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Eric W. Buetzow

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ERIC W. BUETZOW*

INTRODUCTION

As the end of Leroy Hendricks's prison sentence for child molestation drew near, Kansas sought to commit him to a civil institution under the state's Sexually Violent Predator Act (SVPA).[1] The SVPA established commitment procedures for persons convicted of an enumerated sex crime, who, due to a "mental abnormality or personality disorder," are found likely to re-engage in predatory acts of sexual violence.[2] Such individuals become eligible for commitment as a "sexually violent predator" (SVP).[3] After a jury found Hendricks eligible for commitment under Kansas's SVPA, Hendricks challenged the constitutionality of his commitment.[4] The Supreme Court of Kansas struck down the law as a violation of substantive due process rights under the Fourteenth Amendment.[5]

The U.S. Supreme Court reversed, however, holding in a five-to-four decision that commitments of this type do not violate the Fourteenth Amendment's due process requirements.[6] The Court wrote:

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* J.D. Candidate, University of California, Hastings College of the Law, 2007. I would like to give thanks to Professor David Faigman for his guidance on this Note and special thanks to my family for their unwavering support.

1. KAN. STAT. ANN. §§ 59-29a01 to -29a21 (2005); Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

2. § 59-29a02. Under the Kansas SVPA, these elements must be proved at trial beyond a reasonable doubt following a probable cause determination by the court. § 59-29a05, -29a07(a).

3. The SVPA defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." § 59-29a02(a).

4. *In re* Care and Treatment of Hendricks, 912 P.2d 129, 130–31 (Kan. 1996).

5. *Id.* at 138.

6. *Hendricks*, 521 U.S. at 371. The Court also held that the SVPA is "non-punitive" and thus violates neither the Constitution's double jeopardy prohibition nor its ban on ex post facto law making. *Id.* at 369.

> [Hendricks's] admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a "mental abnormality" under the Act, thus plainly suffices for due process purposes.[7]

While the Court settled the debate over the ultimate constitutionality of the type of commitment in *Hendricks*, the Court left uncertain the precise requirements demanded by substantive due process in this context. Specifically, does the commitment of a defendant who does not suffer from a "lack of volitional control" still pass constitutional muster? If not, what degree of volitional inability sufficiently warrants commitment?

Because of this initial uncertainty, the Court was forced to clarify its position five years later in *Kansas v. Crane*.[8] In *Crane*, the Kansas Supreme Court had once again overruled the civil commitment of a sex offender under the Kansas SVPA on due process grounds, but this time it had done so under the auspices of the Supreme Court's language in *Hendricks*.[9] The Kansas high court reasoned that *Hendricks* compelled a finding that the defendant is completely unable to control his behavior, a finding the trial court had not made in the case of defendant Crane.[10]

Upon review, the U.S. Supreme Court held that while *Hendricks* does not require a finding of *total* or *complete* lack of control, "there must be proof of serious difficulty in controlling behavior."[11] The Court expressly rejected the notion "that the Constitution permits commitment of the type of dangerous sexual predator considered in *Hendricks* without *any* lack-of-control determination."[12] The Court vacated the trial court's commitment of defendant Crane and remanded the case for further proceedings.[13]

This could have been considered the end of the debate over whether the Constitution requires a finding of serious volitional inability for the civil commitment of sex offenders. Curiously, however, most state courts which have subsequently considered the issue with respect to their state's SVP statute refuse to mandate such a finding.

Part I of this Note will analyze the recent Florida Supreme Court decision *State v. White*,[14] the latest in a line of state court decisions that

7. *Id.* at 360 (quoting § 59-29a02).
8. 534 U.S. 407 (2002).
9. *Id.* at 411.
10. *Id.*
11. *Id.* at 413.
12. *Id.* at 412.
13. *Id.* at 415.
14. 891 So. 2d 502 (Fla. 2004).

essentially interpret around the *Crane* volitional requirement. This analysis will demonstrate how the reasoning employed in *White* and similar decisions is irreconcilable with the Supreme Court's ruling in *Crane*. Part II will discuss state court institutional schemes and explore the possibility that majoritarian political pressures resulting from these schemes could be playing a role in the state judicial analyses of SVP laws against federal substantive due process standards. I suggest that, given the current scholarship on popular judicial retention mechanisms, this category of cases presents significant potential for political considerations to enter the decisional calculus.

I. *STATE V. WHITE*: A CONVENIENT INTERPRETATION OF *CRANE*

In 1995, defendant James White was convicted of sexual battery.[15] Four years later, prior to his release from prison, the State of Florida initiated proceedings to have White involuntarily committed to a civil institution pursuant to Florida's SVP statute, the Jimmy Ryce Act (the Ryce Act).[16] Under the Ryce Act, like the Kansas SVPA, a defendant who has been convicted of an enumerated sexually violent offense may be civilly committed if he or she suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if he or she is not confined in a secure facility for long-term control, care, and treatment.[17]

After a jury found that these elements were met, deeming White eligible for commitment under the statute, a Florida appellate court overturned the commitment on the ground that the trial court erred in denying White a jury instruction "as to an essential element of proof."[18] That essential element was whether or not White had serious difficulty controlling his behavior, an element required, the appellate court reasoned, by the United States Supreme Court's holding in *Crane*.[19] In 2004, the Florida Supreme Court granted review, giving itself occasion to consider whether *Crane* indeed required a finding that the defendant had serious difficulty controlling his or her behavior.

In a four-to-three decision, Florida's high court reversed the appellate court ruling and held that the U.S. Supreme Court's decision in *Crane* did not require such a finding and thus jury instructions on this

15. *White*, 891 So. 2d at 503.

16. *See id.*; *see also* The Jimmy Ryce Act, FLA. STAT. §§ 394.910 to .931 (1999). For the history and a general discussion of the Ryce Act, see Mari M. Presley, Comment, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487 (1999).

17. § 394.912(10).

18. White v. State, 826 So. 2d 1043, 1044 (Fla. Dist. Ct. App. 2002) (per curiam).

19. *Id.*

point need not be given.[20] In other words, the court in *White* refused to concede that *Crane* compelled an explicit volitional impairment finding for the civil commitment of sex offenders in its state. However, after the Supreme Court's decision in *Crane*, how does the *White* court justify this result?

A. PROBLEMS IN REASONING

Principally, the court in *White* proffers what appears to be a "same result" or "functional equivalent" rationale. That is, that Florida's sexually violent predator statute will *in effect* only net sexually violent offenders who have difficultly controlling their behavior, thus negating the need for an explicit finding on volition. The court reasoned:

> Although the Ryce Act does not state the standard in terms of whether the respondent has serious difficulty controlling behavior, it accomplishes the same result. The respondent must suffer from a "mental abnormality," which predisposes him to commit sexually violent offenses. Moreover, the respondent must be "likely to engage in acts of sexual violence," which means that "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." One who fits such a description necessarily will have difficulty controlling his behavior. The terms in the statute, when taken together (if not independently) comply with the requirements of *Crane*.[21]

But this view of *Crane* is problematic on multiple fronts. First and foremost, it is difficult to adopt such a conception of *Crane* given the U.S. Supreme Court's statement that "[w]e do not agree . . . that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination."[22] Furthermore, the mere "difficulty" of controlling behavior that the *White* court depicts is undoubtedly less demanding than the standard actually articulated in *Crane*, which requires "that there must be proof of *serious* difficulty in controlling behavior."[23] And, not surprisingly, there is no mention by the Supreme Court in *Crane* of a "same result" exception that would enable state courts to forgo a lack of control determination.[24]

There is no confusion within the Supreme Court itself as to what the holding in *Crane* demands. In addition to the majority's language, Justice Scalia clearly articulates, "[t]oday's opinion says that the Constitution requires the addition of a third finding . . . that the subject suffers from

20. *White*, 891 So. 2d at 509.
21. *Id.* at 509–10 (quoting § 394.912).
22. *Crane*, 534 U.S. at 412.
23. *Id.* at 413 (emphasis added).
24. *See* 534 U.S. 407.

an inability to control behavior."[25] Therefore, the source and existence of any genuine ambiguity on the matter remains mysterious. It is largely from relying on other states' decisions that the court in *White* came to understand the issue as an open one.[26]

It is also important to highlight that Florida's Ryce Act and the Kansas SVPA at issue in *Crane* are essentially identical.[27] The Court in *Crane* found the statute and jury instructions based on the requirements of the statue to be constitutionally unacceptable.[28] Thus, for the Florida Supreme Court to suggest that somehow the Ryce Act sufficiently imposes what *Crane* requires is logically unsatisfying.

Specifically, the *White* court's view requires a leap in logic that the Court in *Crane* was not willing to make. Under *Crane*, one who suffers from a mental abnormality or personality disorder and is deemed likely to commit future acts of sexual violence cannot be said to *necessarily* suffer from serious volitional impairment, nor is the perceived likelihood of committing future acts necessarily *because of* a volitional impairment. As Justice Scalia points out in his dissent, a sex offender may have "a will of steel, but . . . delusionally believe[] that every woman he meets is inviting crude sexual advances."[29] Stated differently, a defendant may suffer from a mental or personality disorder that has the effect of predisposing him or her, at some level, to re-offending, yet simultaneously be able to control his or her behavior to a high degree. Such a person may nevertheless be found by a jury to be "likely" to commit future acts of sexual violence.[30]

Yet under a logical reading of the majority view in *Crane*, a person who fits this description would not be eligible for civil commitment. The Court asserted that the volitional impairment requirement works conjunctively with the other elements to achieve the constitutionally important result of distinguishing dangerous sex offenders from the "dangerous but typical recidivist convicted in an ordinary criminal

25. *Crane*, 534 U.S. at 423 (Scalia, J., dissenting). Justice Scalia's dissent attacked the correctness and wisdom of requiring proof of volitional impairment. *Id.* at 421–22.

26. *See* 891 So. 2d at 507–09. Curiously, one state omitted from the majority's discussion is Kansas. *Id.* Kansas followed the remand in *Crane*, mandating that a separate and specific jury instruction be given on volition. *See id.* at 512 (Pariente, C.J., dissenting) (citing KANSAS JUDICIAL COUNCIL, PATTERN INSTRUCTIONS KANSAS 3D CIVIL ch. 130.20 (3d ed. 2003)); *see also id.* at 516 (Anstead, J., dissenting). For brief discussion of other state court decisions on this issue, see discussion *infra* Part. I.C. *See also* Peter Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of* Kansas v. Crane, 55 STAN. L. REV. 2229, 2248–51 (2003).

27. *See White*, 891 So. 2d at 512 (Pariente, C.J., dissenting); *id.* at 516 (Anstead, J., dissenting).

28. 534 U.S. at 412.

29. *Id.* at 422 (Scalia, J., dissenting). Justice Scalia would find that such an individual is a dangerous sexual predator eligible for commitment under the Constitution. *Id.*

30. Such a situation is particularly possible in Florida under the Ryce Act, where "likely" is defined merely as "a degree as to pose a menace to the health and safety of others." FLA. STAT. § 394.912 (1999); *see also White*, 891 So. 2d at 503.

case."[31] Recall that in *Crane*, just as in *White*, the jury made affirmative findings that (1) the defendant sex offender suffered from a mental abnormality or personality disorder, and (2) his condition rendered him likely to commit future acts of sexual violence.[32] Unlike the *White* court, the Court in *Crane* was clearly unwilling to infer the existence of volitional impairment simply from these findings. Instead, it vacated and remanded the case with instructions that "there must be proof of serious difficulty in controlling behavior."[33] This move demonstrates that *Crane* requires states to add additional protections beyond those already implicit in their SVP statutes.[34]

Furthermore, as Florida's Chief Justice illuminates in his dissent, the jury instructions eventually found to be inadequate in *Crane* were actually more constitutionally desirable than the instructions given in *White*.[35] The original *Crane* instructions contained a substantive definition of "likely," which was defined as "more probable to occur than not to occur."[36] In contrast, the jury instructions given in *White* only ask the jury to determine if the likelihood of committing future acts reaches "such a degree as to pose a menace to the health and safety of others."[37] It is difficult to imagine this standard posing much of an obstacle to a jury considering the fate of a convicted sex offender who suffers from a mental or personality disorder. It is even more difficult to appreciate how this amorphous standard will necessarily net only those offenders who have serious volitional impairment.

Undoubtedly, however, it must be conceded that a defendant's likelihood of committing future acts as a result of a mental or personality disorder and his or her inability to control behavior will often bear a close relationship in most SVP cases. The Court in *Crane* admitted that there may be "considerable overlap" between the factors and "our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior."[38] Regardless, the Court ultimately rejected a view of *Hendricks* and the Constitution that would permit different judicial treatment for mental impairments already thought to necessarily be of a volitional nature.[39]

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31. *Crane*, 534 U.S. at 413.

32. *In re* Care and Treatment of Crane, 7 P.3d 285, 286–94 (Kan. 2000).

33. *Crane*, 534 U.S. at 413.

34. Pfaffenroth, *supra* note 26, at 2248.

35. *White*, 891 So. 2d at 512 (Pariente, C.J., dissenting).

36. *Id.* (quoting *In re Care and Treatment of Crane*, 7 P.3d at 288).

37. *Id.* at 503.

38. 534 U.S. at 414, 415; *see also In re* Commitment of W.Z., 801 A.2d 205, 217 (N.J. 2002) ("One's likelihood to commit such acts obviously relates to the control determination that the trial court must make.").

39. *See Crane*, 534 U.S. at 415 ("Nor, when considering civil commitment, have we ordinarily

The *White* court also indicates that it found itself more inclined to adopt the "same result" theory because the Court in *Crane* never overruled the commitment in *Hendricks* even though defendant Hendricks never received a jury instruction on inability to control behavior. The court reasoned, "[i]t is telling that *Crane* upheld the commitment in *Hendricks* as constitutional even though the jury instructions in that case did not include a requirement of 'serious difficulty in controlling behavior.'"[40]

But the Court in *Crane* seemed to preempt this logic. It emphasized that in *Hendricks*, volitional impairment was never truly at issue. The defendant had essentially stipulated to his own inability to control his urges to molest children,[41] and there was not much reason for the Court to consider the matter in detail.[42] Consequently, discussion of volitional elements in that case is admittedly scant.[43] Some have even depicted *Crane* as "a belated effort by the majority to cabin its earlier decision in *Hendricks* by limiting that case to its facts."[44] One would think this would render Hendricks's commitment not particularly telling on the issue. It is also worth noting that Justice Scalia presented the same argument in his *Crane* dissent, not for disputing what the holding requires, but more appropriately for disputing the correctness and wisdom of the decision.[45]

Finally, the court in *White* quoted the Supreme Court's stated principle that "'the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment.'"[46] The court in *White* used this notion for the proposition that "the Supreme Court rejected a bright-line rule in this context."[47]

There are contextual problems with the recitation of these principles. Foremost, it is not immediately apparent how state discretion in selecting mental and personality disorders for commitment eligibility can be automatically transposed into state discretion over the administration of the volitional requirements of substantive due process.

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distinguished for constitutional purposes among volitional, emotional, and cognitive impairments.").

40. *White*, 891 So. 2d at 510 (quoting *Crane*, 534 U.S. at 413).

41. *Crane*, 534 U.S. at 414 ("Hendricks himself stated that he could not 'control the urge' to molest children.").

42. *See id.* at 412–13 (explaining that *Hendricks* "consisted of a special and serious lack of ability to control behavior," and "[i]n recognizing that fact, we did not give to the phrase 'lack of control' a particularly narrow or technical meaning"); *see also id.* at 422 (Scalia, J., dissenting) ("The Court appears to argue that, because *Hendricks* involved a defendant who indeed *had* a volitional impairment . . . its narrowest holding covers only *that* application of the SVPA . . . .").

43. *See id.* at 412–13.

44. Pfaffenroth, *supra* note 26, at 2245.

45. 534 U.S. at 421–22 (Scalia, J., dissenting).

46. State v. White, 891 So. 2d 502, 510 (Fla. 2004) (quoting *Crane*, 534 U.S. at 413).

47. *Id.*

More significantly though, when placed in proper perspective, the referenced statements of the Supreme Court in *Crane* can be better understood as explaining the Court's reluctance to draw a bright line as to the *degree* of volitional impairment that *Hendricks* and the Constitution demand, not whether a finding need be made at all. It was in the paragraph preceding these statements where the Court provided, "we recognize that... 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior."[48] The Court then explained, "We recognize that *Hendricks as so read* provides a less precise constitutional standard than would those more definite rules for which the parties have argued. But the Constitution's safeguards of human liberty [in this area] are not always best enforced through precise bright-line rules."[49]

Thus, in the end, the court in *White* appears to impetuously rely on the Supreme Court's admission of providing an imprecise standard with respect to degree of volitional inability in order to maintain that *Crane*'s due process requirements are malleable to the extent that such determinations need not even be made.

B. STANDARD OF REVIEW ISSUES

After holding that a lack of control determination need not be made by the fact-finder for civil commitments under Florida's Ryce Act to pass constitutional muster, the court in *White* then conducted a review of the record based on a sufficiency of evidence standard to determine if the volitional impairment requirements of *Crane* were in fact satisfied.[50] This approach raises further criticisms and questions.

Most glaringly, much can be said about conducting a review for sufficient proof when an initial finding on the matter has never actually been made. As dissenting Justice Anstead articulated:

> [O]ur role and review of the sufficiency of the evidence is ordinarily limited to a determination of whether the proof was adequate to support a determination by the fact-finder, in this case a jury, on the issue. Today, we have turned our role on its head by finding the evidence sufficient on the one hand, but concluding that the jury does not need to be told about the issue on the other.[51]

Further, the elements for commitment under the Ryce Act must be established at trial by the standard of "clear and convincing evidence,"[52] which far exceeds a showing of sufficient proof. Since *White* holds that a

48. *Crane*, 534 U.S. at 413.
49. *Id.* (emphasis added).
50. *See White*, 891 So. 2d at 508–11.
51. *Id.* at 516–17 (Anstead, J., dissenting).
52. FLA. STAT. § 394.912(10) (1999).

determination on volitional inability need not be made at trial,[53] the requirements of *Crane* will be enforced only by a measure of "sufficient proof," and only if appellate review is granted. While it is true that the volitional requirements of *Crane* are constitutionally compelled, that is not to say that the Ryce Act requirements for civil commitment are not. In fact, *Hendricks* suggests the opposite.[54] Hence, the Constitution does not provide much justification for maintaining disparate standards of proof for different commitment requirements.

Moreover, the approach of the Florida Supreme Court in *White* raises serious questions as to how and when a defendant subject to commitment under the Ryce Act may petition for redress under the volitional requirements of *Crane*. May the issue only be raised on appeal, at which time a "sufficiency of the evidence" review will be conducted? May the issue be raised at trial post-verdict in a motion for judgment notwithstanding the verdict? May the issue be raised at trial pre-verdict in a motion for directed verdict? The analysis employed in *White* presents no obvious answers to these questions.

Lastly, the undertaking of the review itself can be seen as an inconsistent directive to lower courts. The need to review the issue with this or any other standard is contrary to the court's earlier proclamation that one who fits the description of the terms of the Ryce Act "*necessarily* will have difficulty controlling his behavior."[55] Are lower courts supposed to conclude that a valid verdict for the State under the Act must, ipso facto, satisfy the volitional requirements of *Crane*? Or, must they conduct a review of the facts for sufficient proof of volitional impairment specifically? If the latter is the correct option, then why wouldn't adequate proof of the Ryce Act elements alone suffice given the *White* court's "same result" conclusion?

C. Reasoning that Transcends Florida

As previously indicated, Florida is not alone in its refusal to explicitly implement the requirements of *Crane* in civilly committing sex offenders. In fact, a multitude of states join in Florida's reasoning, asserting that their SVP statutes sufficiently incorporate by implication the demands of *Crane*. These states include California,[56] South Carolina,[57]

53. *See White*, 891 So. 2d at 508–09.

54. *See* Kansas v. Hendricks, 521 U.S. 346, 357–58 (1997) (describing components of involuntary commitment statutes that generally must be present for the statute to be upheld).

55. *White*, 891 So. 2d at 510 (emphasis added).

56. *See* People v. Williams, 120 Cal. Rptr. 2d 11, 16 (Ct. App. 2002), *aff'd*, 74 P.3d 779 (Cal. 2003) ("This [statutory] language clearly presumes a serious difficulty in controlling behavior: if a person cannot control his dangerous behavior to the extent that he is predisposed to commit criminal sexual acts and thus becomes a menace to others, he has sufficient volitional impairment to be found an SVP.").

57. *See In re* Treatment and Care of Luckabaugh, 568 S.E.2d 338, 349 (S.C. 2002) ("Inherent

Washington,[58] Illinois,[59] Wisconsin,[60] Arizona,[61] and Texas.[62] By and large, "[t]hese state court decisions fly in the face of *Crane*."[63] They can be regarded as the implementation of Justice Scalia's dissenting view that the "'very existence of a mental abnormality or personality disorder that causes a likelihood of repeat sexual violence in itself establishes the requisite difficulty if not impossibility of control.'"[64] In comparison, just a handful of states have mandated the explicit incorporation of lack of volition into civil commitment determinations in order to address the *Crane* majority.[65]

Perhaps it can be argued that these results can be attributed to the Supreme Court's own failure in *Crane* to specify "whether existing state procedures comport with the lack of volitional control requirement,"[66] which thereby facilitated interpretive exploitation in the state courts. But again, the disposition in *Crane*—vacated and remanded—clearly indicates the inadequacy of the original procedures and represents a

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within the mental abnormality prong of the Act is a lack of control determination .... The Act's requirements are the functional equivalent of the requirement in *Crane*.").

58. *See In re* Det. of Thorell, 72 P.3d 708, 719 (Wash. 2003) ("Because the standard 'to commit' instruction requires the fact finder to find a link between a mental abnormality and the likelihood of future acts of sexual violence if not confined in a secure facility, the instruction requires a fact finder to determine the person seriously lacks control of sexually violent behavior.").

59. *See* State v. Varner, 800 N.E.2d 794, 798 (Ill. 2003) ("*Crane* did not hold that the Constitution requires a specific determination by the fact finder in every case that a person lacks volitional control, because *Crane* upheld the commitment in *Hendricks* as constitutional, even though there was no specific lack-of-control determination in *Hendricks*.").

60. *See* State v. Laxton, 647 N.W.2d 784, 794 (Wis. 2002) ("Proof that a person is sexually violent necessarily and implicitly includes proof that the person's mental disorder includes serious difficulty in controlling his or her behavior ....").

61. *See* State v. Ehrlich, 59 P.3d 779, 787 (Ariz. 2002) ("[A]lthough the statute does not expressly refer to 'serious difficulty in controlling behavior,' the statutory language does embody the functional equivalent of that phrase.").

62. *See In re* Commitment of Almaguer, 117 S.W.3d 500, 506 (Tex. App. 2003) ("A trial court does not err in refusing to submit a jury instruction on the law which is already encompassed in the instructions and question.").

63. Pfaffenroth, *supra* note 26, at 2249.

64. *Laxton*, 647 N.W.2d at 797–98 (Abrahamson, C.J., dissenting) (quoting Kansas v. Crane, 534 U.S. 407, 419–20 (2002) (Scalia, J., dissenting)); *accord* Pfaffenroth, *supra* note 26, at 2250.

65. *See In re* Det. of Barnes, 658 N.W.2d 98, 101 (Iowa 2003) ("[T]he [Iowa SVP] statute must be interpreted to require a showing of a serious difficulty in controlling behavior, as the Supreme Court held in *Crane*."); *In re* Civil Commitment of Ramey, 648 N.W.2d 260, 266 (Minn. Ct. App. 2002) ("In short, *Crane* adds to *Hendricks* the affirmative duty to make a lack of control determination, which is already a requirement of the Minnesota standard ...."); Thomas v. State, 74 S.W.3d 789, 792 (Mo. 2002) (holding that an instruction defining "mental abnormality," to comply with *Crane*, must state that a "mental abnormality" is a "condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior"); *In re* Commitment of W.Z., 801 A.2d 205, 215 (N.J. 2002) ("The definition of 'sexually violent predator' requires proof of past sexually violent behavior ...."); *see also* KANSAS JUDICIAL COUNCIL, *supra* note 26 (requiring proof that a respondent's disorder makes it seriously difficult for him or her to control his or her behavior).

66. Pfaffenroth, *supra* note 26, at 2245.

salient procedural component that state courts have conveniently ignored.[67] Yet, casting these arguments aside, a more fundamental question exists regarding the state courts' underlying willingness to perform an end run around *Crane*: if the reasoning of *White* and its counterparts is indeed faulty, could externalities be a driving force?

II. COULD IT BE? INSTITUTIONAL PRESSURES AND "ACCOUNTABILITY" IN STATE COURTS

Within the *Crane* and *Hendricks* cases exists a not-so-subtle intra-state battle between state political structures. While largely overlooked amongst the legal wrangling over substantive due process jurisprudence, the Kansas Supreme Court twice confronted the state legislature by striking down its SVPA on account of federal constitutional rights.[68] In the years following, the same court also declared Kansas's administration of the death penalty unconstitutional and ordered the Kansas legislature to spend a specific amount of additional money on public education.[69] Calls for retribution have since echoed from the state legislature. They have proposed bills to direct the state judiciary closer to majoritarian lines.[70] Although the justices are already subject to a popular "retention election" every six years, a proposed constitutional amendment would abandon the current "merit selection plan" for picking Supreme Court justices.[71] Under the merit selection plan, an independent judicial commission produces a list of nominees from which the governor may select.[72] The proposed amendment would replace this arrangement with gubernatorial appointment and senate confirmation.[73] One legislator urged that judicial isolation under the current system "serves to exacerbate public frustration with an alienation from a process they see as insular and elitist."[74]

Among other things, these circumstances from Kansas are illustrative of the fact that there are two main mechanisms available to state majoritarian bodies with which they may attempt to control their judiciary: judicial selection and retention.[75]

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67. *Id.* at 2248.

68. *See In re* Care and Treatment of Crane, 7 P.3d 285, 290 (Kan. 2000); *In re* Care and Treatment of Hendricks, 912 P.2d 129, 138 (Kan. 1996).

69. Associated Press, *Committee Considers Changing Selection of Supreme Court Justices*, LAWRENCE JOURNAL-WORLD, Feb. 9, 2006, http://www.ljworld.com/news/2006/feb/09/committee_considers_changing_selection_supreme_cou/?kansas_legislature.

70. *See id.*

71. *Id.*

72. KAN. CONST. art. III, § 5; *see also* Associated Press, *supra* note 69 ("In Kansas, a nominating commission considers applicants, then presents the governor with three finalists from which to pick one.").

73. H.R. Con. Res. 5033, 81st Leg., Reg. Sess. (Kan. 2006); Associated Press, *supra* note 69.

74. Associated Press, *supra* note 69.

75. *See generally* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best"*

A. JUDICIAL SELECTION MODELS: FRONT-END POLITICS

Generally speaking, states employ four models for initial selection of judges and justices: gubernatorial appointment, partisan election, nonpartisan election, and the "merit plan."[76] Each of these methods unavoidably thrusts judicial selections into the elements of modern politics.

First, the gubernatorial appointment method frequently bases appointments principally on political considerations.[77] "Clearly, the appointive method does nothing to lessen the effect of partisan politics upon the selection of judges.... [A]t the very least, there is significant potential for partisan politics to play the determinative role in the selection of judges...."[78]

Second, both partisan and nonpartisan elections are undoubtedly riddled with political elements, and purposefully so. Partisan elections are at least partially modeled around the idea that judges should be selected in the same manner as legislators,[79] while nonpartisan elections attempt only to remove the elements of partisan political affiliation.[80] The subjugation of judicial candidates to the usual elements of political campaigns remains inherent in both methods. More specifically, the elections are expensive, and in large states extraordinarily expensive.[81] Accordingly, fundraising has become increasingly important to attaining judicial office via election. Not surprisingly, lawyers have been the principal contributors to judicial candidates.[82] Recently, individual litigants and special interest groups have also stepped up their role in financing campaigns.[83] The immediately apparent perception of "justice for hire" only highlights the obvious political influence lurking in this method of judicial selection.

Lastly, despite its name and the recent efforts of the Kansas legislature, review of social scientific evidence does not lend credence to the notion that "merit selection" is a better model for actually achieving judicial independence.[84] As previously noted, "[m]erit selection calls for gubernatorial appointment of judges from a list of names submitted by

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Method?, 23 FLA. ST. U. L. REV. 1 (1996) (discussing judicial selection and retention and what each of the alternative methods of judicial selection and retention accomplishes).

76. *Id.* at 12.

77. *Id.* at 16.

78. *Id.*

79. *Id.* at 17.

80. *See id.* at 25.

81. *Id.* at 19, 27. Costs to candidates may be higher in nonpartisan elections due to the lack of party voting labeling and the corresponding cue. *Id.* at 27.

82. *Id.* at 20–21, 27.

83. *Id.* at 21–22.

84. Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002).

an independent nominating commission."[85] Evidence suggests that because nominating commissions themselves become susceptible to political influence and considerations, the merit selection plan does not effectively insulate judicial selection from political forces.[86] Rather, "[t]he forum for such political considerations has merely been shifted from the electoral arena to the commissions and the governor's mansion."[87]

Thus, speaking broadly, all current methods of judicial selection employed in state government structures allow for a significant degree of political influx at the selection phase. No one method can be considered the "best."[88] However, the existence of political considerations on the front end is not in itself problematic in relation to notions of judicial independence. In fact, "[b]ased on the evidence to date, the conclusion reasonably could be drawn that selective mechanisms simply do not have much of an impact on the operation of state judiciaries."[89] It is when states also maintain majoritarian power over the retention of judges and justices that external considerations are more likely to work their way into judicial decision-making.

B. RETENTION AND "ACCOUNTABILITY": BACK-END MAJORITARIAN PRESSURE AND CONSTITUTIONAL RIGHTS

Perhaps the most distinguishing feature of modern state court systems is the use of majoritarian means to control judicial retention. While the federal selection model of executive appointment and legislative consent surely maintains similar potential for political infusion to that described above, unlike the Article III federal courts, the overwhelming majority of states also utilize control mechanisms on the retention end.[90] Thirty-eight states force their justices and judges through either re-election or retention elections.[91] In retention elections, a judge runs unopposed and voters are asked whether the judge should be retained in office.[92] Additionally, of the remaining states, three utilize popularly-elected legislative bodies for re-appointments or retention

85. *Id.* at 729.

86. *See id.* at 732–33, 744.

87. Webster, *supra* note 75, at 32.

88. *Id.* at 38.

89. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992).

90. *See* AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL JURISDICTION COURTS, INITIAL SELECTION, RETENTION, AND TERM LENGTH (2004), http://www.ajs.org/js/selectionretentionterms.pdf.

91. *See* AM. BAR ASS'N, AN INDEPENDENT JUDICIARY, REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, STATE JUDICIAL INDEPENDENCE: A REVIEW OF RECENT ISSUES AND ARGUMENTS 38 (1997), *available at* http://www.abanet.org/govaffairs/judiciary/r5.html; AM. JUDICATURE SOC'Y, *supra* note 90.

92. Reddick, *supra* note 84, at 729; AM. JUDICATURE SOC'Y, *supra* note 90, at n.1.

votes.[93] The overall aim of these structural components is to introduce some element of judicial "accountability."[94]

This overall institutional arrangement has led many, including the American Bar Association, to question the true level of judicial independence that can be achieved in state courts under such a model.[95] The conceptual difference in levels of independence between the state and federal institutions has long fueled the historical debate over the aptitude of state courts to effectuate minoritarian constitutional rights.[96] Many cite the substitute of popular elections for tenure protections as the source of "clear disparity in the relative independence levels of state and federal judges."[97] One legal scholar has even gone so far as to suggest that absence of tenure and salary protection is so inconsistent with concepts of basic fairness that it constitutes a procedural due process violation.[98] He suggests, "[i]magine, for a moment, that the Chicago Cubs announced that from this point forward, they would hire umpires, unilaterally determine their salaries, and retain unreviewable discretion to fire them at any time. Can anyone imagine that we could trust a call at second base?"[99]

But despite decades of theoretical debate, definitive empirical evidence of state court inferiority in protecting individual rights has not been attained.[100] In fact, Professor Erwin Chemerinsky argues that this question is unanswerable empirically, and thus it is futile to inquire whether states achieve actual "parity" with federal courts in their willingness and ability to protect individual federal rights.[101]

However, even conceding Professor Chemerinsky's point that overall comparative empirical data has been and will forever be inadequate to show state court inferiority, accumulating evidence may

93. AM. JUDICATURE SOC'Y, *supra* note 90 (South Carolina, Vermont, and Virginia utilize such bodies).

94. *See* Reddick, *supra* note 84, at 739; *see also* Webster, *supra* note 75, at 1–11.

95. *See* AM. BAR ASS'N, *supra* note 91; Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333–35 (1988). *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (examining constitutional difficulties with elected judges).

96. *See generally* Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369 (1988); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*] (proposing that litigants with federal constitutional claims should generally be able to choose the forum, federal or state, in which to resolve their disputes); Redish, *supra* note 95.

97. Redish, *supra* note 95, at 333.

98. *Id.* at 335.

99. *Id.* at 333.

100. Chemerinsky, *Parity Reconsidered*, *supra* note 96, at 256.

101. *Id.* at 255–73. *But see* Redish, *supra* note 95, at 338 (contending that the existence of obvious institutional differences renders the lack of definitive empirical evidence non-determinative).

illustrate that distinct pressures resulting from majoritarian accountability schemes are visibly manifesting themselves within the state court institutions.

A 1992 study of constituent influence on state supreme court justices examined death penalty votes in four states from 1983 to 1988.[102] The study indicated that "[i]n order to appease their constituencies, justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the majority instead of casting dissenting votes on volatile issues."[103] Moreover, the study further suggested that justices subject to election will act strategically to minimize political opposition and are motivated by self-interested desires of retaining office when faced with "possible sanctions created by the institutional environment."[104] The author of the study concluded that, under certain conditions, justices subject to election assume a "representational posture," and overall, "it appears that judicial elections do have an impact on individual justices' voting behavior in state supreme courts."[105]

Others, nevertheless, contend that electoral measures do not pose effective threats of accountability to state judiciaries because incumbents overwhelmingly succeed in re-elections and retention elections.[106] For instance, out of 3912 judicial elections in ten states from 1964 to 1994, only fifty incumbent judges were defeated.[107] As a result, some view the use of elections as accomplishing a mere "rubber stamp approval of incumbent judges."[108]

But it does not follow that the extent to which the threat is actually carried out will necessarily determine the effectiveness of the threat itself. It is faulty to assume "that majoritarian pressures would only manifest themselves in the form of electoral defeats."[109] In a 1991 survey of judges who had recently stood for retention, three-fifths of the judges who participated revealed that elections had a pronounced effect on their

102. Hall, *supra* note 89, at 427.

103. *Id.*

104. *Id.* at 428.

105. *Id.* at 442.

106. *See* Reddick, *supra* note 84, at 739; Webster, *supra* note 75, at 18.

107. *See* B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1430 (2001) (citing Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000)).

108. Reddick, *supra* note 84, at 739 (quoting William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79, 80 (1977)). *But see* Joseph W. Little, *Is Merit Selection and Retention of Trial Judges a Good Idea?*, FLA. B. NEWS, Sept. 15, 1999, http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/486b0b0odbe2278985256b10007a5c80?OpenDocument ("Democratic accountability to the people can be best assured by periodically exposing judges, as we now do, to the risk of facing genuine competitors on the hustings.").

109. Croley, *supra* note 95, at 741–42.

behavior on the bench.[110] Eighty-six percent of judges perceived themselves as "responding to their environment."[111] Of these modern pressures, former California Supreme Court Justice Otto Kaus observed, "'[t]here's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them around election time.'"[112]

Plus, as Professor Croley demonstrates, "the effects of such pressures seem likely to be significant systematically—that is, not just for those judges directly involved in salient elections."[113] For example, California Superior Court Judge Joyce Karlin sentenced a defendant shopkeeper to probation after he was convicted of manslaughter for fatally shooting a fifteen-year-old assailant.[114] The sentence led to a public campaign to unseat the judge in her reelection bid.[115] Although the campaign failed, a fellow judge reportedly remarked to her colleagues regarding a pending case, "there's no way I can give straight probation because I don't want to be the next Judge Karlin."[116]

The past two decades have provided plenty of judicial food for thought. In 1986, a highly politicized retention election led to the ouster of California Chief Justice Rose Bird, Justice Joseph Grodin, and Justice Cruz Reynoso.[117] At issue was their voting record on death penalty cases.[118] Opposition campaigns successfully portrayed them as "soft on crime."[119] In 1996, supreme court justices from both Tennessee and Nebraska were removed in similar fashion over the death penalty and being "soft on crime."[120] In 1998, California again saw campaigns waged against Chief Justice Ronald George and Justice Ming Chin, who were targeted by anti-abortion groups for rulings striking down abortion regulation.[121] While both justices retained their seats, they were forced to raise substantial funds to counter the attack,[122] which often requires looking for contributions from lawyers and other interested parties who come before the court.[123] Anti-abortion groups similarly went after

110. Reddick, *supra* note 84, at 739–40 (citing Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994)).

111. *See id.* at 740.

112. Croley, *supra* note 95, at 694 (quoting Paul Reideinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 58).

113. *Id.* at 740.

114. *Id.* at 739.

115. *Id.* at 739–40.

116. *Id.* at 740.

117. *See* Dann & Hansen, *supra* note 107, at 1431–32.

118. *Id.*

119. *Id.* at 1432.

120. *Id.* at 1434–37.

121. *Id.* at 1432.

122. *Id.* 1432–33.

123. Webster, *supra* note 75, at 37.

Florida Chief Justice Lender Shaw and Justice Rosemary Barkett in 1990 and 1992, respectively.[124]

Judicial rulings on these "hot button" issues have been responsible for setting off politically heated and expensive retention elections, and likely will continue to do so into the future.[125] While more comprehensive study of the effects of constituent response in state supreme courts is needed,[126] "it seems that at least some judges in elective states are beginning to respond to majoritarian political pressures."[127]

C. Specific Relevance to SVPs and Substantive Due Process

As demonstrated above, the judicial enforcement of minoritarian rights may garner vociferous political reactions when non-conforming to constituent value judgments. The nature of these reactions fosters legitimate majoritarian pressures within the state court structure and under certain conditions may generate at least some degree of judicial response. The adjudication of substantive due process rights of convicted sex offenders seems to embody a circumstance where, as with the death penalty and abortion, the potential for these pressures to manifest themselves is particularly high.

Initially, it's hard to imagine a minority group with weaker political stature and stronger popular opposition than convicted sex offenders who suffer from mental or personality defect. It is not surprising that the political climate generated from crimes committed by released sex offenders is responsible for the passage of SVP laws in the first place.[128] In addition, the continuing public rhetoric that surrounds this issue has been characterized as one of "zero tolerance,"[129] such that "[n]o politician can afford to have any weakness on the issue exposed."[130] This rhetoric has tended to "shape the problem of sexual violence in the form of the archetypal 'Beauty and the Beast' [story],"[131] for which SVP commitment statues have become the public's solution.[132] As a result, once a state successfully adopts an SVP program, any efforts to limit the growth of such programs are met with fierce public opposition.[133]

Therefore, the potential for strong majoritarian backlash surrounding the judicial limitation of SVP programs is particularly high.

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124. *Id.* at 36–37.

125. *See* Dann & Hansen, *supra* note 107, at 1436.

126. *See* Hall, *supra* note 89, at 432.

127. Croley, *supra* note 95, at 788.

128. *See* Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 Seton Hall L. Rev. 1233, 1234 (2004).

129. *Id.* at 1248.

130. *Id.*

131. *Id.*

132. *Id.* at 1249.

133. *Id.* at 1250.

It's not far-fetched in this politically volatile environment to envision that justices who do vote to enforce constitutional limitations or safeguards on SVP statutes are susceptible to being portrayed publicly as "soft on crime," "pro-sex offender," or "anti-public safety."

Additionally, aside from the contentiousness that this issue brings generally, state judiciaries face even more pressure when addressing the specific threat of re-offense inherent in civil commitment decisions. Imagine for a moment that defendant White had been released following a Florida Supreme Court ruling vindicating his rights against civil commitment under *Crane*. Further consider the enflamed political outcry that would have been generated in the event that White re-offended following the ruling. The judicial incentive that is subsequently generated seems obvious. The element of re-offense that is present may push the degree of political volatility beyond that which surrounds the death penalty, the issue most responsible for removing state supreme court justices.[134]

To further exacerbate the situation, an electorate upset over a state court's ruling on the rights of sex offenders will not likely look to the U.S. Supreme Court's holding in *Crane* as the source of the unfavorable law. Speaking generally, voters are highly results-driven in judicial elections.[135] That is, rather than evaluating jurisprudence, reasoning, or even general judicial competence, "voters tend to cast their ballots on the basis of whether or not they like the results in the cases that the judge has decided."[136] Legally persuasive sources of authority will not be of much assistance to jurists fighting off popular opposition: "Though voters may be somewhat more willing to accept a legal explanation for a unanimous court's unpopular decision, the electorate can be expected to demand greater accountability on issues where voters have information and strong preferences and where judges have singled themselves out."[137]

In a very real way, state judicial determinations of the due process rights of sexual predators have the potential to, at the very least, generate contentious and hard fought retention bids. It is interesting to note that all of the states that have thus far interpreted *Crane* as not requiring a finding of volitional impairment employ majoritarian judicial retention methods. Seven of those states use re-election or retention elections, while one requires legislative reappointment.[138]

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134. A court's alternative to the death penalty is generally life imprisonment, removing judicial responsibility for re-offense.

135. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988).

136. *Id.*

137. *See* Hall, *supra* note 89, at 430–31.

138. AM. JUDICATURE SOC'Y, *supra* note 90 (indicating that Arizona, California, Florida, Illinois, Texas, Washington, and Wisconsin use re-election or retention elections, while South Carolina uses

Let it be clear that this is not to suggest that institutional political pressures dispositively decided *White* and the various decisions that follow its reasoning. Indeed, the state courts that have adopted the opposing interpretation of *Crane* are also subject to retention elections or re-election and are thus subject to the same pressures.[139] Rather, this is only to suggest and evaluate the possibility that, when analyzing state SVP laws against individual substantive due process rights, majoritarian considerations and electoral incentive could be infused into the decisional calculus, thus increasing the likelihood that states will prevail in preserving their SVP statutes. For example, state supreme courts such as Florida's may become subtly more inclined to rely on the reasoning of those other state courts that, as of yet, have been able to maintain a suspect interpretation of *Crane*. In these of all cases, "basic self-interest may also be an important consideration to the state supreme court justice when rendering decisions."[140]

CONCLUSION

The Florida Supreme Court is the newest of many state courts to adopt a dubious and perhaps somewhat self-serving interpretation of *Crane*. This interpretation is questionable and other states would be wise not to follow suit. With the certainty of state law being in the greatest interest of states both individually and collectively, an interpretation of *Crane* that requires a specific finding on volition is constitutionally safer and more jurisprudentially sound. The current split among states only further emphasizes the possibility of Supreme Court review on the adequate enforcement and implementation of *Crane*.[141] Moreover, requiring a finding on volitional inability is not likely to seriously inhibit states in their commitment of sexually violent predators. The various arguments and the Court's concessions regarding the interconnectedness of volition, the "likely to re-offend" element, and the mental or personality disorder element demonstrate this point. As noted by the remarks of the Kansas Attorney General following the ruling in *Crane*, "'[w]e'll have to show that a potential predator has a serious difficulty in controlling his or her behavior, . . . [but] [f]rom a practical standpoint, I don't think prosecutors are really going to change the evidence they put on.'"[142] Thus, states effectively risk very little by mandating a specific finding on whether there is a serious difficulty in controlling behavior.

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legislative reappointment).

139. *See* AM. JUDICATURE SOC'Y, *supra* note 90 (indicating that Iowa, Kansas, Minnesota, and Missouri all use re-election or retention elections).

140. Hall, *supra* note 89, at 443.

141. The new composition of the Court may affect the extent that it enforces *Crane*.

142. Pfaffenroth, *supra* note 26, at 2248 (quoting Jim Mclean, *Stovall Buoyed by Ruling on Extended Incareceration*, TOPEKA CAPITAL J., Jan. 23, 2002).

The risk perceived may lie in public reaction to the state judicial vindication of federal due process rights of convicted sex offenders up for civil commitment. Current scholarship and electoral events across the past two decades suggest that such political considerations may be entering the judicial equation as a consequence of institutional state judiciary schemes, namely majoritarian retention mechanisms. It is not inappropriate to question the extent to which these considerations play a role and the types of cases that are most likely to be implicated. The interpretation of state SVP statutes against federal constitutional standards presents a situation where the potential for political influence within state judiciaries may be at a heightened level given the distribution of incentives. Such scrutiny is particularly warranted in this realm given the suspect reasoning that has been offered in favor of preserving state SVP statutes.