for by three members present, and the names of those calling for the yeas and nays must be entered in the Journal by the Chief Clerk.").

[19] *See* Petition for Rehearing at 5, 13-14, Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003) (No. 41679).

[20] Emergency Motion for Stay Pending Decision on Petition for Rehearing, *Guinn* (No. 41679).

[21] Guinn v. Legislature of Nev., 76 P.3d 22 (Nev. 2003) ("Guinn II"), *cert. denied sub nom.* Angle v. Guinn, 124 S. Ct. 1662 (2004).

[22] Order Denying Motion to Intervene at 1, *Guinn* (No. 41679).

[23] *See* Supplement to Petition for Rehearing and Motion to Withdraw Opinion at 2, *Guinn* (No. 41679) (discussing passage of SB 8).

[24] *See* United States v. Munsingwear, Inc., 340 U.S. 36 (1950); City of Las Vegas v. Sunward Sales, Inc., 643 P.2d 1207, 1208 (1982).

[25] *Guinn II,* 76 P.3d at 33.

[26] *Id.* at 34 (Maupin, J., dissenting).

[27] Angle v. Guinn, 124 S. Ct. 1662 (2004).

[28] Amodei v. Nev. State Senate, 2004 U.S. App. LEXIS 9407 (9th Cir. 2004).

[29] U.S. Const. art. IV, § 4.

[30] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849).

[31] 505 U.S. 144, 185 (1992).

[32] *Id*. at 185 (citing John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 118 & nn. 122-123 (1980); Laurence H. Tribe, American Constitutional Law 398 (2d ed. 1988); William M. Wiecek, The Guarantee Clause of the U.S. Constitution 287-289, 300 (1972); Arthur Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 70-78 (1988)).

[33] *See* City of N.Y. v. United States, 179 F.3d 29 (2d Cir. 1999); Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist., 132 F.3d 1095, 1099-1100 (5th Cir. 1998); Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 468-69 (3d Cir. 1996); Padavan v. United States, 82 F.3d 23, 27-28 (2d Cir. 1996); Kelley v. United States, 69 F.3d 1503, 1511 (10th Cir. 1995); Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000). *But see* State *ex. rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1157-62 (Or. 1997) (holding that Guarantee Clause claims remain nonjusticiable).

[34] *See, e.g.*, Press Release, California Department of Education, O'Connell to Ask State Supreme Court to Break Budget Impasse (July 17, 2003) (available at http://www.cde.ca.gov/nr/ne/yr03/yr03rel39.asp).

[35] *See* Commonwealth *ex rel* Miller v. Commonwealth *ex rel* Duke, No. 02-CI-00855 (Franklin Cir. Ct. 2002); Greveden v. Commonwealth *ex rel* Fletcher, No. 2004-CA-001588-I, 2004 Ky. App. LEXIS 251 (Ky. Ct. App. Sept. 3, 2004)

[36] 798 N.E.2d 941 (2003).

[37] *Kelley*, 69 F.3d at 1511.

[38] 169 F.3d 820, 895 (4th Cir. 1999) (Wilkinson, CJ., concurring), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

[39] 505 U.S. at 186.