

JUDGE STEGNER: A MODEL OF IDAHO’S SELF-RESTRAINED JUDICIARY

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I. INTRODUCTION

“The most important thing we do is not doing.” Justice Louis D. Brandeis¹

“That is the wrong answer” is not exactly the words you want to hear from your boss. Especially if you’re pretty sure that you have given the right answer.

I had the privilege of clerking for Judge John Stegner from 2012 to 2013 in Latah County. It was, in my opinion, a desirable posting. For most students at the College of Law who would go observe court at the Latah County Courthouse, Judge Stegner was their first exposure to real court proceedings and the decorum of a judicial officer. For a new law school graduate, Judge Stegner seemed to me to be just about the best person to observe how to thoughtfully reason through thorny issues. He didn’t disappoint me.

And I was very interested in not disappointing him. At the time, I was anxiously waiting for my bar results. I had the irrational feeling that if I had reached the wrong conclusion on the simple issues Judge Stegner assigned to me, then it was more than likely I had delivered the bar examiners the wrong answers on my exam.

Working for Judge Stegner exposed me to how judges ought to make decisions and emphasized to me the importance of having good judges. I will discuss that good judges are a critical component of maintaining a legitimate judiciary and peaceful society. Being a good judge has more to do with restraining the urge to venture where a judge should not than a judge’s academic accomplishments,

1. ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 1 (1957).

pedigree, courtroom experience, or personal political convictions. As Idaho's judges properly exercise judicial restraint, the State's judiciary is rewarded by strengthening its own legitimacy and power. Judge Stegner is a good example of the sort of self-restrained judicial officer that our state deserves. While I acknowledge that the argument for the importance of self-restrained judges is well-trod and has been argued better by more intelligent people than me, I hope that my unique position in observing and being mentored directly by Judge Stegner might qualify me to make an argument that he is a model example of a restrained judge.

I will define and outline the theory of judicial self-restraint, describe some of Idaho's judicial history that was critical to establishing the legitimacy of Idaho's judiciary, and outline a few examples of Judge Stegner exercising restraint, including a time when I gave Judge Stegner the wrong answer.

II. COURTS ARE NECESSARY FOR A PEACEFUL SOCIETY

Accidents, broken promises, unfairness, or simple hurt feelings are part of the human condition. Disputes are part of life. As a result, throughout history, developing a routine mechanism for resolving disputes, ideally without violence, was a paramount objective of any serious government. The absence of a government-endorsed dispute resolution mechanism does not eliminate the sources of disputes. Indeed, if the state does not establish a way for people to pursue "justice" through some authorized process, people will form their own justice.² Historically, the "default" dispute resolution methods were violent and *ad hoc*.³ Examples of the "default" methods include hue and cry, clan/familiar feuds, mob violence, and the like.⁴ While the "default" methods may accomplish the objectives of imposing order on and over people, places, and things, the violent means of achieving that order is untenable for a law-based society.⁵ In addition, these "default" methods have a tendency to not truly resolve the dispute.⁶

The solution to the "default" methods is to create an official and sanctioned power that can resolve the dispute—a court. However, in order to successfully bypass "default" methods, everyone involved in the dispute and observing the dispute must agree that the sanctioned court is actually capable of fairly deciding the dispute. Rousseau's Social Contract argued that people were only obligated to

2. THOMAS HOBBS, *LEVIATHAN* (1651) (ebook), <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm>. This is, of course, Thomas Hobbes's argument. Without government, all that remains is "continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short." *Id.* at ch. XIII.

3. CHARLES REMBAR, *LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 91-115 (1980).

4. *Id.*

5. *Chambers v. Balt. & O.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").

6. REMBAR, *supra* note 3 at 98. Today's litigants may complain about the inefficiencies of resolving a dispute through trial and appeal. However, lingering blood feuds with never-ending sudden reprisals must have been an inefficient horror of another kind. It makes one grateful for the banal predictability of a court's calendar.

obey legitimate powers.⁷ While Rousseau may have written more about executive and legislative bodies, his argument is true for courts as well. Courts must be legitimate and, perhaps more importantly, be seen as legitimate.

One comparison that illustrates the vital importance of judicial legitimacy is between the disputing parties in the 2000 United States Presidential Election and the 2007 Kenyan Presidential Election. Both elections involved close margins, allegations of irregularities, and a dispute that needed resolution.⁸ The parties in the 2000 United States Presidential Election—George Bush and Al Gore—squared off their dispute in the courts, refined their arguments, and the United States Supreme Court ultimately held for Bush.⁹ To say that the Supreme Court's decision was controversial is an understatement.¹⁰ The Court's decision has been criticized, explored, and discussed *ad nauseam*.¹¹ However, Americans who woke up to the news of the Supreme Court's decision did something remarkable. They accepted the decision peacefully, even though the stakes were high and half of the country felt the decision was misguided.¹² Even Gore famously instructed his team to refrain from “trashing the Supreme Court” in their responses to the decision.¹³

The 2007 Kenyan Presidential election was also a close, bitterly contested race.¹⁴ Irregularities and fraud, both substantive and alleged, were rampant throughout the 2007 race.¹⁵ At the end, Raila Odinga was declared to have lost to the incumbent President Mwai Kibaki.¹⁶ Odinga, unlike Gore, refused to have Kenya's judges review his grievances.¹⁷ Expressing a complete lack of confidence in the fairness he could expect, Odinga and his supporters referred to the judges as “Kibaki's” and refused to even file a petition to have the election examined.¹⁸

7. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* (George Douglas Howard Cole trans., 1920) (ebook), <https://www.gutenberg.org/files/46333/46333-h/46333-h.htm>.

8. See *infra* notes 9 through 20.

9. *Bush v. Gore*, 531 U.S. 98 (2000).

10. See STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 27 (2021).

11. See, e.g., HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427 (2006); Elspeth Reeve, *Just How Bad was Bush v. Gore*, ATLANTIC (Nov. 29, 2010), <https://www.theatlantic.com/politics/archive/2010/11/just-how-bad-was-bush-v-gore/343247/>.

12. BREYER, *supra* note 10, at 27.

13. Andrew Rice, *The 2000 Election Never Ended*, N.Y. MAG.: INTELLIGENCER (Nov. 5, 2020), <https://nymag.com/intelligencer/2020/11/bush-v-gore-and-the-2000-election-never-ended.html>.

14. Ediwon Odhiambo Abuya, *Consequences of a Flawed Presidential Election*, 29 LEGAL STUD. 127, 134–35 (2009).

15. *Id.* at 132–35.

16. *Id.* at 134–35.

17. Ediwon Odhiambo Abuya, *Can African States Conduct Free and Fair Presidential Elections?*, 8 N. W. J. INT'L HUM. RTS. 122, 152 (2010).

18. *Id.* at 152–53.

Instead, Odinga and his supporters took their dispute to the streets of Kenya.¹⁹ When the dust settled, approximately 1,100 Kenyans had been killed, tens of thousands suffered, and over 500,000 people were displaced from their homes.²⁰ Why did Americans enjoy peace while Kenyans suffered death and destruction? Simply put, Gore trusted the United States courts enough to accept the decision and Odinga didn't even trust the Kenyan courts to look at his dispute.²¹

III. JUDICIAL RESTRAINT IS WHAT MAKES A GOOD JUDGE AND A STRONG JUDICIARY

Judicial legitimacy is the difference between how Gore and Odinga went about resolving their important disputes about their election losses. Judicial legitimacy is what gives judges their power.²² It is the power that when a judge makes a decision regarding a specific dispute, it is seen as an application of the law generally and not the judge favoring one party over the other.²³ In order for this marvelous power of peaceful dispute resolution to work, it needs judges who understand why it works. As Justice Stephen Breyer explains:

If the public comes to see judges as merely “politicians in robes,” its confidence in the courts, and in the rule of law itself, can only decline. With that, the Court’s authority can only decline, too, including its hard-won power to act as a constitutional check on the other branches.²⁴

The reason why people bring their disputes to the courts and then abide by the decision is because, on the whole, people believe they are going to get a fair shake from the judge.

19. See Abuya, *supra* note 14 at 138 (“Within hours of the announcement of the disputed presidential results, the country plunged into bloodshed.”).

20. *Id.* at 128.

21. While the focus of this article isn't broad enough to fully analyze the full similarities and distinguishing elements of the two disputes discussed briefly here, it is significant to note that between the 2007 Kenyan Presidential election and the 2013 Kenyan Presidential election, Kenya adopted a new constitution that formed a new judiciary. Odinga ran again in 2013 and he lost again. While Kenyans braced for another literal street fight, Odinga opted this time to bring the dispute to the new Kenyan Supreme Court. Unfortunately for Odinga, he lost his case in the courts. However, Odinga accepted Kenya's judges this time and there was no bloodshed in 2013 as there was in 2007. As one of his supporters explained, “Why do you think [Odinga] brought this case to the Court instead of reacting as they did last time? The Constitution! In the new constitution, the judges are vetted and have been career judges. There is no corruption with the Supreme Court. They are vetted, that is why we trust them.” Charles Herman, *The Adjudication of Kenya's 2013 Election: Public Perception, Judicial Politics, and Institutional Legitimacy* SIT Graduate Institute/SIT Study Abroad SIT Digital Collections, 4, 28 (Spring 2013) (unpublished manuscript) (on file with the School for International Training Independent Study Project (ISP) Program).

22. BREYER, *supra* note 100 at 16.

23. *Id.* at 30.

24. *Id.* at 63.

Judges personally provide our society with the assurance that there is an avenue for everyone to be heard out and understood.²⁵ As alluded to earlier, the guarantee that citizens can turn to the courts to resolve their disputes between their business partners, neighbors, family, and even the government itself, keeps societal peace. This “dispute resolution guarantee” could be said to be a vital part of Rousseau's unwritten “social contract.”²⁶ If the public perceives the guarantee to be meaningless, then the “social contract” is likely to be breached with violence.²⁷ No wonder so much ink has been spilt as academics, practitioners, and even judges themselves wring their hands fretting over the legitimacy of the judicial branch of the government.²⁸ The alternative is for the public to use the “default” methods of dispute resolution.²⁹

Individual judges have a central obligation and active role to ensure and promote the dispute resolution justice guarantee.³⁰ There's a reason why the idiom “sober as a judge” has had cachet in the English language for centuries.³¹ The public, not to mention litigants, expect judges to be fair, neutral, and engaged. Idaho has been fortunate that the overwhelming majority of its judges have taken this responsibility seriously. Judges are expected to hear and decide the disputes that are brought before them.³² Part of this duty is to explain why the judge concluded their decision was correct. Typically this is done in a carefully written opinion that examines both sides' arguments, the applicable legal principles, and the court's own analysis. While this intellectual work is important for the lawyers litigating the case, other judges who may take up a similar question, and even the public, it is especially vital for the disappointed litigant.³³ As a consequence, the manner, justification, and even the attitude of how a judge resolves a controversy is, in the long run, more important than the resolution of the dispute itself.³⁴

25. *Boddie v. Connecticut*, 401 U.S. 371, 388 (1971) (Brennan, J., concurring) (“Courts are the central dispute-settling institutions in our society.”).

26. ROUSSEAU, *supra* note 7.

27. *Id.*

28. *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARVARD L. REV. 1787 (2005); Nate Raymond and Andrew Chung, *U.S. Supreme Court risks its legitimacy by looking political, Justice Kagan says*, REUTERS (Sept. 14, 2022, 3:10 PM), <https://www.reuters.com/legal/us-supreme-court-risks-its-legitimacy-by-looking-political-justice-kagan-says-2022-09-14/>.

29. REMBAR, *supra* note 3.

30. IDAHO CODE JUD. CONDUCT, pmbl.

31. English speakers have been illustrating that they were clear-headed, serious, and reserved with this complimentary idiom since at least 1694. Michael G. Walsh, *Lawyerly Clichés and Their Origins, Part Three (R-z)*, EXPERIENCE 30, 32. (2006).

32. IDAHO CODE JUD. CONDUCT R. 2.7. (2017).

33. *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (Tenn. 2014) (“[Judicial opinions] are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic.”) (quoting *Bright v. Westmoreland Cnty.*, 380 F.3d 729, 732 (3d Cir. 2004)).

34. *See James Boyd White, What's an Opinion for?*, 62 U. CHI. L. REV. 1363, 1366-69 (1995).

Judicial restraint is a legal tradition with many principles, but all deal with the philosophy that a judge ought not utilize certain, unsound decision-making tools.³⁵ Why are the tools, or in other words the method or process, in which a judge makes a decision important? After all, isn't the purpose of a judge to simply resolve a dispute between the parties standing before the court? Of course, it is. But a judge is more than just a simple referee between two bickering parties. To encourage others to seek redress before a judge, judicial restraint provides a litany of tools a judge may use to reach a decision. Using the tools of judicial restraint doesn't only improve a court's decision-making, it also ensures that the judge promotes the legitimacy of our society's dispute resolution guarantee.

A. Avoiding Advisory Opinions

One important way that judges ensure their decisions promote legitimacy is by only rendering a decision on actual disputes that can actually be resolved by the decision.³⁶ This tool of justiciability requires judges to avoid making advisory opinions regarding a hypothetical dispute.³⁷ Since a judge's decision can have an impact that reaches far beyond the litigants at bar, an unrestrained judge may think it sensible to resolve a dispute before it even happens. Historically, the ancient English judges of the King's Bench were often called on to render advisory opinions for the Crown and Parliament alike for hundreds of years.³⁸ As a matter of fact, advisory opinions requested by the House of Lords established a number of common law doctrines, such as the insanity defense.³⁹ In the late 1700s, the tradition of advisory opinions was under criticism.⁴⁰ After nearly a century of judges' unease with the practice, at the end of the 1800s the English judiciary ended the custom of issuing advisory opinions.⁴¹ Perhaps unsurprisingly given the

35. ROBERT A. CARP, ET AL, *JUDICIAL PROCESS IN AMERICA* 74 (10th ed. 2016).

36. *Westover v. Idaho Cnty. Risk Mgmt. Program*, 430 P.3d 1284, 1288, 164 Idaho 385, 389 (2018).

37. *Id.*

38. Jonathan D. Persky, "*Ghosts That Slay*": *A Contemporary Look at State Advisory Opinions*, 37 *CONN. L. REV.* 1155, 1161–64 (2005). It goes without saying that there was enormous pressure to render an opinion that the king would approve of. Famous Lord Coke's judicial tenure ended after he refused to issue an advisory opinion to King James I on the grounds that the request was a clear attempt to manipulate the outcome. *Id.* at 1162.

39. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843) In 1843, the delusional Daniel M'Naghten drew a pistol and shot Edward Drummon killing him. *Id.* After his trial, a jury found him not guilty, on the ground of his insanity. *Id.* The controversy over the verdict reached the debates in the House of Lords, who "determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th of May, all the Judges attended their Lordships . . ." *Id.* The resulting advisory opinion is known as "the M'Naghten Rules."

40. Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 *VAND. L. REV.* 621, 652 (2021).

41. Persky, *supra* note 38, at 1163. English judges ceased granting advisory opinions first to the Crown first in *Lord Sackville's Case*, 28 Eng. Rep. 940 (1760), and by the end of the 1800s to parliament. *Id.* at 1163-64. In their reply to King George II, the judges politely answer the hypothetical question posed

contemporaneous debate over advisory opinions, the newly birthed Federal Judiciary opted in 1793 to refuse President George Washington's request to answer twenty-nine hypothetical legal questions.⁴²

The trouble with issuing an advisory opinion is that these opinions threaten the dispute resolution justice guarantee. Judicial decisions are often decried as mere politics instead of a careful consideration of a problem.⁴³ The abstract and factless nature of answering a hypothetical question worsens that perception because it pushes a judge into the role of a legislator.⁴⁴ In other words, you don't expect to get a fair shake from a politician, but you should expect fairness from a judge. Despite the Federal Judiciary's strong distaste for issuing advisory opinions, some state judiciaries do issue advisory opinions.⁴⁵ Fortunately, Idaho's judges have wisely left hypothetical law making to the legislature.⁴⁶

B. Respecting the Role of the Legislative Branch

Judges also exercise restraint by resolving only what they need to resolve and not more. Often a litigant presents an argument that the legislature has adopted an unconstitutional statute, inviting a judge to invalidate an unpopular law. However, courts routinely decline the invitation to strike down a democratically crafted rule.⁴⁷ Justice Marshall explained the danger well:

No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must

and state "[i]n general, they are very averse to giving extra-judicial opinions. . . ." The message was apparently received and no English monarch requested an opinion again.

42. *Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004).

43. Examples range from professional media, Stephen Collinson, *Conservatives are on a roll in their quest to remake America through the courts*, CNN (June 30, 2023), <https://www.cnn.com/2023/06/30/politics/conservatives-remake-america-courts/index.html>; to individuals with a twitter handle, @apkvr, X (Dec. 5, 2018, 6:49 PM), <https://x.com/apkvr/status/1070495374870241280?s=20> ("Hey Chief Justice Roberts, you still think there is no politic[sic] judges, because the Ninth Circuit (circus) is at it again. Are we at a point where laws mean nothing. Last executive thought so, do you?").

44. *Vieth*, 541 U.S. at 302; *see also* Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007-08 (1924).

45. Despite the Federal Judiciary's strong distaste for issuing advisory opinions, Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota's judiciaries do issue advisory opinions. *See* Jonathan D. Persky, "Ghosts That Slay:" *A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1166-67 (2005); *see also* ALA. CODE § 12-2-10 (1975); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. III, art. II; MICH. CONST. art. 3, § 8; N.H. CONST. pt. II, art. 74; OKLA. STAT. tit. 22, § 1003 (1910); R.I. CONST. art. 10, § 3; S.D. CONST. art. V, § 5.

46. *Harris v. Cassia Cnty.*, 681 P.2d 988, 991, 106 Idaho 513, 516 (1984).

47. *E.g.*, *Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium Dist.*, 192 P.3d 1026, 1028, 146 Idaho 202, 204 (2008).

meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.⁴⁸

Stamping out legislation as unconstitutional calls into question a judge's motives, especially when the decision essentially resolves a matter of policy that was debated, negotiated, and decided by the legislature.⁴⁹

In order to preserve the dispute resolution justice guarantee, judges must assure the public that when a statute is struck down, it is because the legislature crossed a line—and not the court. To that end, courts ought to only invalidate a statute where the legislature overstepped the bounds of the constitution and not more.⁵⁰

Courts have the remarkable power to say what the Constitution or a statute means. In the wrong hands, the power of judicial review would become the power of judicial constitutional amendment. Maintaining the role of a neutral arbiter is also why judges ought not do away with laws that are, in the judge's mind, simply unwise.⁵¹ Occasionally this means that a judge must simply hold their nose, decide against their personal conviction, and respect the democratic will made manifest in the state code. Judges are not artists, free to follow their hearts and invoke their own vision of right and wrong. Departing from restraint raises the specter that disputes won't be resolved in a fair and correct way.⁵² Justice Thurgood Marshall said it best, "The Constitution does not prohibit legislatures from enacting stupid laws."⁵³ In order for the dispute resolution guarantee to be preserved, a litigant

48. *Ex parte Randolph*, 20 F. Cas. 242, 254 (D. Va. 1833) (Marshall, J., concurring) (emphasis added).

49. See, e.g., Stephen Collinson, *Conservatives are on a Roll in Their Quest to Remake America Through the Courts*, CNN (June 30, 2023), <https://www.cnn.com/2023/06/30/politics/conservatives-remake-america-courts/index.html>.

50. *E.g.*, *Wasden v. State Bd. of Land Comm'rs*, 153 Idaho 190, 198 (2012) (quoting *Voyles v. City of Nampa*, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976)) ("When part of a statute or ordinance is unconstitutional and yet is not an integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance.").

51. *Boddie v. Connecticut*, 401 U.S. 371, 384 (1971) (Douglas J., concurring) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.").

52. It could be said that the 1937 court packing crisis was in part due to Franklin D. Roosevelt's perception that the Supreme Court opposed New Deal legislation on political grounds, rather than performing its Article III duty of checking governmental overreach. STEVEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 17–21 (2021). FDR's plan to reform the Supreme Court was deeply unpopular, even with FDR's political allies. *Id.* at 18. There is an argument that this unpopularity was due, in part, because the packing plan damages the dispute resolution guarantee. After all, if securing a favorable judicial decision is obtainable through one brutish exercise of power, rather than the law, there is no guarantee that the government can resolve anyone's dispute in a way that should be respected or honored.

53. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209, (2008) (Stevens, J., concurring).

must be satisfied that the judge will follow the law; even if the judge thinks the law is stupid.

C. *Stare Decisis*

Perhaps the best, and most discussed, tool of juridical restraint is *stare decisis*. While the tools of judicial restraint discussed above largely require a judge to properly respect the other two branches of the government—particularly the legislature's role—*stare decisis* requires a judge to respect the judiciary. When a judge explains their reasoning and application of prior precedence, they are following centuries of common law tradition.⁵⁴ At the same time, the judge assures the parties that their arguments have been heard and considered.⁵⁵ Like the other restraint tools, adhering to *stare decisis* assures that a judge will follow legal tradition more than his own personal views.⁵⁶

A court's duty to observe and follow precedence is rooted in its practicability and legitimizing power. *Stare decisis* is an abbreviation of the legal maxim *stare decisis et non quieta movere*—stand by the thing decided and do not disturb the calm.⁵⁷ Deferring to precedent, especially, from a higher court, certainly preserves the calm and predictability of the law.⁵⁸ Even if a district court judge believes an appellate court's prior decision was wrong, very few district judges would choose to rock the boat, even if the appellate court appears to be preparing to change course.⁵⁹ When a judge follows precedence, they are really communicating that fairness, stability, predictability, and efficiency rules their courtroom.⁶⁰ The value of this reassurance for the dispute resolution guarantee has been long observed. Both William Blackstone and Alexander Hamilton wrote of its benefits.⁶¹ It ensures the public that the law is stable and reliable.⁶² It helps lawyers predict a dispute and advise their clients to compromise or forge ahead with a lawsuit.

54. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to Rehnquist Court*, 52 VANDERBILT L. REV., 647, 661 (1999). There is no consensus as to when the tradition started, *stare decisis* seems to be as ancient as English common law itself. *Id.*

55. See Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV., 103, 118-119 (2021).

56. RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 6 (2017).

57. James C. Rehnquist, *The Power That Shall Be Vested in A Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV., 345, 347 (1986).

58. See *supra* note 49, at 30.

59. *Id.*

60. *Id.* at 34.

61. *Id.*

62. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). (“[*Stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

IV. IDAHO'S JUDGES – CONTINUING TO IMPROVE AND STRENGTHEN THE DISPUTE RESOLUTION GUARANTEE IN IDAHO

Idaho has been fortunate to have good judges and judicial staff who take the dispute resolution guarantee seriously. Idaho's early history illustrates the problems of a judiciary that lacks restraint and, as a consequence, respect from the public. Idaho's statehood reforms and the continuing tradition of judicial improvement have created a legacy that each Idaho judge should strive to live up to.

A. The Trouble With Idaho's Territorial Judges

Idaho was one of the last parts of the United States to be settled by people of European descent.⁶³ The early days of Idaho's disputes were typical of Wild West stories, water rights, cattle and sheep owners, and mining claims.⁶⁴ Unfortunately, there were few resources for official dispute resolution. Idaho's territorial boundaries shifted constantly.⁶⁵ This impacted the availability of territorial courts and, until 1860, court services in what would become Idaho were simply unavailable.⁶⁶ For the thousands of miners working in the territory, going to court was simply not a practical answer.⁶⁷ In the absence of the dispute resolution guarantee, the default methods prevailed as it was not uncommon for these early disputes to be settled at gunpoint.⁶⁸

At the founding of the state, the Idaho constitutional delegates were deeply concerned with the perceived failings of the territorial judiciary.⁶⁹ In the view of the delegates, the territorial judiciary had not been serving the needs or expectations of the territory.⁷⁰ Editorials critical of the territorial courts rarely held back dissatisfaction.⁷¹ As one editorial lamented “[a] corrupt judiciary is about the greatest curse that can be inflicted on any people.”⁷² Distrust of the territorial judicial system was widespread. For example, Mormons refrained from using the territorial courts, opting instead for their church's “Bishop's courts” to resolve disputes.⁷³

Most of the blame for the weakness of the territorial courts was self-inflicted by the territorial judges. The territorial government, including the judiciary, was federally controlled. Federal appointees to the Idaho territory were, more often

63. See DENNIS C. COLSON, *IDAHO'S CONSTITUTION: THE TIE THAT BINDS* 2-4 (1991).

64. See generally RANDY STAPILUS, *SPEAKING ILL OF THE DEAD: JERKS IN IDAHO HISTORY* (2015).

65. CARL F. BIANCHI, *JUSTICE FOR THE TIMES: A CENTENNIAL HISTORY OF THE IDAHO STATE COURTS* 3 (1990) [hereinafter *JUSTICE FOR THE TIMES*].

66. *Id.* at 4–5. Although, it should be noted that the indigenous people of Idaho all had dispute resolution mechanisms for members of their tribes. *Id.*

67. *Id.* at 3.

68. See, e.g., RANDY STAPILUS, *SPEAKING ILL OF THE DEAD: JERKS IN IDAHO HISTORY* 64–65 (2015).

69. COLSON, *supra* note 63, at 180.

70. *Id.*

71. *JUSTICE FOR THE TIMES*, *supra* note 65, at 15.

72. *Id.* at 15.

73. *Id.* at 5.

than not, from the east, unfamiliar with Idaho's laws, and uninterested in staying put.⁷⁴ Indeed judicial turnover was so commonplace that some judicial appointees never even arrived to sit in a courtroom and hear a case.⁷⁵ Although the territorial courts were created by Congress in 1863 and all three seats of the Territorial Supreme Court were appointed within a week, the Territorial Supreme Court did not hold court with all three judges present until 1866, three years later.⁷⁶ Worst of all, these territorial judges were perceived to disregard their predecessor's decisions, a critical failure of judicial restraint.⁷⁷ At least one territorial judge refused to provide written decisions of his rulings, even after receiving a request by the lawyers arguing the case.⁷⁸

By not utilizing the tools of judicial restraint, the territorial judges likely encouraged the desire for statehood. The territorial judges were seen as largely uninterested in the disputes they were called to resolve, to say nothing about the Idaho Territory itself.⁷⁹ Improving the quality and predictability of the judiciary was a primary selling point for those advocating Idaho's statehood.⁸⁰ As the delegates for statehood put it:

Scarcely has one judge, sent to us from abroad, obtained even a slight insight into the laws and customs of the territory, before another coming in his room has undone the work of his predecessor, and this chronic condition of change has left all out business and property interests in a constant state of doubt and uncertainty.⁸¹

Improving the judiciary was so worthy a goal that the delegates designated that nearly a third of the budgeted cost of the proposed State government should be dedicated to supporting the new judicial branch.⁸² At the dawn of statehood, Idahoans were, as they are now, fiscal conservatives and the taxpayer's cost of funding the government was a political sticking point.⁸³ Nevertheless, the cost of a "good" judiciary was apparently deemed worth the public expense. As one delegate explained, "cheap justice, is generally injustice."⁸⁴

74. *Id.* at 180–81.

75. *Id.* at 7. Idaho was a territory for twenty-seven years. In that time, twenty-six different Supreme Court justices were appointed to four-year terms that were rarely fully served. *Id.* at 15.

76. JUSTICE FOR THE TIMES, *supra* note 65, at 8–9; COLSON, *supra* note 63, at 180–81.

77. COLSON, *supra* note 63, at 180.

78. JUSTICE FOR THE TIMES, *supra* note 65, at 181.

79. *Id.*

80. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 2092–93 (I. W. Hart ed. 1912) [hereinafter PROCEEDINGS AND DEBATES].

81. *Id.* at 2092.

82. *Id.* at 2093; COLSON, *supra* note 63, at 194.

83. PROCEEDINGS AND DEBATES, *supra* note 80, at 2093 ("Some objection has been urged against statehood on the ground that the cost of government will be greatly increased.") The costs of the judiciary were debated at length as part of the convention. *Id.* at 1533–40.

84. *Id.* at 1537.

Fortunately, the “improving the judiciary” objective of statehood was a success. Idaho’s courts have continued to strengthen the public’s confidence in the dispute resolution guarantee. Idaho’s judges and courts have an excellent reputation for integrity, efficiency, and dedication.⁸⁵ This is in part because of Idaho’s courts striving to continue to improve. Idaho’s courts have adopted modern technology that has improved the efficiency and organization of the courts.⁸⁶ In addition, Idaho has been a national leader in treatment courts for twenty-five years.⁸⁷ More importantly, however, is that Idaho’s judges are examples of the self-restrained judiciary who listen thoughtfully, adhere to the law, and who explain their reasoning. Gone are the territorial days where, at best, your dispute would be settled by a disinterested, unrestrained federal appointee from the East or, worse, at the point of a gun.

B. Judge Stegner is a Restrained Judge Who Has Safeguarded and Promoted the Dispute Resolution Guarantee to Everyone Who Came Into His Courtroom

As illustrated above, judges have a variety of tools for self-restraint. Restraining yourself from following your own vision of right and wrong is a tremendously difficult thing. For most professions, self-restraint isn’t necessarily an asset. However, for judges, it is a requirement. Judges live and exist in the real world—there is no ivory tower. They deal with real people who are having real problems. Judges, including Judge Stegner, are human beings. Working in Judge Stegner’s chambers, I had the occasion to observe that struggle. In my observations, Judge Stegner took his duty to self-restrain seriously. In a way I hope does not make Judge Stegner uncomfortable, I am going to share two illustrations where Judge Stegner was an outstanding example of a principled, self-restrained jurist.

i. Respecting a Stupid Law

When I was clerking, Judge Stegner served as the District Court Judge for Latah County in Moscow, Idaho. As most Idaho attorneys know, Moscow is the home of the University of Idaho. College life is active at the U of I and it is not surprising that disputes arise. One such dispute arose between a twenty-year-old college student and the Moscow Police Department.⁸⁸ The student had been accused of violating Idaho’s prohibition on individuals possessing alcohol under the age of twenty-one.⁸⁹ An important part of the dispute centered on that Idaho’s underage drinking law was unconstitutional because its punishment was unrelated

85. JUSTICE FOR THE TIMES, *supra* note 65, at 249.

86. Chief Justice G. Richard Bevan, *2023 State of the Judiciary Address* (January 18, 2023), https://isb.idaho.gov/blog/state-of-the-judiciary-address/?utm_source=rss&utm_medium=rss&utm_campaign=state-of-the-judiciary-address, (addressing the Idaho Senate and Idaho House of Representatives).

87. *Id.*

88. *State v. Bennett*, No. CR-2003-3111, (D.C. Idaho July 20, 2004) (Opinion on Appeal), *aff’d*, 142 Idaho 166, 125 P.3d 522 (2005).

89. *Bennett*, No. CR-2003-3111, at *1.

to the crime.⁹⁰ A magistrate judge had rejected the student's argument, and the dispute was elevated to Judge Stegner's courtroom.⁹¹

In the oral arguments, it seemed that Judge Stegner was convinced by the student's argument.⁹² The student argued that the Idaho legislature had constitutionally overstepped by requiring courts to suspend a youth's driver's license, in addition to the fine and jail time.⁹³ The argument was that the punishment was unrelated to the crime and violated the Constitution's due process guarantee.⁹⁴ Suspending a driver's license was not a rational punishment for a crime that did not involve getting behind the wheel and, therefore, the case merited a dismissal.⁹⁵ In asking the prosecutor questions during the argument, Judge Stegner critically and thoroughly explored the lack of the government's interests and Judge Stegner suggested that the punishment was not thought out.⁹⁶ In exasperation, the prosecutor submitted that the court could not simply rewrite the Legislature's statute.⁹⁷ The dispute was submitted and a few weeks later, Judge Stegner issued his opinion denying the student's motion to dismiss.⁹⁸ In his opinion, Judge Stegner explained that the government needed only "a legitimate reason for acting as it did" to survive rational constitutional scrutiny.⁹⁹ Further, that burden was satisfied even if "it is at least fairly debatable."¹⁰⁰

Although he concluded that the suspension of a youth's driver's license did not constitute a substantive due process violation, Judge Stegner's opinion hints at his discomfort with the outcome.¹⁰¹ An Idaho Attorney General Opinion letter stated that although two foreign states had upheld similar punishments, neither court had persuasively articulated a rational relationship between underage drinking and the driver's license suspension punishment.¹⁰² Judge Stegner remarked simply, "[w]hile this Court views the Deputy Attorney General's letter as the better way to analyze the rational relationship test, given the most recent U.S. Supreme Court and Ninth Circuit Decision it is not the test which will be applied."¹⁰³

90. *Bennett*, No. CR-2003-3111, at *4. This was not the only argument, the student also argued that the Moscow Police had spoiled evidence by destroying the supposed alcoholic beverages the student had been found holding. *Id.* at *2–3. Since I do not think these arguments are relevant to this discussion, there is no analysis of that part of the case.

91. *Id.* at *2.

92. Interview with Randall D. Fife, Idaho Falls City Attorney, in Idaho Falls, Idaho (Oct. 2, 2023) (Mr. Fife was the state's prosecutor who argued the *Bennett* appeal in Judge Stegner's courtroom).

93. *Bennett*, No. CR-2003-3111, at *4.

94. *Id.*

95. *See id.*

96. Interview with Randy Fife, *supra* note 92.

97. *Id.*

98. *Bennett*, No. CR-2003-3111, at *7.

99. *Id.* at *5.

100. *Id.*

101. *Id.* at *6–7.

102. *Id.* at *6.

103. *Id.* at *6–7.

Why didn't Judge Stegner simply follow "the better way" articulated by the Idaho Attorney General's Office? Because he is a self-restrained judge. Judge Stegner probably thought that the driver's license suspension was a stupid punishment, but, perhaps following Justice Thurgood Marshall's legal maxim, he correctly respected the Legislature's democratic and constitutional rule to set punishments for the violations of their statutes.¹⁰⁴

ii. Getting the "Wrong Answer"

Judge Stegner assigned work to his clerks much like other judges. One of my main tasks was to prepare "bench briefs" on the various issues that came before the court. As anyone who has had the privilege of working as a clerk knows, this work entails reading the parties' briefs, researching the issues independently, and then, typically, drafting your own take on the dispute. Often, Judge Stegner and I would discuss the dispute and my conclusions. We'd sometimes have back-and-forth discussions that felt more like I was already practicing law and arguing my position in his courtroom. I was always outgunned in these battles of wits. Occasionally, after picking apart my analysis, Judge Stegner would suggest that I revise my brief and try again. I didn't know it at the time, but Judge Stegner was sharpening and preparing me to be a lawyer. Lawyers need to defend their arguments if they hope to be effective advocates, after all.

So, in the fall of 2012, sitting on an old couch in Judge Stegner's office, I was running through the issues pending before the court. One was of interest, if only because it was unusual. A petition to set aside a withheld judgment had been filed. The petitioner had plead guilty to a felony possession of a controlled substance when she was a very young adult. As part of a plea agreement, the petitioner had received a withheld judgment. In the petition, it was explained that the petitioner had had a turbulent transition from teenager to adulthood. Her parents had been either absent or neglectful, leaving the petitioner to take on the burden of providing for her younger siblings. It was during this difficult period that the petitioner fell into the wrong sort of crowd and became associated with drugs. The arrest and conviction provided the petitioner with tools and resources to get her life back on track and the petition had made it clear that she had fully taken every advantage. The petitioner had attended college and was on the threshold of completing a competitive pharmaceutical graduate program. As I recall, she had been ranked in the top one or two percent of all graduates for the past five years. She had made a tremendous impact on her professors and colleagues and the petition included their letters in an attempt to sway the court. More remarkable still, although the petitioner was *pro se*, her pleadings and filings were well-written and intelligent. Although she could have applied for a dismissal earlier, it appeared that she sought the dismissal now to apply for and be eligible to receive a pharmaceutical license. The facts were about as persuasive and deserving a case as I could imagine and that Judge Stegner had ever seen. Of course, there was one problem.

104. The student ultimately appealed to the Idaho Supreme Court, which upheld Judge Stegner's restrained decision. See *State v. Bennett*, 142 Idaho 166, 172, 125 P.3d 522, 528 (2005).

Idaho's withheld judgments are a provision of statutory law, they are not a common law doctrine.¹⁰⁵ This legislative grant of authority permits a judge to withhold a judgment following a guilty plea with probation terms.¹⁰⁶ The idea behind the withheld judgment is a straightforward incentive for someone, particularly first-time offenders, to reform and fly straight.¹⁰⁷ If a defendant will merely comply and faithfully fulfill all the conditions of his or her probation, the defendant can return to the court and petition for dismissal of the case.¹⁰⁸ It is an extraordinary thing. The result of a withheld judgment that is the dismissal of a criminal charge under Idaho Code § 19-2604 is a nullity; “the effect is as if it had never been rendered at all.”¹⁰⁹ There is only one thing that the legislature requires withheld judgment petitioners to show a judge, that “[t]he court did not find, and the defendant did not admit, in any probation violation proceeding that the defendant violated any of the terms or conditions of any probation that may have been imposed.”¹¹⁰

And therein was the rub. The worthy petitioner had only one flaw. Shortly after the petitioner had pled guilty, received a withheld judgment, suspended jail time, and was sentenced to a term of probation, the petitioner was brought back to court to face the allegation of committing a probation violation. As I recall, the violation was for something that seemed trivial, a failure to communicate with her probation officer or consuming alcohol. The record indicated that the petitioner freely admitted the violation, waiving her right to an evidentiary hearing. The court supervising probation imposed a sanction of extended probation with instruction that more severe sanctions would be in store for further violations. The petitioner must have taken all this to heart, as the record contained no further violations and recorded, ultimately, an otherwise successful and satisfactory completion of probation. In the meantime, the petitioner achieved academic and personal success.

I hadn't planned to spend much time on the petition to restore civil rights that the petitioner had filed in my afternoon meeting with the Judge. It seemed to me to be pretty cut and dry. Admittedly I had skipped over all “self-serving” portions of the petition and went looking at the record. There's a probation violation, no relief, and I told the Judge so.

“That's the wrong answer.”

Judge Stegner's conclusion was matter-of-fact and confident. I was surprised. I asked the Judge why he felt that way. Judge Stegner simply told me that he thought I was wrong, that I needed to do more digging and I would come across the right answer. I left the meeting a little shook up. I was a little proud of my ability to

105. State v. Branson, 128 Idaho 790, 793, 919 P.2d 319, 322 (1996) (explaining that power to set aside a sentence is outside a court's “inherent judicial power.” See also IDAHO CODE § 19-2601 (2018).

106. IDAHO CODE § 19-2601(3) (2018).

107. Branson, 128 Idaho at 793, 919 P.2d at 322.

108. IDAHO CODE § 19-2604 (2017).

109. State v. Parkinson, 144 Idaho 825, 828, 172 P.3d 1100, 1103 (2007) abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 262 P.3d 502 (2011).

110. IDAHO CODE § 19-2604(b)(i) (emphasis added).

research, I'd been recognized for it as a law student and I often helped my friends with their research projects. I couldn't believe I'd missed something. Digging into the issue simply cemented my opinion. I won't go into the entire legislative history and amendments of Idaho Code § 19-2604 here. I drafted a memo, doubling-down on my position. Judge Stegner sent it back with a note "try again." I was stumped, I kept picking at loose threads whenever I got a chance. Finally, the day of the hearing came. Minutes before taking the bench, the Judge came into my office. I explained that I hadn't found anything new and told him that, in my opinion, he simply did not have the authority to dismiss the withheld judgment. "That's the wrong answer," was his only reply. As he took the bench, I felt a little embarrassed that I could not find the answer that must have been obvious to Judge Stegner. To my surprise, Judge Stegner, after carefully listening to the petitioner, ruled from the bench. Citing the limits imposed by the legislature and reiterating the relevant facts, Judge Stegner denied the petition and encouraged the petitioner to seek out other options, including the Board of Pardons and Parole.¹¹¹ It was bad news for the petitioner, she left the courtroom and wept just outside of my office door for what seemed like a long time.

Judicial restraint might mean a judge is required to deny a worthy cause. At least it required that result from Judge Stegner while I clerked for him. I don't know what came of the petitioner. She may have felt that the result was very unfair, I know that Judge Stegner felt it was unfair. After Judge Stegner made his decision, I realized that I hadn't given Judge Stegner the wrong legal analysis, the answer was just not how Judge Stegner personally wanted to rule. I doubt that the petitioner ever learned just how badly the judge denying her requested relief wanted to grant it. She didn't know that he and I had for weeks looked for a way to acknowledge her hard work and successful efforts to be a good citizen.

I don't even know that had Judge Stegner given into his desire to grant worthy relief whether anyone would have opposed the ruling. It's possible that it might have even gone unnoticed. After all, there was only one interested party. But Judge Stegner, observing *stare decisis*, didn't give in and re-enforced his commitment to judicial restraint. By following the principles of self-restraint in a case no one is likely to review or contest, a judge steels the court system against criticism on the issues that attract the public's attention and criticism.

V. CONCLUSION

Every litigant that entered Judge Stegner's courtroom, whether they knew it or not, could be sure that they were getting every measure of the dispute resolution guarantee. Judge Stegner's courtroom, as a consequence, preserved the peace in Latah County because he ensured that the laws adopted by the Legislature would be followed. People in the community could be sure that he would apply the law, even if he disagreed personally with the wisdom of the law. In that way Judge Stegner continued to build on Idaho judicial tradition that began with statehood. I got to see him continue in that tradition first-hand. He treated every dispute with dignity. Paid attention and was interested, even in uninteresting issues. As a result,

111. IDAHO CONST. art. IV, § 7 (The Idaho Constitution has granted the authority to grant pardons to the Idaho Board of Pardons and Parole).

he leaves Idaho's judiciary better and stronger than he found it. I might not be able to speak for the whole bar, but I will miss reading his opinions and seeing his restrained influence on the bench.

