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State Ex Rel. Holmes v. Gainer: The Legislative Pay Raise and the Disappearing West Virginia Constitution

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**STATE EX REL. HOLMES v. GAINER:
THE LEGISLATIVE PAY RAISE AND THE
DISAPPEARING WEST VIRGINIA CONSTITUTION**

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I. INTRODUCTION

Few issues in recent state history have engendered the degree of controversy and distaste among state residents as the 1994 legislative pay raise. Soon after the passage of this legislation,¹ litigation was initiated to challenge the constitutionality of the procedures utilized in the introduction and eventual passage of the pay raise. A declaratory judgment action was brought by Donna J. Boley, a state Senator from Pleasant County, West Virginia, and Robert Pulliam, M.D., a member of the House of Delegates from Raleigh County, West Virginia, in the Circuit Court of Kanawha County.² The action alleged that the procedures employed by the legislature and the Citizens Legislative Compensation Commission³ in effecting the pay raise were unconstitutional under West Virginia Constitution Article VI, Section Thirty-three. Upon the filing of this suit, Glen B. Gainer III, Auditor of the State of West Virginia, informed the Clerk of the Senate and the Clerk of the House of Delegates that he would not honor any invoices presented to him for payment of legislative salaries or expenses under the authority of House Bill 4031 until a final judicial determination of the bill's constitutionality had been made.⁴ The Auditor's position prompted Darrell E. Holmes, Clerk of the Senate, and Donald L. Kopp, Clerk of

1. W. VA. CODE §§ 4-2A-1 to -10 (1994 & Supp. 1994), *as amended* by H.B. 4031 (1994).

2. A complaint was filed by Donna J. Boley and Robert Pulliam, M.D., plaintiffs, against Larrie Bailey, Treasurer of West Virginia, which sought a declaratory judgment to declare West Virginia Code Chapter 4, Article 2A, *as amended* by H.B. 4031 (1994), null and void and to enjoin the Treasurer from disbursing any monies pursuant to the amended statute. Complaint, State *ex rel.* Holmes v. Gainer, 447 S.E.2d 887 (W. Va. 1994) (No. 94/22226) [hereinafter Complaint].

3. The Citizens Legislative Compensation Commission is a seven-person entity created under a 1970 amendment to W. VA. CONST. art. VI, § 33; its purpose is to consider and recommend compensation and expense allowance modifications for and to the state legislature. See *infra* text accompanying notes 48-52.

4. Letter from Glen B. Gainer III, Auditor of the State of W. Va., to Darrell E. Holmes, Clerk of the West Virginia Senate, and Donald L. Kopp, Clerk of the W. Va. House of Delegates (Apr. 4, 1994) (on file with author) [hereinafter Gainer Letter].

the House of Delegates, to petition the Supreme Court of Appeals of West Virginia for a Writ of Mandamus compelling Auditor Gainer to perform his constitutional duty to issue warrants for payment of legislative salaries and expenses in accordance with House Bill 4031.⁵ The Clerks also asked that the Supreme Court issue a Writ of Prohibition prohibiting Judge Herman Canady of the Kanawha County Circuit Court from hearing the declaratory judgment action filed in that court.⁶

The Supreme Court of Appeals of West Virginia held by a 3-2 majority in *State ex rel. Holmes v. Gainer*⁷ that the Clerks should be granted the requested Writs of Mandamus and Prohibition. Justice Miller's majority opinion concluded that although West Virginia Constitution Article VI, Section Thirty-three allowed the Citizens Legislative Compensation Commission to meet as often as necessary, it prohibited the Commission from submitting resolutions on legislative compensation and expense allowances specifically in the 1994 legislative session.⁸ The opinion held that this Commission could submit resolutions for compensation only on a quadrennial basis calculated from the 1971 legislative session, thereby precluding submission of such a resolution in the 1994 legislative session.⁹ However, the majority, after reviewing principles for determining retroactivity of judicial opinions, held that the 1994 legislative compensation and expense allowances contained in House Bill 4031 were not invalid.¹⁰ This Comment examines the decision of the Supreme Court of Appeals of West Virginia in *State ex rel. Holmes v. Gainer*¹¹ and explores the possible consequences of what the court said in its opinion, as well as what the court failed to address.

5. See Memorandum of Law for Petitioners from Darrell E. Holmes, Clerk of the W. Va. Senate, and Donald L. Kopp, Clerk of the W. Va. House of Delegates, at 1-2, *State ex rel. Holmes v. Gainer*, 447 S.E.2d 887 (W. Va. 1994) (No. 94/22226) [hereinafter Petitioners' Memorandum].

6. *Id.* at 2.

7. 447 S.E.2d 887, 896 (W. Va. 1994).

8. *Id.* at 888, Syl. Pt. 3.

9. *Id.*

10. *Id.* at 889, Syl. Pt. 5.

11. 447 S.E.2d 887 (W. Va. 1994).

Part Two of this Comment provides the factual background and procedural posture of the case. This part will begin to lay a framework that suggests the court allowed discovery in this case in violation of the Speech or Debate Clauses of the Constitutions of both the State of West Virginia¹² and the United States.¹³ These violations of the federal and state Speech or Debate Clauses were not addressed by the court in the majority or dissenting opinions.

Part Three examines the background of three separate issues: (1) the state constitutional provision concerning the formation of the Citizens Legislative Compensation Commission to bring resolutions concerning legislative compensation and expense allowances;¹⁴ (2) a synopsis of general principles for determining retroactivity of judicial decisions in West Virginia; and (3) a background of the Speech or Debate Clause of the state and federal constitutions. Part Four explains the rationale of the majority and of the two very different dissenting views.¹⁵ Part Five concludes that the court's reasoning that the pay raise was passed unconstitutionally rests on solid ground, but the majority's analysis in failing to make this decision retroactive was flawed. Additionally, Part Five analyzes the distressing manner in which the court permitted discovery which violated the Speech or Debate Clauses of the state and federal constitutions as well as the doctrine of separation of powers inherent in the constitutional system. The possibility of judicial intrusion into the legislative sphere and future implications of such intrusion is also discussed. Accordingly, this Comment outlines what the Supreme Court of Appeals of West Virginia should have done differently in its decision of this case.

II. STATEMENT OF THE CASE

This case focuses on the constitutionality of the pay raise which was initiated by resolution of the Citizens Legislative Compensation

12. W. VA. CONST. art. VI, § 17.

13. U.S. CONST. art. I, § 6.

14. W. VA. CONST. art. VI, § 33.

15. Justice Miller delivered the opinion of the court, joined by Justice Workman and Justice McHugh. *Holmes*, 447 S.E.2d at 889. Chief Justice Brotherton and Justice Neely filed separate dissenting opinions. *Id.* at 896-901.

Commission and which was passed by the West Virginia Legislature.¹⁶ On March 3, 1994, the Commission convened and adopted a resolution containing its recommendations with respect to compensation and expense allowances.¹⁷ In this resolution, the Commission recommended that each member of the legislature receive compensation in the sum of twenty thousand dollars per year for service in either house of the legislature.¹⁸ Other recommendations were made concerning expenses incurred by, and additional services performed by, legislators.¹⁹ The resolution was signed by six of the seven members of the Commission.²⁰ During the legislative session at the time the resolution was submitted, the legislature incorporated a modified version of the resolution into House Bill 4031, which increased the yearly compensation for legislators to only fifteen thousand dollars per year and provided for various types of expense allowances.²¹ Additionally, this bill included pay increases for other state officials and all state judges.²² Governor Gaston Caperton signed House Bill 4031 into law on March 19, 1994.²³

Four days later, on March 23, 1994, Senator Donna J. Boley and Delegate Robert Pulliam, M.D., filed a declaratory judgment action in the Kanawha County Circuit Court seeking to have the pay raise law declared void because of its unconstitutionality; requesting a temporary injunction prohibiting Treasurer Larrie Bailey from making any disbursements pursuant to this legislation; and asking for a permanent injunction prohibiting any such payments in the future.²⁴ The suit was assigned to Judge Herman Canady. Upon being informed of the constitutional challenge of the pay raise, Glen B. Gainer III, State Auditor,

16. Citizens Legis. Compensation Comm. Res. (1994) (enacted).

17. *Id.* at 1.

18. *Id.*

19. *Id.* at 1-5.

20. *Id.* at 7-8. The members of the Commission who signed the resolution were James M. Brown, Chairman, Linda D. Fluharty, Janet L. Nabors, Milan Puskar, Neal W. Scaggs, and Anthony Yanero. Commission member Fred Haddad did not sign the resolution.

21. W. VA. CODE §§ 4-2A-1 to -10 (1994 & Supp. 1994), *as amended by* H.B. 4031 (1994).

22. *Id.*

23. Petitioners' Memorandum, *supra* note 5, at 2.

24. *See* Complaint, *supra* note 2.

informed Darrell E. Holmes, Clerk of the West Virginia Senate, and Donald L. Kopp, Clerk of the West Virginia House of Delegates, by letter dated April 4, 1994, that he would not honor payment for any legislative salaries or expenses pursuant to enacted House Bill 4031 until the bill's constitutionality had been judicially determined.²⁵

At this point, Holmes and Kopp, the Clerks of the respective houses of the legislature, petitioned the Supreme Court of Appeals of West Virginia²⁶ for a Writ of Mandamus compelling Auditor Gainer to honor legislative pay and expense vouchers pursuant to enacted House Bill 4031 and for a Writ of Prohibition to prohibit Judge Herman Canady from hearing the declaratory judgment action filed by Senator Boley and Delegate Pulliam.

On April 12, 1994, the Supreme Court of Appeals of West Virginia issued a Rule to Show Cause, requiring Auditor Gainer, the respondent, to show cause why the Writ of Mandamus should not be awarded by the court.²⁷ The court ordered on April 20, 1994, that Senator Boley and Delegate Pulliam be allowed to intervene in the action.²⁸ On April 22, 1994, Intervenors Boley and Pulliam filed a Supplemental Motion for Discovery in which they asked the Supreme Court of Appeals of West Virginia to allow them to depose nine individuals: Petitioners, Donald L. Kopp and Darrell Holmes; State Senators James Humphreys, William R. Sharp, and William R. Wooton; and four members of the Citizens Legislative Compensation Commission, James Brown, Anthony Yanero, Linda Fluharty, and Janet Nabors.²⁹ Additionally, the Intervenors asked the court's permission to issue a subpoena duces tecum to Governor Caperton's office requesting records of any meetings held between the governor and Senators Wooton and

25. Gainer Letter, *supra* note 4.

26. Petitioners' Memorandum, *supra* note 5, at 1.

27. Supplemental Memorandum of Law for Petitioners at 3, State *ex rel.* Holmes v. Gainer, 447 S.E.2d 887 (W. Va. 1994) (No. 94/22226) [hereinafter Supplemental Memorandum of Law].

28. *Id.*

29. *Id.* at 19.

Sharp between the dates of January 15, 1994, and March 3, 1994.³⁰ The court granted this motion on April 22, 1994.³¹

Relators Kopp and Holmes moved the court on April 26, 1994, to require the Intervenors to identify the genuine issues of material fact upon which they sought discovery. The Relators argued that the Intervenors' responsive pleading to the Petition for Writ of Mandamus admitted the material factual allegations set forth in the Petition and only denied the Relators' legal conclusions as to the constitutionality of enacted House Bill 4031.³² Thus, the Relators argued that discovery was not necessary and that such inquiry into legislative and committee functions in the passage of the bill in question was violative of the doctrine of separation of powers between governmental branches and of the Speech or Debate Clause³³ of the West Virginia Constitution.³⁴ The Supreme Court of Appeals of West Virginia rejected the Relators' arguments and denied this motion.³⁵ The Intervenors undertook discovery beginning on April 28, 1994.³⁶ Counsel for the Intervenors deposed seven of the nine designated individuals.³⁷

Thus, the Supreme Court of Appeals of West Virginia was faced with the determination of the constitutionality of enacted House Bill 4031. Within this central theme, three distinct sub-issues were present: (1) did the explicit language of the West Virginia Constitution invalidate the legislative pay raise provisions of enacted House Bill 4031;³⁸ (2) were communications between members of the legislature and members of the Citizens Legislative Compensation Commission improper, and if so, did this impropriety invalidate the legislative pay raise provisions of enacted House Bill 4031;³⁹ and (3) should the

30. *Id.*

31. *Id.*

32. Supplemental Memorandum of Law, *supra* note 27, at 19-20.

33. W. VA. CONST. art. VI, § 17.

34. Supplemental Memorandum of Law, *supra* note 27, at 20.

35. *Id.*

36. *Id.*

37. *Id.* Senator Sharp and Commission member Nabors were never deposed without explanation.

38. See Brief of the Intervenors at 10, State *ex rel.* Holmes v. Gainer, 447 S.E.2d 887 (W. Va. 1994) (No. 94/22226) [hereinafter Brief of the Intervenors].

39. *Id.*

court strike the discovery conducted by the Intervenors as violative of the Speech or Debate Clause of the West Virginia Constitution and as contrary to the doctrine of separation of powers between governmental branches?⁴⁰

III. BACKGROUND OF THE LAW

In assessing whether or not the passage of House Bill 4031 was constitutional, the *Holmes* court considered West Virginia Constitution Article Six, Section Thirty-three which had never been interpreted by the court. In doing so, however, the *Holmes* court virtually ignored the Speech or Debate Clause of the West Virginia Constitution⁴¹ by allowing the Intervenors to depose several legislators.

A. *The Constitutional Procedures for Enacting a Legislative Pay Raise*

The amendment to Article Six, Section Thirty-three of the West Virginia Constitution, creating the Citizens Legislative Compensation Commission (the Commission), was proposed by House Joint Resolution Number Eight in 1970 and submitted to the voters in the November general election of that same year.⁴² The voters of the state approved this constitutional amendment on November 8, 1970.⁴³ This new provision created a seven-member commission for the express purpose of considering and recommending compensation and expense allowance modifications to the state legislature.⁴⁴ This amendment was designated the "Legislative Improvement Amendment," and provides, in pertinent part, that:

Members of the legislature shall receive such compensation in connection with the performance of their respective duties as members of the legislature and such allowances for travel and other expenses in connection therewith as shall be (1) established in a resolution submitted to the legislature by the citizens legislative compensation commission hereinafter

40. Supplemental Memorandum of Law, *supra* note 27, at 18-20.

41. W. VA. CONST. art. VI, § 17.

42. Brief of the Intervenors, *supra* note 38, at 1.

43. *Id.*

44. *Id.*

created, and (2) thereafter enacted into general law by the legislature at a regular session thereof, subject to such requirements and conditions as shall be prescribed in such general law. The legislature may in any such general law reduce but shall not increase any item of compensation or expense allowance established in such resolution. All voting on the floor of both houses on the question of passage of any such general law shall be by yeas and nays to be entered on the journals. . . .

The commission shall meet as often as may be necessary and shall within fifteen days after the beginning of the regular session of the legislature in the year [1971] and within fifteen days after the beginning of the regular session in each fourth year thereafter submit by resolution to the legislature its determination of compensation and expense allowances, which resolution must be concurred in by at least four members of the commission.⁴⁵

Soon after ratification by the voters, then Governor Arch A. Moore, Jr. appointed the original seven members to serve upon the Commission.⁴⁶ On February 1, 1971, the Commission introduced its first resolution to the Senate. Similar resolutions were introduced in the years 1975, 1979, and 1983.⁴⁷

Intervenors Boley and Pulliam challenged the constitutionality of House Bill 4031 in their original Complaint to the Kanawha County Circuit Court as being constitutionally defective in four ways.⁴⁸ First, they alleged that the Commission submitted its resolution to the legislature on the fifty-first day of the session rather than within the first fifteen days of the session as required by the ratified Legislative Improvement Amendment.⁴⁹ Second, Intervenors Boley and Pulliam alleged that the provisions of the ratified amendment precluded the Commission from submitting a compensation and expense resolution in the year of 1994.⁵⁰ Third, the Intervenors alleged that the decision to submit the resolution to the legislature was not done in an independent manner "without the inherent political pressures or influence that may

45. W. VA. CONST. art. VI, § 33.

46. Brief of the Intervenors, *supra* note 38, at 1.

47. *Id.* at 2.

48. Complaint, *supra* note 2, at 3-4.

49. *Id.* at 3.

50. *Id.* Under this interpretation of the provision, years 1971, 1975, 1979, 1983, 1987, 1991, and 1995, and every fourth year thereafter, were permissible years for submission of a compensation and expense allowance resolution to the legislature.

be associated with the [l]egislature.”⁵¹ Finally, the Intervenors alleged that the manner in which the resolution was passed in the legislature violated the requirement that such a resolution be enacted into general law by a “yea” or “nay” recorded floor vote by both houses. Instead, the Intervenors alleged that the resolution was merely “incorporated as a Committee substitute for H.B. 4031, an existing bill unrelated to legislative compensation and expense reimbursements.”⁵²

Although the Supreme Court of Appeals of West Virginia had not yet had the opportunity to interpret the somewhat confusing language of the Legislative Improvement Amendment as ratified, two separate state attorney generals spoke to the issue concerning the frequency with which the Commission was constitutionally permitted to meet and submit resolutions for compensation and expense allowances. In 1977, Attorney General Chauncey Browning issued a formal opinion and stated:

[I]t is the opinion of this office that the provision [Article Six, Section 33 of the Constitution] in no way restricts the Commission in presenting such a resolution more often than every four years after the year 1971. Otherwise, there would be no need for the above provision requiring the Commission to meet as often as may be necessary. What purpose would be served for the Commission to have meetings “as often as may be necessary” when it could take no action in accordance with the constitutional provision?⁵³

On March 9, 1994, current Attorney General Darrell V. McGraw, Jr., had the opportunity to revisit this question in an advisory letter to Keith Burdette, President of the West Virginia Senate; concurred with the previous interpretation; and opined that “no limiting language or provisos bar presentation of a resolution on a more frequent basis [than quadrennially].”⁵⁴ Additionally, Attorney General McGraw quoted *State ex rel. Barker v. Manchin*⁵⁵ in concluding that the purpose of the provision was to “breathe due process into the establishment of

51. *Id.*

52. *Id.* at 4.

53. 57 Op. Att’y Gen. 115, 116 (1977).

54. Letter from Darrell V. McGraw, Jr., Attorney General of the State of W. Va., by Jacquelyn I. Custer, Assistant Attorney General, to Keith Burdette, President of the W. Va. Senate 1-2 (Mar. 9, 1994) (on file with author) [hereinafter McGraw Letter I].

55. 279 S.E.2d 622 (W. Va. 1981).

fair and proper legislative salaries.”⁵⁶ In a second advisory letter on March 10, 1994, Attorney General McGraw interpreted the provision requiring the Commission to submit its resolution to the legislature within fifteen days of the legislative session as “nonrestrictive” and, therefore, applied only when the Commission met in the required fourth year.⁵⁷ Thus, according to McGraw, the fifteen-day requirement did not apply in the 1994 legislative session.⁵⁸ The *Holmes* court would reach a different conclusion than the two attorney generals regarding the interpretation of the amendment’s confusing language about the frequency of resolution submissions.

B. Retroactivity of Judicial Decisions in West Virginia

In *Holmes*, the Supreme Court of Appeals of West Virginia decided that its holding would not have retroactive effect based on certain principles the court follows in determining whether a judicial decision will have full retroactive effect. These principles were set forth in *Bradley v. Appalachian Power Co.*⁵⁹ In *Bradley*, the court espoused six factors the court considers when deciding whether full retroactivity is appropriate in a given situation.⁶⁰ First, the court must determine the “nature of the substantive issue overruled.”⁶¹ Retroactivity is less appropriate when the overruled issue involves a traditionally settled area of law than when such overruled issue is clearly foreshadowed.⁶² A second factor the court considers is whether the overruled decision is primarily procedural in nature rather than substantive.⁶³ Retroactivity is more readily accorded to procedural decisions rather than substantive

56. McGraw Letter I, *supra* note 54, at 2 (quoting *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981)).

57. Letter from Darrell V. McGraw, Jr., Attorney General of the State of W. Va., by Jacquelyn I. Custer, Assistant Attorney General, to Keith Burdette, President of the W. Va. Senate 2 (Mar. 10, 1994) (on file with author).

58. *Id.*

59. 256 S.E.2d 879, 880-81, Syl. Pt. 5 (W. Va. 1979).

60. *Id.* at 880.

61. *Id.*

62. *Id.*

63. *Id.* at 880-81.

decisions.⁶⁴ Third, overruled common law decisions “may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties.”⁶⁵ Fourth, where an overruling decision involves substantial public policy issues arising from statutory or constitutional interpretations that are a clear departure from previous precedent, it is less likely that retroactivity will be extended.⁶⁶ Fifth, radical departures from previous substantive decisions will likely not be extended retroactively.⁶⁷ Finally, the court considers what courts in other jurisdictions have decided about retroactive/prospective applications in the same area of law as the overruled decision.⁶⁸ The *Holmes* court would choose not to make its holding retroactive.

C. *The Speech or Debate Clause*

In addition to the question of the constitutionality of the pay raise, Relators Holmes and Kopp alleged that the court allowed discovery by the Intervenors in “blatant violation of the [West Virginia] Rules of Appellate Procedure and the separation of powers doctrine set forth in the West Virginia Constitution.”⁶⁹ The Relators alleged that no genuine material issues of fact were raised by the Intervenors which required discovery, yet the court permitted this discovery.⁷⁰ The Speech or Debate Clause of the West Virginia Constitution states that:

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during the session, and for ten days before and after the same; and for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place.⁷¹

64. *Bradley*, 256 S.E.2d at 880-81, Syl. Pt. 5.

65. *Id.* at 881, Syl. Pt. 5.

66. *Id.*

67. *Id.*

68. *Id.*

69. Supplemental Memorandum of Law, *supra* note 27, at 18.

70. *Id.* at 19-20.

71. W. VA. CONST. art. VI, § 17 (emphasis added).

The federal constitution contains an analogous provision which states that "for any Speech or Debate in either House, [the Senators and Representatives] *shall not be questioned in any other Place.*"⁷² The *Holmes* court refused to acknowledge any of the issues raised by the Relators concerning violations of the Clause as a result of the court allowing the Intervenor to depose legislators, the clerks of the respective houses of the state legislature, and members of the Commission.

Very little has been written concerning the interpretation of the West Virginia Speech or Debate Clause. However, the analogous federal provision has been analyzed in several instances. The United States Supreme Court has stated that the purpose of the Clause is to protect legislators "not only from the consequences of litigation's results but also from the burden of defending themselves."⁷³ The Court has interpreted the Clause as going beyond its literal language and has held that the Clause protects members from inquiry into the "deliberative and communicative processes" that are an integral part of legislative proceedings with respect to the consideration of legislation.⁷⁴ In *United States v. Johnson*,⁷⁵ the Supreme Court stated that the Speech or Debate Clause functioned to protect the integrity of the legislative branch by allowing legislators to engage in their legislative function without fear of inquiry by the coordinate branches of the government. However, the actions of congressmen which fall outside legislative activities are not protected by the Clause as the Clause is to be construed as only protecting the integrity of the legislative process.⁷⁶ For example, a legislator's newsletter to constituents would not be subject to the protection of the Clause.⁷⁷

One of the foremost cases interpreting the federal Speech or Debate Clause is *Tenney v. Brandhove*.⁷⁸ In this case, the Court stated that the "privilege of legislators to be free . . . from civil process" for

72. U.S. CONST. art. I, § 6 (emphasis added).

73. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

74. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

75. 383 U.S. 169, 178 (1966).

76. *See Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979).

77. *Id.* (commonly known as an exercise of the franking privilege).

78. 341 U.S. 367 (1951).

what they do or say in the legislative process has its origin in the struggles between the King and Parliament in the sixteenth and seventeenth centuries.⁷⁹ Additionally, the Court stressed its principle that a court's interference into the legislative function is not consistent with the separation of powers doctrine upon which the Constitution is founded.⁸⁰ The Court expressed a concern that "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed."⁸¹ The Court opined that the courts are not the place for such controversies.⁸²

However, the early 1970s marked the end of absolute legislative immunity under the Speech or Debate Clause as courts began to inquire into legislative motive in passing legislation.⁸³ In several areas of constitutional interpretation, the courts have held that unconstitutional legislative motive is enough to invalidate legislation as unconstitutional.⁸⁴ Evidence of unconstitutional motive is best ascertained from testimony and discovery from legislators.⁸⁵ Thus, a constitutional collision is created as the courts' role in deciding a statute's constitutionality runs head on into the protection from inquiry specified in the Speech or Debate Clause.⁸⁶ Professor Louis B. Raveson has hypothesized that the privilege afforded by the Speech or Debate Clause is only a qualified one.⁸⁷ Thus, Professor Raveson argues that the jurisprudence surrounding this conflict between judicial inquiry and legislative independence suggests that "members of Congress should not be compelled to testify or submit to discovery unless doing so is demon-

79. *Id.* at 372.

80. *Id.* at 377.

81. *Id.* at 378.

82. *Id.*

83. Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 880 (1985).

84. *Id.* at 881, 883 n.21 (citing *Washington v. Davis*, 426 U.S. 229 (1976) (holding that the plaintiff in an equal protection challenge bore the burden that challenged discriminatory conduct was undertaken with a racially discriminatory purpose; *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (holding that a showing of improper legislative motive constituted a prima facie case to establish an equal protection violation in regard to de jure school segregation)).

85. Raveson, *supra* note 83, at 881.

86. *Id.* at 881-82.

87. *Id.* at 882.

strably critical for the court to discharge its obligation.”⁸⁸ As this commentator submits, this conflict must be resolved on a case by case basis.⁸⁹ An intrusion into the legislative process should be warranted only when absolutely necessary for judicial review.⁹⁰ The *Holmes* court was faced with resolving this conflict.

IV. THE DECISION

The *Holmes* court was faced with interpreting the confusing language of the Legislative Improvement Amendment to the West Virginia Constitution. The majority opinion held that the language of the Amendment precluded the Citizens Legislative Compensation Commission from recommending a legislative compensation and expense resolution in 1994 as the year was not one falling within the quadrennial cycle.⁹¹ However, the 3-2 majority declined to make its decision retroactive⁹² and, thus, validated the passage of House Bill 4031. In contrast, the two bitter dissents took very different views of the proper interpretation of the Legislative Improvement Amendment.⁹³ Though the constitutionality of the amendment was addressed, no member of the court made any reference to the request of Relators Holmes and Kopp that the court strike certain aspects of discovery which they alleged to be in violation of the Speech or Debate Clause of the West Virginia Constitution.⁹⁴

A. *The Majority Opinion*

The majority opinion, authored by Justice Miller, garnered a total of three votes.⁹⁵ The majority concluded that although it interpreted the language of the Legislative Improvement Amendment to find that

88. *Id.*

89. *Id.* at 888.

90. Raveson, *supra* note 83, at 892.

91. *Holmes*, 447 S.E.2d at 893.

92. *Id.* at 894.

93. *Id.* at 896-97.

94. See Supplemental Memorandum of Law, *supra* note 27, at 18-24.

95. *Holmes*, 447 S.E.2d at 889 (Miller, J., delivered the opinion of the Court, joined by Workman, J., and McHugh, J.).

the passage of the pay raise was procedurally unconstitutional, it would still issue the Relators' requested Writs of Mandamus and Prohibition by applying its interpretation only prospectively.⁹⁶ In so holding, the majority rejected the Relators' argument that the Citizens Legislative Compensation Commission could meet as often as necessary and submit resolutions to the legislature concerning compensation and expenses at any time.⁹⁷ The Relators argued that the constitutional amendment mandated a meeting of the Commissioners every fourth year commencing from 1971, but that the Commission was free to meet more frequently to submit resolutions at any time.⁹⁸ Additionally, the Relators argued that the constitutional requirement that such a resolution be submitted within fifteen days of the beginning of the legislative session only applied to the mandated quadrennial meeting.⁹⁹ The court rejected all of these interpretations of the Legislative Improvement Amendment. Instead, the court held that although the Commission may meet as often as necessary, only every four years commencing in 1971 may it submit a compensation and expense allowance resolution to the legislature and such resolution must be submitted within the fifteen days of the beginning of the session.¹⁰⁰

1. The Solution to the Ambiguity of the Legislative Improvement Amendment

The central issue in *Holmes* centered around the question of how often the Citizens Legislative Compensation Commission could meet and submit resolutions for compensation and expense allowances. The *Holmes* court first addressed the contention of Intervenor Boley and Pulliam that the Commission's resolution submitted on March 3, 1994, was not within a year constitutionally allowed.¹⁰¹ The court conceded that a motivating factor behind the adoption of the Legislative Improvement Amendment was to "liberalize the ability to increase legisla-

96. *Id.* at 896.

97. Petitioners' Memorandum, *supra* note 5, at 6.

98. *Id.*

99. *Id.* at 6-7.

100. *Holmes*, 447 S.E.2d at 892-93.

101. *Id.* at 890-91.

tive compensation and expense allowances.”¹⁰² Prior to this amendment to the state constitution, a separate constitutional amendment was necessary each time to raise the compensation and expense allowances of the legislature.¹⁰³ Nonetheless, in view of past history, the court believed that the voters who ratified the amendment did not intend for the Commission to submit a resolution more often than every four years.¹⁰⁴

First, the court focused on the inherent ambiguity within the amendment. Specifically, Relators Holmes and Kopp pointed to the phrase, “[t]he commission shall meet as often as may be necessary,” to support their contention that the pay raise bill was passed in accord with proper constitutional procedure.¹⁰⁵ Conversely, Intervenor Boley and Pulliam relied upon the remainder of the same paragraph to support their assertion that the Commission may only submit its compensation and allowance resolution quadrennially beginning in 1971.¹⁰⁶ Therein lay the ambiguity.

Second, the court considered the Intervenor’s additional contention that a resolution, pursuant to the amendment, must be submitted within fifteen days of the beginning of the legislative session, a requirement that was not met in this instance.¹⁰⁷

The majority acknowledged the position taken by two separate state attorney generals¹⁰⁸ that the Commission could submit compensation and expense allowance resolutions on intervals more frequently than quadrennially.¹⁰⁹ However, Justice Miller declined to agree with the opinions of the attorney generals, finding instead that the attorney generals did not adequately consider the historical background sur-

102. *Id.* at 891.

103. *Id.*

104. *Id.* at 893.

105. *Holmes*, 447 S.E.2d at 891 (quoting W. VA. CONST. art VI, § 33).

106. *Id.* See *supra* note 50.

107. *Holmes*, 447 S.E.2d at 894-95 (House Bill 4031 was submitted to the Legislature by the Citizens Legislative Compensation Commission on the fifty-eighth day of the 1994 legislative session).

108. See *supra* notes 53, 54, and 57.

109. *Holmes*, 447 S.E.2d at 891-92.

rounding the adoption of the Legislative Improvement Amendment.¹¹⁰ In so finding, Justice Miller foreshadowed the court's ultimate ruling that resolutions could be submitted only every fourth year.

However, the court recognized that its holding that resolutions could be submitted only every fourth year must be reconciled with the amendment's language which clearly stated that the Commission could meet as often as necessary.¹¹¹ To resolve the ambiguity, the court relied on its rule that "[q]uestions of constitutional construction are in the main governed by the same general rules applied in statutory construction."¹¹² The court believed that the attorney generals' interpretations of the section, that the Commission could submit resolutions whenever it felt necessary, would "emasculate" the language of the provision which set up the quadrennial cycle for pay raises.¹¹³ Therefore, it was necessary for the court to look at the "statute as a whole" to give the provision its intended effect.¹¹⁴

The court held that the amendment only intended to give the Commission latitude in determining the frequency of its meetings; yet, the amendment intended to restrict the Commission's submission of its resolutions only on a quadrennial basis beginning with the 1971 legislative session.¹¹⁵ This holding, reasoned the majority, gave meaning to the amendment as a whole and comported with the historical background of the amendment.¹¹⁶

110. *Id.* at 892.

111. *Id.* (the court noted that the provision contained no mandatory language that the Citizens Legislative Compensation Commission's resolution can be submitted only on a quadrennial basis).

112. *Id.* (quoting *Winkler v. State Sch. Bldg. Auth.*, 434 S.E.2d 420, 422, Syl. Pt. 1 (W. Va. 1993)).

113. *Id.*

114. *Holmes*, 447 S.E.2d at 892 (quoting *State ex rel. Fetters v. Hott*, 318 S.E.2d 446, 447, Syl. Pt. 3 (W. Va. 1984); *Smith v. State Workmen's Compensation Comm'r*, 219 S.E.2d 361, 362, Syl. Pt. 2 (W. Va. 1975)).

115. *Id.*

116. *Id.* at 892-93 (the court explained that it believed that although the Legislative Improvement Amendment was designed to loosen the restrictive requirements which mandated a citizen vote on legislative pay increases, the amendment was not intended to allow the Commission to submit compensation and expense allowance resolutions any more often than four years).

The court's holding to resolve the ambiguity of the Legislative Improvement Amendment was very simple. First, the Commission may meet as often as necessary.¹¹⁷ Second, only on a quadrennial basis may it submit its compensation and expense allowances to the legislature, beginning in 1971.¹¹⁸ Finally, the legislature is free to act on the Commission's resolution at any time during the four year cycle before another resolution is constitutionally required of the Commission.¹¹⁹

2. The Rejection of Retroactive Application

Though the court held that the submission of the compensation and expense allowance resolution to the legislature in 1994 was unconstitutional, it refused to extend retroactive application of its rule and invalidate the pay raise bill. The court noted that no previous interpretation of the Legislative Improvement Amendment to the West Virginia Constitution had been rendered and that two separate attorneys had given interpretations of the amendment which would "justify the actions taken by the Commission and [l]egislature."¹²⁰

The decision to apply this holding only prospectively was grounded in the general principles of retroactivity announced by the court in *Bradley v. Appalachian Power Co.*¹²¹ Additionally, the majority analogized the *Holmes* decision to a similar decision made in *Winkler v. State School Building Authority*.¹²² In *Winkler*, the court held that an issuance of school bonds was unconstitutional because it violated the debt restriction provisions of the state constitution,¹²³ but gave this decision only prospective application and refused to invalidate bonds which were issued prior to the *Winkler* opinion.¹²⁴ The *Holmes* court

117. *Id.* at 893.

118. *Id.*

119. *Holmes*, 447 S.E.2d at 893.

120. *Id.*

121. 256 S.E.2d 879, 880-81, Syl. Pt. 5 (W. Va. 1979). The principles of *Bradley* are more fully discussed *supra* Part III.

122. 447 S.E.2d at 894 (citing *Winkler v. State Sch. Bldg. Auth.*, 434 S.E.2d 420 (W. Va. 1993)).

123. W. VA. CONST. art. X, § 4.

124. 434 S.E.2d at 420, 423, Syl. Pt. 9.

explained that prospective application would be implemented only in cases where “substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent.”¹²⁵ Although no interpretation of the Legislative Improvement Amendment had been given by a court, the *Holmes* court placed great emphasis on the two attorney generals’ positions which opined that the actions of the Commission and legislature were constitutional.¹²⁶ The court justified its prospective operation by holding that the questions of this case were substantial public policy issues of the type discussed in *Bradley*, as they involved the constitutional procedures for obtaining legislative pay and expense allowance increases in which state taxpayers maintain a vital interest.¹²⁷

3. The Interpretation of the Fifteen Day Period

The court next addressed the subsidiary contention of Intervenor Boley and Pulliam that the pay raise bill was unconstitutional because of the Commission’s failure to submit its resolution within fifteen days of the beginning of the legislative session. The court stated that the delay in submission of the resolution was due to the Governor’s failure to fill four vacancies on the seven member Commission until early February of 1994.¹²⁸ It reasoned that the Governor’s failure to appoint persons to fill these vacancies until after the fifteen day period had elapsed made it impossible for the Commission to comply with the letter of the constitution.¹²⁹

The court expressed concern that an executive could paralyze the operation of an administrative agency by refusing to appoint persons to such an agency.¹³⁰ Such an action by a governor and a judicial validation of the same could “destroy the reasonable expectations of the parties who are beneficiaries of [the agency’s] jurisdiction.”¹³¹ As au-

125. 447 S.E.2d at 894 (quoting *Bradley*, 256 S.E.2d at 880-81, Syl. Pt. 5).

126. *Id.* at 894. See also *supra* notes 53, 54, and 57.

127. *Holmes*, 447 S.E.2d at 894.

128. *Id.*

129. *Id.*

130. *Id.* at 894.

131. *Id.* at 895.

thority, the *Holmes* court referred to two cases where the Supreme Court of Appeals of West Virginia upheld an agency's decision despite the Governor's failure to appoint to an administrative tribunal the full complement of members.¹³² Therefore, the majority reasoned that Governor Caperton's delay in appointing members to the Citizens Legislative Compensation Commission until after the fifteen day period had elapsed did not invalidate the Commission's compensation and expense resolution.¹³³

4. The Rejection of the Due Process Challenge

Intervenors Boley and Pulliam additionally challenged the constitutionality of the compensation and expense allowance resolution on due process grounds, alleging that the decision to submit the resolution to the legislature was not done in an independent manner consistent with the purpose of the Legislative Improvement Amendment to "remove the Legislature from the initial decision-making process relative to legislative compensation and expenses."¹³⁴ This challenge was based on allegations that certain members of the legislature had contacts with members of the Citizens Legislative Compensation Commission concerning the amount of pay raise that the Commission should recommend.¹³⁵ The court noted a lack of precedent cited by the Intervenors to support the due process challenge in their brief, though the Intervenors did cite two cases in oral argument as authority.¹³⁶ Instead, the

132. *Holmes*, 447 S.E.2d at 894-95 (citing *Francis O. Day Co. v. West Virginia Reclamation Bd. of Review*, 424 S.E.2d 763 (W. Va. 1992) (the Board must enter an order allowing an appeal of a decision to the next higher tribunal when there were not enough members to take action on an administrative appeal which statutorily required four votes rather than delay further an administrative decision); *Serian v. State by and through West Virginia Bd. of Optometry*, 297 S.E.2d 889 (W. Va. 1982) (holding that the Governor's failure to appoint a lay member to the Board of Optometry did not deprive the Board of its jurisdiction to hear a license revocation case)).

133. *Id.* at 895.

134. Brief of the Intervenors, *supra* note 38, at 19.

135. *Holmes*, 447 S.E.2d at 895.

136. *Id.* at 895-96. The *Holmes* court noted that in their oral argument, the Intervenors cited *Portland Audobon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993), and *Home Box Office, Inc. v. Federal Communications Comm'n*, 567 F.2d 9 (D.C. Cir. 1977). However, the *Holmes* court declined to recognize precedential authority in either

Holmes court relied on *Sierra Club v. Costle*,¹³⁷ a case that involved ex parte communications in informal rulemaking procedures of the federal Environmental Protection Agency, for the proposition that there is no “judicial prohibition fashioned under a due process rubric on ex parte communications to informal administrative proceedings.”¹³⁸ The *Holmes* court viewed the Commission as a “limited administrative agency empowered to act on the very narrow issue of legislative compensation and expense allowances.”¹³⁹ Thus, the *Holmes* court dismissed the Intervenor’s due process challenge due to a lack of authority to support the Intervenor’s proposition that ex parte communications between legislators and the Commission, a limited administrative agency, were either improper or unconstitutional.

B. *The Dissenting Opinions*

Chief Justice Brotherton and Justice Neely both filed dissenting opinions in this case. However, the two dissenting opinions differed on both legal and philosophical grounds. The Chief Justice opined that the majority had validated an unconstitutional legislative usurpation of the power delegated to the citizens of West Virginia by the provisions of the Legislative Improvement Amendment to the West Virginia Constitution.¹⁴⁰ Alternatively, Justice Neely dissented on the ground that the procedures employed by both the Commission and the legislature were in accord with the spirit and letter of the West Virginia Constitution

case. *Portland Audobon Soc’y* dealt only with the prohibition of ex parte communications under the federal Administrative Procedures Act, 5 U.S.C. § 557(d)(1), (2) (1976), which is not controlling on decisions of state law. The West Virginia Administrative Procedures Act, W. VA. CODE §§ 29A-1-1 to 29A-7-4 (1993 & Supp. 1994), does not contain a similar prohibition. The court also declined to use *Home Box Office* due to the same circuit court’s contrary opinion in *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981), which held that the principles of *Home Box Office* were not applicable to informal rulemaking of the general policymaking sort.

137. 657 F.2d 298 (D.C. Cir. 1981).

138. *Holmes*, 447 S.E.2d at 896.

139. *Id.*

140. *Id.* at 897-901 (Brotherton, C.J., dissenting).

and hypothesized that this case was grounded in the public's "loathing of all politicians."¹⁴¹

1. Chief Justice Brotherton's Analysis

Chief Justice Brotherton compared the majority's decision with the magic of illusionist David Copperfield.¹⁴² According to the Chief Justice, the majority made the "[c]onstitution disappear in 1994 and reappear in 1995."¹⁴³ This dissenting opinion agreed with the majority's resolution of the language of the Legislative Improvement Amendment but took issue with every other facet of the majority's analysis.¹⁴⁴

As to the retroactive application, the Chief Justice strongly disagreed with the majority's refusal to make its interpretation of the constitutional amendment retroactive. Chief Justice Brotherton criticized the majority for using the attorney generals' opinions collectively as a "crutch" to support the majority's decision not to extend the holding retroactively, thereby validating the unconstitutional actions.¹⁴⁵ According to the Chief Justice: "I have never known this [c]ourt to use the opinion of an Attorney General as a crutch to declare an act of the [l]egislature valid."¹⁴⁶ Moreover, he pointed out that applying the principles of retroactivity was unnecessary in this case because the Commission could meet constitutionally and submit a compensation and expense allowance resolution in January of 1995 in accordance with the majority's holding.¹⁴⁷

As to the fifteen day period, this dissent disputed the majority's characterization of the Commission as a theoretical administrative agency.¹⁴⁸ Chief Justice Brotherton asserted that the majority's concern regarding a governor's ability to paralyze a governmental agency by de-

141. *Id.* at 896 (Neely, J., dissenting).

142. *Id.* at 898 (Brotherton, C.J., dissenting).

143. *Holmes*, 447 S.E.2d at 898.

144. *Id.*

145. *Id.*

146. *Id.* at 898.

147. *Id.* at 899.

148. *Holmes*, 447 S.E.2d at 898.

laying appointment of its members was unfounded.¹⁴⁹ Quite simply, his dissent declared that the meeting of the constitutionally created Commission and its resulting resolutions had no effect on the general operation of the government's legislative function.¹⁵⁰ Therefore, Chief Justice Brotherton would mandate the submission of resolutions within the fifteen day period from the beginning of the legislative session in any quadrennial year.

Chief Justice Brotherton's central dispute with the majority involved the due process challenge to the enactment of House Bill 4031.¹⁵¹ The Chief Justice characterized the passage of the bill as a "deprivation of the citizens' rights through the abuse of legislative power."¹⁵² He emphasized the history of the Legislative Improvement Amendment, which created the Citizens Legislative Compensation Commission and delegated the duty of deciding legislative compensation and expense allowances to the Commission.¹⁵³ Given this history, the Chief Justice nonetheless concluded that the citizens "did not relinquish this power lightly."¹⁵⁴ Therefore, he contended that the intent of the amendment was that the legislature should have no control over the determination of their own salaries.¹⁵⁵ This intent was frustrated by the passage of House Bill 4031.¹⁵⁶ Specifically, Chief Justice Brotherton alleged that the Governor and the legislature engaged in a quid pro quo transaction in which Governor Caperton appointed members to the Commission upon the request of the legislature in exchange for assistance in getting the Governor's stalled legislative program through the legislature.¹⁵⁷ As evidence, the Chief Justice alluded to: (1) a letter written by the President of the Senate asking Attorney General McGraw for an opinion as to when the Commission could constitutionally meet; (2) communications by legislators with the pro-

149. *Id.* at 898-99 (citations omitted).

150. *Id.* at 899.

151. *Id.* at 899-900.

152. *Id.*

153. *Holmes*, 447 S.E.2d at 899.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

posed Commission Chairman, prior to the Governor's appointment of the Commission Chairman, about the proposed Chairman's feelings regarding a legislative pay raise; and (3) an agreement made between the proposed Commission Chairman and legislators concerning the handling of future legislative travel expenses.¹⁵⁸

As a result of this mischief, this dissent declared it was "no surprise" that a very intricately detailed, typed resolution with fill-in blanks for amounts was sent to Commission members for the sole Commission meeting held prior to the resolution's submission.¹⁵⁹ No record was made of any Commission discussion concerning the resolution or of the Commission Chairman's contacts with legislators concerning the resolution.¹⁶⁰ Thus, the Chief Justice concluded that the theoretically independent Citizens Legislative Compensation Commission became "an arm of the [l]egislature and turned its back on the citizens," the very individuals the Commission was created to represent.¹⁶¹ He asserted that a fundamentally unfair process wrought with *ex parte* communications between legislators and Commission members, coupled with the Commission's submission to legislative pressure, served only to weaken government by creating mistrust by the citizenry.¹⁶² In sum, Chief Justice Brotherton concluded that the only due process received in this instance was by the legislators.¹⁶³

2. Justice Neely's Alternative Analysis

Justice Neely dissented to the majority's holding that the provisions of the Legislative Improvement Amendment allow the Citizens Legislative Compensation Commission to submit its resolutions only on a quadrennial basis.¹⁶⁴ According to Justice Neely, "[t]he plain words [of the amendment] allows [sic] the [C]ommission to meet as often as

158. *Holmes*, 447 S.E.2d at 899-900.

159. *Id.* at 900.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Holmes*, 447 S.E.2d at 900.

164. *Id.* at 896 (Neely, J., dissenting).

it wishes, but it *must* submit a resolution every four years.”¹⁶⁵ Justice Neely objected to the majority’s characterization of the language of the amendment as contradictory or ambiguous.¹⁶⁶ He asserted that the majority interpreted the amendment in its own “view” and “belief,” which should have nothing to do with constitutional interpretation, rather than giving the amendment its plain meaning.¹⁶⁷

Justice Neely saw this case as one originating from the public’s “loathing of all politicians in general and a peculiar distaste for legislators in particular.”¹⁶⁸ Contrary to the tone of Chief Justice Brotherton, Justice Neely viewed the legislators as the “heros and not the villains of the democratic process.”¹⁶⁹ This distaste for legislators is the reason why “it was thought necessary to require the Commission to meet at least every four years” and issue a report on compensation and expense allowances.¹⁷⁰ Nothing prevents the Commission from meeting more frequently and submitting resolutions more often.¹⁷¹ Thus, Justice Neely concluded that the pay raise effected by the Citizens Legislative Compensation Commission and legislature was not only constitutional but also well deserved.¹⁷²

V. ANALYSIS

A. *The Court Properly Interpreted the Legislative Improvement Amendment to the West Virginia Constitution*

The inherent ambiguity in the language of the Legislative Improvement Amendment is obvious. The confusion stems from the language which states that “[t]he [Citizens Legislative Compensation C]ommission shall meet as often as may be necessary” contrasted with the language that states that the Commission “shall within fifteen days

165. *Id.*

166. *Id.*

167. *Id.*

168. *Holmes*, 447 S.E.2d at 896.

169. *Id.*

170. *Id.* at 897.

171. *Id.*

172. *Id.*

after the beginning of the . . . session of the legislature in the year [1971] . . . [and] in each fourth year thereafter submit by resolution . . . its determination of compensation and expense allowances. . . ."¹⁷³ The amendment gives the Commission great latitude to meet whenever it deems necessary. However, the additional language implies a restriction on the Commission's ability to submit its recommendations as to compensation and expense allowances.

The majority's holding resolved the contradictory language in a well-reasoned manner. Prior to the enactment of the Legislative Improvement Amendment in 1970, a separate constitutional amendment was required each time to raise legislative salaries.¹⁷⁴ Though the *Holmes* court admitted that the amendment's purpose was to "liberalize the ability to increase legislative compensation and expense allowances,"¹⁷⁵ the majority resisted the interpretation of the amendment which would allow the Commission to submit its resolutions whenever it saw fit. In fact, the Supreme Court of Appeals of West Virginia stated in a prior decision that the Citizens Legislative Compensation Commission "was authorized to recommend to the [l]egislature at four year intervals the maximum compensation to be paid to legislators."¹⁷⁶

The majority's interpretation of the ambiguous language gave meaning to all parts of the amendment. In other cases, the court has said that it will apply the rules of statutory construction to resolve questions of constitutional ambiguity.¹⁷⁷ To ascertain legislative intent, the court has looked at statutes wholly to give each part of the statute meaning and accomplish the general purpose of the legislation.¹⁷⁸ In accordance with these rules of statutory construction, the *Holmes*

173. W. VA. CONST. art. VI, § 33.

174. *Holmes*, 447 S.E.2d at 890-91.

175. *Id.* at 891.

176. *Campbell v. Kelly*, 202 S.E.2d 369, 372 (W. Va. 1974). Interestingly, the *Holmes* court failed to make any mention of the *Campbell* case in its decision. Moreover, Justice Neely, in authoring the majority opinion in *Campbell*, which recognized the four-year limit on resolution submissions, apparently contradicted his own dissent in *Holmes*.

177. *See, e.g., Winkler v. State Sch. Bldg. Auth.*, 434 S.E.2d 420, 422, Syl. Pt. 1 (W. Va. 1993).

178. *Jeffrey v. Jeffrey*, 425 S.E.2d 152, 153, Syl. Pt. 3 (W. Va. 1992).

court's holding takes into account both parts of the constitutional amendment and allows both parts to have meaning.

Additionally, as the majority emphasized, the history surrounding the ratification of the Legislative Improvement Amendment did not lend itself to the conclusion that the Citizens Legislative Compensation Commission may submit its resolutions more often than quadrennially. The Citizens' Advisory Commission, a group that advocated the passage of the 1970 amendment, issued a release, subsequent to the passage of the proposed amendment by the 1970 legislature and prior to the placing of the amendment on the November 1970 ballot, entitled *Five Minute Talk Explaining the "Legislative Improvement Amendment."*¹⁷⁹ This release argued for the passage of the amendment by stating that "[t]his Commission . . . will submit to the [l]egislature every four years its determination of compensation and expense allowances for members of the [l]egislature."¹⁸⁰ The release indicated to the 1970 voters that such resolutions would be submitted only on a quadrennial basis. Thus, it can be easily surmised that the voters intended that a resolution be submitted no more frequently than on a quadrennial basis. The majority's holding gives the deserved weight to that intent while creating an understandable standard for the legislature and the Citizens Legislative Compensation Commission to follow in enacting any future compensation and expense allowance increases.

B. The Court Improperly Applied the Bradley Retroactivity Standard

The *Holmes* court misapplied the standards of retroactivity of overruling decisions set forth in *Bradley v. Appalachian Power Co.*¹⁸¹ In *Bradley*, the factors for determining whether retroactivity will be extended were espoused in the context of an overruling decision. In that case, the *Bradley* court overturned the tort standard of contributory negligence in favor of a standard of comparative negligence and made

179. Brief of the Intervenors, *supra* note 38, at 16.

180. *Id.* (quoting CITIZENS' ADVISORY COMM'N, FIVE MINUTE TALK EXPLAINING THE "LEGISLATIVE IMPROVEMENT AMENDMENT" 2 (1970)).

181. 256 S.E.2d 879, 880-81, Syl. Pt. 5 (W. Va. 1979).

the decision retroactive to all pending cases.¹⁸² In giving retroactive effect to its decision, the *Bradley* court recognized that the contributory negligence standard was a judicially created doctrine.¹⁸³ In the present case, the issue did not revolve around a judicially created doctrine, but more importantly, it revolved around a constitutional provision which the court concluded had been violated.

It is useful to break down the *Bradley* formulation in the context of the *Holmes* case. The *Bradley* factors are contingent on an overruling decision. For example, the first *Bradley* factor states that the nature of the substantive issue overruled is relevant.¹⁸⁴ In the *Holmes* case, no issue, substantive or otherwise, was overruled. To the contrary, the *Holmes* case presented the first occasion in which the court had the opportunity to interpret this important constitutional issue. The entire *Bradley* formulation provides a standard for overruling decisions of previous substantive or procedural issues. The *Holmes* court did not issue an opinion which effectively overruled any issue. Thus, the *Bradley* standard was inapplicable in the *Holmes* decision and was erroneously utilized.

The *Holmes* decision did not overturn any established precedent. It can be argued that the decision did overrule the opinions offered by the attorney generals concerning the interpretation of the Legislative Improvement Amendment. However, the Supreme Court of Appeals of West Virginia previously has made clear that such opinions are not binding and do not carry precedential weight.¹⁸⁵ Therefore, it is disingenuous to argue in the wake of *Wassick* that the *Holmes* opinion overruled anything precedential.

The majority further justified its decision to eschew retroactivity by citing the recent case of *Winkler v. State School Building Authority*.¹⁸⁶ In *Winkler*, the court refused to make retroactive its holding that the School Building Authority's issuance of revenue bonds was

182. *Id.* at 890.

183. *Id.* at 881.

184. *Id.* at 889.

185. *See State v. Wassick*, 191 S.E.2d 283, 287 (W. Va. 1972).

186. 434 S.E.2d 420 (W. Va. 1993).

violative of the state constitution's debt restriction provisions.¹⁸⁷ However, the bonds in *Winkler* had already been issued to bondholders.¹⁸⁸ The invalidation of these issued bonds would have drastically impacted the state of West Virginia's credit rating and negatively impacted the citizens of West Virginia.¹⁸⁹ At the time of the *Holmes* decision,¹⁹⁰ not one dollar of taxpayer money had been spent to finance the cost of the legislative pay raise. The raise was not scheduled to go into effect until the 1995 legislative session. West Virginia's credit rating or credibility among its citizens would not have been negatively impacted by the retroactive application of the *Holmes* decision. These justifications of *Winkler* were not present in the *Holmes* case for the court's refusal of retroactive application. The practical nightmares of retroactivity inherent in *Winkler* were simply not present in *Holmes*. In fact, it could be argued that the credibility of the state government would be bolstered by an extension of retroactivity in this case. For these reasons, the majority's reliance on *Winkler* was misplaced.

C. *The Court Disregarded the Speech or Debate Clause of the Federal and State Constitutions by Allowing Legislators to be Deposed*

The most disturbing aspect of *Holmes* was the court's granting of the request of Intervenors Boley and Pulliam to depose certain members of the West Virginia Legislature as well as members of the Citizens Legislative Compensation Commission¹⁹¹ and its subsequent silent denial of the request by Relators Holmes and Kopp that this discovery be stricken. The Speech or Debate Clauses of both the federal and state constitutions are explicit in prohibiting examination of legislators regarding matters upon which those legislators communicate and

187. *Id.* at 436 (reviewing W. VA. CONST. art. X, §4).

188. *Id.* at 423.

189. *Id.* at 435.

190. *Holmes*, 447 S.E.2d at 887.

191. The court entered an Order on April 22, 1994, granting this request, as well as a request to issue a subpoena duces tecum upon Governor Gaston Caperton's office to obtain records of any meetings between the Governor and Senators William R. Wooton and William R. Sharp.

deliberate while the legislature is in session.¹⁹² However, the absolute protection from examination apparently granted by the federal clause has been eroded somewhat by decisions of the United States Supreme Court.¹⁹³ Due to the dearth of precedent construing the state clause, the United States Supreme Court precedents concerning the federal clause facilitate an understanding of the theory and operation of the state clause.

In the federal system, a case-by-case, ad hoc jurisprudence has evolved in determining whether or not inquiry will be permitted into the legislative process by the courts.¹⁹⁴ Therefore, though a privilege does exist under the Speech or Debate Clause, the privilege is not an absolute one but instead a qualified one.¹⁹⁵ The necessity of a court's intrusion into the legislative province must be balanced with the equally important necessity of legislative freedom and independence.¹⁹⁶ In *Holmes*, the court failed to apply this balancing test, opting instead to invade the legislative province without consideration of, or concern for, legislative freedom and the separation of powers. Application of this balancing rationale would have resulted in the court's denial of the Intervenor's request to depose legislators or alternatively, the court's striking of this discovery.

The deposition of members of the legislature and members of the Citizens Legislative Compensation Commission was not necessary to the resolution of this case. The *Holmes* court based its holding of unconstitutionality solely upon its interpretation of the Legislative Improvement Amendment.¹⁹⁷ The court addressed the Intervenor's claims of due process violations by noting that the Intervenor had cited no rule of law in their brief to support the contention that any contact between legislators and members of the Citizens Legislative Compensation Commission was illegal in any manner.¹⁹⁸ Though acknowledging in its opinion that the Intervenor failed to cite any law until oral

192. See U.S. CONST. art. I, § 6; W. Va. Const. art. VI, § 17.

193. See discussion *supra* Part III.C.

194. See generally Raveson, *supra* note 83, at 882.

195. *Id.*

196. *Id.*

197. *Holmes*, 447 S.E.2d at 890-94.

198. *Id.* at 895.

argument which supported the contention that the citizens of West Virginia were denied due process, and rejecting the Intervenor's basis for this contention, the court nevertheless failed to exercise its prerogative to strike the Intervenor's discovery. Such discovery intruded into the legislative province by questioning legislators as to their communicative and deliberative processes concerning the passage of the legislative pay raise.

No necessity existed for the court to inquire into the legislative process. The court based its holding on other factors independent of the Intervenor's due process argument. This intrusion upon legislative freedom and independence was not vital or important to the court's decision in this case and was unwarranted. The balancing of interests between legislative freedom and judicial inquiry was never performed by the court. The court's order granting the Intervenor's motion for discovery on April 22, 1994, and subsequent silent refusal to strike this discovery in its opinion of July 20, 1994, were poorly considered exercises of raw judicial power. The privilege of legislators from having to explain their actions to the judiciary provided by the state and federal Speech or Debate Clauses was effectively written out of the constitution in this case *sub silentio*. Not one member of the *Holmes* court addressed this issue. The court's silence set a dangerous precedent of exhibiting a lack of respect for the concept of separation of powers among the three co-equal branches of government in this State.

VI. CONCLUSION

Upon a preliminary glance, the holding of *State ex rel. Holmes v. Gainer* appears to be frustrating only to the citizens of West Virginia. The court's holding of the unconstitutionality of the pay raise diluted by its declination of retroactivity frustrated the intent of the Legislative Improvement Amendment and disgusted voters around the state.¹⁹⁹ The court's analysis of the historical background concerning the amendment was well-reasoned and appropriately decided. The court

199. A review of election results from the November, 1994, general election reflects some distaste among state voters toward those members of the legislature who voted in favor of the pay raise.

easily could have invalidated the pay raise but instead erroneously chose to employ the standards of retroactivity to validate an unconstitutional legislative act.

The most disturbing aspect of this case was the court's total disregard for legislative independence. The court offered no rationale for its granting of discovery into the legislative process and its subsequent refusal to strike this discovery as violative of the Speech or Debate Clause and of the tripartite system of distribution of governmental power. Though several federal decisions have held that it is permissible to inquire into the legislative process when necessary for a court to decide an important issue, no such necessity existed in this case. The implications of the court's actions in this case are expansive in scope. Any controversial act passed by the legislature could subject legislators to interrogation regarding the passage in light of the due process argument of the Intervenor in this case. This failure to balance legislative interests with judicial inquiry resulted in the judiciary becoming the preeminent branch of government in this circumstance. The legislature was compelled by subpoena to answer questions concerning activities which are constitutionally privileged under the state and federal constitutions. If the privilege was so easily disregarded by the Supreme Court of Appeals of West Virginia in the *Holmes* case, it is doubtful that it will be given much more serious consideration in the future.

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