South Carolina Law Review

Volume 56
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 7

Summer 2005

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SIMMONS V. GREENVILLE HOSPITAL: AN UNUSUALLY STRINGENT RULE AGAINST RETROACTIVE LEGISLATION

I. INTRODUCTION

The philosophical underpinnings of the American system of government are as numerous as they are diverse. However, separation of powers between diverse branches is undeniably one of the most important notions of government. Montesquieu, whose theories of governance are apparent throughout our system, emphasized this notion that "there is no liberty, if the judiciary power be not separated from the legislative and the executive."[1] This idea was so important to the framers of the United States Constitution that in, 1789, James Madison proposed a new article to the Constitution expressly separating the branches of government.[2]

The framers of the South Carolina Constitution felt that separation of powers was so critical to the operation of the state government that they included a specific clause.[3] Article I, section 8 of the South Carolina Constitution states that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no . . . departments shall assume or discharge the duties of any other."[4] Yet, just as the federal separation of powers doctrine is enigmatic, as common law notions such as the political question doctrine and the prohibition against advisory opinions illustrate, so too is South Carolina's. South Carolina's constitutional text leaves a wide berth for courts to interpret what violates its separation of powers provision.

In *Simmons v. Greenville Hospital System*,[5] the South Carolina Supreme Court recently added some meaning to that very clause with respect to the division between the legislature and the judiciary. In *Simmons*, the court delivered the final jurisprudence in a long line of cases that created a framework for examining certain retroactive legislation for compliance with South Carolina's constitutional separation of powers mandate.[6] The *Simmons* court held that the separation of powers clause prevents South Carolina's General Assembly from acting retroactively in the face of a judicial decision, and that any legislation attempting to do so is ineffective for any cause of action accruing prior to the legislation's passage.[7]

This Note examines the importance of *Simmons* and its predecessors in expanding the power of the South Carolina judiciary. Part II examines the precedent leading up to *Simmons* and the impact of the court's decision on

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1. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1535 (1991) (quoting CHARLES MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (T. Nugent trans., 1949)).

2. *Id.* at 1539. The text of the proposed article read:

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

Id. (quoting 12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds., 1979)).

3. S.C. CONST. art. I, § 8.

4. *Id.*

5. 355 S.C. 581, 586 S.E.2d 569 (2003).

6. *Id.* at 587–88, 586 S.E.2d at 572.

7. *Id.* at 588, 586 S.E.2d at 572.

separation of powers jurisprudence in South Carolina. Part III compares South Carolina's separation of powers law to that of other states and the federal government and focuses on South Carolina's position among the varying applications of the separation of powers doctrine in the context of retroactive legislation. Finally, Part IV critiques the precedent leading up to *Simmons* and concludes that, although the legal path leading to *Simmons* was questionable, its end fully justifies the means.

II. BACKGROUND

A. Separation of Powers Becomes a Weapon for the Judiciary

In *Lindsay v. National Old Line Insurance Co.*,[8] the South Carolina Supreme Court used some choice language by a trial court judge to commence a new line of separation of powers jurisprudence.[9] The *National Old Line* court ruled on a rather mundane issue: whether two statutes purporting to charge fees to foreign insurance companies doing business in South Carolina could coexist.[10] The first statute—known as the "Retaliatory Statute"[11]—charged a reciprocal fee differential to foreign insurers doing business in South Carolina to equalize the fees South Carolina's insurers paid when insuring businesses in foreign jurisdictions.[12] The second statute provided for a credit against the reciprocal fee differential for insurers making certain qualified investments in South Carolina.[13] Previously, in *Lindsay v. Southern Farm Bureau Casualty Insurance Co.*,[14] the South Carolina Supreme Court addressed the conflict between these laws by holding that the General Assembly intended the Retaliatory Statute to apply even where an insurance company was making qualified investments in the state.[15] *Southern Farm Bureau* effectively eviscerated the statutory credits for any foreign insurance companies whose home states charged higher fees for South Carolina insurers doing business in their state.

The General Assembly disagreed with the court's interpretation of its legislative intent and amended the Retaliatory Statute to state that "'all license fees and charges made pursuant to this section shall be reduced to the extent of investment credits granted by [the qualified investment sections].'"[16] It provided further that "'[t]his enactment is declared to be declaratory of the existing provisions of Section 37-132.'"[17] This "declaratory" language, in the thinking of the General Assembly, made the investment credits retroactive to the initial passage of the Retaliatory Statute.

Following the amendment, John Lindsay, Insurance Commissioner for South Carolina, brought a declaratory judgment action against National Old Line Insurance Co. (National Old Line), an Arkansas insurance carrier, to decide whether

8. 262 S.C. 621, 207 S.E.2d 75 (1974).
9. *Id.* at 628, 207 S.E.2d at 77–78.
10. *Id.* at 624, 207 S.E.2d at 75–76.
11. *Id.* at 625, 207 S.E.2d at 76.
12. S.C. CODE ANN. § 37-132 (Michie 1962) (current version at S.C. CODE ANN. § 38-7-90 (West 2002)).
13. S.C. CODE ANN. § 37-123 (Michie 1962).
14. 258 S.C. 272, 188 S.E.2d 374 (1972) (per curiam).
15. *Id.* at 281, 188 S.E.2d at 378.
16. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 628, 207 S.E.2d 75, 77 (1974); S.C. CODE ANN. § 37-132 (current version at S.C. CODE ANN. § 38-7-90 (West 2002)).
17. *Nat'l Old Line Ins. Co.*, 262 S.C. at 628, 207 S.E.2d at 77.

the amended statute allowed the insurance company to collect investment credits against fees paid prior to the amendment.[18] National Old Line sought these credits despite Arkansas' higher license fees charged against foreign insurers.[19]

In holding that National Old Line could not receive credit for fees paid prior to the amendment,[20] the trial court judge[21] stated:

> "[T]he provision in the 1972 amendment that it is 'declared to be declaratory of the existing provisions of Section 37-132' is a legislative attempt to reverse a decision of the Supreme Court. In effect, the General Assembly has said as to Lindsay vs. Southern Farm Bureau . . . 'We reverse.' Under our State Constitution which provides . . . for the separation of the legislative, executive and judicial powers of the government, the General Assembly does not have authority to do this. Consequently, the 1972 amendment is to be given prospective effect only."[22]

A majority of the South Carolina Supreme Court agreed with the lower court's reasoning and affirmed its decision.[23] Thus, the court created the notion that, in South Carolina, separation of powers prevents the General Assembly from enacting a statute that operates retroactively in the face of a supreme court decision.

In dissent, Justice Brailsford questioned the applicability of the separation of powers clause to retroactive legislation.[24] In his opinion, Brailsford wrote:

> The sole question is whether the amendment shall control the calculation of the insurance company's license tax for years prior to its adoption. The language of the amendment . . . leaves no doubt that the legislature *intended* an affirmative answer to this question. I would give effect to the declaratory language *as manifesting the intention of the legislature that the amendment should operate retrospectively* and calculate the license tax accordingly.[25]

Justice Brailsford believed that the legislative intent should control, such that, if the General Assembly intended its new law to operate retroactively, then that intention should prevail.[26]

B. The South Carolina Tort Claims Act: Expansion of the Doctrine

For twenty-five years, the *National Old Line* decision remained dormant in South Carolina's jurisprudence.[27] However, the General Assembly set the machinery of change in motion in 1986 by enacting the South Carolina Tort Claims

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18. *Id.* at 624, 207 S.E.2d at 76.
19. *Id.* at 625, 207 S.E.2d at 76.
20. *Id.* at 626, 207 S.E.2d at 76–77.
21. Judge A. Spruill, Jr.
22. *Nat'l Old Line Ins. Co.*, 262 S.C. at 628, 207 S.E.2d at 77–78.
23. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974).
24. *Id.* at 630, 207 S.E.2d at 78 (Brailsford, J., dissenting).
25. *Id.* (emphasis added).
26. *Id.*
27. *See* Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 402–03, 520 S.E.2d 142, 157 (1999) (citing *Nat'l Old Line* for the first time since the original ruling).

Act (SCTCA),[28] which capped tort claims against the state at $250,000.[29] Two years later, in 1988, the General Assembly passed the Uniform Contribution Among Tortfeasors Act (UCTA),[30] which creates a right of contribution for any jointly liable tortfeasor who pays more than his or her pro rata share of the joint liability.[31]

In *Southeastern Freight Lines v. City of Hartsville*,[32] these two laws came into conflict. The plaintiff died when a Southeastern Freight Lines Truck collided with her vehicle inside Hartsville city limits at an intersection not marked with proper warnings.[33] Southeastern Freight Lines settled the claim with the plaintiff for $400,000 and sought contribution from the city and state for $266,667, their pro rata shares pursuant to the UCTA.[34] The City of Hartsville and South Carolina contested contribution on the grounds that "the total liability of the government entities in this case [can] not exceed $250,000" under the UCTA.[35]

The supreme court held that the conflict between the SCTCA and the UCTA was "incapable of reasonable reconcilement," and that one law had to give way to the other.[36] To determine which statute should control, the court held that the most recent statute—the UCTA—impliedly repealed the offending portions of the older statute—the SCTCA.[37] In so holding, *Southeastern Freight Lines* established that the General Assembly's passage of the UCTA repealed the statutory caps that the SCTCA defined.[38] Notably, that ruling nullified the offending provisions of the SCTCA in their entirety, not merely with respect to claims involving joint tortfeasors.[39]

The General Assembly did not agree with the South Carolina Supreme Court's view that it intended for the UCTA to repeal the statutory caps in the SCTCA.[40] On July 1, 1994, a mere two months after the ruling in *Southeastern Freight Lines*, the General Assembly amended the Tort Claims Act.[41] The amendment stated that the governmental statutory caps "are reenacted *and made retroactive* to . . . the effective date of the South Carolina Contribution Among Tortfeasors Act, *except for causes of action that have been filed* in a court of competent jurisdiction before July 1, 1994."[42]

The South Carolina Supreme Court subsequently reviewed the General Assembly's retroactive amendment of the SCTCA in *Steinke v. South Carolina Department of Labor, Licensing & Regulation*.[43] Steinke died in a bungee jumping accident when the cables supporting the elevator carrying him to the jumping height

28. S.C. CODE ANN. §§ 15-78-120–15-78-200 (West Supp. 2003).
29. S.C. CODE ANN. § 15-78-120(a)(1) (West Supp. 2003) (amended in 1997, increasing the cap to $300,000).
30. S.C. CODE ANN. §§ 15-38-10–15-38-70 (West Supp. 2003).
31. S.C. CODE ANN.§ 15-38-20(A) (West Supp. 2003).
32. 313 S.C. 466, 443 S.E.2d 395 (1994).
33. *Id.* at 468, 443 S.E.2d at 396.
34. *Id.*
35. *Id.*
36. *Id.* at 469, 443 S.E.2d at 397.
37. *Id.* (citing Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 368 S.E.2d 64 (1988)).
38. Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994).
39. *See id.*
40. *See* Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 402, 520 S.E.2d 142, 157 (1999) (citing Appropriation Act of 1994, 1994 S.C. Acts 5129, 5793).
41. Appropriation Act of 1994, 1994 S.C. Acts 5129, 5793.
42. *Id.* (emphasis added).
43. 336 S.C. 373, 520 S.E.2d 142 (1999).

snapped and sent him 160 feet to his death.[44] Steinke's estate's suit against the South Carolina Department of Labor, Licensing, and Regulation (the Department) alleged that it negligently failed to revoke the license of the bungee jumping operation when it was aware that the elevator was unsafe.[45] At trial, the jury awarded the plaintiff $900,000 in damages.[46] On appeal, the Department raised a number of defenses to liability, including the SCTCA's statutory caps.[47]

In *Steinke*, the supreme court reiterated that *Southeastern Freight Lines* rendered the SCTCA caps meaningless because of the conflict with the UCTA.[48] The court noted further that the General Assembly's 1994 amendment explicitly did not apply to causes of action filed prior to July 1, 1994.[49] In conclusion, the court determined that, because Steinke filed the original complaint on June 29, 1994, the amendment's express reinstatement provision was inapplicable.[50]

The court could have ended its discussion there without affecting the result of the case. However, the court added that "[t]his issue implicates the doctrine of separation of powers,"[51] and cited *National Old Line* as precedent for the notion that "'a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively.'"[52]

The court held that "this case, filed before the Legislature reinstated the statutory caps, is controlled by the principles outlined in *Lindsay [v. National Old Line]* . . . . The Legislature may not retroactively overrule this Court's interpretation of the statutes in *Southeastern Freight Lines*."[53] Consequently, the General Assembly's 1994 amendment to the SCTCA could not operate retroactively.[54] The court did state, however, that the General Assembly was free to reinstate the statutory caps in future cases, but the court did not specify what constitutes a future case.[55] This question—what constitutes a future case—left open the issue that created the current state of South Carolina law.

In *Simmons v. Greenville Hospital System*,[56] the South Carolina Supreme Court heard a case with facts allowing it to solidify the jurisprudence it began with in *National Old Line* and expanded in *Steinke*. In *Simmons*, the plaintiff's child, Chavis Simmons, contracted a dangerous infection while in the Neonatal Intensive Care Unit at Greenville Memorial Hospital in late April 1992.[57] Chavis suffered permanent brain damage as a result of the infection.[58]

Chavis' parents filed suit against the hospital on his behalf on May 8, 1998, alleging negligence on the part of the hospital.[59] The hospital settled the suit for $1,500,000, but paid out only $250,000 based on its belief that the SCTCA statutory

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44. *Id.* at 382, 520 S.E.2d at 146–47.
45. *Id.* at 384, 520 S.E.2d at 147.
46. *Id.* at 382, 520 S.E.2d at 146.
47. *Id.* at 401, 520 S.E.2d at 156.
48. *Id.* at 402, 520 S.E.2d at 157.
49. Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 402, 520 S.E.2d 142, 157 (1999).
50. *Id.* at 403, 520 S.E.2d at 157.
51. *Id.* at 402, 520 S.E.2d at 157.
52. *Id.* at 402–03, 520 S.E.2d at 157 (citing Lindsay v. National Old Line Ins. Co., 262 S.C. 621, 628–29, 207 S.E.2d 75, 78 (1974)) (alteration in original).
53. *Id.* at 403, 520 S.E.2d at 157–58.
54. *See id.*
55. Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 403, 520 S.E.2d 142, 158 (1999).
56. 355 S.C. 581, 586 S.E.2d 569 (2003).
57. *Id.* at 583, 586 S.E.2d at 569–70.
58. *Id.* at 583, 586 S.E.2d at 570.
59. *Id.*

caps limited any recovery.[60] The Chavis family subsequently sought a declaratory judgment that the SCTCA did not so limit the hospital's liability. At trial, the court found for the hospital and limited the plaintiff's recovery to $250,000.[61]

On appeal, the South Carolina Supreme Court faced the question of whether the SCTCA's statutory cap, which the General Assembly amended in 1994 and 1997, applied to Simmons' claims.[62] Under *Steinke*, the statutory caps only applied to "future cases" with respect to the 1994 amendment to the SCTCA.[63] The *Simmons* court faced the challenge of determining whether the liability caps applied to a cause of action that *accrued* before passage of the amendment, but which the plaintiff filed after the amendment's effective date.[64]

The *Simmons* court again cited *National Old Line* and the separation of powers doctrine for the proposition that legislation cannot operate retroactively in the face of a final judicial decision.[65] The court noted that:

> At the time [the] claim arose—when Chavis was infected shortly after his birth in 1992—there were no statutory caps in place under the rule of *Southeastern*. Therefore, the Legislature's attempt to reach back and change the status of such claims that arose prior to the Legislature's 1994 reinstatement of the liability caps . . . is, by definition, retroactive, and violates the doctrine of separation of powers.[66]

Thus, the *Simmons* court articulated what is now the rule regarding separation of powers in South Carolina. The General Assembly has the power to enact statutes retroactively. When the Supreme Court has invalidated a statute, however, the General Assembly may only reenact the law such that it operates prospectively. Any such statute that operates on a cause of action accruing prior to the date on which the General Assembly reenacts the statute violates the separation of powers doctrine and is ineffective for those causes of action.[67]

III. ANALYSIS: THE SEPARATION OF POWERS SPECTRUM

This Part analyzes South Carolina's approach to constitutional jurisprudence by placing it on a continuum of the effect the separation of powers doctrine has on retroactive legislation in other United States jurisdictions. On the permissive end of the continuum are governments that allow retroactive legislation in any situation. Conversely, on the restrictive end of the spectrum are governments that allow no retroactive legislation whatsoever. In the United States, the federal government is close to the permissive end, while South Carolina occupies a position close to the restrictive end of the spectrum.

60. *Id.* at 583–84, 586 S.E.2d at 570.
61. *Id.* at 584, 586 S.E.2d at 570.
62. Simmons v. Greenville Hosp. Sys., 355 S.C. 581, 584, 586 S.E.2d 569, 570 (2003).
63. Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 403, 520 S.E.2d 142, 158 (1999).
64. *Simmons*, 355 S.C. at 587, 586 S.E.2d at 572 (emphasis added).
65. *Id.* at 586, 586 S.E.2d at 571.
66. *Id.* at 587–88, 586 S.E.2d at 572.
67. *Id.*

A. Simmons *Compared to Federal Jurisprudence*

In ruling that the General Assembly cannot retroactively amend a statute that the judicial branch has invalidated, the *Simmons* court framed separation of powers jurisprudence very different from the federal system.[68] The United States Constitution does not have an express separation of powers clause[69] like the South Carolina Constitution does, but our federal government has long recognized the doctrine.[70]

In the very narrow area of retroactive legislation, *Plaut v. Spendthrift Farm* is the seminal United States Supreme Court case.[71] Prior to *Plaut*, the Supreme Court held that a special statute of limitations existed for violations of securities law that, in most cases, was shorter than the applicable jurisdictional limitation.[72] That rule resulted in the lower federal courts dismissing a number of cases under the securities law statute of limitations that would otherwise have gone forward.[73]

Congress, however, did not like the Court's interpretation of the statute of limitations and amended the law to extend the federal limitation.[74] As part of the amendment, Congress sought to reinstate cases that were "dismissed as time barred . . . and . . . which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction."[75] In this instance, the Court struck down the amendment and held that "[b]y retroactively commanding the federal courts to reopen *final judgments*, Congress has violated [the] fundamental principle" of separation of powers.[76]

The Court also stated, however, that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply [it] in reviewing judgments still on appeal . . . and must alter the outcome accordingly."[77] Thus, in a federal court, as long as Congress makes clear its intent that a law act retroactively, the law will affect accrued, filed, and even decided causes of action, provided that the time limit for the *final* appeal has not yet expired.[78] This approach lies in stark contrast to that

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68. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) provides an illustration of the federal approach. There, the Supreme Court noted:

> Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.

Id. at 226.

69. Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2682 (1996). In fact, the framers of the United States Constitution rejected any explicit separation of powers clause. Brown, *supra* note 1, at 1531.

70. *See supra* notes 3–4 and accompanying text. *See, e.g.*, PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 312 (Univ. of Chi. Press 2000) (noting that separation of power concerns motivated the early constitutional debates of such early American icons as John Adams, James Madison, and Thomas Jefferson).

71. 514 U.S. 211 (1995).

72. *Id.* at 213–14.

73. *Id.* at 214.

74. *Id.*

75. *Id.* at 215 (quoting 15 U.S.C. § 78aa-1 (Supp. V 1988)).

76. *Id.* at 219 (emphasis added).

77. Plaut v. Spendthrift Farm, 514 U.S. 211, 226 (1995).

78. *Id.* (emphasis added). The only other federal limitation on retroactive legislation is that it must comport with due process. United States v. Carlton, 512 U.S. 26, 30–31 (1994) (stating that only rational basis review applies to due process challenges to retroactive legislation) (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation.") (citing Usery v. Turner Elkhorn Mining Co., 428 U.S.

of South Carolina and illustrates that the federal courts fall very close to the permissive end of the separation of powers spectrum.

B. South Carolina in Comparison to Other States

Though the separation of powers model that *Simmons* articulated differs materially from the federal model, South Carolina is not alone at the restrictive end of the spectrum. Some states ban retrospective laws, which "are generally defined as laws which 'take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed.'"[79] These states emulate South Carolina and fall toward the restrictive end of the continuum.

Some states, however, do allow retroactive legislation. Montana, for instance, allows retroactive legislation so long as the legislature expressly declares the statute to be retroactive.[80] In Michigan, "it is undisputed . . . that the Legislature can validate retroactively anything that it could have originally authorized."[81] These states fall in line with the permissive federal model.

1. Georgia, Illinois, and Washington

Georgia provided the primary precedent on which the South Carolina Supreme Court relied in rendering the *National Old Line* decision:[82] *McCutcheon v. Smith*.[83] In that case, the Georgia Supreme Court revisited its previous ruling that, under the Georgia Civil Service Act of 1943, plaintiff McCutcheon was not an employee of Fulton County.[84] On February 8, 1945, the Georgia Legislature amended the act in question to state that "as of June 1, 1943, Mrs. Evelyn W. McCutcheon was an employee of Fulton County . . . and that she occupied the position of matron of the Fulton County jail."[85]

The Georgia Supreme Court held that the Georgia Legislature's retroactive attempt to change the judicial interpretation of a statute "offends the [separation of powers] clause of the [Georgia] Constitution . . . and is void."[86]

The primary basis for the *McCutcheon v. Smith* decision was a previous Georgia decision, *Wilder v. Lumpkin*.[87] The *Wilder* court stated that, when a "law is the exercise of a judicial power, and . . . it interferes with no *vested right,* [and] *impairs the obligation of no contract*," then it "may be admitted to retroactive efficiency."[88] In combination, these cases show that Georgia is concerned with retroactive legislation only in the instance where that legislation in some way impinges on a vested right. Although this interpretation places Georgia on the

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1, 17 (1976)).

79. Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 340 (Mo. 1993) (en banc) (quoting Lucas v. Murphy, 156 S.W.2d 686, 690 (Mo. 1941)). Some state constitutions expressly provide this ban. *See, e.g.*, MO. CONST art. I, § 13 (noting that "no . . . law . . . retrospective in its operation . . . can be enacted").

80. MONT. CODE ANN. § 1-2-109 (2003).

81. Armco Steel Corp. v. Dept. of Treasury, 358 N.W.2d 839, 844 (Mich. 1984).

82. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974).

83. 35 S.E.2d 144 (Ga. 1945).

84. *See* McCutcheon v. MacNeil, 28 S.E.2d 469, 471 (Ga. 1943).

85. *Smith*, 35 S.E.2d at 148.

86. *Id.* at 148–49.

87. 4 Ga. 208 (1848).

88. *Id.* at 212 (emphasis added).

restrictive end of the spectrum, its separation of powers doctrine is less restrictive than South Carolina's.

Illinois jurisprudence, which the *Steinke* court cited in support of its decision,[89] also treats retroactive legislation much like South Carolina. In *Roth v. Yackley*,[90] the Illinois Supreme Court held that precedent "do[es] not recognize that the [Illinois] General Assembly may retroactively overrule a decision of a reviewing court."[91] However, more recently, the Illinois Supreme Court clarified this holding by stating that "[*Roth*] . . . [is] not contrary to [the] . . . principle that the General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court *with respect to cases which have not been finally decided*."[92] Thus, while Illinois may have held to the doctrine that its General Assembly could not act retroactively over a court decision, its supreme court now applies the separation of powers doctrine like the federal courts.

The *Steinke* court also cited a Washington case in support of its separation of powers holding.[93] In the cited opinion, the Washington court noted that "legislative clarifications, as opposed to amendments, are generally retroactive and effective from the original date of the statute."[94] However, when the clarifying statute exists "to correct a *judicial interpretation* of a prior law . . . the effect is *prospective only*. Any other result would make the legislature a court of last resort."[95] Therefore, Washington's approach falls close to the restrictive end of the spectrum.

2. *Pennsylvania*

Pennsylvania's separation of powers jurisprudence is similar to South Carolina's post-*Simmons* rule and may be instructive on the future impact of the decision. In Pennsylvania, the "'state constitution [does not] invalidate[] a non-penal statute merely because it is retroactive.'"[96] However, Pennsylvania also holds that "'[r]etrospective laws may be supported *when they do not disturb any vested right*, but only vary remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and when prosecuted.'"[97] In this context, the Pennsylvania Supreme Court expressly noted that "[t]here is a vested right in an *accrued* cause of action."[98] Therefore, in Pennsylvania, the legislature may act retroactively. However, its retroactive legislation cannot apply to causes of action that accrued prior to the passage of the act.[99] This test is substantially similar to the South Carolina approach.

Interestingly, the Pennsylvania Supreme Court stated that its view "is consistent with federal decisional law which squarely holds that a legislature may not constitutionally eliminate *in toto* a remedy, whether judicially or legislatively

89. Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 403 n.11, 520 S.E.2d 142, 157 n.11 (1999).
90. 396 N.E.2d 520 (Ill. 1979).
91. *Id.* at 522.
92. Sanelli v. Glenview State Bank, 483 N.E.2d 226, 231 (Ill. 1985). Notably, the decision in this case predated *Steinke* in South Carolina by fourteen years.
93. *Steinke*, 336 S.C. at 403 n.11, 520 S.E.2d at 157 n.11.
94. Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n, 694 P.2d 697, 700 (Wash. Ct. App. 1985) (citing Johnson v. Morris, 557 P.2d 1299 (Wash. 1976)).
95. *Id.* (alteration in original) (quoting C. SANDS, STATUTES AND STATUTORY CONSTRUCTION, § 27.04, at 313 (4th ed. 1973)).
96. Jenkins v. Hosp. of the Med. Coll., 634 A.2d 1099, 1104 (Pa. 1993) (quoting Banasch v. Pa. Publ. Util. Comm'n, 532 A.2d 325, 337 (Pa. 1987), *aff'd*, 488 U.S. 299 (1989)).
97. *Id.* (emphasis added) (quoting Smith v. Fenner, 161 A.2d 150, 154 (Pa. 1960)).
98. *Id.* (emphasis added) (quoting Gibson v. Commonwealth, 415 A.2d 80, 83 (Pa. 1980)).
99. *Id.* at 1105.

created which has already accrued."[100] Despite Pennsylvania's declaration of federal congruence, federal courts have directly questioned its jurisprudence as contrary to federal constitutional precedent.[101] In *In re TMI*, the Third Circuit Court of Appeals stated the *Plaut* rule that "federal constitutional precedent . . . finds no vested right in a tort cause of action *before final judgment*."[102] Further, "[t]hese cases [that] treat an accrued tort cause of action as a 'vested right' under the United States Constitution . . . are contrary to current . . . precedent."[103] Given Pennsylvania's apparent interest in following accepted federal standards and the Third Circuit's opinion that it currently fails to do so, Pennsylvania may shift to the more permissive end of the spectrum.

South Carolina occupies a position on the restrictive end of the separation of powers spectrum close to that of Pennsylvania. Like Pennsylvania, South Carolina is at least impliedly following the "vested right" doctrine. *Simmons* and its predecessors expressly follow Georgia's precedent,[104] which, dating back to 1848, has been concerned with the legislative trampling of a *vested* right.[105] Further, the *Simmons* rule appears to follow Pennsylvania's *Jenkins* rule, which states that vesting occurs when the cause of action accrues, not at some other moment, such as the time when the right of final appeal expires.[106]

Because of its similarity with Pennsylvania, South Carolina's doctrine regarding retroactive legislation is subject to the same criticism that the Third Circuit levied against Pennsylvania.

IV. ANALYSIS: QUESTIONABLE MEANS TO A WORTHWHILE END

A. Weak Links in the Chain of Precedent

While courts frequently change their jurisprudence over time, *Simmons* is a significant departure from previous South Carolina decisions implicating retroactive legislation and the separation of powers doctrine.[107] Two distinct problems arise from *Simmons* that will trouble anyone analyzing or applying its holding. First, the holding in *National Old Line* may not provide sufficient grounds to make the legal leap the South Carolina Supreme Court took in *Steinke*. Second, the rule promulgated by the South Carolina Supreme Court in *Steinke* was arguably dicta, a fact that the *Simmons* court should have acknowledged before significantly changing South Carolina's constitutional law.

South Carolina's evolution from *National Old Line* to *Steinke* marked a material shift from the permissive to the restrictive end of the separation of powers spectrum. Examination of the *National Old Line* decision indicates that it was consistent with *Plaut*-like federal jurisprudence regarding retroactive legislation. Under the rule in Georgia—which *National Old Line* cited as precedent—"'[a]

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100. *Id.* (quoting *Gibson*, 415 A.2d at 83).
101. *See In re* TMI, 89 F.3d 1106, 1115 (3d Cir. 1996).
102. *Id.* at 1115 n.9 (emphasis added) (citations omitted).
103. *Id.* (citations omitted).
104. *See, e.g.*, Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974) (citing Georgia law to support ban on retroactive legislation).
105. Wilder v. Lumpkin, 4 Ga. 208, 212 (1848).
106. Simmons v. Greenville Hosp. Sys., 355 S.C. 581, 587–88, 586 S.E.2d 569, 572 (2003).
107. *See, e.g.*, Hyder v. Jones, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978) (holding that the South Carolina General Assembly may indicate a statute is to apply retroactively through clear intent); State v. McLeod, 270 S.C. 557, 560, 243 S.E.2d 446, 448 (1978) (noting that the "General Assembly ordinarily has the authority to direct that an act operate retroactively").

legislative exposition of a doubtful law is the exercise of a judicial power, and if it interferes with no vested rights, [and] impairs the obligation of no contract . . . it is in itself harmless, and may be admitted to retroactive efficiency.'"[108] Further, taking *McCutcheon v. Smith* on its facts, the case itself is actually more like *Plaut* than *Simmons*. In *McCutcheon v. Smith*, the Georgia Legislature acted to overturn a final decision by the Georgia Supreme Court regarding a single instance, rather than retroactively overturning a law for all causes of action that vested before the General Assembly could act.[109] Thus, *McCutcheon v. Smith* involved overturning a final decision, which is not acceptable even under the permissive federal rule.

National Old Line's factual and procedural posture was substantially similar to that inserted in *McCutcheon v. Smith*.[110] Consequently, here again, *any* retroactive application would violate even the permissive separation of powers rule in *Plaut*.[111] Thus, the *National Old Line* decision represented a very weak foundation for the restrictive application of the separation of powers doctrine which followed it in *Steinke* and *Simmons*.

Beyond those concerns, using *Steinke* as precedent for *Simmons* may be the portion of the opinion most vulnerable to criticism. The *Simmons* court cited *Steinke* as authority that the General Assembly may not act retroactively to affect cases *filed* before the law is effective.[112] *Steinke*'s weight as precedent on this point is subject to scrutiny, because the *Steinke* court did not need to reach the issue of whether or not the statute in question could operate retroactively to adequately resolve the case.

In *Steinke*, under the plain language of the challenged statute, any cause of action "filed in a court of competent jurisdiction before July 1, 1994" was not subject to the new rule.[113] The plaintiff filed the claims in *Steinke* on June 29, 1994 and, therefore, under the express language of the statute, the claims were not subject to the new law.[114] Consequently, the court did not need to proceed on the question of whether the statutory caps applied.

Under these circumstances, the holding in *Steinke* that the General Assembly cannot make retroactive laws was arguably dicta. Certainly this instance would not be the first time dicta from a prior opinion evolved into a rule in a subsequent case. However, given the constitutional import of the decision, the fact that the ground on which *Simmons* stands is not as solid as the court tacitly implies is especially noteworthy.

B. While Legally Questionable, Simmons *Is Still Good for South Carolina*

Many commentators consider the separation of the powers of governance into three branches to be the cornerstone of the United States Constitution and the

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108. McCutcheon v. Smith, 35 S.E.2d 144, 148 (Ga. 1945) (quoting Wilder v. Lumpkin, 4 Ga. 208, 212 (1848)).

109. *Id.*

110. Lindsay v. Nat'l Old Line Ins. Co., 262 S.C. 621, 626, 207 S.E.2d 75, 76 (1974).

111. *See also* Sanelli v. Glenview State Bank, 483 N.E.2d 226, 231–32 (Ill. 1985) (defining a *Plaut*-like rule and distinguishing a prior case in which a legislative act overturning a fine already paid was a violation of separation of powers). The Illinois Supreme Court explained: "*Roth* was an attempt to recover fines and costs that had been paid in cases which had been finally adjudicated." *Id.*

112. Simmons v. Greenville Hosp. Sys., 355 S.C. 581, 587, 586 S.E.2d 569, 572 (2003) (emphasis added).

113. Steinke v. S.C. Dep't of Labor, 336 S.C. 373, 402, 520 S.E.2d 142, 157 (1999) (quoting Appropriation Act of 1994, 1994 S.C. Acts 5129, 5793).

114. *Id.* at 403, 520 S.E.2d at 157.

fulcrum upon which our personal liberties rest:[115] "Men's minds cannot be at rest if two or three of the kinds of governmental power are held in the same hands."[116] Separating governmental functions into the three branches protects the governed against "arbitrary, tyrannical rule."[117]

In *Simmons*, the South Carolina Supreme Court sought to protect these notions. While the mechanism the court used may have been unorthodox, the result is a positive move for the state in two major respects: (1) the rule furthers the federal interest by experimenting with new political theories, and (2) the rule helps to even the balance of power between the branches of the South Carolina government by creating more independence for the judiciary.

1. Simmons *Represents Heroic Experimentation*

The holdings in *Plaut* and *Simmons* resided distinguishably at opposite ends of the separation of powers spectrum.[118] However, no constitutional requirement mandates that states' separation of powers jurisprudence mirror that of the federal courts. To the contrary, the Constitution provides that "[t]he United States shall guarantee to every State . . . a Republican Form of Government."[119] The Supreme Court has refrained from attempting to define or limit the scope of this provision, usually on the grounds that adjudicating such a case would be a political question and therefore not justiciable.[120]

Commentators suggest that this approach encourages states to be incubators for new political ideas.[121] *Simmons*, in going against well-established federal jurisprudence, is arguably one such experiment. However, as Justice Brandeis aptly stated:

> This Court has the power to prevent . . . experiment[ation]. We may strike down the [law] which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.[122]

Under these federal principles, South Carolina remains free to continue its "novel . . . experiment[] without risk to the rest of the country"[123] and without federal interference. In deviating from the federal examples, South Carolina and other states with similar jurisprudence would continue to "serve as [a] laborator[y]

115. *See* PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 312 (Univ. of Chi. Press 2000).
116. *Id.* (paraphrasing MONTESQUIEU, *supra* note 1, at 151).
117. *Id.*
118. Simmons v. Greenville Hosp. Sys., 355 S.C. 581, 587–88, 586 S.E.2d 569, 572 (2003).
119. U.S. CONST. art. IV, § 4.
120. *See generally* Baker v. Carr, 369 U.S. 186, 228–29 (1962) (holding that claims resting on the Guaranty Clause are not justiciable because "they touch matters of state governmental organization").
121. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
122. *Id.*
123. *Id.*

for the development of new social, economic, and political ideas."[124] To do so may draw continued attention to South Carolina's perceived unwillingness to conform with a more national model.[125] However, differing and unusual jurisprudence between state and federal governments is exactly what the federal system of government envisions.[126]

2. Simmons *Helps to Even the Balance of Power in South Carolina*

Traditionally, South Carolina's General Assembly is the most powerful branch of the state government.[127] A primary reason for this power is that the General Assembly has sole control over the selection of supreme court justices,[128] court of appeals judges,[129] and circuit court judges.[130] In contrast, the vast majority of states allow for popular election of state court judges at some level.[131]

In addition, the legislative dominance over the judiciary arises from the fact that, traditionally, the General Assembly has near total control over the budget in South Carolina.[132] A court simply cannot function properly without the requisite funding to manage its workload.[133] As one prominent jurist noted, "The legislature's control over the provision of financial resources to the judiciary prevents the judiciary from being completely independent from the rest of the government."[134] While at first glance this criticism appears purely academic, evidence shows that budgetary control does affect the thought process of judges. One judge noted in a judicial roundtable, "I have actually had a judge say to me: 'Why not take that phrase out of your opinion, you do not need it, and it might offend the Senate. And you know how that could affect the judicial budget.'"[135]

The South Carolina General Assembly's willingness, albeit dated, to invoke its constitutional power to eliminate the court of appeals when it disapproves of a ruling further encourages judicial deference.[136] The most famous example occurred in the aftermath of *M'Cready v. Hunt*.[137] During restoration, South Carolina passed a number of statutes to help defend itself against export tariffs on goods destined for the North.[138] The statute questioned in *M'Cready* required members of the

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124. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., dissenting).

125. *See, e.g., S.C. at Crossroads*, THE AUGUSTA CHRON. (Augusta, Ga.), Apr. 21, 2000, at A4 (claiming that controversy over the confederate flag promotes the perception that "South Carolina is the most backward state in the nation").

126. *Fed. Energy Regulatory Comm'n*, 456 U.S. at 788 (O'Connor, J., dissenting) (stating that one of "the most valuable aspects of our federalism . . . [is] that the 50 states serve as laboratories for the development of new social, economic, and political ideas").

127. JAMES LOWELL UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA VOLUME I: THE RELATIONSHIP OF THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES 7 (1986).

128. S.C. CONST. art. V, § 3.

129. S.C. CONST. art. V, § 8.

130. S.C. CONST. art. V, § 13.

131. UNDERWOOD, *supra* note 127, at 7–8.

132. *Id.* at 8.

133. *Id.* at 59.

134. J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. LAW 241, 246 (2001).

135. *Roundtable Discussion, Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 27 (1998) (comments of Judge Calabresi, Circuit Judge for the Second Circuit Court of Appeals).

136. UNDERWOOD, *supra* note 127, at 39.

137. 20 S.C.L. (2 Hill) 1 (1834).

138. UNDERWOOD, *supra* note 127, at 38.

South Carolina Militia to swear allegiance to the state rather than to the federal government.[139] The South Carolina Court of Appeals overturned the law on the grounds that it violated the United States Constitution.[140] The General Assembly viewed the court's decision as siding with the federal rather than the state government and retaliated by abolishing the court of appeals for nearly twenty-five years.[141]

Unsurprisingly, when the General Assembly has shown its willingness to exert this level of control over the court, the court's members will be reluctant to exercise judgment contrary to legislative will.[142] However, the modern need for a court of appeals to help relieve appellate backlog probably prevents the General Assembly from repeating this retaliatory move. Yet the aftermath of *M'Cready* nonetheless remains a symbol of the South Carolina General Assembly's power over the judiciary.

With this history of involuntary deference to the legislative will in mind, South Carolina's restrictive position on the separation of powers doctrine, as *Simmons* articulated, is arguably a beneficial step toward eliminating this improbable, but very real risk. Maintaining principles of freedom requires not only a division of power, but also a balance between the divisions.[143] *Simmons'* impact on the overall separation of powers while minimal, shifts the balance more in favor of the judiciary and leaves the door open for a further shift in that direction. As this balance between the judiciary and the General Assembly continues to equalize, the judiciary will become more independent from outside influences the General Assembly may have on it.

3. The Benefits of an Improved Balance in South Carolina

A strong judiciary, independent of influence from the General Assembly, yields a number of benefits for state government as a whole. First, when a judiciary at least appears independent, it lends credibility to the government's policies.[144] A common public complaint is that legislatures are beholden to the private interests funding their campaigns.[145] An independent court is not seen as being so beholden. Thus, as the independent judiciary validates laws, that validity, if perceived to be independent, extends to the policies of the legislature and improves the public view of the government.

Second, an independent judiciary is "important in those cases where courts are called upon to resolve disputes between individuals and the state."[146] In South Carolina, where the General Assembly selects the high court's judges, the appearance that justices will side with the government that installed them is a real, albeit poorly-founded, public concern. Decisions like *Simmons*, which not only rule against the government, but also diminish the influence of the General Assembly,

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139. *Id.* at 39.
140. *Id.*
141. *Id.*
142. *Id.*
143. KURLAND & LERNER, *supra* note 115, at 312.
144. *See* Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 62 (2003).
145. *See Now Look Who's Hiding Special-Interest Donations*, U.S.A. TODAY, Sept. 26, 2003, at 12A (noting that South Carolina, among others, received a failing grade for its system of disclosure of campaign finances).
146. Wallace, *supra* note 134, at 242.

improve both the credibility and the perceived independence of South Carolina's judiciary.

A final justification is the somewhat self-affirming presumption that the public demands a judiciary that is independent from all outside influences.[147] "[P]ublic acquiescence, if not approval, is crucial. To obtain credibility, the appearance and the reality of impartiality must be preserved."[148] The obvious manifestation of this notion is in the Model Code of Judicial Ethics: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[149] While the primary focus of this rule is on financial and personal influences,[150] its message is clear: Judges should avoid any appearance of susceptibility to outside influence. Influence, of course, can come just as easily, if not more easily, from an employer than from a family member or from having a pecuniary interest in a party before the court. If the public perceives the General Assembly as having influence over the judiciary, a reasonable citizen could certainly conclude that a judge in any given instance may not be completely impartial. By increasing independence from the General Assembly through careful judicial expansion of doctrines such as separation of powers, the South Carolina judiciary is slowly meeting the public's expectation of a judiciary that operates free from influence by the other branches of the government.

More difficulty arises in foreseeing a tangible benefit from the *Simmons* ruling, which, aside from its apparent repercussions regarding the General Assembly's ability to act retroactively, is simply a shift in South Carolina's concept of separation of powers. However, some recent South Carolina cases indicate that a small increase in the supreme court's power with respect to the General Assembly may be sufficient to make a change.

As of the date of this writing, *Abbeville v. South Carolina* had just closed arguments before the trial court.[151] *Abbeville* is a continuation case in which the South Carolina Supreme Court found that the South Carolina Constitution required the General Assembly to fund a "minimally adequate education" for each child in the state.[152] Currently, the plaintiffs' rural school districts are suing the state, alleging that the General Assembly is not meeting this requirement. Regardless of the outcome at trial, both parties intend to appeal.[153]

Assuming the case arrives at the South Carolina Supreme Court, the dissent to the original *Abbeville* decision frames one of the barriers to a ruling for the school districts. Justice Moore argued that, because the South Carolina Constitution does not impose a standard on the General Assembly's funding of education, in doing so the judiciary has violated separation of powers.[154] This separation of powers question will reappear if and when the South Carolina Supreme Court hears *Abbeville* and determines whether the General Assembly is meeting the "minimally adequate" requirement. The Supreme Court will then have to decide if the

147. Stephenson, *supra* note 144, at 63.

148. UNDERWOOD, *supra* note 127, at 79.

149. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003).

150. *See id.*

151. Drew Jubera, *School Funding Trial No Sprint; 11-Year S.C. Case, Dozens of Others Seen as Sequel to* Brown v. Board, ATL. J.-CONST., Dec. 11, 2004, at 1A.

152. Abbeville County Sch. Dist. v. State, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999).

153. Jubera, *supra* note 151.

154. *Abbeville County Sch. Dist.*, 335 S.C. at 70, 515 S.E.2d at 541 (Moore, J., dissenting); *see also* Jennifer L. Fogle, Note, Abbeville County School District v. State: *The Right to a Minimally Adequate Education in South Carolina*, 51 S.C. L. REV. 781, 783 (2000) (citing Justice Moore's dissent).

separation of powers bars it from holding the General Assembly to a judicially-created standard. However, with the court's apparent willingness to strengthen the separation of powers doctrine, as *Simmons* shows, Justice Moore's concern may not preclude a resolution in favor of the Abbeville school districts.

V. CONCLUSION

In *Simmons v. Greenville Hospital*, the South Carolina Supreme Court reinforced its earlier holding that the doctrine of separation of powers bars the South Carolina General Assembly from passing a statute that retroactively overrules a supreme court decision. In many respects, this rule is an outlier when compared to the separation of powers jurisprudence of both the federal government and many other states. However, this restrictive rule, in the grand scheme of South Carolina constitutional law, is beneficial to the state in two very significant ways. First, the rule shows that South Carolina is willing to stand alone in its responsibility to act as an incubator for new political ideas. Second, the rule shifts a modicum of power from the General Assembly to the judiciary in a way that helps even the historically unequal balance of power between the two branches. While the federal courts may criticize South Carolina's rule, they have no power to change it, and *Simmons* will be able to take its place in the long history of South Carolina jurisprudence as a small step toward achieving balance within the state government.

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