JUDICIAL TENURE IN VERMONT: DOES GOOD BEHAVIOR MERIT RETENTION?

Nor is the people's judgment always true:
the most may err as grossly as the few.[1]

INTRODUCTION

In February of 1997, the Vermont Supreme Court declared the state's funding procedure for public schools unconstitutional.[2] The Court held that the state's financing system for public education violated the Education Clause or the Common Benefits clause of the Vermont State Constitution.[3] In response, the Vermont General Assembly passed the Equal Educational Opportunity Act of 1997 (Act 60) in an attempt to redress the illegalities of the state's funding system.[4] Act 60 restructured the property tax system of the state in an effort to provide more equitable school funding between "property rich" and "property poor" towns in the state.[5] Both *Brigham v. Young* and Act 60 caused significant controversies in Vermont.[6]

Elections for statewide offices occurred the following year. During the primaries, the controversy caused by *Brigham* and Act 60 played an integral role in many candidates' election rhetoric. Bernard Rome, a candidate in the Republican primary for the governor's seat, focused heavily on the *Brigham* decision in his campaign. He claimed that the Supreme Court had exercised

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1. John Dryden, *Absalom and Achitophel* (1681) *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 304 (15th ed. 1980).

2. *See* Brigham v. Young, 166 Vt. 246, 692 A.2d 384 (Vt. 1997).

3. *See* id. at 390. The Education Clause provides: "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." VT. CONST. ch. II, § 68. The Common Benefits Clause states:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .

VT. CONST. ch. I, art. 7

4. *See* 1997 Vt. Acts & Resolves, 279.

5. "Property rich" towns have higher land values and denser populations, thus the tax burden per landowner is lower than in "property poor" towns with lower land values and sparser populations. *See Brigham*, 692 A.2d at 387-90.

6. *See* John Dillon, *The Dooley Duality*, VERMONT SUNDAY MAGAZINE, October 18, 1998, at 4-13. *See also* Peter Teachout, *"No Simple Disposition": The Brigham Case and the Future of Local Control Over School Spending in Vermont*, 22 VT. L. REV. 21 (1997).

a power it did not possess by ruling on an essentially legislative issue.[7] Rome averred that this alleged error by the Court warranted the removal of several Justices. He indicated that as governor he would use Vermont's judicial retention system as a means of ousting the "three most liberal" justices from the bench.[8] Rome did not prevail in the primary election; however, threats of judicial nonretention continued.[9]

Two Justices who participated in the *per curiam* Brigham decision retired from the bench prior to the end of their terms.[10] John McClaughry, president of the Ethan Allen Institute,[11] mounted an attack on the three Justices who remained on the Court.[12] McClaughry argued that the Justices violated their oath of office, which requires them to do nothing "injurious" to the Vermont Constitution, by finding a constitutional right to equal educational opportunity.[13] Thus, McClaughry argued, the Legislature should remove them from the bench by means of Vermont's judicial retention system.[14]

The political consequences of the *Brigham* decision bring into sharp focus the means by which Vermont chooses and retains members of the bench. Underlying McClaughry's arguments for removal is a question over what kind of political pressure members of Vermont's bench should have to withstand. McClaughry would like to see a high level of judicial accountability, whereas constitutional provisions indicate judges are entitled to a significant amount of independence. The purpose of this paper is to evaluate Vermont's judicial nomination and retention system. While it does not focus on the specific issues raised by the *Brigham* decision, the controversies created by that case provide a context for discussing judicial independence and accountability in Vermont.

Two main questions emerge from the rhetoric surrounding *Brigham*. First, is a decision like *Brigham* a legitimate ground for removing the justices from the bench? This question is addressed through a consideration of judicial independence and its role in Vermont's system of government; an examination of constitutional interpretation and judicial review; and finally,

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7. *See* Dillon, *supra* note 6, at 5.

8. *See id.*

9. *See* John McClaughry, *Judicial Review Process Provides Necessary Check*, BURLINGTON FREE PRESS, Sept. 22, 1998, at 11A.

10. Frederic W. Allen and Ernest W. Gibson both retired at the mandatory age of seventy, prior to their next scheduled retention elections in 1999.

11. The Ethan Allen Institute is a conservative think tank in Concord, Vermont.

12. The Justices remaining on the bench are Justice John A. Dooley, James L. Morse, and Denise R. Johnson.

13. *See* John McClaughry, *Here Are Some Reasons Not to Keep the Brigham Justices*, BURLINGTON FREE PRESS, February 9, 1999, at 9A; John McClaughry, *Deny Brigham Justices New Terms*, THE SUNDAY RUTLAND HERALD, January 31, 1999, at C3.

14. *See* McClaughry, *supra* note 13, at 9A.

an explanation of the standards for removing judges for the bench contained in Vermont law. The analysis leads to the conclusion that removal from the bench may not be predicated on political differences or legally disputable issues.

The second question addresses whether Vermont's judicial retention system is the appropriate place to apply the standard of good behavior which modifies the nature of judicial tenure in the Vermont Constitution. A descriptive history of judicial appointment and tenure in Vermont, and an explanation of how the current system functions leads to the conclusion that the retention system is inherently suited to discipline "not good" behavior. However, the system contains weaknesses that make it vulnerable to attempts at removal based on differences in judicial philosophy or political ideology.

I. THE HISTORY OF JUDICIAL APPOINTMENT AND TENURE

A. Significance of Judicial Independence

Alexander Hamilton deemed "the judiciary [the] least dangerous" branch of government because it lacked any power "over either the sword or the purse . . . [therefore it] may truly be said to have neither FORCE nor WILL, but merely judgment."[15] Independence allows the judiciary to exercise its sole power, judgment, in a principled and consistent manner.[16] Thus, Senator Patrick Leahy, after describing the current threat to Vermont's judiciary, observed that, "[f]or more than two centuries, a strong and independent Federal Judiciary has served as the bulwark against overreaching by the political branches of government and has been the protector of our constitutional rights and liberties."[17] Moreover, independence ensures that the judiciary can "carry out the law in spite of popular trends."[18]

Judicial independence is considered "a general principle of the highest importance to the proper administration of justice that a judicial officer, in

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15. THE FEDERALIST NO. 78 (Alexander Hamilton).

16. *See* Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117 (1996). Burbank begins his discussion of federal judicial independence by stating:

> Judicial independence is a means to an end rather than an end itself. The framers did not enshrine judicial independence in so many words, and their goals in providing for tenure during good behavior and forbidding the diminution of compensation while a federal judge holds office were to strengthen the separation of powers and thereby help ensure equal justice under law.

Id.

17. Senator Patrick J. Leahy, *On The Importance Of An Independent Judiciary For The Vermont Bar Association*, VT. B.J. & L. DIG. 27, September 1998.

18. Honorable Shireen Fisher, *Judicial Independence and Accountability*, VT. B.J. & L.DIG. 18, June 1997.

exercising judicial authority, shall be free to act upon his [or her] own convictions, without apprehension of personal consequences to himself [or herself]."[19] A more complete description states:

> Judicial independence means simply that a life-tenured federal judge is free from all political and other outside pressures to decide cases in a wholly impartial manner. She must commit herself to following the Constitution, the statutes, common law principles, and the precedent that interprets each of them. Her decision making is limited to properly admitted evidence, constrained by appropriate procedural rules, records, and legal principles. Prevailing political winds have no effect. The codes of conduct require a judge to adhere not only to the principle of actual impartiality and absence of outside influence, but also require a judge to be free from even the appearance of any improper influence. Thus, a judge resigns from all other affiliations that would call her impartiality into question, divests herself of any financial interests which would raise similar question, and refrains from all activity that appears to have the capacity to influence personal decision making.[20]

Since the adoption of the United States Constitution, federal judges have received independence secured by lifetime tenure during good behavior and a salary guaranteed not to diminish during that time.[21] The federal provisions provide the most independence possible among the range of judicial selection and tenure options.[22] Lifetime appointments mean that judges do not have to worry about currying the favor of an executive officer, appointing committee, or the general public when deciding cases. A judge with lifetime appointment can only be removed from the bench through impeachment.[23] Therefore, they can decide cases without fear of reprisal. Secure salary provisions prevent retaliation through indirect means.[24] The federal provision makes it impossible for the legislature to reduce a judge's salary as means of expressing disapproval over a specific decision.

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19. Penny J. White, *It's a Wonderful Life, or is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 4 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871)).

20. Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 645-646 (1995).

21. *See* U. S. CONST. art. III, § 1 and discussion *infra* section II.

22. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 9 n.33 (1995).

23. *But cf.* Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994) (arguing that criminal prosecution can also function to remove judges from the bench).

24. *See* Harry T. Edwards, *Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges*, 87 MICH. L. REV. 765, 766 (1989).

In addition to length of tenure and salary provisions, levels of judicial independence can be gauged by examining the method of getting judges onto the bench. Appointment increases independence because judges are not dependent on popular opinion in order to obtain a position on the bench. In contrast, popular elections decrease independence by turning judges into politicians, creating the possibility that thoughts of winning the next election may enter the decision calculus in cases that catch the public eye. The remaining sections of this paper will use the three factors -- length of tenure, salary provisions, and method of filling judicial vacancies -- as indicators of the level of judicial independence.

The federal provisions stem directly from the lack of judicial independence during colonial times.[25] Judges under English monarchies were appointed by and served at the pleasure of the King, sometimes deciding cases based on the King's command.[26] The Declaration of Independence specifically targeted the King's control of the judiciary through manipulations of tenure and salary as a source of dissatisfaction with the English government.[27] As a consequence, no state made judicial tenure dependent on the pleasure of the chief magistrate.[28] In devising their new governments, the states made the legislatures, or executive councils responsible for the appointment and tenure of judges.[29]

Moving the power over the judiciary from the executive to the legislative branch did not increase judicial independence. Many state constitutions limited judicial tenure to a specific number of years, others provided legislative control over salaries and there were also a variety of means to remove judges from the bench, including a simple address of the legislature.[30] Legislative control of the judiciary, as opposed to judicial independence, was the actual goal of the framers of the state constitutions.[31] They theorized that as representatives of the people, the legislatures would maintain a judiciary that served the public needs, as opposed to the prior system that only served the needs of the monarch.

While this theory may have logical appeal, it did not withstand the test of time. The states soon realized that a majority could tyrannize the populace just as ruthlessly as any monarch. Legislatures in many states took upon

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25. *See* SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 1 (1980).

26. *See generally* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 51-79 (1944) (discussing the condition and functioning of the judiciary under the Stuart monarchy).

27. *See* CARBON, *supra* note 25, at 1.

28. *See* GORDON WOODS, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 160 (1969).

29. *See id.*

30. *See id.* at 161.

31. *See id.*

themselves the responsibility for resolving all manner of disputes and problems, whether suited for legislative action or not. As Madison put it, the representative assemblies in the states were "drawing all power into [their] impetuous vortex."[32] In 1786, the Vermont Council of Censors, responsible for reviewing the actions of the Legislature every twelve years, charged that the body was reaching for "uncontrolled dominion." The Council noted that the Legislature acted as a court of chancery in all cases over £4,000, reversed court judgments, stayed executions after judgments, and prohibited court actions in matters over land titles and private contracts.[33] The Legislature took these actions "according to their sovereign will and pleasure", giving no regard to rules of law.[34]

Vermont's experience is representative of events in all the early states. The extent to which legislatures abused their power lead to the realization that "America had little to fear from the traditional abuse of power by the few over the many. 'It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.'"[35] In other words, "[a]n elective despotism was not the government we fought for."[36] As a consequence, one standard by which all constitutions could be measured was the extent to which they separated the three powers of government: executive, legislative and judicial.[37] A governmental structure that provides for effective separation of powers enhances judicial independence.

B. Judicial Independence and Constitutional Interpretation

The importance of judicial independence can vary with the role one believes the judiciary should have in government.[38] Accordingly, that belief will influence the method of judicial selection and retention one thinks is appropriate. In other words, "before we can talk seriously about how to select and retain judges, we must have an idea of what they do and what they ought to do. As with any job, the job description logically precedes the determination of qualifications."[39] Determining the role of courts in society is an inherently political process, the truth of which is demonstrated every time someone accuses a judge of legislating from the bench. Thus by

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32. *See id.* at 407.
33. *See id.*
34. *See id.*
35. *Id.* at 413.
36. *Id.* at 452.
37. *See id.*
38. *See* CARBON, *supra* note 25, at 4.
39. *Id.* at 4 n.14 (quoting Frederick Schauer, *Judging in a Corner of the Law*, 61 S.CAL. L. REV. 1717, 1732 (1988)).

extension "[t]he process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process."[40]

A spectrum of judicial functioning illuminates a discussion of independence. On one end, judges are "living oracles" of the law, and their opinions are simply elaborations of preexisting rules applied to the case at hand.[41] At this end of the spectrum, judicial independence should be high because "mere mortals should not interfere with [the judge's] oracular vision."[42] The end of the spectrum calling for more accountability assumes that judges function more like legislators; thus the opinions they produce represent their political position.[43] At this end, if judges implement their political proclivities without constraint they should be subject to similar forms of accountability used for legislators.[44] Accountability may be even more important than for legislators because judges have the ability to thwart the will of the majority.[45]

However, as a former California Supreme Court Justice points out, very little of what judges actually do occurs at either end of this spectrum.[46] Instead, statutory language, constitutional provisions, or common law rules compel judges to decide cases in ways that contradict, or do not allow for, personal preferences.[47] They also continuously confront issues where no objectively determinable rule exists, thus precluding a mechanical application.[48] This reality conforms to a point near the middle of the spectrum of judicial functioning. In the middle lies a process called "reasoned elaboration."[49] This conception of a judge's work means:

> [F]irst . . . that the [judge] is obliged to resolve the issue before him on the assumption that the answer will be the same in all like cases. . . . He is to decide the question, in other words, as a *question of law*.

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40. Webster, *supra* note 22, at 3 n.9 (quoting Daniel J. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A. J. 122, 122 (1980)).

41. *See* Webster, *supra* note 22 at 4; Joseph R. Grodin, *Developing a Consensus of Constraint: A Judges Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1973 (1988). William Blackstone originally characterized judges as "living oracles" of the law. Under this conception, their job did not require the exercise of discretion - they mechanically applied rules to facts in order to reach their decisions. *See* Webster, *supra* note 22 at 4.

42. Grodin, *supra* note 41, at 1973.

43. *See id.* at 1974; Webster, *supra* note 22, at 6.

44. *See* Webster, *supra* note 22, at 6.

45. See id. at 10.

46. *See* Grodin, *supra* note 41, at 1974.

47. *See id.*

48. *See id.* at 1975.

49. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

> Secondly, the [judge] is obliged to relate his decision in some reasoned fashion to the . . . statute out of which the question arises. He is not to think of himself in the same position as a legislator taking part in the enactment of a statute in the first place. He is not to say simply, '*I* think that [the facts of the present case] should or should not be [considered as falling under the statute].' He is obliged, instead, to respect the position of the legislature in the institutional system. He is to ask himself, "Ought this statute which the legislature has enacted to be read as including or as not including [the facts of the present case]?[50]

If judges function under a system of reasoned elaboration, fundamental principles of justice, common law rules, and statutory and constitutional language provide a check on their exercise of discretion. These limitations reduce the need for public control of judges, yet simultaneously recognize that judges may have to exercise discretion in extending legal principles to novel situations.

The role of courts, and the importance of judicial independence, also changes with the type of law at issue. Historically, state courts have paid less deference to legislation than the common law, and construed ambiguous statutes narrowly when they conflict with common law principles .[51] Yet, in cases of comprehensive, well-drafted legislation, courts are more willing to make the common law conform to the legislature's intent.[52] However, the judiciary's role and the balance between independence and accountability is more problematic when constitutional questions arise. State constitutions impose affirmative obligations on the state, making them difficult, if not inappropriate, for courts to enforce.[53] A possible approach to resolving state constitutional questions would place the responsibility for defining the scope of the state's duty on the court, and the responsibility for implementing the duty on the legislature.[54] This division of tasks respects the traditional separation of powers between the judiciary and the legislature.[55]

Yet courts may still encounter difficulties in the process of defining a state's constitutional duties; the *Brigham* decision is an example. The Vermont Supreme Court found that the state's Constitution required them to impose a duty on the state to provide substantially equal educational

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50. *Id.* at 143 (emphasis in original).

51. *See* The Honorable Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1556 (1997).

52. *See id.* at 1556 & n.57.

53. *See id.* at 1558.

54. *See id.* at 1558-59.

55. *See id.* at 1559.

opportunity.[56] The Court imposed this duty in spite of entrenched opponents to education finance reform.[57] The Court did not, however, specify how the State should ensure that all Vermont school children have substantially the same educational opportunity. Even though the ultimate solution was left to the legislature, the Court was criticized for finding a duty in the first place.[58]

Judicial independence is paramount when courts must protect the constitutional rights of a minority, or the rights of people lacking access to political processes.[59] The early experience of the original states underscores the importance of judicial independence for protecting individual rights from an "elective despotism."[60] Another facet of the problem arises when a supreme court declares laws unconstitutional on grounds that do not plausibly apply some preexisting constitutional norm.[61] However, supreme courts may often find themselves in the position of devising original constitutional responses to new constitutional problems as social norms and values shift over time. This potential raises the question of how a state supreme court should interpret its constitution.[62]

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56. *See Brigham*, 166 Vt. at 397.

57. The Vermont Legislature had considered property tax reform prior to the Brigham decision, yet no solution had passed into law. *See Dean Avoids Property Tax Reform*, States News Service, January 15, 1997, available in LEXIS, Regnws Library, Vtnws File. *See also* McClaughry, *Deny Brigham Justices*, *supra* note 13, at C3.

58. *See* Teachout, *supra* note 6, at 31.

59. The U.S. Supreme Court addressed this issue in United States v. Carolene Products Co., 304 U.S. 144 (1938). In a footnote, Justice Stone indicated that the Court may apply stricter judicial scrutiny than usual to economic regulations that "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [or] which tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 153, n.4. Another example analogous to Vermont's experience occurred in Connecticut. The Connecticut Supreme Court declared that the Hartford public schools were unconstitutionally segregated along racial lines. The court minimized public resistance by maintaining separation of powers and deferring resolution of the problem to political processes. *See* Peters, *supra* note 51, at 1559.

60. *See* discussion *supra* section I.A.

61. *See* Hans A. Linde, *E Pluribus - - Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

62. Judicial review was established in Vermont in the early 1900's. *See* Baker v. State, 744 A.2d 864, 900 & n.3 (1999) (J. Johnson, dissenting). For the purposes of this note, the legitimacy of judicial review is assumed. Gordon Woods states in a discussion of the development of the separation of powers in colonial America:

> The decisive assumption in the development of this judicial agency and authority was the real and ultimate sovereignty of the people. Judicial review did not 'by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in statutes, stands in opposition to that of the people, declared in the constitution, the judges . . . ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.'"

WOODS, *supra* note 28, at 462.

Theories of constitutional interpretation provide one source of answers for this dilemma. The theories can be categorized into two main groups: originalism and non-originalism.[63] Originalism is the mode of constitutional adjudication that gives the text of the Constitution, and the intent of its drafters, binding authority. The types of arguments that fall under originalism include those based in the history, the text, or the structure of the constitution.[64] Non-originalist arguments use ethics, prudence, and judge-made doctrines.[65] These arguments do not depend on a showing that their premises have previously been incorporated into constitutional doctrine.

Therefore, when deciding a constitutional issue, one of the first dilemmas facing a court is whether or not the history, text and structure of the constitution will shape their opinion. To adopt a solely non-originalist approach to a constitutional decision would truly beg the question of what role the judiciary has in government.[66] Non-originalist arguments provide virtually no limiting principle to a court's interpretive power – ethics can be uselessly subjective, prudence is vague, and judge-made doctrine depends on the judge. Therefore, a court must show how its decisions are rooted in constitutional doctrine if it is to respect the separation of powers that became the hallmark of colonial constitutions. Moreover, reliance on non-originalist arguments removes "any vestige of deference to the values of continuity and stability that the rule of law provides."[67]

Yet, the need for a pre-existing constitutional principle to justify a court's decisions then begs the question of how a court can address evolving

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63. *See* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B. U. L. REV. 204 (1980).

64. *See* Linde, *supra* note 61, at 180.

65. *See id.*

66. *See id.* at 181. Linde posits that,

> If nonoriginalist arguments are good constitutional law, why should you not ask a court simply to apply the enlightened moral consensus or societal values of the day to the merits of your case and cheerfully argue that nothing in the text or the history of the constitution is important for that purpose? . . . An argument that invokes only extra constitutional theories to override legislative enactments and claims that a link to a constitution does not matter would pose an insurmountable problem for either court, state or federal, for it does not offer a convincing way to explain why an extra constitutional value belongs at the state or at the national level. The United States Supreme Court, whatever motivates it on the merits, necessarily must insist that such a claim arises under something in the Constitution of the United States, for this alone gives the Court jurisdiction under article III of the Constitution. If a state court, in turn, is to strike down a law enacted in its own state without asserting that such a law would be void throughout the nation, the court must have a basis in its own state's constitution.

Id.

67. L. Kinvin Wroth, *The Constitution and the Common Law: The Original Intent About the Original Intent*, 22 SUFFOLK U. L. REV. 553, 557 (1988).

contemporary issues and values never contemplated by the drafters. In other words, given that courts should be constrained to originalist arguments, the question becomes what "interpretive intent" the framers had toward evolving issues and values.[68] Or, how did the framers envision later decision-makers interpreting and applying the often abstract provisions in the constitution? The answer to this question lies in the process of reasoned elaboration, previously discussed, which forms the core of a judge's function.

Adherence to precedence, and reasoning by analogy allows the common law to evolve and thereby resolve new problems.[69] The abundant evidence of the evolving nature of the legal system in colonial times supports the conclusion that the framers must have "fully understood the open-ended and creative powers of the courts in developing and applying rules of law based on analysis of basic principles found in precedent."[70] From this conclusion, it is a short step to realize that incorporated in the Vermont constitution is an institution inherently capable of applying generalized principles to specific situations in ways that account for changing social and economic conditions. Therefore, the likely "interpretive intent" of the framers is for the judiciary to use reasoned elaboration when deciding constitutional as well as common law issues.[71] This method of deciding constitutional issues makes the constitution a living document that brings meaning to our present condition. It also brings to mind John Marshall's admonition, "In considering this question, then, we must never forget, that it is a Constitution we are expounding."[72]

Given that judicial independence is a cornerstone of Vermont's framework of government, and that the Supreme Court must necessarily ground their constitutional decisions on originalist turf, decisions like *Brigham* epitomize the proper function of a state supreme court. Therefore, decisions that require the Court to interpret the Vermont Constitution cannot be a legitimate reason for removing a justice from office.

C. Constitutional Standards Limiting Judicial Tenure

Even though members of the bench should not be removed from office on the basis of their judicial philosophy, the retention system in the Vermont

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68. *See id.* at 558. *See also* Brest *supra* note 63, at 215-217.

69. *See* Wroth, *supra* note 67, at 559-567 (describing the evolution of the early English legal system and the American colonial system in a demonstration of how the process of reasoned elaboration allowed each system to adapt to changing social conditions).

70. *Id.* at 567.

71. *See* Susana Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 810 (1998) (arguing that originalism is a necessary starting point, yet inadequate stopping point in any constitutional analysis).

72. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

Constitution may be an appropriate procedure for enforcing constitutional standards of judicial tenure. The Vermont constitution contains two explicit standards by which judges can be removed from office. Chapter II, § 58 provides: "Every officer of State, whether judicial or executive, shall be liable to be impeached by the House of Representatives, either when in office or after resignation or removal for mal-administration." By way of comparison, the U.S. Constitution provides that all civil officers may be impeached for treason, bribery, or other high crimes and misdemeanors.[73] The Senate can convict and remove a judge from office after impeachment.[74]

The other standard for removing a judge from office specifies the length of judicial tenure. Chapter II, § 36 states: "The justices of the Supreme Court and the judges of all subordinate courts shall hold office during good behavior for the terms for which they are appointed."[75] The phrase "hold office" implies that if a judge behaved "badly", removal from office would be appropriate. The U.S. and Pennsylvania constitutions also have provided tenure during good behavior.[76] Interpreting the meaning of "good behavior" raises the precise type of interpretive question as that considered in the previous section: what did the framers intend by the use of the phrase. The phrase was common and readily understood in the 18th century, but is impenetrable today given changes in social norms and language.[77] In an attempt to decipher the framer's original intent, I will discuss pieces of evidence that reflect possible meanings.

No clear definition of "good behavior" exists.[78] Although, one commentator notes that "[t]he Framers considered judicial independence to be of paramount importance to the success of the new government. By investing federal judges with tenure during 'good behavior,' they sought to insulate the judicial branch from the political pressures of the other branches."[79] As described by Alexander Hamilton, the standard of good behavior greatly improved the administration of justice:

> The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the

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73. *See* U.S. CONST. art. II, § 4.

74. *See* VT. CONST. ch. II, § 58.

75. VT. CONST. ch. II, § 36.

76. See U.S. CONST. art. III, § 1. The Pennsylvania Constitution of 1776, § 23 provided a seven year term to the judges of the Supreme Court with eligibility for reappointment. In addition, this section provided for removal for misbehavior at any time by the General Assembly. The Pennsylvania Constitution of 1790, Art. 5, § 2 gave judges of the Supreme Court tenure during good behavior, yet also provided for removal for any reasonable cause not constituting ground for impeachment.

77. *See* Sherry, *supra* note 71, at 797-798.

78. *See* Simon, *supra* note 23, at 1653.

79. *Id.*

> modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.[80]

The intent of incorporating "good behavior" into the constitution is clearly to bolster judicial independence.[81] However, this intent does not help determine when a judge has behaved badly, and thus should be removed from the bench. At the federal level, some clues come from ratification debates and legislative histories of acts regulating the judiciary. For example, during the debate over the repeal of the 1801 Circuit Courts Act, Senator John Ewing Colhoun of South Carolina explicitly stated that good behavior is "to act with justice, integrity, ability and honor, and to administer justice speedily and impartially . . ."[82]

More persuasive evidence of the meaning of good behavior comes from debates during the Constitutional Convention itself. In arguing against a proposal to make Article III judges removable by the Executive upon application by the House and Senate, Governor Morris of Pennsylvania said that he "'thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial.'"[83] This statement supports the view that the standard protects a judge for nearly all behaviors short of criminal activity. Therefore, these pieces of evidence indicate that the term "good behavior" implies a level of security that strictly circumscribes legislative discretion over the removal of judges from office.[84]

Specific examples of conduct leading to impeachment also help to establish the meaning of good behavior. Out of fifty-eight documented cases of impeachment of Article III judges, most have arisen out of egregious misbehavior.[85] Fourteen of these impeachments resulted in trials before the Senate, seven of which led to convictions and removal from office.[86] The list of impeached behavior includes drunkenness and senility, incitement to revolt and rebellion against the Nation, bribery, kickbacks and tax evasion,

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80. *See* THE FEDERALIST No. 65, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81. *See* Sherry, *supra* note 71, at 795-802 (using textualist and originalist interpretations to demonstrate the framer's intent).

82. *Id.* at 803.

83. *See id.* at 802 (citing JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 536 (1966)).

84. *See* Sherry, *supra* note 71, at 799.

85. *See* Edward D. Re, *Article III Federal Judges*, 14 ST. JOHN'S J. LEGAL COMMENT. 79, 89 (1999); Edwards, *supra* note 24, at 774-775 & n.46.

86. *See* Re, *supra* note 85, at 89.

conspiracy to solicit bribes, false statements to a grand jury, favoritism in appointments of receivers, and mistreatment of counsel.[87] None of these impeachments stem from a judge's political views or judicial philosophy, which means that judicial independence when deciding cases is very high.

The impeachment of U.S. Supreme Court Justice Samuel P. Chase explains why politicians no longer attempt to use the system for political ends. The charges against Justice Chase accused him of partisan conduct on the bench: "[Justice Chase] did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz."[88] Behind this charge were four separate incidents, all with political undertones. First, Chase delayed the Supreme Court's August 1800 term while he campaigned for the reelection of Federalist John Adams.[89] Second, two trials over which Chase presided resulted in convictions under statutes passed by the Federalists.[90] Finally, in a charge to a grand jury, Chase accused the Republicans of leading the country toward a "mobocracy, the worst of all possible governments."[91]

President Jefferson initiated the impeachment against Justice Chase, however the effort failed. The Senate acquitted him in 1805. While a majority of the Senate voted Justice Chase guilty on two out of eight articles of impeachment, the Constitution required a two-thirds majority to convict.[92] After the trial, John Quincy Adams observed the partisan nature of the process, and the importance of the safeguards built into the impeachment process:

> [T]his was a party prosecution, and is issued in the unexpected and total disappointment of those by whom it was brought forward. It has exhibited the Senate of the United States fulfilling the most important purpose of its institution, by putting a check upon the impetuous violence of the House of Representatives. It has proved that a sense of justice is yet strong enough to overpower the furies of factions; but it has, at the same time, shown the wisdom and necessity of that provision in the Constitution which requires the concurrence of two-thirds for conviction upon impeachments. The attack upon Mr. Chase was a systematic attempt upon the independence and powers of the Judicial Department, and at the

87. *See id.* at 89; Edwards, *supra* note 24, at 774 n.47.

88. *See* WILLIAM REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 59 (1992); Re, *supra* note 85, at 90.

89. *See* REHNQUIST, *supra* note 88, at 53.

90. *See id.*

91. *See* Sherry, *supra* note 71, at 804.

92. *See* REHNQUIST, *supra* note 88, at 104-105.

> same time an attempt to prostrate the authority of the National Government before those of the individual States.[93]

If the attack were successful, at least some Republicans in Congress, and perhaps President Jefferson himself, viewed it as the first removal of many from the Supreme Court.[94]

As a result of the failed removal of Justice Chase, federal judges cannot be removed for political reasons, but only for the "gravest cause."[95] Justice Chase is the only example of a federal judge ever being impeached on the basis of judicial philosophy or opinions.[96] Since his acquittal, the tension between the judiciary and other branches of government has not ceased. However, when the judiciary has come under political attack, the executive and legislative branches have not resorted to the impeachment process as a means of imposing their will.[97] Thus, constitutional practice for nearly two hundred years has not allowed impeachment on political grounds.[98]

The examples of impeached behavior could set the standard for enforcing "good behavior." However, interpreting good behavior as the converse of impeachable conduct poses difficulties. The difficulties stem from the different standards used to describe impeachment and tenure. At the federal level, judges may be removed from office after impeachment and conviction for "treason, bribery, or other high crimes and misdemeanors."[99] In Vermont, the impeachment standard appears less stringent. The House of Representatives can impeach "[e]very officer of State, whether judicial or executive . . . for mal-administration."[100] The different language used to describe judicial tenure ("good behavior") and the standard for impeachment

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93. *Id.* at 107 (quoting I JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, 370-371 (1874)).

94. *See id.* at 53-57.

95. *See* Edwards, *supra* note 24, at 777.

96. *See* Sherry, *supra* note 71, at 806.

97. *See* REHNQUIST, *supra* note 88, at 125-134. Rehnquist notes that President Jefferson himself acknowledged after the acquittal of Justice Chase that impeachment was a "scarecrow" that would not be used again. Rehnquist also observes that Congress repealed the Supreme Court's jurisdiction over habeas corpus cases in 1868, rather than resorting to impeachment, in their successful effort to prevent the Court from hearing the case of William H. McCardle. The case would have given the Court an opportunity to invalidate parts of the Reconstruction Acts of 1866. The next moment where impeachment may have played a role came during Roosevelt's presidency. After the Court invalidated much of the New Deal legislation promulgated by Roosevelt, the President proposed his "court-packing" plan rather than resorting to impeachment. *See also* Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 990 (1996).

98. *See* Sherry, *supra* note 71, at 806 (arguing that if constitutional "misinterpretation" was legitimate grounds for impeachment, John Marshall would have been impeached for *Marbury*, and Roger Tanney would have been impeached for *Dred Scott*).

99. *See* U.S. CONST. art. II, § 4.

100. *See* VT. CONST., ch. II, § 58.

("mal-administration") raises the question of whether a gap exists between the two terms.[101] Is there "not good" behavior that does not rise to the level of mal-administration? And if so, can the judicial retention system address "not good" behavior that does not rise to an impeachable level.[102] A consideration of Vermont's history helps answer both questions.

II. CONSTITUTIONAL AND LEGISLATIVE HISTORY OF JUDICIAL APPOINTMENT AND TENURE IN VERMONT

Vermont derived much of its original constitution from the one first used by Pennsylvania.[103] A comparison of the two state constitutions and the U.S. Constitution reveals a spectrum between judicial independence and accountability.[104] Factors along this scale that influence independence include: (1) length of term of office, (2) the method used to fill an office, and (3) a salary provision. Judicial independence is increased by lifetime appointments with fixed salaries. Judicial accountability is increased by short terms of office filled by popular election with no salary security.

Table 1 shows the provisions of each constitution according to a relative position along the spectrum. The U.S. Constitution provides the most independence, while the Vermont Constitution provides the most accountability. Despite textual similarities between the original constitutions of Vermont, Pennsylvania and the United States, the unique history of

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101. *See* Edwards, *supra* note 8, at 780-83. Edwards argues that such a hiatus exists at the federal level between "good behavior" and "high crimes and misdemeanors". He proposes the appropriate method of regulating judicial misconduct that falls in the gap is judicial self-regulation. This solution respects the fact that no constitutional provision indicates that Congress should have any role in managing the judiciary beyond the impeachment clause, and would thus preserve judicial independence. *See id.*

102. The only case of a judge being removed from office through Vermont's judicial retention system does not provide much guidance in defining "good behavior" or "mal-administration". In 1993, the legislature removed Superior Court Judge Arthur A. O'Dea from office shortly after the Vermont Supreme Court publicly reprimanded him and suspended him from presiding in family court for two years. The Court ruled that O'Dea had violated Canon 3A(3) of the Judicial Code of Conduct by addressing attorneys and litigants "in an extremely impatient and discourteous manner." *In re Arthur J. O'Dea*, 4 VT. L. WK. 19, 19 (1992). The Court went on to note that "such conduct on the part of a judge is particularly egregious because it undermines respect for the law in a most insidious manner." *Id.* at 23. This language supports an argument that O'Dea's conduct was tantamount to "mal-administration." However, he was removed from office by means of the retention system. Yet, this may have been merely a matter of timing. He was subject to retention three months after the Court's decision, thus the incident was fresh in the mind of the legislature. An argument against the possibility that he could have been impeached comes from the fact that he was removed from office by a vote of 87 to 86. *See* JOURNAL OF THE SENATE OF THE STATE OF VERMONT, 974, 1993. The more cumbersome process of impeachment requires a two-thirds senate majority for conviction and removal. *See* VT. CONST. ch. II, § 58.

103. *See* Paul Gillies, *Not Quite a State of Nature: Derivations of Early Vermont Law*, 23 VT. L. REV. 99, 99 (1998).

104. Many thanks to Professor Peter Teachout for his insights into the comparisons in this section.

Vermont reflects a specific role for the judiciary separate and distinct from the roles envisioned in other states and for the federal courts.[105]

Sections 20 and 23 of the 1776 Pennsylvania Constitution provided that:

> The president, and in his absence the vice-president, with the council, five of whom shall be a quorum, shall have power to appoint and commissionate judges. . .
> The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehavior at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council, or general assembly, nor to hold any other office civil or military, nor to take or receive fees or perquisites of any kind.[106]

The provisions of the Pennsylvania Constitution mix elements of independence and accountability. Appointment by the president and council prevents the political pressures created in a general election. Yet, seven year terms raise the specter of removal by the appointing officials, potentially increasing a judge's accountability to their political preferences. A fixed salary prevents manipulation of judicial behavior through the use of financial incentive or disincentive.

Table 1

	INDEPENDENCE ← SCALE OF JUDICIAL INDEPENDENCE → ACCOUNTABILITY		
	U.S. Constitution	1776 Pennsylvania Constitution	1777 Vermont Constitution
Appointing/ Electing Body	Executive nomination; appointment "with Advice and Consent" of Senate [Art. II, § 2]	Appointed by Governor and Council [Ch. II, § 20]	No specific provision in Constitution. Default appointment by Governor and Council [Ch. II, §XVIII]

105. *See* Peters, *supra* note 51, at 1553.

106. PA. CONST. OF 1776, in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3087-88 (Francis Newton Thorpe, Ph.D., LL.D., ed. 1909).

	U.S. Constitution	1776 Pennsylvania Constitution	1777 Vermont Constitution
Terms	Life-time tenure "during good behavior" [Art. III, § 1]	Seven-year terms during good behavior with possibility of reappointment [Ch. II, §23]	No specific provision in Constitution.
Salary Security	"Compensation ... shall not be diminished" [Art. III, §1]	"Fixed Salaries" [Ch. II, §23]	"Paid adequate, but moderate compensation" [Ch. II, §XXIII]
Impeachment	Can be impeached and removed for "treason, bribery, or other high crimes and misdemeanors" [Art. II, §4]	Can be impeached and removed for "mal-administration" [Ch. II, §22]	Can be impeached and removed for "mal-administration" [Ch. II, §XX]
Other			Justice shall "be impartially administered" [Ch. II, §XXIII]

As Table 1 shows, Vermont's 1777 constitution made no explicit provision for the creation of a superior court (what is now referred to as the supreme court), leaving the appointment of judges to the Governor under Section XVIII.[107] However, on October 20, 1779, the General Assembly of the state passed *An Act Directing and Regulating the Choice of Judges of the Superior Court*:

> Whereas no particular directions are given in the constitution for regulating the choice of judges of the superior court; in consequence of which it is necessary that some proper mode be provided by the general assembly. Therefore,
>
> Be it enacted, and it is hereby enacted by the representatives of the freemen of the state of Vermont in general assembly met, and by the authority of the same, that in future the judges of the superior court shall be chosen in October annually, by

107. *See* 12 LAWS OF VERMONT - STATE PAPERS OF VERMONT 15 (Allen Soule, ed. 19).

> the governor, council, and house of representatives by their joint ballot.[108]

In contrast to the Pennsylvania Constitution, Vermont provided one-year tenures without any provision for salary. This subjected judges to the political climate of the state legislature, thereby circumscribing judicial independence.

The United States Constitution provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[109]

Lifetime tenure during good behavior with a guaranteed salary provides the most independence of the three constitutions. Under the federal system, judges can only be removed from the bench through impeachment. Thus, the federal system leaves judges substantially free from the influences of contemporary political opinion. In comparison to the federal and Pennsylvania constitutions, Vermont began with the highest level of accountability for the judiciary.

From this point on, Vermont's unique history and character has tailored the role of the judiciary. In 1782, Vermont's General Assembly passed a more comprehensive act delineating the structure of the court system in the state. The act, entitled *An Act Defining and Limiting the Powers of the Several Courts Within this State*, dealt with Justices of the Peace, County Courts, and the Supreme Court of Judicature.[110] While this Act did not change the method or frequency of selecting judges of the supreme court, it did specify the size of the Court. "[O]ne Chief-Judge, and four other Judges; . . . any three of whom to be a Quorum . . ." comprised the entire Court.[111] The Act still made no provision for salary.

The State adopted a revised constitution on July 4, 1786, which made explicit provisions for the election of judges.[112] Chapter II, Section IX, specified that the representatives of the General Assembly, "in conjunction with the council, annually (or oftener if need be) elect judges of the supreme and several county and probate courts, sheriffs and justices of the peace."[113]

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108. *See id.* at 178.
109. U.S. CONST. art. III § 9.
110. *See* 13 STATE PAPERS OF VERMONT 1781-1784, 102-107 (John A. Williams ed., 1969).
111. *Id.* at 105.
112. *See* 14 STATE PAPERS OF VERMONT 1785-1791, 130 (John A. Williams ed., 1969).
113. *Id.*

A new section was also added to this constitution that provided for separation of powers between the judicial, legislative and executive branches.[114] This section, however, was not intended as a check on the judiciary, but rather on the legislature.[115] The section operated in tandem with the Council of Censors, provided for in the 1777 Constitution, which met every ten years to review the constitutionality of legislature's activities to ensure they did not exceed the scope of their power.[116] At this point in history, a provision for the separation of powers was a benchmark by which all constitutions could be evaluated.

The next significant development occurred in 1787. The General Assembly passed *An Act Defining the Powers of the Supreme and County Court Within this State* on March 8.[117] This act modified the size and composition of the county and supreme courts as specified in the act of 1782. The 1787 Act set the size of county courts at "one chief Judge and two side Judges, any two of whom shall be a quorum," and set the supreme court at "one chief Judge, and two side Judges, . . . any two of whom shall be a quorum."[118] The Act kept the term of judges at one year, and once again made no provision for salary.

The change in court composition effected by the 1787 Act illuminates the intended role of the judiciary. Side judges, an institution unique to Vermont, can be lay people that assist a legally trained judge in deciding cases. That the Act specifically made a quorum of the supreme court potentially consist of two side judges indicates a willingness in the General Assembly to forego legal rules. Vermonters may have had a similar view of the legal profession as New Hampshire's Justice Dudley displayed in his jury instruction of the late 1700's: "It is our business to do justice between the parties, not by any quirks of law out of Coke or Blackstone, books that I never read, and never will, but by common sense and honesty as between man and man."[119] Courts during this era were more inclined to pay deference to

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114. *Id.* at 129. Ch. II, sec. VI reads, "[t]he legislative, executive and judiciary departments, shall be separate [sic] and distinct, so that neither exercise the powers properly belonging to the other." *Id.*

115. See discussion in Section I.

116. Interview with Peter Teachout, Professor of Constitutional Law, Vermont Law School, in South Royalton, Vt. (Oct. 7, 1998) (on file with author).

117. *See* 14 STATE PAPERS, *supra* note 112, at 213.

118. *Id.* at 213-214.

119. *See* Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary's Battle for Independence in New Hampshire, 1786-1818*, 39 AM. J. LEGAL HIST. 310, 313 (1995).

principles of equity than the letter of the law,[120] decisions laypersons could reach as competently as judges.

The system established by the 1787 Act apparently functioned well. The General Assembly passed a similar act on October 29, 1791 that maintained the same system in regards to court composition, quorums and length of tenure for both the county and supreme courts.[121] Additionally, the State ratified a new constitution in 1793 that did not make any significant changes to the 1786 Constitution, or the subsequent acts, concerning the selection of judges.[122]

Since 1793, only two ratifications dealing with judicial tenure have passed. In 1870, Article of Amendment XXVI was added to the constitution.[123] The first version of this amendment that did not pass proposed a tenure system similar to the current framework. The amendment suggested that supreme court justices be appointed by the Governor with the advice and consent of the Senate, for a term of six years.[124] The General Assembly defeated this proposal as "inexpedient" by a vote of 233 to 2.[125] The amendment ratified in its place only extended the term of office of supreme court judges to two years.

Although defeated, the proposed amendment concerning six year terms indicates a trend in Vermont's attitude toward judicial independence. As this discussion demonstrates, Vermont has consistently provided more independence to the judiciary. At first, the judiciary was statutorily created, it then received constitutional authority in 1786, which was followed by the constitutional extension of supreme court terms in 1870. Combined with the fact that six-year terms were proposed, this history indicates that people perceived the current level of independence to be inadequate.

The trend toward increasing judicial independence is also corroborated by the next major change in the judicial system. *The Judicial Selection Act*, passed in 1966, created a judicial selection board responsible for recommending superior and district court judges for appointment by the Governor.[126] The significance of this change is dramatic. Nomination by a small body of individuals indicates an intention to put judicially qualified people on the bench. Appointment by the Governor from a small pool of nominated individuals, as opposed to legislative election, indicates an

120. *See id.* at 313.
121. *See* 15 STATE PAPERS OF VERMONT 14-19 (John A. Williams, ed. 19).
122. *See id.* at 167.
123. *See* GENERAL STATUTES OF VERMONT 1862: APPENDIX 1870, 32b (1873).
124. *See* 4 WALTER H. CROCKETT, HISTORY OF VERMONT 40 (1921).
125. *See id.*
126. *See* 1967 Vt. Acts & Resolves, 635-39.

intention to insulate judges from the prevailing political climate of the General Assembly. The Act also provided for six year terms with retention elections by the General Assembly. The features of the Act demonstrate that Vermont wanted to increase judicial independence.

In addition, a significant provision of the Act required that "judges shall not make any contribution to or hold any office in a political party or organization or take part in any political campaign."[127] Limiting a judge's political activity demonstrates a commitment to impartially administered justice, which by inference implies that the selection process should also be bipartisan.

The second constitutional change since 1793 further corroborates a move toward judicial independence. The 1974 amendments addressed the selection and tenure of justices of the peace, assistant and probate judges, as well as judges and justices of the superior and supreme courts.[128] These amendments form the foundation for the current retention system in Vermont. The amendments to Chapter II, Section 28 state:

> §28a. The supreme court
> The Supreme Court shall consist of the Chief Justice of the State and four associate justices of the Supreme Court. . . .
> §28c. Appointment of judges, qualifications, tenure, retirement, removal
> The Governor, with the advice and consent of the Senate, shall fill a vacancy in the office of chief justice of the State, associate justice of the Supreme Court or judge of any other court . . . from a list of nominees presented to him by a judicial nominating body established by the General Assembly having authority to apply reasonable standards of selection. . . .
> The justices of the Supreme Court and judges of all subordinate courts . . . shall hold office for terms of six years . . . At the end of the initial six year term and at the end of each six year term thereafter, such justice or judge may give notice in the manner provided by law of his desire to continue in office. When such justice or judge gives the required notice, the question of his continuance in office shall be submitted to the General Assembly and he shall continue in office for another term of six years unless a majority of the members of the General Assembly voting on the question vote against his continuing in office. . . .

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127. *Id.* at 638.
128. *See* 1973 & 1974 Vt. Acts & Resolves, 642-46.

> The justices of the Supreme Court and the judges of all subordinate courts shall hold office during good behavior for the terms for which they are appointed.[129]

This language became incorporated into the state's constitution in Chapter II, §§29, 32, 34, and 36. A constitutional provision for six-year terms with retention by the General Assembly supports the increasing importance of judicial independence in the state.

These amendments mark the first time members of the Vermont bench were constitutionally granted tenure during good behavior. However, the text does not provide any insight over the type of acts covered by the standard. Therefore, we are left with the same inference under Vermont's constitution as under the Federal constitution: that different standards for tenure and impeachment imply a gap of "not good" behavior that is not subject to a disciplinary procedure.

III. HOW THE CURRENT SYSTEM FUNCTIONS

Under the statutes promulgated pursuant to the constitutional amendments, justices and judges are appointed by the governor from a list of recommended candidates generated by a Judicial Nominating Board.[130] The Judicial Nominating Board consists of eleven members; two appointed by the governor who are not attorneys; three elected by the Senate, not all from the same party, and no more than one attorney; three elected by the House of Representatives under the same restrictions as the Senate; and three attorneys elected by members of the state bar.[131] Any eight members of the Board form a quorum.[132]

The Judicial Nominating Board is responsible for submitting a list of qualified candidates for judicial vacancies to the governor based on their assessment of an attorney's qualifications.[133] In determining whether a candidate is qualified, the Board must consider "such factors as integrity, legal knowledge and ability, judicial temperament, impartiality, health, experience, diligence, administrative and communicative skills, social consciousness and

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129. *Id.* at 644-46.

130. *See* VT. STAT. ANN. tit. 4, §601 (1997). Ensuring that qualified judges remain on the bench for long tenures requires that an effective retention system incorporate some kind of judicial nominating body that has the expertise to select judicial candidates based on capability. *See* CARBON, *supra* note 25, at 6.

131. *See* VT. STAT. ANN. tit. 4, §601(b)(1-4) (1997).

132. *See* VT. STAT. ANN. tit. 4, §601(e) (1997).

133. *See* VT. STAT. ANN. tit. 4, §602(b) (1997).

public service."[134] The list of qualifications provides insight into the nature of the process. None of the qualifications concern a candidate's political preference. In fact, impartiality is specifically mentioned. Just as the *Judicial Selection Act* of 1966 implied through its limitation of a judge's political activity, these qualities indicate the bipartisan nature of the process.

Once appointed, each judge and justice must undergo retention every six years.[135] To begin this process, the Joint Committee on Judicial Retention is appointed during the first seven days of each biennial session of the General Assembly.[136] The Committee is responsible for reviewing a judge's performance during the previous term and making a recommendation to the General Assembly on whether or not to retain a judge.[137] The Committee is composed of four members of the House appointed by the Speaker of the House in his or her sole discretion and four members of the Senate appointed by the Senate Committee on Committees in its sole discretion.[138]

A judge seeking retention must file a "declaration of retention" with the Secretary of State on or before September 1 of the year preceding the last year of a term.[139] The declaration provides a convenient method for the judge to articulate their accomplishments over the last six years, as well as an opportunity for the Joint Judicial Retention Committee to gain insights into

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134. VT. STAT. ANN. tit. 4, §601(d) (1997). Selection of candidates based on professional qualifications implies that once a judge is appointed, a retention system does not function in the same manner as popular elections for legislative or executive positions. While a higher level of public accountability is provided as compared to a life-tenure system, professional qualifications play a larger part in retention than do political preferences. Retention systems are meant to keep qualified judges in office unless "extreme circumstances" arise. *See* CARBON, *supra* note 25, at 40. "Extreme circumstances" were never explicitly defined by the creators of retention elections, though most likely include old age, poor health, involvement in partisan politics, lack of judicial competence, inappropriate judicial conduct or temperament, and criminal activity. *See id.*

135. Judicial retention elections were originally devised by Roscoe Pound, John H. Wigmore, and Albert Kales in 1914. *See* CARBON, *supra* note 25, at 2. At that time, the Progressive movement emphasized enhancing the power of the people in government. The first complete proposal for a judicial retention system, developed by Kales, contained four elements: (1) a list of nominations for judicial vacancies generated by a commission of judges, (2) the selection of an individual from the list by the state's chief justice with popular retention elections during the judge's tenure, (3) a requirement that every second appointee be selected from the list, and (4) a requirement that all appointees participate in retention elections or have their office declared vacant. *See* Webster, *supra* note 22, at 29 n.190. Kales aimed to create a system that fostered the selection and retention of skilled judges while recognizing the public desire, reflected in the Progressive movement, to have some control over the judiciary. *See* CARBON, *supra* note 25, at 2.

136. *See* VT. STAT. ANN. tit. 4, §607(a) (1997).

137. *See* VT. STAT. ANN. tit. 4, §608(b) (1997).

138. *See* VT. STAT. ANN. tit. 4, §607(a) (1997); Thomas A. Little, Esq. Representative, Chittenden District 5-4, *Summary of Judicial Retention Process*, Sept. 28, 1998, memorandum on file with author.

139. *See* VT. STAT. ANN. tit. 4, §§4,71(b),604(a) for the provisions dealing with Justices, superior court judges and district judges respectively. *See also* Little, *supra* note 138, at 3.

the individual's temperament.[140] Upon receipt of the declaration, the Legislative Council assumes responsibility for collecting information about a judge's performance.[141]

Questionnaires are sent to the judge seeking retention, and attorneys, assistant judges, guardians ad litem, probation officers, victims' advocates, domestic violence advocates, court clerks, court reporters and recorders who appeared before, or worked with, the judge during the period of review.[142] The questionnaires sent to attorneys and nonlawyers are organized into five sections: (1) overall judicial performance, (2) integrity and impartiality, (3) judicial temperament, (4) judicial management, and (5) legal ability and preparation.[143] The individual questions are phrased such that all answers fit on a scale from "always" to "never" with an option for "cannot rate."[144]

The Committee begins the evaluation process with an initial interview with each judge up for retention.[145] A judge receives survey results and unsigned comments in order to review them prior to the interview.[146] The interviews provide an opportunity for judges to expand on statements made in their declaration of retention and gives committee members an opportunity to ask about any goals for their next term.[147] A judge is entitled to have counsel present at the interview, and to present oral or written testimony as well as witnesses to testify on her behalf.[148] The initial interviews are public meetings, however the Committee is empowered under the Senate Rules to enter executive session for deliberation and voting.[149]

After the initial interview, a public hearing is scheduled for each judge.[150] The hearing is an opportunity for members of the public to present criticism or praise of specific judges. Each judge may attend his or her hearing, but may not speak or be questioned by others in attendance.[151] Most often witness testimony focuses on a particular decision made by the judge.[152] The survey results are made available to the public at the hearing.[153] A

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140. *See* Little, *supra* note 138, at 1.
141. *See id.* at 2.
142. *See id.*
143. *See* Legislative Council, *Judicial Performance Evaluation*, on file with author.
144. *See id.*
145. *See id.* at 3.
146. *See* VT. STAT. ANN. tit. 4, §608(d) (1997).
147. *See* Little, *supra* note 138, at 3.
148. *See* VT. STAT. ANN. tit. 4, §608(d) (1997).
149. *See* Little, *supra* note 138, at 3.
150. *See id.* at 4.
151. *See id.*
152. *See id.* at 5.
153. *See id.* at 4.

follow-up meeting of the Committee occurs after the public hearing where the judge is given an opportunity to respond to witness' comments.[154] At the end of the follow-up meeting, the Committee schedules a time to deliberate and vote on their recommendation of retention to the General Assembly.[155]

Deliberation occurs in an open discussion format given specific criteria for evaluation in 4 V.S.A. §608(b): "In conducting its review the Retention Committee shall evaluate judicial performance, including but not limited to such factors as integrity, judicial temperament, impartiality, health, diligence, legal knowledge and ability and administrative and communicative skills." These factors are substantially similar to the criteria considered by the Judicial Nominating Board. The Committee may also consider criteria contained in the Code of Judicial Conduct and the American Bar Association guidelines for selecting judges.[156] The Committee uses the survey results, testimony from the public hearing, and the judge's own written and oral comments in arriving at a recommendation.[157]

The statutory categories of evaluation again indicate the bipartisan nature of the process. As with the characteristics considered by the nominating commission, these criteria concern a judge's legal ability. They do not assess a judge's political preferences, and by implication indicate that a judge should not be removed for partisan reasons. This indicates that removal from office based on the substance of a decision is not within the intended uses of the system. However, neither do the criteria refer to criminal acts, nor other types of egregious behaviors that have been the subjects of impeachment at the federal level. Thus, the retention system does not attempt to regulate impeachable behaviors.

After the Committee arrives at a recommendation by majority vote, one member assumes the responsibility for preparing a report given to the Joint Assembly of the General Assembly.[158] A common practice not required by statute or rule is for the individual reports to be summarized at party caucuses shortly before the Joint Assembly meets.[159] The Joint Assembly functions under the Joint Rules of Senate and House of Representatives.

The Joint Assembly provides an opportunity for open debate and discussion on specific judges. Debate occurs after the Committee member delivers the retention report and recommendation. Voting then occurs by

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154. *See id.* at 5.
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.* at 6; VT. STAT. ANN. tit. 4, §608(e).
159. *See* Little, *supra* note 138, at 6.

secret ballot.[160] The results for each judge are tabulated immediately and announced to the Joint Assembly.[161] The results are also printed in the Journal of the Joint Assembly approximately two to three days after the voting.[162] If a judge is not retained, her position is declared vacant at the end of her term, and the Governor is responsible for appointing a replacement.[163]

IV. DOES GOOD BEHAVIOR MERIT RETENTION?

Two conclusions are manifest in the legislative history of Vermont's judiciary and the structure of the retention system. First, there is an historical trend toward increasing judicial independence in Vermont. This trend is marked by the adoption of a constitutional provision mandating a separation of powers, the increasing length of judicial tenures, the creation of the Judicial Nominating Board, and the constitutional provision of tenure during good behavior. Second, there is also a strong tradition of judicial accountability. Beginning with Vermont's first statute providing one-year tenures to judges, the state has provided more judicial accountability than similar states. Legislative elections and short terms of office both demonstrate judicial accountability, albeit to a lesser degree than states that fill judicial vacancies by popular elections.

The legislative interpretation of the constitutional provisions for retention elections manifests both judicial independence and accountability. The fundamental purpose of retention elections is to enhance accountability. Yet, the Retention Committee's criteria for evaluation imply that the system should function to evaluate a judge's professional qualifications, as opposed to judicial philosophy. The criteria also do not specify the type of egregious wrongdoing that would be a basis for impeachment. Therefore, the retention

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160. *See id.* at 7. Most states with retention systems similar to Vermont's use popular elections, as opposed to legislative elections. *See* Francis C. Cady, *Court Modernization: Retrospective, Prospective and Perspective*, 6 SUFFOLK U. L. REV. 815, 817-818 (1972). Connecticut and Virginia are the only other states to use legislative elections. *See generally*, SARI S. ESCOVITS ET AL., JUDICIAL SELECTION AND TENURE (1975) (cataloging the form of judicial selection and retention in each state). Another approach, used in Hawaii and the District of Columbia, delegates the retention decision to a commission. *See* Webster, *supra* note 22 at 34. From a theoretical standpoint, longer terms between elections and smaller, more specialized bodies making retention decisions supposedly increase judicial independence and decrease public accountability. *See* CARBON, *supra* note 25, at 13. Smaller decision making bodies with expertise over judges' qualifications would minimize the political nature of the process by increasing the likelihood that retention decisions would be made based on qualifications rather than political considerations.

161. *See id.*

162. *See id.*

163. *See* VT. STAT. ANN. tit. 4, §§ 4(c), 71(b), 604(a) for the procedure of filling vacancies created by nonretention for Justices, superior judges and district judges respectively.

system is an inherently appropriate mechanism that allows the Legislature to remove judges for acts that do not meet the "good behavior" standard.

However, as the attacks generated by the *Brigham* decision demonstrate, the system is susceptible to abuse. Several features make politically motivated attacks possible and potentially successful. First, once the Retention Committee makes its recommendation to the Joint Assembly, voting occurs by secret ballot. Secret ballots make legislators unaccountable for the votes they cast. Second, the system does not specify any criteria that each legislator must take into account when the final voting occurs. Therefore, the potential exists that a legislator could vote to remove a judge from office based on differences in judicial philosophy or political view without any means for constituents to hold that legislator accountable.

Open ballots are the logical alternative. However, this option may create a difficult situation for legislators whose constituents would like to see a judge removed from office solely for political reasons. An open ballot would mean that if a legislator respects the proper function of the system and votes to keep the judge in office, her constituents might decide to remove her from office. The converse is also possible where a legislator, whose constituents would like to keep a judge in office, votes for removal solely for political reasons. Therefore, open ballots alone would not be an effective solution to eliminating the possibility of politically motivated attacks.

Adopting specific professional qualification criteria that the legislators must consider in casting their votes would help limit their accountability to their constituents when making retention decisions. In the event that a legislator votes contrary to the will of her constituents, she can point to the decision-making criteria in her defense. Therefore, criteria specifying professional qualifications combined with open ballots would enhance judicial independence while simultaneously preserving judicial accountability. A more radical alternative to eliminate the potential of political attacks would involve creating a Judicial Retention Board responsible for making retention decisions on the basis of professional qualifications.[164] This would effectively eliminate public opinion as a factor in the decision process, yet also substantially reduce the level of accountability.

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164. Both Hawaii and the District of Columbia use a Retention Commission. A smaller decision making body with more expertise enhances judicial independence while reducing accountability. See discussion *supra* note 160.

CONCLUSION

Vermont's history demonstrates a trend toward increasing judicial independence. However, a strong tradition of accountability remains in the current retention system. Despite this tradition, the history of judicial impeachment and the evolution of Vermont's constitutional and statutory provisions regulating the judiciary demonstrate that members of the bench should not be removed from office for political reasons. While the retention system can function to discipline judges for "not good" behavior, two weaknesses exist. Secret ballots in the Joint Assembly should be replaced with open ballots and specific criteria enumerating professional qualifications on which legislators should base their decisions. Until these changes are made, the potential for successful politically motivated attempts to remove judges from office remains. Should one of these attempts succeed, Vermont's constitutional structure and history would truly be damaged.

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