

Summer 2014

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John J. Chung

Roger Williams University School of Law

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Recommended Citation

Chung, John J. (2014) "Celebration of the 20th Anniversary: Twenty Years of Impact: The Role of Roger Williams University School of Law's Alumni in Rhode Island Legal History," *Roger Williams University Law Review*: Vol. 19: Iss. 3, Article 4.
Available at: http://docs.rwu.edu/rwu_LR/vol19/iss3/4

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Twenty Years of Impact: The Role of Roger Williams University School of Law's Alumni in Rhode Island Legal History

John J. Chung*

INTRODUCTION

Twenty years ago, Roger Williams University School of Law ("Law School") enrolled its first class. Set against the temporal pace of the law, twenty years represents a blip in the timeline. In first-year Contracts class, my students read cases from 1825, 1845, and 1854.¹ The life of the law is more appropriately measured in terms of decades, or even centuries. Yet, in its youthful existence, the graduates of the Law School have occupied key roles in some of the most important cases of Rhode Island's legal history. This demonstrates the large role the Law School has come to play in the state, and the significant impact of its graduates. In such a relatively short amount of time, the Law School has exerted a disproportionate positive influence in the state through its talented alumni.

* Professor of Law, Roger Williams University School of Law. I would like to thank Genevieve Allaire-Johnson, Carly Iafrate and Jason Gramitt for their time and cooperation in this project. For me, the highlight of writing this article was meeting them and learning about their professional experiences. I would also like to thank John Tarantino for his gracious cooperation in helping me learn more about the cases discussed. This article was greatly improved as a result.

1. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (Mass. 1825); *Kirksey v. Kirksey*, 8 Ala. 131 (Ala. 1845); *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Exch. Div.).

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This paper highlights three cases decided by the Rhode Island Supreme Court (“Supreme Court”) in each of which a Law School alumnus or alumna played a crucial role. These cases were selected because of their massive public impact and important public policy issues, and because they affect or will affect most, if not all, Rhode Island residents and businesses. These are some of the most important cases ever litigated in the history of the State.

The first case is *Irons v. Rhode Island Ethics Commission*.² The *Irons* case addressed the extent to which the Ethics Commission may investigate allegedly improper legislative acts of state legislators.³ Every state, to some degree, faces issues concerning the propriety of actions by public officials, and the *Irons* case may be the most important Rhode Island case decided by the Court in this area. The *Irons* case required the Supreme Court to address the issue of alleged ethics violations by a state legislator, and to decide the correct interpretation of the State Constitution in the face of two directly conflicting provisions. The lead lawyer for the Rhode Island Ethics Commission (“Ethics Commission”) was Jason Gramitt (Class of 1996). Part I of this paper discusses the case.⁴

Part II discusses *State of Rhode Island v. Lead Industries Association, Inc.* (the “Lead Paint Case”).⁵ The State filed this case against former manufacturers of lead pigment and sought damages and equitable relief.⁶ The case was brought in order to remedy the grave and widespread public health problems created by lead paint.⁷ There now seems to be little doubt that exposure to lead results in severe health problems, especially among children, and that Rhode Island is one of the states most affected by lead exposure.⁸ The question before the Supreme Court was whether the defendants were liable for the undisputed harm to Rhode Island’s residents caused by lead exposure.⁹ One of the key lawyers for the state was Genevieve Allaire-Johnson (Class of

2. 973 A.2d 1124 (R.I. 2009).

3. *Id.* at 1125.

4. *Id.*

5. 951 A.2d 428 (R.I. 2008).

6. *Id.* at 434.

7. *See id.* at 436–40.

8. *See id.* at 436.

9. *See id.* at 440–42.

1997).¹⁰

The third case, discussed in Part III, is *Rhode Island Public Employees' Retiree Coalition v. Chafee* (hereinafter referred to as the "Pension Case").¹¹ This case challenged the constitutionality of legislation that affects pension payments to already-retired employees.¹² Many states face severe budget shortfalls, and are examining the possibility of reducing the burden of pension obligations.¹³ Experts on this subject argue that reducing pension obligations is necessary to achieve solvency for the pension plans.¹⁴ The beneficiaries of the pensions argue that any change to the pensions is a breach of a promise made to them, on which they relied for years or even decades.¹⁵ The entire country is watching this case because the result in Rhode Island may serve as a template for other states dealing with their own budget crises. The case is currently pending, and the resolution of the case may send tremors across the country. At the heart of the case is Carly Iafrate (Class of 2000), who filed the lawsuit on behalf of the plaintiffs.¹⁶

PART I: THE IRONS CASE

The *Irons* case arose out of an investigation by the Ethics Commission of then-State Senator William V. Irons ("Senator Irons").¹⁷ In 2004, a complaint was filed with the Ethics

10. *Id.* at 434.

11. 58 A.3d 915 (R.I. 2012).

12. *Id.* at 916.

13. John Hood, *The States in Crisis*, 6 NAT'L AFF. 49, 49–50 (2011).

14. See *Strengthening the Multiemployer Pension System: How Will Proposed Reforms Affect Employers, Workers and Retirees?: Before Subcomm. on Health, Employment, Labor, and Pensions, H. Comm. on Edu. & the Workforce*, 113 Cong. 4–5 (2013) (submitted by Thomas C. Nyhan, Executive Director and General Counsel, Central States Southeast and Southwest Areas Pension Fund); Kris Maher, *Union-Employer Proposal Would Hit Some Retirees*, WALL ST. J., April 12, 2013, <http://online.wsj.com/news/articles/SB10001424127887324010704578418902425198428>.

15. See Maher, *supra* note 14.

16. *Retiree Coalition*, 58 A.3d at 915.

17. STATE OF RHODE ISLAND ETHICS COMM'N, <http://www.ethics.ri.gov/> (last visited Feb. 7, 2014). The Ethics Commission has jurisdiction over every state and municipal elected, appointed and public employee:

The Rhode Island Ethics Commission is a constitutionally mandated body empowered to adopt, enforce and administer the Code of Ethics. The Code sets forth standards of conduct for all public officials and

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employees. The Commission educates and advises public officials and employees about the standards of conduct set out in the Code of Ethics. Additionally, the Ethics Commission oversees the financial disclosure program which requires all elected officials, all candidates for public office and certain categories of persons appointed to serve as officers or members of state or municipal agencies to file statements annually.

Id.

In 1976, the Rhode Island General Assembly enacted the state's first Code of Ethics and created the Conflict of Interest Commission. That Code governed the activities of state and municipal elected and appointed officials and required all such officials to meet newly imposed financial disclosure requirements. The Conflict of Interest Commission enforced the statute.

In November, 1986, Rhode Island voters adopted a constitutional amendment mandating that the General Assembly "establish an independent, non-partisan ethics commission" R.I. Const. art. III, sec. 8. In 1987, the General Assembly replaced the Conflict of Interest Commission with a 15-member Ethics Commission. In 1992, the General Assembly reduced the size of the Ethics Commission to the current nine members.

The Rhode Island Constitution empowers the Ethics Commission to adopt and enforce a Code of Ethics, to investigate violations and to impose penalties, including removal from office. R.I. Const. art. III, sec. 8. Legislation enacted by the General Assembly grants the Ethics Commission additional powers to issue advisory opinions to public officials and employees and to offer educational programs. The statute also governs the process by which Commissioners are appointed, sets quorum requirements and defines the administrative powers of the Commission.

The Rhode Island Constitution requires that public officials and employees "adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage." R.I. Const. art. III, sec. 7. The Constitution provides that all Rhode Island elected and appointed public officials and public employees are subject to the Code of Ethics at both the state and local levels of government.

Ethics Commission History, STATE OF RHODE ISLAND ETHICS COMM'N, <http://www.ethics.ri.gov/about/History> (last visited Feb. 7, 2014).

The Commission is comprised of nine Rhode Islanders. Four are appointed directly by the Governor; five are appointed by the Governor from lists of nominees submitted by the majority and minority leaders in the House and Senate and by the House Speaker, respectively. No Commission Member may serve more than one full five-year term. While serving on the Ethics Commission, members are prohibited from holding or campaigning for public office, holding office in any political party or political committee, and participating in or contributing to any political campaign.

Commission, alleging that Senator Irons acted “wrongfully by ‘participating in a governmental decision to affect pharmacy issues, while he was paid significant commissions by Blue Cross & Blue Shield of Rhode Island’ when he voted against Pharmacy Freedom of Choice legislation in 1999 and 2000.”¹⁸ In other words, the complaint alleged that Senator Irons acted unethically by voting on a matter affecting a business that was paying him for outside work.¹⁹ In response to the complaint, the Ethics Commission conducted a preliminary investigation and found that probable cause existed with respect to the allegation that Senator Irons had a substantial conflict of interest when he participated in the consideration of pharmacy choice legislation, and the allegation that Senator Irons used his public office to obtain financial gain for his client.²⁰ Senator Irons fought the investigation, and filed a complaint in Superior Court on the ground that his actions as a legislator were protected by Rhode Island constitutional immunity.²¹ The Superior Court ruled in his favor, and the Ethics Commission petitioned the Supreme Court for a writ of certiorari in order to obtain review of the lower court’s ruling.²²

The case was historically important because of the strong public interest issue involved and because it required the Supreme Court to reconcile a direct conflict between two provisions of the Rhode Island Constitution. In the Supreme Court’s own words:

The case before us presents this Court with an unusual constitutional conundrum: at the heart of the controversy are two conflicting constitutional provisions, the purpose of each of which is to serve the proper functioning of our representative democracy. One of the long-acknowledged purposes of the Rhode Island Constitution’s speech in debate clause, article 6, section 5, is the protection of

STATE OF RHODE ISLAND ETHICS COMM’N, <http://www.ethics.ri.gov/about> (last visited Feb. 7, 2014).

18. Esther Kapinos, Recent Case, *Irons v. The Rhode Island Ethics Commission*, 973 A.2d 1124 (R.I. 2009), 15 ROGER WILLIAMS U. L. REV. 273, 273–74 (2010).

19. *See Irons*, 973 A.2d at 1126.

20. *Id.* at 1127–28.

21. *Id.* at 1126–27.

22. *Id.* at 1129.

individual legislators from encroachment by the coordinate branches of government and from legal challenges by disgruntled citizens; but, the legislators are garbed with such protection only while engaged in carrying out their core legislative duties. To the framers of the various constitutions, the public is the ultimate beneficiary of this narrow protection because the speech in debate clause assures an unfettered legislative process. The limited but important immunity conferred by this constitutional provision exists, in the words of Thomas Jefferson, “in order to give to the will of the people the influence it ought to have . . .”

At the same time, our Constitution contains another provision that is pertinent to the case before us—namely, section 8 of article 3. That provision mandates the establishment of an ethics commission and the adoption of a code of ethics by the General Assembly and then states that “[a]ll elected and appointed officials shall be subject to the code of ethics . . .”

It is now our solemn duty to determine the applicability of these two constitutional provisions to the case at bar.²³

This unusual feature of the Constitution, with its directly conflicting provisions, by itself, would make *Irons* a significant case. The fact that the issue affected ethics and public conduct made the case even more important.

Article 6, section 5 of the Rhode Island Constitution provides: “For any speech in debate in either house, no member shall be questioned in any other place.” The Supreme Court observed: “The plain and unequivocal language of the clause ‘confers a privilege on legislators from inquiry into their legislative acts or into the motivation for actual performance of legislative acts that are clearly part of the legislative process.’”²⁴ Senator Irons argued that this clause conferred immunity on him and barred any enforcement action by the Ethics Commission.²⁵

The Supreme Court began its analysis of Senator Irons’

23. *Id.* at 1125–26.

24. *Id.* at 1129 (quoting *Holmes v. Farmer*, 475 A.2d 976, 983 (R.I. 1984)).

25. *Id.*

argument with a review of the history and fundamental policies protected by the immunity.²⁶ Perhaps to emphasize the weight of historical precedent, the Supreme Court traced the lineage of the immunity clause back to 1455.²⁷

Speech-in-debate immunity is a venerable and important product of historical travails (and their resolution) in England that occurred long before the events of 1776, but that immunity was most definitely embraced by this country once independence was achieved. This Court previously has detailed the history of this privilege, and we have noted that it was asserted by members of the English Parliament as early as 1455, with its first known written appearance found in the Speaker's Petition of 1542. The importance of the privilege was not lost on the founders of this nation; it was separately included in the Articles of Confederation as well as in the constitutions of several states; and eventually it was included in the United States Constitution, in which it was included with "virtually no debate." The language of the speech in debate clause of this state, included in our first written constitution in 1842, as well as that of the similar provision in the United States Constitution, was derived from the English Bill of Rights of 1689—a milestone in the centuries-long power struggle between the Parliament and the monarchy. More recently, the electorate of this state *reaffirmed* the speech in debate clause, when, in 1986, the voters adopted a neutral rewrite of the then-existing provisions of the Rhode Island Constitution.²⁸

The Supreme Court then focused on the protection afforded to individual legislators, and the reason why individual legislators needed protection. Underlying the need for immunity were considerations of separation of powers.

The speech in debate clause "protects the institution of the Legislature itself from attack by either of the other

26. *Id.* at 1129–30.

27. *Id.*

28. *Id.* at 1130 (citations omitted) (emphasis added).

co-equal branches of government.” Further, this Court has expressly stated that one of the purposes of the speech in debate clause is “to protect individual legislators from executive and judicial oversight that realistically threatens to control his conduct as a legislator.”²⁹

The Supreme Court then emphasized that the primary purpose of the immunity clause was not to benefit individual legislators, but to benefit the public at large.³⁰ The clause was adopted to protect the independence of legislators so that they could fully and freely represent their constituents, without fear of retaliation by third parties.³¹

In addition, it should go without saying that, because the speech in debate clause “ensure[s] the Legislature freedom in carrying out its duties,” the people are the intended and ultimate beneficiaries.

As this Court noted previously—invoking the wisdom of the nation’s earliest published case interpreting the legislative privilege—the privilege exists “not with the intention of protecting the members [of the Legislature] against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal.” Without fear of encroachment by the coordinate branches of government or by legal challenges brought by disgruntled citizens, the people’s representatives may engage in “the free flow of debate among legislators and the maximization of an effective and open exchange of ideas.” Indeed, the legislative privilege serves as but one of many constitutional checks and balances that ensure that the General Assembly can perform its duties without encroachment from the other branches.³²

The Supreme Court concluded its analysis by noting the

29. *Id.* at 1130–31 (citations omitted).

30. *Id.*

31. *Id.*

32. *Id.* at 1131 (citations omitted).

immunity clause provides absolute immunity.³³ The decision confirmed that a bright-line test was necessary to provide the protection underlying the immunity clause.³⁴

This Court has interpreted the speech in debate clause to provide legislators with “absolute” immunity from questioning “by any other branch of government for their acts in carrying out their legislative duties relating to the legislative process.” We wish to stress in the strongest possible terms, however, that it in no way grants a legislator the right to transgress the Code of Ethics or any other law. Legislators are held accountable for violations of the Code of Ethics, and they are not immune for actions which violate that code. The only exceptions are those in which the speech in debate clause of the constitution is implicated. The immunity afforded merely precludes the Ethics Commission from prosecuting within a narrow class of *core legislative acts*. Actions of legislators “in proposing, passing, or voting upon a particular piece of legislation” are core legislative acts that fall “clearly within the most basic elements of legislative privilege.” In short, “as long as [a legislator’s] challenged actions, stripped of all considerations of intent and motive, were legislative in character, the doctrine of absolute legislative immunity protects them from such claims.”

Activities that remain unprotected by this immunity include, but are not limited to: speeches delivered outside of the legislature; political activities of legislators; undertakings for constituents; assistance in securing government contracts; republication of defamatory material in press releases and newsletters; solicitation and acceptance of bribes; and criminal activities, even those committed to further legislative activity.

Here, the actions of Senator Irons, as alleged in the Ethics Commission’s complaint, were, as the parties both agree, core legislative acts. Senator Irons participated in

33. *Id.*

34. *Id.* at 1131–32.

debate, considered legislation affecting pharmacies, and voted, in both 1999 and 2000, to oppose legislation denominated as the Pharmacy Freedom of Choice Act. These are precisely the activities concerning which the Ethics Commission has charged him.³⁵

The fundamental importance of the immunity clause is enshrined in the Rhode Island Constitution.³⁶ Nonetheless, the Ethics Commission responded to Irons' argument by relying on a different, but equally important, provision of the Constitution: the Ethics Amendment, which was adopted to address concerns over public corruption in the state.³⁷ In order to reach its decision, the Supreme Court was required to rule on the direct conflict between the immunity clause and the Ethics Amendment.³⁸

The Supreme Court examined the Ethics Amendment and the important policies addressed by the Ethics Amendment.³⁹ In particular, the Supreme Court discussed the reason why Rhode Island had a need for the amendment.

The Ethics Amendment, like the speech in debate clause, was not the product of a vacuum but rather of specific historical circumstances. In 1992, the then Justices of this Court acknowledged in *In re Advisory Opinion to the Governor (Ethics Commission)*, 612 A.2d 1, 11 (R.I. 1992), that, prior to the amendment's adoption "widespread breaches of trust, cronyism, impropriety, and other violations of ethical standards decimated the public's trust in government." In response, an ethics committee was created as part of the 1986 Constitutional Convention to consider effective measures of ethical reform. The ethics committee recommended that an independent nonpartisan ethics commission with sweeping powers should be created to adopt a code of ethics and oversee ethics in state and local government. The state's electorate approved these recommendations, and they were codified in article 3 of

35. *Id.*

36. *See id.* at 1135.

37. *Id.* at 1130.

38. *Id.* at 1133–34.

39. *Id.* at 1130–34.

the Rhode Island Constitution.⁴⁰

The Supreme Court then highlighted the thorny legal issue before it.⁴¹ The immunity clause and the Ethics Amendment directly conflict.⁴² In the case of Senator Irons, there was no way to reconcile the two parts of the Rhode Island Constitution.⁴³ Only one of the provisions could be controlling, and the Supreme Court would need to decide that one applied and the other did not.⁴⁴

In support of its contention that the Ethics Amendment created a narrow exception to the speech in debate clause, the Ethics Commission points to the language in section 8 of article 3, which section states that “All elected and appointed officials . . . shall be subject to the code of ethics.” There is no doubt that a frequently cited canon of constitutional interpretation counsels against creating an exception to a constitutional provision when the plain

40. *Id.* at 1132–33. Sections 7 and 8 of article 3 of the Rhode Island Constitution provide as follows:

Section 7. Ethical conduct—the people of the State of Rhode Island believe that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage. Such persons shall hold their positions during good behavior.

R.I. CONST. art. III § 7.

Section 8. Ethics commission—Code of Ethics.—The general assembly shall establish an independent non-partisan ethics commission which shall adopt a code of ethics including, but not limited to, provisions on conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure. All elected and appointed officials and employees of state and local government, of boards, commissions and agencies shall be subject to the code of ethics. The ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as provided by law; and the commission shall have the power to remove from office officials who are not subject to impeachment.

R.I. CONST. art. III § 8.

41. *Irons*, 973 A.2d at 1133–34.

42. *Id.*

43. *Id.*

44. *Id.* at 1133.

language of that provision does not expressly provide for exception. . . . As Chief Justice John Marshall observed, “It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.” . . . Thus, our conundrum: *the language of both provisions is unequivocal and absolute, neither admits of any exceptions.*⁴⁵

The Supreme Court came down on the side of the immunity provision.⁴⁶ A simple (and perhaps rough) way to understand the Supreme Court’s decision is to ask: which principle at stake came first? And did the later principle expressly infringe upon the earlier principle? The answers: the immunity principle came first (going back to 1455), and the ethics principle (when it became part of the Constitution) did not expressly carve out for itself an exception to the older principle.⁴⁷

We conclude, as we must, that both constitutional provisions at issue are specific, unequivocal, do not allow for any exception, and both were affirmed by the voters on the same day. Yet, they stand in diametrical opposition to each other. We cannot accept an invitation to read into the Ethics Amendment an unexpressed repeal of such an ancient and venerable hallmark of our form of government as is the immunity provided in the speech in debate clause without a clear and explicit directive for such an exception in the language of the Ethics Amendment itself. Because no such language is present, we decline to recognize any partial repeal of speech-in-debate immunity.

Because we hold that the Ethics Amendment does not create an exception to the speech in debate clause and, because the alleged actions of Senator Irons were core legislative acts entitled to speech-in-debate immunity, we hold that the Ethics Commission may not question him with respect to those acts. We do not accept the Ethics

45. *Id.* (citation omitted) (emphasis added).

46. *See id.* at 1133–34.

47. *See id.* at 1134.

Commission's argument that such a holding on our part emasculates the entire Code of Ethics with respect to members of the General Assembly. Indeed, the Ethics Commission remains responsible to enforce the Code of Ethics against legislators when they are engaged in activities other than core legislative activities. As this Court previously has indicated, any claims of speech-in-debate immunity "going beyond what is needed to protect legislative independence are to be closely scrutinized."

We wish to emphasize that this decision is predicated on our respect for the speech-in-debate immunity—a right that is expressly guaranteed by our constitution and that is widely recognized in this country and most of the English-speaking world. Unquestionably, this right could be modified (or even obviated) by a sufficiently explicit constitutional amendment—but we perceive no such explicitness in the language of the 1986 Ethics Amendment. If the citizens of Rhode Island wish to empower the Ethics Commission to investigate and prosecute legislators with respect to their legislative actions, notwithstanding the operation of the speech in debate clause, they most certainly have the power to do so.⁴⁸

So where does this decision leave the Ethics Commission? It leaves it powerless to investigate core legislative activity. More specifically, the Ethics Commission cannot and does not investigate allegations a conflict of interest against legislators. This may seem like a puzzling result, especially in light of the Supreme Court's own observation of the state's problems with "widespread breaches of trust, cronyism, impropriety, and other violations of ethical standards [which] decimated the public's trust in government."⁴⁹ Yet, every issue has at least two sides. From the legislator's point of view, if *Irons* had been decided the other way, then any unpopular vote might trigger an ethics complaint from a disgruntled party. As a result, every vote would be subject to the possibility of an investigation, and the threat of

48. *Id.* at 1134–35.

49. *Id.* at 1132.

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investigation might inhibit a legislator from taking what she believes to be the right action on behalf of her constituents.

If the Ethics Commission is to have the authority to investigate legislative acts, then it appears that a constitutional amendment would be required. The Supreme Court made an unequivocal ruling in *Irons*.⁵⁰ Only legislative action can change the course of the law.⁵¹ However, constitutional amendments are difficult to achieve under any circumstances. So, it appears that *Irons* has set the legal landscape for the foreseeable future.⁵²

Although the Ethics Commission lost the case, there still may be a positive take away. Even if the Ethics Commission is restrained in its ability to investigate, perhaps just simply knowing that it is there, ready to enforce the Ethics Amendment (when it is able), will have a chilling effect on attempts to violate the public's trust. Whether this effect exists is a matter of speculation, but if the existence of the Ethics Commission gives pause to anyone who is contemplating a questionable act, then this could be viewed as a positive effect on the ethical environment. Moreover, even though the Ethics Commission's powers are severely restrained with respect to state legislators, it still has authority over numerous other public officials and employees, such as town council members, state agency employees, school teachers, and university professors. The willingness of the Ethics Commission to investigate a powerful legislator should serve as a warning to anyone under the jurisdiction of the Ethics Commission that it stands ready, willing, and able to act.

Before and since the *Irons* case, Jason Gramitt has been a tireless advocate for ethics enforcement and reform in the state.⁵³ He makes numerous appearances before public bodies to discuss the work of the Ethics Commission, and his efforts have been noticed by the media, including coverage by Rhode Island Public Radio.⁵⁴ He is a widely recognized champion of ethics reform and

50. *Id.* at 1134–35.

51. *See id.*

52. *See id.*

53. *See* Interviews with Jason Gramitt, Education Coordinator of the RI Ethics Commission (2013).

54. Ian Donnis, *Outlook Uncertain on Push to Restore RI Ethics Commission*, R.I. NAT'L PUB. RADIO (Mar. 1, 2012, 7:16 AM), <http://ripr.org/post/outlook-uncertain-push-restore-ri-ethics-commission>.

enforcement of the ethics laws.⁵⁵

Mr. Gramitt was in the first class to enroll at the Law School and was on the first editorial board of the Law Review.⁵⁶ He was the driving force in the establishment of the Rhode Island edition of the Law Review (prior to that time, the law review of Suffolk Law School had published a survey of Rhode Island law).⁵⁷ Mr. Gramitt grew up in the Columbus, Ohio area and went to college at Ohio University in Athens, Ohio.⁵⁸ After college, he was a licensed social worker working with families with children at risk of removal.⁵⁹ His work involved frequent involvement with the judicial system as an advocate and witness, and this experience led him to law school.⁶⁰ When asked why he chose a completely new law school in a region of the country with which he had no connection, Mr. Gramitt said he was drawn by the beauty of the Bristol area and by the fact that he would be in the first enrolling class.⁶¹ He believed that being in the first class would provide an opportunity to better shape his own experience and perhaps help shape the school's legacy.⁶² The Law School is fortunate that people like Mr. Gramitt made that choice to embark on (what was then) a great experiment.⁶³ Mr. Gramitt also demonstrates the Law School's ability to draw people to this area, and add to the richness of talent in Rhode Island.⁶⁴

This paper takes no view as to whether *Irons* was a welcome or unwelcome result; however, the important point is that it was an historic case raising difficult and novel issues, and one of the Law School's alumni was a key participant. This is one example of how the Law School features in the legal culture of Rhode Island. Cases like *Irons* do not come along often, but when they do, it should not be surprising to find an alumnus involved.

55. See Interviews with Jason Gramitt, *supra* note 53.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

PART II: THE LEAD PAINT CASE

The State filed the Lead Paint Case in 1999 against former lead pigment manufacturers and the Lead Industries Association, a national trade association of lead producers, and asserted that they were liable for causing lead paint poisoning, especially among children.⁶⁵ The state alleged a theory of public nuisance against the defendants, and sought abatement of the public nuisance.⁶⁶ In the course of researching this case, I was provided with an estimate that the defendants' potential liability for abatement was in the ballpark of three billion dollars.⁶⁷

The State filed the case on the basis of the following facts. The Rhode Island General Assembly described childhood lead poisoning as "the most severe environmental health problem in Rhode Island."⁶⁸ In the early 1990s, the General Assembly began an investigation into the problem of childhood lead poisoning.⁶⁹ The investigation revealed that exposure to even low levels of lead increased a child's health risk, and that most significant sources of environmental exposure to lead are lead-based paint in older housing, and dust and soil contaminated by the paint.⁷⁰ It further found that tens of thousands of children in Rhode Island suffered from lead poisoning, and concluded that childhood lead poisoning "is dangerous to the public health, safety, and general welfare of the people and necessitates excessive and disproportionate expenditure of public funds for health care and special education, causing a drain upon public revenue."⁷¹ Perhaps it is not surprising that the city of Providence has been called "the lead paint capital" because of its disproportionately large number of children with elevated blood-lead levels.⁷² There was clearly a strong public interest motivating the lawsuit.

The state alleged that the manufacturers of lead pigment

65. State of Rhode Island v. Lead Indus., 951 A.2d 434 (R.I. 2008).

66. *Id.*

67. See also Center for Legal Policy, *Judicial Lead-ership: State Courts are Rebuffing the Trial Lawyers' Attack on Paint Manufacturers*, 3 TRIAL LAWYERS INC., July 2007, at 1, available at http://www.triallawyersinc.com/pdfs/tli_update_3.pdf.

68. *Lead Indus.*, 951 A.2d at 436.

69. *Id.* at 438.

70. *Id.*

71. *Id.*

72. *Id.* at 436 (citation omitted).

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“had manufactured, promoted, distributed, and sold lead pigment for use in residential paint, despite that they knew or should have known, since the early 1900s, that lead is hazardous to human health . . . The State asserted that defendants failed to warn Rhode Islanders of the hazardous nature of lead and failed to adequately test lead pigment. In addition, the State maintained that defendants concealed these hazards from the public or misrepresented that they were safe.”⁷³ The State sought compensatory and punitive damages, and an order requiring defendants to abate lead pigment in all Rhode Island buildings accessible to children.⁷⁴ In the trial of the case, an expert testified that “from January 1993 to December 2004 at least 37,363 children in Rhode Island were poisoned by lead in paint [and that] [i]n 2004, a total of 1,685 children were affected.”⁷⁵

The case was in trial for four months and is the longest civil jury trial in Rhode Island’s history.⁷⁶ The jury found defendants NL Industries, Inc., The Sherwin Williams Co., and Millennium Holdings LLC liable under the public nuisance theory.⁷⁷ The jury found in favor of defendant Atlantic Richfield Co.⁷⁸ The victory against the defendants, however, was short-lived. The Supreme Court reversed the judgment against the defendants that were found liable.⁷⁹

The Supreme Court was fully aware that its decision would have an adverse impact on thousands of children, and it seems fair to say that the court issued its decision with a heavy heart.⁸⁰ The Supreme Court went out of its way to observe that it:

is bound by the law and can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law. This Court is powerless to fashion

73. *Id.* at 440.

74. *Id.*

75. *Id.* at 437–38.

76. *Id.* at 434.

77. *Id.*

78. *Id.*

79. *Id.* at 457.

80. *See id.* at 436.

independently a cause of action that would achieve justice that these children deserve.⁸¹

In the same vein, the Supreme Court concluded the opinion by quoting a passage from an opinion written by Judge Bruce Selya of the United States Court of Appeals for the First Circuit.⁸²

This is a hard case—hard not in the sense that it is legally difficult or tough to crack, but in the sense that it requires us . . . to deny relief to a plaintiff for whom we have considerable sympathy. We do what we must, for it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.⁸³

The facts of the case clearly made it difficult for the Supreme Court to reach the decision that it did.⁸⁴ The court reached the decision required by the law.⁸⁵

In terms of the large-scale social issues and the dollar amount of potential liability, there are few cases like the Lead Paint Case. An adverse decision could have potentially bankrupted the defendants, and the welfare of tens of thousands of children weighed on the other side of the balance. There is much about the case that draws attention. However, there is one aspect of the case that is largely unknown. A practicing lawyer reading this paper might wonder what was required in terms of discovery in such a large case. Throughout pre-trial and trial, the case created massive logistical and administrative challenges. One of the Law School's alumni was a key participant in meeting these challenges.

One of the issues raised by the case was whether it was proper to permit a state to hire private lawyers on a contingent fee basis. This same issue has been raised in other cases across the country where a state had found itself in need of hiring outside, private counsel.⁸⁶ A state's need to hire private counsel lies in the

81. *Id.*

82. *Id.* at 480–81.

83. *Id.* (citing *Burnham v. Guardian Life Ins. Co. of America*, 873 F.2d 486, 487 (1st Cir. 1989)).

84. *See id.*

85. *See id.*

86. *See State v. Hagerty*, 580 N.W.2d 139 (N.D. 1998); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998); *Conant v. Robins, Kaplan, Miller &*

fact that some cases have such massive discovery and investigative needs that a state simply does not have enough staff to handle the work. In an unrelated case, a California court was asked to decide the propriety of a government entity hiring private counsel.⁸⁷ That court took specific note of Rhode Island's Lead Paint Case in ruling on the issue. The plaintiffs in the California case asked Genevieve Allaire-Johnson to provide an affidavit describing the work involved in the Lead Paint Case, because she was one of Rhode Island's state lawyers responsible for meeting the discovery demands in the case and coordinating the effort to comply with the logistical and administrative demands of the case.⁸⁸ At the time of the Lead Paint case, she was a lawyer in the Rhode Island Attorney General's office.⁸⁹ Her affidavit stated:

The case of *Rhode Island v. Lead Industries Association*, CA. PC No. 99-5226 is one example of the massive undertaking and significant resources necessary to enable the State of Rhode Island to litigate this type of case. First, the large number of lawyers who entered their appearances on Defendants' behalf speaks to the massive undertaking of this type of litigation. As of 2005, one hundred twenty-one (121) lawyers had entered their appearance, twenty-nine (29) local Rhode Island attorneys and ninety-two (92) out-of state counsel on behalf of the Defendants. In contrast, the Rhode Island Department of Attorney General has a total of fourteen (14) lawyers assigned to the Civil Division's Government Litigation Unit, which represent the State and its various agencies, department and officers. The three attorneys who were assigned to the case from the Government Litigation Unit also had other cases they worked on simultaneously while engaged in the public nuisance litigation.

The response to discovery requests alone was a mammoth

Ciresi, L.L.P., 603 N.W.2d 143 (Minn. App. 1999).

87. Brief for Genevieve M. Allaire-Johnson as Amicus Curiae Supporting Petitioners, *County of Santa Clara v. Superior Court* (No. S163681), (Cal. Apr. 29, 2009), 2009 CA S. Ct. Briefs 902354.

88. *See id.*

89. *Id.* at 1.

undertaking and required the State to produce millions of pages of documents from seven (7) different state agencies including the Governor's Office and the General Assembly for all documents related to the human exposure to lead; lead paint and pigment on buildings and, for all state buildings that had lead in paint on them, specifications and contracts going back for an indefinite time period. All documents had to be reviewed for privilege and privilege logs produced. A separate office space was secured to review and produce the documents. The entire production of documents was overseen by 3 full-time lawyers whose sole responsibility was dedicated to the discovery production alone. There were over 412 depositions conducted over a period of 615 days with Defendants noticing 345 and Plaintiffs noticing 67 depositions. There were well over 2000 pleadings filed. Ultimately, after the monumental discovery process, extraordinary motion practice and one hung jury, a second trial was conducted that resulted in a four-month jury trial that is reported to be the longest civil jury trial in the history of the Rhode Island Superior Court. Prior to the filing of appeal in the Rhode Island Supreme Court, the Superior Court docket sheet was a colossal record-setting 193 pages long.⁹⁰

One hundred twenty-one lawyers on behalf of the defendants is an astounding number, as is 412 depositions and millions of pages of documents produced.⁹¹ Lawyers who have been involved in large-scale litigation would be familiar with the difficult and complex challenge of coordinating discovery and maintaining a proper record. Not many cases generate this kind of work, and Ms. Allaire-Johnson is one of the relatively few lawyers with first-hand involvement in a case like this. Cases like this become the hallmark of a lawyer's career. Ms. Allaire-Johnson is from the northern part of Rhode Island and went to Providence College.⁹² However, she did not proceed to college immediately after high

90. *Id.* at 10.

91. *See id.*

92. Interviews with Genevieve Allaire-Johnson, Legal Counsel for R.I. Dept of Labor (2013).

school.⁹³ She owned and operated her own business for several years before college.⁹⁴ It was during this time as a business owner that she decided she would eventually go to law school.⁹⁵ For her, the Law School “was an excellent choice and proved a demanding but fantastic experience. In addition to the accomplished and accessible faculty, I found that I had numerous opportunities for clerkships, clinics and internships.”⁹⁶ Her years in practice have confirmed the fact that the Law School “offers a unique opportunity to work with the Rhode Island bench and bar and has a significant impact for those students who plan to practice in New England.”⁹⁷ It is fair to say that alumni like Ms. Allaire-Johnson have a positive impact on the Law School in return.⁹⁸

After the Lead Paint Case, Ms. Allaire-Johnson entered private practice, representing plaintiffs in highly complex medical malpractice cases.⁹⁹ In 2013, she returned to work for the state in a newly created position as Legal Counsel for the Rhode Island Department of Labor and Training.¹⁰⁰ She is now prosecuting civil and criminal cases related to unemployment insurance fraud, workers’ compensation, and workforce regulation and safety.¹⁰¹

PART III: THE PENSION CASE

The Pension Case arose out of the enactment of the Rhode Island Retirement Security Act of 2011 (“RIRSA”) by the General Assembly in November 2011.¹⁰² RIRSA affects the retirement benefits of Rhode Island public employees.¹⁰³ Rhode Island is experiencing a huge debt burden and growing pension liabilities.¹⁰⁴

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 2011 R.I. Pub. Laws 408; 2011 R.I. Pub. Laws 409.

103. *See id.*

104. Mary Williams Walsh, *The Little State With a Big Mess*, N.Y. TIMES (Oct. 22, 2011), <http://www.nytimes.com/2011/10/23/business/for-rhode-island-the-pension-crisis-is-now.html?pagewanted=all>.

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The \$7.4 billion state retirement plan was only 50 percent funded and on course to run out of money as early as 2019. For decades Rhode Island officials had fitfully tried to reform the system, with little success, as workers and retirees fought to keep hard-won benefits that the state could no longer afford.¹⁰⁵

The State's Treasurer issued a report stating: "Without drastic measures to rein in costs, . . . the state's retirement liabilities would devastate a wide range of government programs and ultimately bankrupt the pension plan itself, to the detriment of retirees."¹⁰⁶ Even among the many state and municipal governments experiencing budget crises, Rhode Island's situation stands out, as a result, the Rhode Island pension problems have been the subject of national and international media coverage.¹⁰⁷

Indeed, the situation surrounding Rhode Island's pension reform is so remarkable that it was the subject of a lengthy article in *Institutional Investor* magazine, which is one of the leading (if not, the leading) publication for investment professionals around the world.¹⁰⁸ As of October 2013, the website of the magazine featured articles about a Russian bank, a billionaire in Mexico, and Canadian pension reform.¹⁰⁹ The magazine typically does not

105. IMOGEN ROSE-SMITH, *Rhode Island Treasurer Defies Conventional Pension Wisdom*, *Institutional Investor* (Jan. 7, 2013), <http://www.institutionalinvestor.com/Article.aspx?ArticleId=3133362#.UvPZAXIN1uY>.

106. *Id.*

107. *See id.*

Established in 1936, Rhode Island's retirement system comprises four plans: the employees' and teachers' retirement funds, which are combined; the Judicial Retirement Benefits Trust; the State Police Retirement Benefits Trust; and the Municipal Employees' Retirement System. The entire system is managed by the treasurer and her staff and overseen by two boards. The Employees' Retirement Board of Rhode Island has oversight for the plan's liabilities, and the ten-person Rhode Island State Investment Commission oversees investment strategy, manager selection and asset allocation. The treasurer chairs both boards.

Id.

108. *See* INSTITUTIONAL INVESTOR 2013 MEDIA KIT, <http://euromoney.http.internapcdn.net/euromoney/IIMag/2013IIPrint.pdf> (last visited Feb 7, 2014). The readers of *Institutional Investor* manage hundreds of billions of dollars, and is the leading publication for institutional investment professionals in the United States, Europe and China. *See id.*

109. *See generally* INSTITUTIONAL INVESTOR, <http://www.institutional>

cover local, municipal issues, because it has a global audience. Yet, it devoted a lengthy amount of print to pension reform in Rhode Island.¹¹⁰ This attention underscores the significance of the events in the smallest state. The world is watching Rhode Island. This is what the magazine had to say:

By June 2010, the state employees' and teachers' retirement plans were 48.4 percent funded, down from 62.3 percent in 2008. The funding ratio for the judges' plan stood at 77.8 percent, the state police plan had fallen to 69.7 percent, and the municipal retirement system had a funding ratio of 73.6 percent. The retirement plans were continuing to pay out more in benefits than they were bringing in and draining a greater share of the state budget."¹¹¹

The Rhode Island Retirement Security Act of 2011 increased the minimum retirement age for most employees not already eligible to retire, suspended cost-of-living adjustments for retirees and moved all public workers except public safety officers who pay into Social Security and judges to a hybrid defined benefit-defined contribution system. Even more significant, the new law rewrote the rules for everyone, including fully vested employees and current retirees, not just 20- and 30-something workers.¹¹²

RIRSA is the first legislation of its kind, according to the Institutional Investor.¹¹³ The legislation "has a meaningful impact on the funding gap and promises to ease some of the generational tensions that hamper many pension reform attempts. Government officials in other cash-strapped states have taken notice, as have labor advocates. All are closely following a lawsuit filed by public sector unions to block the Rhode Island law."¹¹⁴

investor.com (last visited Jan. 30, 2014).

110. See INSTITUTIONAL INVESTOR 2013 MEDIA KIT, <http://euromoney.http.internapcdn.net/euromoney/IIMag/2013IIPrint.pdf> (last visited Feb. 7, 2014).

111. ROSE-SMITH, *supra* note 105.

112. *Id.*

113. *Id.*

114. *Id.*

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In addition to coverage in the Institutional Investor, Rhode Island's pension woes were covered in a Chicago newspaper,¹¹⁵ an edition of Business Week,¹¹⁶ and around the country.¹¹⁷

115. See David Klepper, *Rhode Island Pension Problems Top Illinois*, CHI. SUN-TIMES (Sept. 24, 2011), <http://www.suntimes.com/news/nation/7809742-418/rhode-island-pension-problems-top-illinois.html>.

Illinois may not have the worst pension problem in the nation.

Rhode Island, the nation's smallest state, may have the largest problem in the land . . .

. . . Rhode Island is on the hook for billions of dollars' worth of pension benefits owed to police officers, firefighters, teachers, judges and state workers. But the money's not there. Projected investment gains never happened. State actuarial projections failed to keep up with public workers who are retiring earlier and living longer.

Estimates put Rhode Island's unfunded liability for public workers' pensions at \$7 billion, slightly less than the entire state budget for one year. To make good on promises to public workers, the state must pour more and more into the pension system every year, from \$319 million in 2011 to \$765 million in 2015 and \$1.3 billion in 2028.

Illinois had \$126.4 billion in pension liabilities, and assets worth just over half that amount, according to a Pew Study on the States study released earlier this year.

But when Rhode Island's cost is divided among its 1 million residents, it becomes clear that it has one of the weakest pension systems in the nation.

Id.

116. See David Klepper, *Lawmakers pass sweeping RI pension system overhaul*, BUS.WEEK (November 17, 2011), <http://www.businessweek.com/ap/financialnews/D9R2RBOG0.htm>.

Little Rhode Island is taking aim at one of the nation's biggest public pension problems and the results could have implications for other states grappling with ever-increasing retirement costs.

State lawmakers on Thursday passed sweeping changes to the pension system that covers state employees, teachers and many municipal workers. The proposal will save billions of dollars by suspending promised pension increases, raising retirement ages and creating a new system that combines pensions with 401(k)-style accounts . . .

. . . Rhode Island needs \$7 billion to fully fund its pension fund. Nearly every state is confronting similar problems, caused by escalating pension costs, huge investment losses and recession-induced budget deficits.

Despite jeers and the threat of a lawsuit from public workers, Rhode Island lawmakers on Thursday night approved one of the most far-reaching overhauls to a public pension system in the nation . . .

. . . The proposal would suspend pension increases for retirees for

In June of 2012, organized-labor groups in Rhode Island “filed five lawsuits seeking to overturn the Retirement Security Act.”¹¹⁸ The labor groups argued that the reforms were “unconstitutional because the state could find other reasonable alternatives to the law.”¹¹⁹ Further, they argued that “[t]he Rhode Island case has become an important issue for national labor advocates. If the changes for vested and retired members and the hybrid plan requirements hold up, similar changes could be introduced to other states’ pension plans.”¹²⁰

Carly Iafrate is the lawyer for plaintiffs.¹²¹ The complaint she filed sought to enjoin the implementation of RIRSA.¹²² The

five years and then only if pension investments perform well. The bill also raises retirement ages for many workers and creates a benefit plan that mixes pensions with 401(k)-style accounts. The changes wouldn’t apply to municipal pension plans, which are typically the result of collective bargaining . . .

. . . The landmark legislation could have big implications around the nation. Nearly every state is confronting the same problem, caused by escalating pension costs, huge investment losses and recession-induced budget deficits. The Pew Center on the States released a report earlier this year that found that states face a collective gap of \$1.26 trillion between what they’ve promised public workers and what they have set aside to meet those promises.

Id.

117. See, e.g., Tom Mooney, *Think Tank Holds up R.I. Pension Overhaul as Model for Other States*, PROVIDENCE J. (Feb. 26, 2014) <http://www.providencejournal.com/breaking-news/content/20140225-think-tank-holds-up-r.i.-pension-overhaul-as-model-for-other-states.ece> (reporting other states’ discussion of the R.I. pension case); Jennifer Levitz & Jon Kamp, *Rhode Island Officials, Unions Agree on Pension Fix*, WALL STREET J. (Feb. 14, 2014), <http://online.wsj.com/news/articles/SB10001424052702303704304579383231379024624> (discussing the R.I. pension case settlement proposal); Rick Lyman, *Rhode Island Reaches Deal to Soften Pension Changes*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/us/rhode-island-reaches-deal-to-soften-pension-changes.html?_r=1 (same); Associated Press, *Deal is Announced in Landmark Pension Case in RI*, WASHINGTON POST (Feb. 14, 2014), http://www.Washingtonpost.com/business/deal-is-announced-in-landmark-pension-case-in-ri/2014/02/14/322f2a76-95bf-11e3-ae45458927cced b6_story.html (same).

118. ROSE-SMITH, *supra* note 105.

119. *Id.*

120. *Id.*

121. Rhode Island Public Employees’ Retiree Coalition v. Chafee, 58 A.3d 915 (R.I. 2012).

122. Complaint, Rhode Island Public Employees’ Retiree Coalition v. Chafee, No. 12-3166, 2012 WL 5520058 (R.I. Sup. Ct. June 22, 2012).

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complaint focused on the treatment of cost of living retirement adjustments (“COLA”) of already-retired employees.¹²³ The complaint alleged that RIRSA “retroactively and substantially altered COLAs for *already-retired* state employees, public school teachers and certain municipal employees, to their substantial injury.”¹²⁴ The Supreme Court described the case as “a case involving a substantial public interest and requiring the resolution of complex questions of constitutional law, the speedy, effective, and efficient determination of which is of incalculable importance to all of the state’s citizens.”¹²⁵ The significance of this case is not confined to Rhode Island. “The Rhode Island case has become an important issue for national labor advocates. If the changes for vested and retired members and the hybrid plan requirements hold up, similar changes could be introduced to other states’ pension plans.”¹²⁶ The complaint alleged:

- a. RIRSA terminated COLAs to all existing retirees which ordinarily would be paid annually in January 2013, and each year thereafter during the life of the retirement based upon the entire retirement allowance.
- b. RIRSA does not allow, at any time, for the full restoration of the COLAs in the amounts and frequency originally promised to the retirees.
- c. RIRSA instead provides that no COLA will be paid annually to retired teachers and state employees until the ‘system’ is 80 percent funded. The ‘system’ for purposes of determining whether COLAs will be paid to state employees and public school teachers includes the aggregate of the ERS, the State Police Retirement Benefits Trust and the Judicial Retirement Benefits Trust. According to State estimates, the annual COLA will not be restored for about 16 years.
- d. RIRSA provides that no COLA will be paid to MERS beneficiaries until the individual MERS plan to which the beneficiary belongs reaches 80 percent funding.

123. *See id.*

124. *Id.* at ¶ 51 (emphasis added).

125. *Retiree Coalition*, 58 A.3d at 917.

126. ROSE-SMITH, *supra* note 105.

e. Even if the plans reach 80 percent funding (and thus, an annual COLA returns), RIRSA reduces the amount of the COLA in two ways. First, it reduces the percentage applied by eliminating the 3 percent compounded COLA and instead, providing for a COLA that is supposed to range between 0-4 percent, simple. According to the State's actuaries, with a 7.5 percent investment return assumption, the expectation is that the COLA will not reach 3 percent.

f. The second way the COLA will be reduced under RIRSA is that even if the COLA returns, it will apply only to the first \$25,000 of a beneficiary's retirement allowance.

g. Until the system is 80 percent funded, the significantly reduced COLAs will only be paid every five years.¹²⁷

The plaintiffs alleged that RIRSA violates the Contract Clause of the Rhode Island Constitution, Article 1, Section 12.¹²⁸ It also alleged that RIRSA violates the Due Process Clause of the Rhode Island Constitution (Article 1, Section 2) and the Takings Clause (Article 1, Section 16).¹²⁹ Plaintiffs also sought relief under theories of Promissory Estoppel and Breach of Contract.¹³⁰

The proceedings in the case have been stayed, and the parties have been ordered into mediation talks.¹³¹ The superior court also issued a gag order on the attorneys and parties, so the progress of the mediation has not been reported.¹³²

Rhode Island is not alone in facing this kind of crisis, as evidenced by the bankruptcy filing of the city of Detroit.¹³³ Like

127. Complaint, *supra* note 122 at ¶ 51.

128. *Id.* at ¶¶ 54–60. The Contract Clause provides: “No ex post facto law, or law impairing the obligations of contracts, shall be passed.” R.I. CONST. art. I, § 12.

129. Complaint, *supra* note 122 at ¶¶ 61–66.

130. *Id.* at ¶¶ 67–72.

131. Mike Stanton, *R.I. Pension Talks Continue Behind Closed Doors*, PROVIDENCE J. (Aug. 10, 2013), <http://www.providencejournal.com/breaking-news/content/20130810-r.i.-pension-talks-continue-behind-closed-doors.ece>.

132. *Id.*

133. Zachary A. Goldfard, *After Detroit's Bankruptcy Filing, City Retirees on Edge as They Face Pension Cuts*, WASH. POST (July 21, 2013), http://articles.washingtonpost.com/2013-07-21/business/40713530_1_kevyn-d-city-retirees-bankruptcy-filing.

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Rhode Island, a large part of Detroit's crisis is the problem of underfunded pension plans for retired public employees.¹³⁴ "[N]o part of [Detroit's] bankruptcy process is stirring as many passions as the potential need to slice pensions and benefits for retirees."¹³⁵ Detroit's pension situation is similar to Rhode Island's.¹³⁶ Detroit's pension obligations are underfunded by 3.5 billion dollars; Detroit's total debt obligations total eighteen billion dollars.¹³⁷ Like the Pension Case, the retirees in the Detroit case are challenging the constitutionality of proposed pension cuts and relying on the Michigan constitution to support their argument.¹³⁸

The crisis arising out of strained public budgets and pension obligations to public employees is a widespread and pressing issue.¹³⁹ The issue affects not only thousands of retirees, but also every taxpayer in the affected jurisdictions.¹⁴⁰ These are grave problems that arise on a local or state level, but they affect national and international financial markets.¹⁴¹ These cases are

134. *Id.*

135. *Id.*

136. See Ben Eisen, *Pensions loom large in Detroit bankruptcy*, WASH. POST (Oct. 23, 2013), <http://blogs.marketwatch.com/encore/2013/10/23/pensions-loom-large-in-detroit-bankruptcy-fight/>.

137. *Id.*

138. Steven Church, *Detroit Judge Questions Bankruptcy Critics' Pension Claim*, BLOOMBERG (Oct. 15, 2013), <http://www.bloomberg.com/news/2013-10-15/detroit-judge-questions-bankruptcy-critics-pension-claim.html>. In the Detroit case, the American Federation of State, County & Municipal Employees, argued in an August court document:

Michigan Public Act 436 of 2012, the Local Financial Stability and Choice Act, MCL § 141.1541, et seq. ("PA 436") purportedly authorizing the Emergency Manager to file for chapter 9 protection runs afoul of the Michigan Constitution by not explicitly prohibiting the impairment of vested pension rights in bankruptcy, which rights are prescribed in the Michigan Constitution, and further offends the Constitutional rights of individual Detroit citizens to local self-governance.

Eisen, *supra* note 136.

139. See Melanie Hicken, *Retired Union Workers Facing Unprecedented Pension Cuts*, CNNMONEY (Nov. 15, 2013), <http://money.cnn.com/2013/11/15/retirement/pension-cuts/>.

140. See *id.*

141. Local and state governments issue bonds, which are bought primarily by institutional investors. The bonds are assigned credit ratings that reflect the risk of non-payment or default. If credit ratings are downgraded, the bond issuer must pay a higher rate of interest. The higher cost of interest is borne by the taxpayer. If credit ratings are upgraded, the

among the biggest and most important cases of our times.

If the case proceeds after mediation talks, the legal issues to be raised will involve important constitutional principles. This paper expresses no view of the merits or advocates for any side. Just as a matter of legal analysis, however, it seems likely that the parties will address the applicability of *Home Building & Loan Association v. Blaisdell*.¹⁴² In *Blaisdell*, the creditor challenged the constitutionality of a Minnesota law (called the Minnesota Mortgage Moratorium Law), which, among other things, extended the period of redemption on foreclosed properties.¹⁴³ The creditor argued that the law violated Article 1, Section 10 of the U.S. Constitution, which provides in pertinent part: “No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . .”¹⁴⁴ The creditor argued that the moratorium was an impermissible rewriting of the mortgage contract with the borrower.¹⁴⁵ The state court upheld the statute as an emergency measure even while conceding that the obligations of the mortgage contract had been impaired.¹⁴⁶

The Supreme Court began its analysis by noting the important purpose of the Contract Clause.¹⁴⁷

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so

bond issuer pays a lower rate of interest, which benefits the taxpayer. The resolution of the pension issues will likely have an effect on credit ratings of the jurisdictions at issue because pension obligations are one of the factors that determine the credit rating.

142. 290 U.S. 398 (1934).

143. *Id.* at 419.

144. *Id.* at 461.

145. *Id.* at 416.

146. *Id.* at 420.

147. *Id.* at 428.

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alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.¹⁴⁸

However, the Court affirmed the ruling of the Minnesota Supreme Court and upheld the validity of the Minnesota law.¹⁴⁹ Despite the fundamental importance of the Contract Clause, the Court observed that the prohibition against impairing contracts was not absolute.¹⁵⁰

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.¹⁵¹

The Court then weighed the factors in deciding the proper

148. *Id.* (quoting *Ogden v. Saunders*, 25 U.S. 213, 213, 354–55 (2001)) (internal quotation marks omitted).

149. *Id.* at 447–48.

150. *Id.* at 442.

151. *Id.* at 442 (citations omitted).

balance between private rights and the public interest.¹⁵²

[T]he State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end “has the result of modifying or abrogating contracts already in effect.” Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.¹⁵³

The Court recognized the need to include consideration of public factors beyond the rights of the two parties to a contract.¹⁵⁴

The reservation of this necessary authority of the State is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the State’s power by the following statement of the controlling principle—a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 692 (1897).

“But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need

152. *Id.* at 434–35.

153. *Id.*

154. *Id.* at 435–36.

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never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.”¹⁵⁵

It further observed:

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.¹⁵⁶

It is crucial to note that *Blaisdell* was decided during the Great Depression.¹⁵⁷ The severe economic crisis set the factual foundation on which the decision was based. In the absence of the urgent conditions accompanying the Great Depression, it is unlikely that the moratorium would have passed constitutional muster.¹⁵⁸

155. *Id.*

156. *Id.* at 437 (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

157. *See id.* at 398.

158. *Id.* at 445–46.

An emergency existed in Minnesota, which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge, or as lacking in adequate basis . . . The finding of the legislature and state court has support in the facts of which we take judicial notice . . . [T]here were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, the economic emergency which threatened “the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence was a ‘potent cause’ for the enactment of the statute.” . . . The legislation was addressed to a legitimate end, that is, the legislation was not for the mere

In light of the *Blaisdell* case, it may have been necessary for the State to draw parallels between current economic conditions and the Great Depression. Such comparisons would not be far off the mark. The country is still trying to recover from the economic collapse connected to the bursting of the housing bubble, the collapse of the sub-prime mortgage market, and the bankruptcy of Lehman Brothers in 2008.¹⁵⁹

The collapse of Lehman Brothers, a sprawling global

advantage of particular individuals, but for the protection of a basic interest of society.

Id.

The Court also cited the preamble to the Minnesota Mortgage Moratorium Law:

Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

Whereas, The State of Minnesota possesses the right under its police power to declare a state of emergency to exist, and

Whereas, the inherent and fundamental purpose of our government is to safeguard the public and promote the general welfare of the people.

Id. at 421 n.3.

159. See *Crash Course*, ECONOMIST (Sept. 7, 2013), <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article>.

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bank, in September 2008 almost brought down the world's financial system. It took huge taxpayer-financed bail-outs to shore up the industry. Even so, the ensuing credit crunch turned what was already a nasty downturn into the worst recession in 80 years . . . The effects of the crash are still rippling through the world economy.¹⁶⁰

The pension problems of Rhode Island and other states are directly tied to these events.¹⁶¹ The closer the state can tie the facts of the current situation to the Great Depression, the greater the chance that *Blaisdell* may be applicable law.¹⁶² One way to read *Blaisdell* is that the constitutional prohibition on the impairment of contracts must be relaxed in times of economic exigency.¹⁶³ If the case ultimately goes to trial, the State would likely argue that private contracts should not be allowed to stand in the way of a remedy of a large-scale public problem, such as a state budget crisis.

Nevertheless, on February 14, 2014, after a lengthy period of mediation, the parties to the pension suit announced a settlement agreement. The settlement agreement terms retain the structure of the Rhode Island Retirement Security Act, but would grant better benefits for those affected.¹⁶⁴ This agreement—more appropriately called a proposal—will not take effect until it has overcome several hurdles. First, the individual plaintiffs in the suit must vote upon the proposal.¹⁶⁵ Next, the proposal must survive a fairness hearing conducted by Judge Taft-Carter of the Rhode Island Superior Court.¹⁶⁶ Finally, the proposal must be passed into legislation by General Assembly before it will take effect.¹⁶⁷

If the settlement is successful, however, it means that the

160. *Id.*

161. *See id.*

162. *See id.*

163. *See* 290 U.S. at 427–28.

164. For more details on the pension settlement proposal, *see Details Present On Pension Settlement: Would Settle Six Challenges to 2009, 2010, 2011 Pension Changes, Keep Retirement System on Healthy Path*, THE RHODE ISLAND PENSION SETTLEMENT PROPOSAL, <http://ripensioninfo.org/press-release/> (last visited Feb. 27, 2014).

165. *Id.*

166. *Id.*

167. *Id.*

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burden of restoring health to the pension system will be placed squarely on the backs of mostly middle-income retirees who relied on the promise of their pensions. They will argue that they fully performed and honored their part of their contracts with the state. Retirees who put in thirty or more years with the state and who retired with the understandable expectation that their pensions would be honored exactly as promised now find themselves facing cuts. For those already retired, they did everything required of them under their agreement with the state. They expect nothing less in return. Promises mean something, both legally and morally, and the plaintiffs simply expect the state to honor its promises. They will further claim that the rules are being changed in the middle of the game, and they will bear the brunt of the suffering.

Again, this paper takes no view on the merits of either side. What is clear, however, is that the Pension Case is one of the most important cases in Rhode Island's history. Every resident of Rhode Island will be affected by the resolution of this case (whether resolution comes in the form of a court judgment or a settlement).

And in the center of all this is Carly Iafrate.¹⁶⁸ She is one of the most important participants in these issues. Iafrate is one of the leading labor lawyers in the state. Her clients include Council Ninety-Four of the American Federation of State, County and Municipal Employees, which is the largest public service union in the state.¹⁶⁹ She is now at the heart of a case that will potentially affect every Rhode Island resident.¹⁷⁰ The case she filed is also the subject of close attention from interested third-parties throughout the country.¹⁷¹ Most lawyers never see a case with such high stakes involved. The Law School can claim one of its own as the lead lawyer in a case of the highest importance.

Ms. Iafrate is from Rehoboth, Massachusetts and went to college at the University of Massachusetts-Amherst.¹⁷² Of her experience at the Law School, she said this: "Law school

168. Rhode Island Public Employees' Retiree Coalition v. Chafee, 58 A.3d 915 (R.I. 2012).

169. *See id.*

170. *See id.*

171. *See id.*

172. Interviews with Carly Iafrate, Esq., Carly Iafrate Law Office (2013).

transformed me – and it was not just the rigorousness of the program; it was the internships and other experiences outside the classroom that were truly invaluable.”¹⁷³ In particular, her internship with Judge Bruce Selya of the United States Court of Appeal for the First Circuit was especially rewarding and “an amazing learning experience.”¹⁷⁴ Ms. Iafrate was also Chief Justice Frank Williams’ first law clerk after his appointment to the Rhode Island Supreme Court.¹⁷⁵ This opportunity arose because Ms. Iafrate was a student in Chief Justice Williams’ municipal government class at the Law School in her third year.¹⁷⁶

One noteworthy aspect of Ms. Iafrate’s career is that, as a law student, she had no idea that she would practice labor law after law school.¹⁷⁷ It was only after she graduated that she fully discovered this area of the law, and now she is one of the leading lawyers in the area.¹⁷⁸ The Law School can be proud that it provided doors of opportunity for Ms. Iafrate. As for almost all law students, neither the Law School nor anyone else can predict where those doors may lead, but the possibilities are limitless.

CONCLUSION

What makes a law school? Some might point to the campus, others might cite the quality of the faculty, and others might point to its history. Another, perhaps more important factor, to include is the impact of the alumni in their respective legal communities. A law school is a reflection of its alumni, and this Law School is right to be proud. Its alumni have been, and are, at the center of the most important legal matters in the state. Its alumni are among the leading lawyers and public officials, and the Law School’s influence and presence will only continue to grow. Already, hearings in local courtrooms are like mini-reunions (so I have been told).

The alumni are the living, breathing, continuous line and life of the Law School. Though the alumni may be separated by years

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

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in their attendance, the link to the Law School provides the common bond for each of them. As a personal observation, it seems the alumni of the Law School are particularly close-knit (more so than at many other schools). Former students are overwhelmingly enthusiastic when asked to help current students. There is a sense of happy obligation from those who have been here to those who are following them. This sense of a strong common bond enriches the Law School and provides the framework for a rewarding future. All of this has occurred in twenty short years. The Law School has accomplished much, with much more yet to come.