Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials

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PRIVATE JUDGES, PUBLIC JURIES: THE OHIO LEGISLATURE SHOULD REWRITE R.C. § 2701.10 TO EXPLICITLY AUTHORIZE PRIVATE JUDGES TO CONDUCT JURY TRIALS

INTRODUCTION

Early in the twentieth century, Roscoe Pound described the American legal system as a horse-and-buggy system near collapse—courts were congested, delay was endemic, and costs were high.1 As dissatisfaction with the legal system increased during the early decades of the twentieth century, there was renewed interest in alternatives to litigation.2 During the 1970s, the United States experienced an unprecedented legal explosion that finally institutionalized alternative dispute resolution.3 Out of this congested atmosphere of urgency grew a unique and controversial alternative to the traditional courts: private judging.

Known popularly as “rent-a-judge,” the private-judging system was first instituted in 1976 in California, amid the staggering onslaught of litigation that plagued that court system.4 Private judging allows parties to bypass the clutter of traditional courts by removing

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1 JEROldS. AUERBACH, JUSTICE WITHOUT LAW 95 (1983).
2 Id. at 96.
3 John H. Barton, Behind the Legal Explosion, 27 STAN. L. REV. 567, 567 (1974); AUERBACH, supra note 1, at 120–21.
4 The California private-judging system emerged in 1976 pursuant to CAL. CIV. PROC. CODE §§ 638–645.1 (West 2007) and CAL. CONST. art. VI, § 21. At that time, the delay in California approached four years in some superior courts. Steven K. Haynes, Comment, Private Means to a Public Ends: Implication of the Private Judging Phenomenon in California, 17 U.C. DAVIS L. REV. 611, 611–14 (1984); Helen I. Bendix & Richard Chernick, Renting the Judge, 21 LITIG. 33, 35 (1994) (“According to the California Judicial Council, in 1988 less than half of the civil cases in certain metropolitan counties were being disposed of in less than two years, and 10 percent of the cases had to wait more than 4-1/2 years for a civil trial date.”).
their dispute for resolution by a neutral third party, usually a retired judge. The parties are afforded the freedom to select the private judge whom they feel is best suited to try their dispute. The parties are then responsible for compensating the private judge. The private judge has the full authority of the court, and his decision is enforceable and appealable in the public courts.

Many states have embraced private judging. In those jurisdictions, private judging helps to ameliorate overburdened systems and gives litigants yet another alternative to the traditional courts. Indeed, private judging (1) is cost-effective, (2) provides tailored expertise, (3) preserves appellate review, (4) is convenient, (5) protects private information, and (6) helps to alleviate congested dockets. Despite the many advantages of the system, private judging is often criticized. Critics deplore the system as an alternative form of justice for the rich that siphons experienced judges away from the public sector to secretly resolve disputes beyond the purview of the public. But many of the criticisms can be equally applied to other alternative-dispute-resolution processes, such as arbitration and mediation, “which have generally been supported—indeed encouraged—by practitioners, consumers of legal services, and legislatures.” Moreover, some criticisms unfairly target private judging, when, in fact, they have equal application to the American justice system as a whole.

One downside for litigants who choose to submit their disputes to a private judge is that, in doing so, they are occasionally required to waive their Seventh-Amendment right to a jury trial. For instance, Indiana’s statute states, “A trial conducted by a private judge shall be conducted without a jury.” In contrast, Colorado’s legislature has explicitly authorized private judges to conduct jury trials. Ohio’s private-judging statute is silent on the issue of jury trials. Some interpreted this ambiguity to be permissive. As a result, private judges in Ohio had been conducting jury trials. Recently, a Cuyahoga County Court of Common Pleas judge brought suit to prevent privately-judged jury trials. In 2006, in Russo v. McDonnell, the

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5 The statutory procedures and nomenclature vary widely among states. Those states that have established procedures for private judging, as the term is used in this Note, include California, Texas, New York, Alabama, Florida, Indiana, Colorado, and Ohio.

6 See Bendix & Chernick, supra note 4, at 33.


8 IND. CODE ANN. § 33-38-10-4 (2007); See also TEX. CIV. PRAC. & REM. CODE ANN. § 151.002(2) (Vernon 2007).

9 COLO. R. CIV. P. 122.

10 OHIO REV. CODE ANN. § 2701.10 (West 2007).

11 852 N.E.2d 145 (Ohio 2006).
Ohio Supreme Court held that state law did not authorize private judges to conduct jury trials. The thesis of this Note is that, although the Ohio Supreme Court's decision stems from a plausible reading of an ambiguous statute, the resulting policy implications negatively affect Ohio's judicial system, and the legislature should rewrite Ohio Revised Code § 2701.10 to explicitly allow private judges to conduct jury trials.

Part I of this Note will provide a general overview of private judging, followed in Part II by an examination of the statutory private-judging system in Ohio. Part III highlights the many advantages of the system and demonstrates the ways private judging benefits private litigants, the traditional court system, and public litigants, alike. Part IV addresses the common public-policy and constitutional criticisms of the system and reveals the tenuous foundation upon which such proclaimed faults lie. Part V will then examine Russo v. McDonnell, as well as the surrounding cases and events. Part VI conducts a cost-benefit analysis of privately-judged jury trials. Finally, Part VII discusses how the jury-selection process should work in privately-judged proceedings.

I. AN OVERVIEW OF THE PRIVATE JUDGING SYSTEM

Private judging is a term sometimes used to refer to any alternative-dispute-resolution process conducted by an official who is not a sitting judge. But, more commonly, the term is used to refer to a court's reference for trial of an action in its entirety or of specific issues of fact or law "to a presiding official selected by the parties, whose decision is fully reviewable and enforceable in the public courts." This Note uses the more common, narrow definition of the term. In this sense, private judging is distinguished from arbitration, mediation, and other nonbinding alternative-dispute-resolution processes.

Although the statutory procedures and nomenclature vary widely among states, private judging generally shares the following characteristics: (1) it is voluntary, requiring the consent of both parties; (2) the parties select the private judge; (3) the private judge is usually a former judge or a lawyer; (4) there is flexibility as to scheduling the time and place of the proceeding; (5) there is an

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12 Chernick, Bendix & Barrett, supra note 7, at 4.
13 Id. at 4–5.
14 Id. at 5. Arbitration is "a private adjudication process with a very limited right of court review." Id. Mediation and other nonbinding dispute resolution processes use neutral third parties to facilitate negotiation or promote settlement. Id. The neutral third party need not be a former judge or lawyer. Id.
opportunity for each side to present proof and arguments; (6) the outcome is typically a reasoned, written decision, supported by findings of fact and conclusions of law; (7) the private judge's decision is binding, and the outcome is subject to appeal.\textsuperscript{15}

Private judging originated in California. The statutory and constitutional provisions authorizing private judging in California existed long before anyone began to use them with any regularity.\textsuperscript{16} But it was not until the last quarter of the twentieth century that the private-judging system became popular in California.\textsuperscript{17} "Approximately one-half of the states now make available some form of private judging."\textsuperscript{18} The primary impetus for the system's growing popularity is "the increasing number and complexity of cases demanding the courts' attention."\textsuperscript{19} As traditional litigation has grown more costly and cumbersome, legislatures have sought to provide, and litigants have gravitated towards, alternative forums that are quicker and more cost-effective.\textsuperscript{20}

\section*{II. PRIVATE JUDGING IN OHIO}

Ohio's private-judging statute took effect on September 26, 1984.\textsuperscript{21} Litigants were slow to recognize the opportunity the statute provided, and the system went unused in Ohio as late as 1988.\textsuperscript{22} By 1992, litigants were utilizing the system; however, the use was minimal.\textsuperscript{23} Between 1992 and 2005, the number of cases referred to

\textsuperscript{15} \textit{Id.} at 5; see also \textsc{Stephen B. Goldberg, Frank E.A. Sander \\& Nancy H. Rogers, Dispute Resolution: Negotiation, Mediation, and Other Processes} 4-5 tbls. 1-1 \\& 1-2 (2d ed. 1992).

\textsuperscript{16} \textsc{Chernick, Bendix \\& Barrett, supra note 7, at 21}. California law authorizes two types of private trials: trials conducted by a referee and trials conducted by a temporary judge—both may serve as private judges. The constitutional provision authorizing temporary judges was enacted in 1966. \textsc{Cal. Const.} art. VI, § 21. The general referee statute dates back to 1872. \textsc{Cal. Civ. Proc. Code} § 638 historical note (West 2007). \textsc{Anne S. Kim, Rent-A-Judges and the Cost of Selling Justice, 44 Duke L.J.} 166, 168 (1995).

\textsuperscript{17} \textsc{Chernick, Bendix \\& Barrett, supra note 7, at 21}.

\textsuperscript{18} \textsc{Winslow Christian, Private Judging, in The Alternative Dispute Resolution Practice Guide} 2 (Bette J. Roth, Randall W. Wulff \\& Charles A. Cooper eds., 2006) (acknowledging that the characteristics of the forum display significant state-by-state diversity and identifying three general types of private judicial officers). For a detailed discussion on available private-judging services, see generally \textsc{National Center for State Courts, Guidelines for the Use of Lawyers to Supplement Resources} (1984) (Appendix A provides a preliminary survey of all states).

\textsuperscript{19} \textsc{Chernick, Bendix \\& Barrett, supra note 7, at 22}.

\textsuperscript{20} \textit{Id.} at 22–23.

\textsuperscript{21} \textsc{Ohio Rev. Code Ann.} § 2701.10 (West 2007).

\textsuperscript{22} \textsc{Amy L. Litkovitz, The Advantages of Using a "Rent-a-Judge" System in Ohio, 10 Ohio St. J. on Disp. Resol.} 491, 492 (1995).

\textsuperscript{23} \textit{Id.} at n.11 (citing \textsc{Supreme Court of Ohio, Ohio Courts Summary 1992 1E, 1F, 1H} ("in the general division of the courts of common pleas in the state, only 20 cases were referred for private judging; in the domestic relations division, 42 cases were referred for private
private judges increased substantially. The general division of the courts of common pleas in the state saw a 340 percent increase; the domestic relations division saw a 1,211.9 percent increase; and the juvenile division saw a 300 percent increase in the number of cases referred to private judges.24

Despite the increased use of Ohio's private-judging system, some critics contend that there is simply no need for it because Ohio's court system, they claim, is not overburdened. The statistics belie this contention. Ohio is the seventh most populous state with a population of approximately 11.5 million.25 More than 3.1 million cases were filed in Ohio courts in 2005.26 Since 1995, the courts of common pleas have seen dramatic increases in the number of filings. In the general division, foreclosure filings have increased by 301 percent, other civil filings by 57 percent, and criminal filings by 31 percent.27 In the domestic relations division, filings have increased by 273 percent.28 In the juvenile division, child support enforcement or modification filings have increased by 60 percent.29 Moreover, there is substantial delay in the general division, including up to three years for complex litigation.30

As Ohio's population continues to increase, so will the burden on the court system. Filings will surge, delays will increase, and confidence in the system will erode. Private judging offers an alternative forum for litigants that can help to mitigate the burden on the courts. Of course, private judging cannot solve this growing problem that looms on the horizon. But presenting litigants with the option of private judging, along with arbitration, mediation, and other forms of alternative dispute resolution, will be integral in ensuring the efficiency and legitimacy of Ohio courts.

24 SUPREME COURT OF OHIO, OHIO COURTS SUMMARY 2005 at 27, 73, 135, available at http://www.sconet.state.oh.us/publications/annrep/05OCS [hereinafter 2005 OHIO SUMMARY] (in the general division of the courts of common pleas in the state, 88 cases were referred for private judging; in the domestic relations division, 551 cases were referred for private judging; and in the juvenile division, 4 cases were referred for private judging).


27 Id.

28 Id.

29 Id.

30 Id. at 27.
A. Ohio Revised Code § 2701.10: How It Works

Ohio Revised Code § 2701.10 authorizes any voluntarily-retired judge to serve as a private judge. The retired judge must first register with the clerk of any court of common pleas, municipal court, or county court—there is no limitation upon the number, type, or locations of courts with which the retired judge may register. Upon registration, the retired judge is eligible to receive referrals for adjudication of civil actions and submissions for determination of specific issues or questions of fact or law in any civil action. Each court is required to maintain and make available a roster of registered private judges.\(^{31}\)

Parties to any pending civil action may unanimously choose to refer the action in its entirety, or submit any specific issue or question of fact or law to a properly-registered private judge of their choosing. If the parties unanimously choose to have a referral or submission made to a private judge, they enter into a written agreement with the private judge. The agreement must: (1) identify the private judge; (2) indicate whether a referral or submission is to be made; (3) if a submission is to be made, describe the specific issue or question to be submitted; (4) indicate that the parties will provide and pay for the necessary facilities, equipment, and personnel; and (5) identify the amount of compensation the parties will pay to the private judge.\(^{32}\)

\(^{31}\) OHIO REV. CODE ANN. § 2701.10(A) (West 2007):

Any voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may register with the clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals for adjudication of civil actions or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court. There is no limitation upon the number, type, or location of courts with which a retired judge may register under this division. Upon registration with the clerk of any court under this division, the retired judge is eligible to receive referrals and submissions from that court, in accordance with this section. Each court of common pleas, municipal court, and county court shall maintain an index of all retired judges who have registered with the clerk of that court pursuant to this division and shall make the index available to any person, upon request. (emphasis added).

\(^{32}\) OHIO REV. CODE ANN. § 2701.10(B)(1):

The parties to any civil action or proceeding pending in any court of common pleas, municipal court, or county court unanimously may choose to have the action or proceeding in its entirety referred for adjudication, or to have any specific issue or question of fact or law in the action or proceeding submitted for determination, to a judge of their choosing who has registered with the clerk of that court in accordance with division (A) of this section.
The agreement is then filed with the clerk of the court or the presiding judge in the case. The presiding judge orders the referral or submission in accordance with the agreement. Upon the entry of the presiding judge's order, the private judge assumes all of the powers, duties, and authority of an active judge. The court is not required to provide the private judge with a courtroom or any other facilities, equipment, or personnel.

If the parties unanimously do choose to have a referral or submission made to a retired judge pursuant to this section, all of the parties to the action or proceeding shall enter into a written agreement with the retired judge that does all of the following:

(a) Designates the retired judge to whom the referral or submission is to be made;
(b) If a submission is to be made, describes in detail the specific issue or question to be submitted;
(c) Indicates either of the following:
   (i) That the action or proceeding in its entirety is to be referred to, and is to be tried, determined, and adjudicated by that retired judge;
   (ii) Indicates that the issue or question is to be submitted, and is to be tried and determined by that retired judge.
(d) Indicates that the parties will assume the responsibility for providing facilities, equipment, and personnel reasonably needed by the retired judge during his consideration of the action or proceeding and will pay all costs arising out of the provision of the facilities, equipment, and personnel;
(e) Identifies an amount of compensation to be paid by the parties to the retired judge for his services and the manner of payment of the compensation.

33 OHIO REV. CODE ANN. § 2701.10(B)(2):
In any case described in division (B)(1) of this section, the agreement shall be filed with the clerk of the court or the judge before who the action or proceeding is pending. Upon the filing of the agreement, the judge before whom the action or proceeding is pending, by journal entry, shall order the referral or submission in accordance with the agreement. No referral or submission shall be made to a retired judge under this section, unless the parties to the action or proceeding unanimously choose to have the referral or submission made, enter into an agreement of the type described in division (B)(1) of this section with the retired judge, and file the agreement in accordance with this division.

34 OHIO REV. CODE ANN. §2701.10(C):
Upon the entry of an order of referral or submission in accordance with division (B)(2) of this section, the retired judge to whom the referral or submission is made, relative to the action or proceeding referred or the issue or question submitted, shall have all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending. The court in which the action or proceeding is pending is not required to provide the retired judge with court or other facilities, equipment, or personnel during his consideration of the action, proceeding, issue, or question. The retired judge shall not receive any compensation, other than that
A private judge to whom a referral is made tries all of the issues in the action, prepares relevant findings of fact and conclusions of law, and enters a judgment as if he were an active judge of the court. A private judge to whom a submission is made tries the specific issue or question submitted, prepares relevant findings of fact or conclusions of law, makes a determination on the issue or question submitted, and files the findings, conclusions, and determination with the clerk of the court. The private judge’s judgment, findings, conclusions, and determinations have the same force and effect as if made by an active judge. Any appeal is to be made as if the private judge were an active judge of the court.35

B. Rule VI: The Supreme Court’s Rules for the Government of the Judiciary of Ohio

Rule VI36 operates in conjunction with section 2701.10 to further define the private-judging system. For instance, section 2701.10(A) authorizes any “voluntarily retired judge” to register as a private judge. Rule VI defines “voluntarily retired judge” as “any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court.”37 The definition excludes any judge who: (1) has been removed or suspended without reinstatement pursuant to the Supreme Court Rules, (2) has resigned or retired from service while a complaint was pending under the Supreme Court Rules, or (3) resigned from office agreed to by the parties and the retired judge, for his services during his consideration of the action, proceeding, issue, or question.

35 OHIO REV. CODE ANN. § 2701.10(D):

A retired judge to whom a referral is made under this section shall try all of the issues in the action or proceeding, shall prepare relevant findings of fact and conclusions of law, and shall enter a judgment in the action or proceeding in the same manner as if he were an active judge of the court. A retired judge to whom a submission is made under this section shall try the specific issue or question submitted, shall prepare relevant findings of fact or conclusions of law, shall make a determination on the issue or question submitted, and shall file the findings, conclusions, and determination with the clerk of the court in which the action or proceeding is pending. Any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge in accordance with this section shall have the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination shall be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court.

36 OHIO GOV. JUD. R. VI.
37 OHIO GOV. JUD. R. VI § 1(C)(2).
between the date of defeat in an election for further service on that court and the end of his or her term.\(^{38}\)

Rule VI also specifies that the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence apply to actions referred or issues submitted to a private judge.\(^{39}\) Similarly, Rule VI requires private judges to comply with the Code of Judicial Conduct.\(^{40}\)

III. ADVANTAGES OF PRIVATE JUDGING

There are many advantages in choosing a private judge over traditional litigation for the resolution of disputes: cost-efficiency, tailored expertise, appellate review, privacy, convenience, and reduced caseloads.

A. Cost-Efficiency

As previously mentioned, Ohio’s congested civil docket can result in substantial delay for some litigants—up to three years.\(^{41}\) In contrast, private judging provides the parties with immediate access to the “courtroom.” Private judges are not burdened with a backlog of cases.\(^{42}\) “[P]arties choosing to hire a [private judge] generally resolve their cases much faster than those waiting for a place on the state court docket.”\(^{43}\) While traditional litigation is often fraught with costly strategic maneuvering designed to delay and frustrate opponents, private judging is imbued with a spirit of cooperation.\(^{44}\) This cooperative spirit promotes efficiency, saving both parties time and money.\(^{45}\) Moreover, despite the fact that private judges charge a substantial amount of compensation for their services,\(^{46}\) “the expedition, sharp focus and practiced informality of private judging virtually guarantees smaller total cost in the privately judged proceeding.”\(^{47}\) As one participant concluded, “[Using a private judge] has saved 80% of the delays, 80% of the legal fees and 80% of the aggravation.”\(^{48}\)

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\(^{38}\) Id.

\(^{39}\) OHIO GOV. JUD. R. VI § 3(A).

\(^{40}\) OHIO GOV. JUD. R. VI § 4(B).

\(^{41}\) See supra notes 26–30 and accompanying text.


\(^{43}\) Id.

\(^{44}\) CHERNICK, BENDIX & BARRETT, supra note 7, at 30.

\(^{45}\) Id.

\(^{46}\) A well-regarded private judge can demand an hourly rate comparable to that of a senior litigation counsel. Christian, supra note 18, at 6.

\(^{47}\) Id.

\(^{48}\) Eric D. Green, Avoiding the Legal Logjam—Private Justice, California Style, in CORP.
B. Tailored Expertise

Private judging enables parties to select a judge who has the necessary experience and expertise to try the particular issues of their case. Parties to cases involving "intricate intellectual property issues, arcane accounting principles, or other issues requiring special expertise" are best served when they don't have to explain the rudiments of the issues to the judge. As Winslow Christian explains in his chapter on "Private Judging":

Litigation counsel are aware of the critical influence on the trial outcome of the judge's experience, professional capacity and personal value system. In the public courts these factors must usually be left to fate; in private judging the parties, if they share an interest in going before a judge with particular qualifications, can with great assurance and precision choose an appropriate judge. Selecting a private judge who is an expert in the subject matter and law of the dispute not only allows the parties to save time and money, but also legitimizes the proceedings and instills confidence in the outcome.

C. Appellate Review

One important advantage of private judging that distinguishes it from all other alternative-dispute-resolution processes is that the outcome is subject to appellate review in the traditional court system. "Arbitration findings, in contrast, are final unless there has been some corruption in the arbitration proceeding itself." Since corporate and other sophisticated clients may be reluctant to subject important cases to the virtually-unreviewable discretion of arbitrators, private judging provides a unique alternative that preserves the right to appeal.

Disp. Mgmt. 65, 71 (1982).
49 Bendix & Chernick, supra note 4, at 34.
50 Christian, supra note 18, at 5 (emphasis in original).
51 Note, supra note 42, at 1600; see also Haynes, supra note 4, at 621 ("An arbitrator's award, unless fraudulently obtained, is final and not appealable, and cannot be enforced until a separate legal action has been filed. In contrast, the private judge's decision is appealable, and corresponds exactly to a traditional civil judgment. For these reasons, private judging is more akin to the traditional courts than to arbitration.").
D. Convenience

The flexibility in scheduling that private judging provides is another advantage of the system. Indeed, private judges are “highly responsive to the needs of counsel.”\textsuperscript{52} Parties determine the time and place of the proceeding. To accommodate scheduling needs, hearings can be held at night or over the weekend.\textsuperscript{53} Moreover, if no mutually convenient location can be identified, the proceedings can be conducted over the phone.\textsuperscript{54} The convenience and flexibility of private judging stands in stark contrast to the formal rigidity of the traditional litigation system.

E. Privacy

In some states, a privately-judged proceeding can remain “confidential until a judgment is rendered.”\textsuperscript{55} Confidentiality can be an advantage to both individuals and businesses alike. Private judging can enable parties to prevent “damaging or embarrassing business or personal behavior” from becoming fodder within the public domain.\textsuperscript{56}

F. Reduced Caseloads

Private judging helps to provide relief from overcrowding in the courts. The effectiveness of the system in reducing caseloads in the public courts will continue to improve “if the quality of private judging is maintained and the creativity of its processes is enhanced by trained and experienced neutrals.”\textsuperscript{57} Private judging, when used in conjunction with other kinds of private dispute resolution, such as mediation and arbitration, will continue to have an increasingly powerful impact by resolving cases that would otherwise remain in the public court system. Thus, private judging benefits not just the private litigants who choose to use the system, but also the traditional court system as a whole, and any public litigants with pending actions.

\textsuperscript{52} Christian, supra note 18, at 6.
\textsuperscript{53} Note, supra note 42, at 1599.
\textsuperscript{54} Chernick, Bendix & Barrett, supra note 7, at 30.
\textsuperscript{55} Christian, supra note 18, at 6.
\textsuperscript{57} Chernick, Bendix & Barrett, supra note 7, at 34.
IV. CONCERNS OVER PRIVATE JUDGING

Although the advantages of private judging are numerous, the system is not without its critics. These critics allege that it creates a (1) a two-tiered system of justice, (2) in which the presiding officials are beholden to repeat customers, (3) the proceedings are cloaked in secrecy, (4) the promise of astronomical hourly rates lures the most talented judges away from the traditional bench, and (5) the parties bypass the traditional system in order to gain priority access to appellate courts. But the empirical evidence generally does not support the public policy concerns or the constitutional challenges to the system. Moreover, "some of these concerns apply to all forms of [alternative dispute resolution], which generally have been supported—indeed encouraged—by practitioners, consumers of legal services, and legislatures."58

A. A Two-Tiered System: Rich v. Poor

Private judges "generally cost between $300 to $500 an hour, though some popular judges command per diem fees of up to $5000."59 Critics contend that private judging creates a dual system of justice populated by two classes of litigants: comparatively affluent litigants, who can afford to pay the exorbitant costs, and poorer litigants, who cannot.60 For example, those litigants who are appearing pro se, using legal aid, or generally dependent upon a judgment to cover litigation costs are allegedly unable to hire a private judge.61 Thus, because "the non-affluent are ostensibly excluded,"62 critics of the system condemn private judging as bad public policy that violates both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.

1. Public Policy Concerns

If the system did in fact create a dual-justice system there would be cause for concern. But private judging is not only for the rich. In fact, "private judging and other ADR techniques may be the only cost-effective dispute resolution forum for litigants with limited means."63 Many privately-judged proceedings involve personal injury or domestic relations disputes where the amount in controversy is

58 Id.
59 Kim, supra note 16, at 175.
60 Note, supra note 41, at 1601.
61 Id.
62 Haynes, supra note 4, at 622.
63 CHERNICK, BENDIX & BARRETT, supra note 7, at 35.
below fifty-thousand dollars.\textsuperscript{64} One participating private judge noted that among those who use system, "the rich are in a great minority. The average litigant is a typical middle class business man, typical middle person . . . people who want to get their matters heard."\textsuperscript{65} Moreover, in the traditional system, wealthy litigants benefit from procedures and services not available to other litigants of lesser means. For example, a wealthy litigant can afford to retain a high-priced trial lawyer whose skill is arguably commensurate with the hourly rate, and the availability of federal courts in diversity cases is limited to cases in which the amount in controversy is at least seventy-five thousand dollars. "[P]rivate judging at least presents the possibility of agreed cost-shifting, which may aid the underfinanced party."\textsuperscript{66} Thus, because litigants of lesser means are capable of benefiting from privately-judged proceedings, it does not create a dual system of justice.

2. Procedural Due Process Concerns

Even if privately-judged proceedings were unavailable to the comparatively non-affluent, the system would not violate constitutional due process. The U.S. Supreme Court has held that the Due Process Clause requires, at a minimum, that a state "afford to all individuals a meaningful opportunity to be heard."\textsuperscript{67} Individuals, whether affluent or non-affluent, simply do not have a fundamental "right of access to any particular forum unless no other recognized, effective forum exists."\textsuperscript{68} Private judging provides an auxiliary forum to the traditional courts. Other effective alternatives include arbitration, mediation, and small claims court. Providing the public with a choice of forums does not inhibit an indigent person's opportunity to be heard. "The poor, just like the wealthy, have an opportunity to assert their rights in a meaningful hearing outside the private judging forum."\textsuperscript{69} Therefore, private judging does not violate the due process rights of poor litigants.

\textsuperscript{64} Id. In Ohio, domestic relations disputes comprise roughly eighty percent of privately-judged cases. 2005 OHIO SUMMARY, supra note 24, at 27, 73, 135, 186, 249.
\textsuperscript{65} CHERNICK, BENDIX & BARRETT, supra note 7, at 36.
\textsuperscript{66} Id.
\textsuperscript{68} Haynes, supra note 4, at 629–30.
3. Equal Protection Concerns

Even if private judges were only available to the comparatively affluent, the system would not violate the Equal Protection Clause. The Fourteenth Amendment's Equal Protection Clause protects against invidious discrimination with respect to classifications based on race, national origin, alienage, gender, and illegitimacy. Courts have developed three different tiers of scrutiny to analyze whether state and federal laws violate equal protection: (1) strict scrutiny, (2) intermediate scrutiny, and (3) rational basis. Strict scrutiny is the most difficult standard of review. It requires that the state law be necessary to achieve a compelling governmental interest. Classifications that (1) disadvantage a suspect class or (2) violate the exercise of a fundamental right command strict scrutiny and are "treated as presumptively invidious." Private judging involves neither a suspect class nor a fundamental right. First, the Supreme Court has repeatedly held that wealth is not a suspect classification. Second, the Supreme Court has never recognized a fundamental right of access to the civil courts. Thus, strict scrutiny cannot be invoked.

On the standard-of-review spectrum, intermediate scrutiny lies between strict scrutiny and rational basis. It is generally applied to legislative classifications based on gender, illegitimacy, and

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75 Harris v. McRae, 448 U.S. 297, 312, 322 (1980).
77 See, e.g., McRae, 448 U.S. at 323 (holding that wealth is not a suspect classification under the Hyde Amendment); Maher v. Roe, 432 U.S. 464, 471 (1977) (holding that the denial of benefits to welfare recipients need not invoke strict scrutiny); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (holding that wealth is not a suspect classification with regards to public education); Dandridge v. Williams, 397 U.S. 471 (1970) (holding that rationality review is sufficient for determining the maximum amount of benefits allowed for welfare recipients).
78 See, e.g., Ortwein v. Schwab, 410 U.S. 656 (1973) (upholding a mandatory state-imposed twenty-five-dollar filing fee for review of welfare benefit termination); United States v. Kras, 409 U.S. 434, 446 (1973) (upholding mandatory state-imposed filing fees for bankruptcy); Boddie v. Connecticut, 401 U.S. 371, 382 (1971) (striking down a state-imposed filing fee in a divorce action, but refusing to recognize a general right of access to the courts). See also Note, supra note 42, at 1603 n.57 (discussing that a right to access to the civil courts is case-specific).
alienage. This heightened review standard requires such classifications to be substantially related to the achievement of important governmental objectives. The Supreme Court has never afforded the poor the protection of this intermediate standard of review. Thus, private judging cannot invoke intermediate scrutiny.

Since private judging does not qualify for review under either strict or intermediate scrutiny, it need only meet the minimal demands of rational basis review. Most classifications will survive this form of scrutiny. Indeed, courts will presume the legislative classification's validity. Under rational basis, "the legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest."

The legitimate governmental interest that private-judging statutes seek to achieve is the reduction of congestion and delay in the traditional court system. Providing this auxiliary forum benefits not only those parties who remove their cases to private judges, but also traditional court system litigants; parties who choose to remain in the public system, or are unable to afford the private system, experience less delay and receive more efficient service as an indirect result of private judging. Moreover, because the private-judging system is self-supporting, the private-payment requirement is an economic necessity. The system simply could not exist without private payments unless the state siphoned funds away from the traditional

82 Craig, 429 U.S. at 197.
83 See Maher v. Roe, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); Longsworth, supra note 69, at 701 (arguing that the existence of social and welfare legislation negates a claim that the class comprised of the poor needs the active judicial intervention provided by intermediate scrutiny). On the issue of the utility of poverty as a suspect class, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 162 (1980) ("What typically disadvantage the poor are various failures on the part of the government (or anybody else) to alleviate their poverty by providing one or another good or service. . . . However, failures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms. A theory of suspicious classification will thus be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with."). But see Note, supra note 42, at 1604 (arguing that poverty, in conjunction with other factors, such as the right to resort to law to enforce or protect one's rights, should entitle poorer litigants to intermediate scrutiny).
85 Lyng v. Castillo, 477 U.S. 635, 639 (1986); see also Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127–28 (1999) ("We have repeatedly held that a classification neither involving fundamental rights nor proceedings along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.") (internal quotation omitted).
system—thereby defeating the burden-easing purpose of private judging. Thus, because a self-supporting private-judging system is a rational means of reducing court congestion and delay, it does not violate equal protection.

B. Conflicts of Interest

Another criticism of privately-judged proceedings focuses on the potential for the private payment to compromise the judge’s impartiality. The concern is that private judges will favor a particular party in order to secure or maintain that party as a “steady customer.” The steady customer would most likely be a wealthy individual or corporation with the means and opportunity to supply a steady flow of business to the judge. Allegedly, the judge "would find it in his self interest to favor these parties where possible."

The available evidence suggests that privately-judged proceedings are "widely seen to be fair and untainted by bias or conflicts of interest." In Ohio, private judges are required to comply with the Code of Judicial Conduct. Canon 3 of that Code requires judges to perform judicial duties impartially, without bias or prejudice. Moreover, the consent requirement will largely neutralize the bias concern, so long as both parties have equal and adequate knowledge about the judge. Of course, when a "repeat player" is matched against a "one-time customer," the balance of knowledge is tilted. This imbalance creates an opportunity for abuse. But the balance can be restored. A database of available private judges could be made available to potential private litigants. The database could include a curriculum vitae, organizational affiliations, and a list of the litigating parties in all past decisions. This information would help to avoid conflicts of interest. It would also facilitate the selection of a judge with experience and expertise well-suited to the dispute.

C. Secrecy

One of the most appealing aspects of private judging, the secret nature of the proceedings, is simultaneously the source of much

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86 Note, supra note 42, at 1607.
87 Id. at 1608.
88 Id. ("Of course, any favoritism could not be overt, for then the opponents of the steady customers would refuse to consent. But over time, referees could safely give steady customers the benefit of the doubt more often than not.").
89 CHERNICK, BENDIX & BARRETT, supra note 7, at 40.
91 Note, supra note 42, at 1608.
Concern. Closed trials enable parties to prevent critical private information, such as trade secrets, sensitive financial data, and embarrassing personal details, from seeping into the public domain. The public is not notified of the time or place of the private hearing, the private judge does not publish an opinion, and the court reporter's record will not be transcribed or filed unless the parties appeal. Some critics contend that the secrecy of these proceedings violates "the public's basic [First Amendment] right to scrutinize the workings of governmental institutions."

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech." But that freedom is not limited to speech alone. The First Amendment freedoms combine to promote a "common core purpose of assuring freedom of communication on matters relating to the functioning of government." This so-called "right to know" is founded upon the principle that "if an individual has the right to speak, there must be a concomitant right to listen; otherwise the freedom to speak would be meaningless. The freedom to listen implies the freedom to know." Critics claim that the secret nature of private judging violates the First Amendment.

The United States Supreme Court has recognized this "right to know" reasoning in the context of criminal trials. In *Richmond Newspapers, Inc. v. Virginia*, the trial court, in a murder trial, ordered the exclusion of the press and public from the courtroom, pursuant to a state statute. A newspaper petitioned the state supreme court for writs of mandamus and prohibition and filed an appeal, but the court dismissed the petitions and denied the appeal. The United States Supreme Court reversed and held that the First Amendment protects the right of press and public to attend criminal trials. The Court emphasized that "it would be difficult to single out any aspect of government of higher concern and importance to the people than

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92 Haynes, supra note 4, at 646–47 (arguing that negotiation, arbitration, and mediation are more appropriate means of preventing public disclosure of critical private information in light of the public interest in open trials).
93 Id. at 640–41.
94 Note, supra note 42, at 1609.
95 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").
97 Shapiro, supra note 56, at 306.
98 448 U.S. 555 (plurality opinion).
99 Id. at 580.
the manner in which *criminal* trials are conducted." The plurality opinion in *Richmond* specifically noted that the holding did not apply to *civil* cases. Moreover, when the Court reaffirmed the *Richmond* decision in *Globe Newspaper Co. v. Superior Court*, it did not choose to extend its application beyond the realm of criminal trials. Justice O'Connor emphasized that "neither *Richmond Newspapers* nor the Court's decision today . . . carry any implications outside the context of criminal trials.

Of course, just because the holdings in these cases are limited to the context of criminal trials, does not imply that there is no right of access to civil proceedings. But it seems unlikely that the Court would extend an unlimited right of access to civil proceedings. Such a holding would have an immediate and drastic effect on the entire spectrum of alternative dispute resolution. Moreover, the concept of a right of access to civil proceedings seems misplaced and unnecessary given that civil interests are ordinarily less severe than criminal interests. Because the Supreme Court has never extended the constitutional right of access to *civil* cases, there is no Supreme Court precedent supporting a First Amendment attack on private judging.

Critics of private judging may, however, find support for the right of public access to civil court proceedings in another body of constitutional doctrine—state constitutions. Twenty-five states have explicit "open court" provisions in their constitutions. In Ohio, the "open courts" provision states, in pertinent part, "*All courts shall be open*, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." This expansive language seems to give strong support to a right of access to civil court proceedings. But in *In re T.R.*, the Ohio Supreme Court concluded that "the open courts provision of the Ohio Constitution creates no greater right of public access to court proceedings than that accorded by the Free Speech and Free Press Rights Clauses of the First Amendment to the United States Const. art. I, § 16 (emphasis added).

100 *Id.* at 575 (emphasis added).
101 *Id.* at 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").
103 *Id.* at 611 (concurring opinion).
105 OHIO CONST. art. I, § 16 (emphasis added).
Constitution.” Thus, it remains unclear whether the “open courts” provision of the Ohio Constitution or the First Amendment right of public access to court proceedings would apply, generally, to civil cases and, specifically, to privately judged proceedings.

D. Brain Drain

Another criticism of private judging is that the promise of high compensation will lure the most talented judges away from the public bench and into early retirement. If there were an exodus of the most talented judges as a result of the private-judging system, it would be a very serious concern. But there is no evidence to support that concern. To the contrary, one study found that, “[d]ata from the survey of retired judges gives no support to the idea that more judges are retiring early to do private judging.” It might be that the intangible emoluments of the bench, such as prestige, status, power, and independence override whatever monetary gains exist in the private sector. Moreover, the lure of higher compensation in private practice existed long before private judging. “Retention of valued public servants should be achieved by offering appropriate job conditions, benefits, and compensation”—not by scapegoating “a service which is beneficial to and desired by litigants.”

E. Priority Access to Appellate Courts

Private judging is occasionally criticized for enabling litigants to leapfrog the congested trial courts in order to gain priority access to the appellate courts. Some have suggested that wealthy litigants might exploit the expedited alternative path to establish precedent sooner. This criticism is highly implausible. To realize this conspiracy theory, a private litigant would have to bring an action before a private judge, intentionally lose, and then appeal to the appellate court in order to secure common law precedent. As one observer commented, “[e]ven if a group of litigants wanted to distort the judicial process in this way, the pragmatic difficulties of such an unlikely scheme would

107 Id. at 448.
109 See Jonathan L. Entin & Erik M. Jensen, Taxation, Compensation, and Judicial Independence, 56 CASE W. RES. L. REV. 965, 1001-09 (2006) (arguing that, despite Supreme Court endorsement, recruitment is not a purpose of the Compensation Clause). Indeed, “to attract good men to and to secure efficiency, the honour and independence of the office are of far greater account than the emoluments that attach to it.” Id. at 1007 (quoting CHARLES EVANS HUGHES, CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT 49 (1910)).
110 CHERNICK, BENDIX & BARRETT, supra note 7, at 45.
111 Shapiro, supra note 56, at 310.
either greatly hamper their progress or make it virtually impossible.”

F. Non-Availability of Trial by Jury

Some might list the non-availability of jury trials in privately-judged proceedings as a downside of the system. Indeed, some jurisdictions explicitly prohibit private judges from conducting jury trials. Colorado expressly authorizes privately-judged jury trials. In Ohio, section 2701.10 does not expressly authorize or prohibit jury trials in privately-judged proceedings; nevertheless, private judges had been conducting jury trials prior to the 2006 case of Russo v. McDonnell, which brought the issue to a head.

V. RUSSO v. MCDONNELL

Under Rule 4(B) of the Rules of Superintendence for the Court of Ohio, “the administrative judge has ‘full responsibility and control over the administration, docket, and calendar of the court or division’ and is ‘responsible to the Chief Justice of the Supreme Court in the discharge of his or her duties.’” Pursuant to this authority, the administrative judge of the Cuyahoga County Court of Common Pleas, Richard J. McMonagle, implemented a policy entitled “Court Policy Regarding Private Judging.” The policy “specif[ied] that ‘jury trials will be permitted with private judges.’” As a result of this policy, private judges were conducting jury trials in Cuyahoga County prior to Russo.

In Russo v. McDonnell, 852 N.E.2d 145 (2006), the Ohio Supreme Court held that jury trials were not permitted in privately-judged proceedings. In so doing, the court recognized that “[a]s court
dockets grow more crowded and litigation costs more expensive, methods of alternative dispute resolution should be encouraged."\(^{120}\)

The court went on to say that the Ohio General Assembly, and not the court, was the proper body to resolve public policy issues.\(^{121}\)

The dispute in Russo grew out of Peffer v. Cleveland Clinic Foundation.\(^{122}\) In Peffer, the parties entered into an agreement to refer the medical malpractice case in its entirety to a private judge, pursuant to section 2701.10. The Cuyahoga County Court of Common Pleas judge assigned to that case, Nancy Margaret Russo, refused to refer the case to the private judge. After Russo’s refusal, the administrative judge, Richard J. McMonagle, ordered the referral to retired judge Peggy Foley Jones under section 2701.10 for the case to proceed to jury trial. McMonagle further specified that Russo no longer had any jurisdiction over the matter and had not since July 15, 2005, the date on which the parties filed the referral agreement.

Subsequently, the Court of Appeals for the Eighth District of Ohio granted the plaintiffs in Peffer a writ of prohibition to prevent Russo from proceeding in the case. The court determined that Russo was without power to act further on the case because McMonagle’s orders had “unambiguously terminated” her authority.\(^{123}\) However, the court did not determine whether section 2701.10 authorized private judges to conduct jury trials.

At this time there were several other cases in the Cuyahoga County Common Pleas Court in which the parties agreed to refer the case to a retired judge for a jury trial under section 2701.10.\(^{124}\) One such case was Austin v. Metrohealth Medical Center.\(^{125}\) In this case, “Judge [John D.] Sutula refused to refer the case, based on his belief that [section] 2701.10 does not authorize jury trials.”\(^{126}\) Then, “[o]n November 23, 2005, the court of appeals [for the Eighth District] dismissed the complaint because ‘[section] 2701.10 and [the applicable judicial rules] do not contain any reference to a jury trial’

prohibition is warranted to prevent the administrative judge from facilitating conduct of jury trials in connection with R.C. 2701.10 cases.”\(^{122}\)

\(^{120}\) Id. at 155 (quoting Colegrove v. Handler, 517 N.E.2d 979, 983 (Ohio 1986)).

\(^{121}\) Id.

\(^{122}\) Id. at 147 (“Relator is the judge assigned in Peffer v. Cleveland Clinic Found., Cuyahoga C.P. case No. CV–03–496855.”).


\(^{124}\) Id.

\(^{125}\) Cuyahoga C.P. No. CV–04–538701.

\(^{126}\) Russo, 852 N.E.2d at 148.
and it could ‘find no reference to the ability of a voluntarily retired judge to conduct a jury trial.’”

“On November 14, 2005, [Russo] filed [an] action for a writ of prohibition to prevent the administrative judge [McMonagle] from ‘compelling or facilitating jury trials in proceedings purportedly submitted or referred’ under [section] 2701.10. [Russo] also requested a writ of prohibition to prevent [McMonagle] from ‘directing or permitting the use of facilities, equipment, resources, utilities and/or personnel of the Cuyahoga County Court of Common Pleas in any proceedings’ under [section] 2701.10.”

“In order to be entitled to the requested extraordinary relief in prohibition, [Russo had to] establish that (1) the administrative judge [was] about to exercise judicial power, (2) the exercise of this power [was] not authorized by law, and (3) denial of the writ [would] cause injury for which no other adequate remedy in the ordinary course of law exist[ed].” The administrative judge did not dispute the fact that he was exercising judicial power. The case centered around the second writ requirement—whether the exercise of power was authorized by law. “If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.” Moreover, if Russo could establish that McMonagle’s exercise of power represented “a patent and unambiguous lack of jurisdiction,” then she would not have to prove the third writ requirement—lack of an adequate remedy of law—“because the availability of alternate remedies like appeal would be immaterial.”

The court found that “the administrative judge patently and unambiguously lack[ed] jurisdiction to compel or facilitate jury trials for civil actions or issues submitted to a retired judge pursuant to section 2701.10. Accordingly,” it determined, “a peremptory writ of prohibition [was] warranted to prevent the administrative judge from [conducting] jury trials in connection with section 2701.10 cases.”

128 Id. at 148–49. On January 5, 2006, the Ohio Supreme Court received notification that Judge Nancy R. McDonnell had succeeded Judge McMonagle as the administrative judge of the common pleas court. Id. at 149. “Pursuant to S.Ct.Prac.R. X(2) and Civ.R. 25(D)(1), Judge McDonnell [was] automatically substituted as the respondent in [the] case.” Id.
129 Id. at 149.
130 Id.
131 Id. at 147 (citing State ex rel. Columbia Gas of Ohio, Inc. v. Henson, 810 N.E.2d 953, ¶ 14 (Ohio 2004)) (internal quotation omitted).
132 Id. at 149 (citing State ex rel. Morenz v. Kerr, 818 N.E.2d 1162 (Ohio 2004)).
133 Id. at 154.
However, the court concluded that a peremptory writ was not warranted to prevent the use of court resources for non-jury trials in connection with section 2701.10 cases. Thus, "in matters referred to private judges . . . the court in which the action or proceeding is pending is not required to provide the retired judge with court or other facilities, equipment, or personnel, but may in its discretion do so if the parties assume the responsibility and pay for all costs arising out of the provision of the facilities, equipment, and personnel."134

The Ohio Supreme Court premised its decision on four bases. First, the court held that both section 2701.10 and Rule VI require bench trials. "Neither the statute nor the rule provides for or mentions the conduct of a jury trial or contemplates a verdict to be returned by a jury."135 After construing the statute to determine the paramount consideration of legislative intent, the court found that the plain language of section 2701.10(B)(1) requires the parties and the retired judge to expressly agree that the referred matter shall be "tried, determined, and adjudicated by that retired judge."136 Furthermore, section 2701.10(D) specifies that a "retired judge to whom a referral is made under this section shall try all of the issues of the action or proceeding, shall prepare relevant findings of fact and conclusions of law, and shall enter a judgment in the action or proceeding in the same manner as if he were an active judge of the court."137 In addition, Rule VI provides that the retired judge must issue a pretrial order of the "issues to be decided by the judge," that at the conclusion of the trial, "[t]he judge shall decide the case promptly," and that the judge's written decision must contain separate findings of fact and conclusions of law."138

Second, the court noted that the General Assembly omitted any mention of jury trials in matters referred or submitted to a private judge in accordance with section 2701.10 and Rule VI and specifically required that these proceedings be tried and decided by the judge.139 In so doing, the court recognized and reiterated the principle of expressio unius est exclusio alterius—the expression of one thing implies the exclusion of another.140

Third, the court determined that when the General Assembly has intended for cases to be tried by jury, it has explicitly "manifested its

134 Id.
135 Id. at 151.
136 Id. at 150 (emphasis omitted).
137 Id.
138 Id. (quoting GOV. JUD. R. VI(3)(B)(1), (C), (D)) (emphasis in original).
139 Id. at 151–52.
140 Id. at 152.
intent with appropriate language." Because "[n]o comparable language appears in either [section] 2701.10 or [Rule] VI," the court refused to interpret the statute in a way that would, essentially, add words that are not present in the text. Because "[n]o comparable language appears in either [section] 2701.10 or [Rule] VI," the court refused to interpret the statute in a way that would, essentially, add words that are not present in the text.

Finally, the court rejected the argument that because section 2701.10(D) does not expressly mention the right to a jury trial, it is impermissible for the statute to abrogate the right to jury trial preserved by Article I, section 5 of the Ohio Constitution. The court explained that "there is no right to a jury trial [ ] unless that right is extended by statute or existed at common law prior to the adoption of the Ohio Constitution." Thus, there is no right to a jury trial in matters referred or submitted to a private judge because neither the statute nor the rule extend that right, "[n]or was there ever any common-law right to a jury trial in cases referred to private judges from the regular court docket." Furthermore, article I, section 5 of the Ohio Constitution "does not prevent a court from giving effect to a waiver of a jury trial by a party who has a right to a jury trial." The court determined that, just as with other alternative dispute-resolution techniques, parties that refer a case to a private judge "manifestly waive their right to a jury trial."

The sole dissenter, Justice Pfeifer, characterized the majority's opinion as "plausible" but observed that section 2701.10 does not directly prohibit private judges from using juries. Once the parties agree to refer a case, the private judge is statutorily empowered to exercise "all of the powers, duties and authority of an active judge of the court in which the action or proceeding is pending." Justice Pfeifer noted that the powers, duties and authority of an active judge include the ability to use Civil Rule 39(C). Civil Rule 39(C) states that "[i]n all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right." Justice Pfeifer concluded that, even if a referred case requires a bench trial and is an action "not triable of right by a jury," as the majority contended, the private judge

141 Id.
142 Id. at 152, 153.
143 Id. at 153.
144 Id.
145 Id. (quoting Shimko v. Lobe, 813 N.E.2d 669 (Ohio 2004)).
146 Id. at 154.
147 Id. at 155 (Pfeifer, J., dissenting).
148 Id. (quoting OHIO REV. CODE. ANN. § 2701.10(C) (West 2007)).
149 Id.
in a referred case nevertheless has the ability, pursuant to Civil Rule 39(C), to "try any issues with an advisory jury" or, "with the consent of both parties, [to] order a trial of any issue with a jury."\(^\text{150}\)

Justice Pfeifer also noted that the General Assembly failed to make any plain statement that can be construed as "abrogating or otherwise affecting the [inviolate] right to a jury trial."\(^\text{151}\) Article I, section 5 of the Ohio Constitution and Civil Rule 38(A) both preserve this inviolate right.\(^\text{152}\) According to Pfeifer, the court "should not interpret a statute to infringe an inviolate right absent plain and clear language from the General Assembly that it intends to do so."\(^\text{153}\)

Regardless of the opposing statutory interpretations employed in both the majority and dissenting opinions, the fact remains that whether private judges should be authorized to conduct jury trials is a question of public policy—not statutory interpretation. The General Assembly did not directly manifest its intent with plain, unambiguous language. As a result, the Ohio Supreme Court was left to resolve a public policy issue with the blunt instrument of statutory interpretation. As the proper body to resolve public policy issues, the General Assembly should accept the court's invitation to resolve this public policy issue by amending the text of section 2701.10 to authorize private judges to conduct jury trials.

VI. COST-BENEFIT ANALYSIS OF PRIVATELY-JUDGED JURY TRIALS

The primary advantage of a jury trial is realized through each individual juror's ability to bring average common sense to bear upon the facts. By constantly bringing the rules of the law to the "touchstone of common sense," the jury makes the law intelligible.\(^\text{154}\) Moreover, "there is much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict."\(^\text{155}\) But some commentators criticize the civil jury. "The arguments against the civil jury can be grouped into three basic categories: delay caused by the use of juries, juror incompetence, and juror prejudice."\(^\text{156}\) Recently, "particular attention has been paid . . . to

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) OHIO CONST. art. I, § 5 ("The right of trial by jury shall be inviolate . . . "); OHIO CIV. R. 38(A) ("The right to trial by jury shall be preserved to the parties inviolate.").

\(^{153}\) Russo, 852 N.E. at 155 (Pfeifer, J., dissenting).


problems that may arise from the use of juries in cases that are highly complex, either legally or factually.”

In jurisdictions that permit private judges to conduct jury trials, a privately-judged jury trial provides litigants with a unique means through which to resolve their dispute. It combines the many advantages of private judging with the commonsensical diligence of the civil jury. For example, suppose party A sues corporation B. Corporation B wants to remove the dispute from the traditional courts for an alternative resolution, but insists on maintaining its right to appeal the outcome. Party A’s financial situation is precarious—she desires a quick resolution to the dispute as well, but is concerned that the moral or emotional strength of her arguments will be overlooked if there is no jury to imbue humanity into what she perceives to be a cold and calculating process. In this situation, a privately-judged jury trial would fulfill the needs of both parties.

Of course, the benefits of the civil jury do not come without a cost to the private-judging system. Indeed, in a privately-judged jury trial, four of the advantages of the private-judging system are diminished: (1) cost-efficiency, (2) tailored expertise, (3) privacy, and (4) convenience. First, the additional time and money spent on the civil jury reduces the cost-efficient nature of the proceeding. But because the statutory fee that the parties must pay the jurors is minimal, the proceeding will most likely retain most of its cost-efficiency. Second, the civil jury diminishes the benefit of submitting complex technical issues to a private judge with relevant expertise. But the private judge’s expertise should still be effective in streamlining the process and helping the jury to understand the issues. Third, the private nature of the proceeding is made less so by bringing in a panel of strangers to judge the dispute. But, presumably, the proceeding would still remain closed to the public, and the jurors would be required to maintain confidentiality. Finally, the convenience of the privately-judged proceeding is lessened by the scheduling and transportation needs of the jurors. This is perhaps the biggest downside of a privately-judged jury trial.

For some parties, the benefits of the civil jury outweigh the jury’s diminution of the advantages of a privately-judged proceeding. This is evidenced by the fact that, prior to Russo, parties in Ohio were electing to have privately-judged jury trials, and parties in other jurisdictions still choose to have privately-judged jury trials despite being required to compensate the jurors. See, e.g., COLO. R. CIV. P. 122(i)(3), (4).
jurisdictions choose to have such trials. Obviously, privately-judged jury trials are not ideal for every litigant, but such trials are undeniably appropriate for some litigants. It is important to provide a range of options so that litigants can choose the method best tailored to resolve their dispute—whether that be traditional litigation, arbitration, mediation, private judging, or privately-judged jury trials. Thus, the Ohio legislature should authorize private judges to conduct jury trials.

VII. JURY SELECTION FOR PRIVATELY JUDGED PROCEEDINGS

Assuming that private judges should be authorized to conduct jury trials under section 2701.10, the issue turns to how those juries should be selected and impaneled. In considering this question it is important to acknowledge that prior to Russo, there was already a method in place. No one objected to the effectiveness of the jury-selection method for privately-judged proceedings. Rather, the argument against privately-judged jury trials was twofold: (1) section 2701.10 does not authorize jury trials in privately-judged proceedings, and (2) public resources should not be allocated to support private proceedings under section 2701.10. Presumably, if the Ohio legislature chooses to authorize private judges to conduct jury trials, the only remaining objection would be the public resources argument—which could easily be neutralized by requiring the parties to compensate not only the judge, but also the jurors, and, possibly, the State of Ohio. Thus, the examination of how the jury-selection system for privately-judged proceedings should work logically must begin with how it did work.

A. Jury Selection: How It Worked Prior to Russo

Ohio law requires that jurors be selected from either the list of registered voters or a combined list of registered voters and licensed drivers. A new jury list is made on August 1 of each year, from which individuals are randomly selected. Those individuals selected for jury duty are served with a notice requiring their attendance before a commissioner at a specified time, for the purpose of testifying concerning their own qualifications to serve as a juror.

160 OHIO REV. CODE ANN. §§ 2313.06, 2313.08 (West 2007).
161 OHIO REV. CODE ANN. §§ 2313.08, 2313.07 (West 2007).
162 OHIO REV. CODE ANN. § 2313.10 (West 2007).
The attending pool of jurors is then narrowed down through *voir dire*—the court and attorneys pose questions to all of the jurors in the pool—and then prospective jurors are excused for cause or by peremptory challenge.\(^6\)

As previously mentioned, the administrative judge of the Cuyahoga County Court of Common Pleas implemented a "Court Policy Regarding Private Judging."\(^4\) This policy allowed private litigants to tap into the public-jury pool. Under the policy, litigants choosing to have their case privately-judged were required to notify the Clerk of the Court of Common Pleas and the administrative judge of their intention to have a jury trial. Upon notification, the administrative judge would order the jury commissioner to call an additional fifty jurors "to help alleviate any possible burden on other judges' jury trials."\(^5\) The parties were not charged with compensating the jurors or the State of Ohio.\(^6\)

**B. Jury Selection: How It Should Work After Russo**

The threshold question in designing a jury selection system for privately-judged proceedings is whether that system should be independent of the public-jury system. For the following reasons, this Note recommends that the jury-selection system for privately-judged proceedings should be an extension of the public system and not an independent process.

1. **Impracticability of a Separate Selection Process**

   There is one glaring impediment to establishing an effective private-jury selection process separate from the public system: enforcement. Under the public-jury system, the sheriff serves the notice to appear upon the prospective juror "personally, by mail, or by leaving it at the juror's residence or at the juror's usual place of

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\(^{64}\) **See Relator's Memorandum in Support of Verified Complaint for Writ of Prohibition and Alternative Writ of Prohibition at A-8, Russo, 852 N.E.2d 145 (No. 05-2130).**

\(^{65}\) This was the most contentious aspect of privately-judged jury trials. **See id.** at 14. ("The burden upon the taxpayers is particularly severe because of the improper use of the public jury pool to support private proceedings under O.R.C. § 2701.10. The Policy requires that an additional 50 jurors be called for duty to supposedly alleviate the burdens that jury trials of cases under O.R.C. § 2701.10 will impose upon the Court. Yet the calling of 50 additional jurors for each private trial greatly increases the financial cost to taxpayers. In Cuyahoga County, jurors are paid $25 per day for their services. Consequently, the calling of 50 additional jurors to accommodate each private proceeding will cost taxpayers approximately $6,250 per week.").
business.’167 If a juror fails to appear she can be fined up to $250 and punished for being in contempt of court.168 Under a private system, there would be no comparable mechanism of enforcement. Jurors could come and go as they please or completely ignore a summons without fear of retribution.

In addition, under the public system, an employer may not “discharge, threaten to discharge, or take any disciplinary action that could lead to the discharge of any permanent employee who is summoned to serve as a juror.”169 Nor can an employer “require or request an employee to use annual, vacation, or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process, or for time spent actually serving on a jury.”170 If an employer violates these provisions it “shall be punished as for a contempt of court.”171 Under a private system, there would be no means of preventing an employer from taking retaliatory action against an employee for fulfilling her jury duty. Thus, the lack of an enforcement mechanism in any private jury system stands as a major obstacle.

Because of the inability to enforce jury duty under a private system, jurors would have to be comprised of either volunteers or paid participants. Given the reluctance with which most individuals undertake jury duty, it is unlikely that there would be a significant number of volunteers willing to serve as jurors in a private system. But even assuming a plentiful supply of volunteers, it is highly unlikely that the resulting jury would fairly represent a cross-section of the community. Paid participants would be equally unsuitable as jurors under a private system. In Cuyahoga County, jurors are paid $25 per day for their services. Under a private system, jurors would probably demand more for their services. Moreover, without an enforceable prohibition on employer retaliation, the paid jurors would primarily be comprised of the unemployed and retired—an insufficient cross-section of the community. Thus, the jury selection system for privately-judged proceedings must be an extension of the public system.

167 OHIO REV. CODE ANN. § 2313.25(A) (West 2007).
168 OHIO REV. CODE ANN. § 2313.99(A) (West 2007).
169 OHIO REV. CODE ANN. § 2313.18(A) (West 2007).
170 OHIO REV. CODE ANN. § 2313.18(B) (West 2007).
171 OHIO REV. CODE ANN. § 2313.18(D) (West 2007).
2. Extension of the Public System

For privately-judged proceedings in which the parties elect a jury trial, juries should be selected and impaneled in the same manner and in the same place they would in an ordinary civil trial. It is important that jurors perceive the privately-judged proceeding to be neither more, nor less, important than any other jury case tried in that locale. Thus, in accordance with pre-Russo practices in Cuyahoga County, the parties should notify the clerk of the court and the administrative judge of their intention to have a privately-judged jury trial. Upon notification, the administrative judge should order the jury commissioner to call an additional fifty jurors. During the time spent responding to a summons for jury duty and participating in the jury-selection process, jurors should not be informed that the matter for which they have been called differs from a normal proceeding. If possible, voir dire should be held in the courthouse of the originating court.

Once the jury is impaneled, the administrative judge should have the discretion to provide a courtroom for the remainder of the privately-judged proceeding. If a courtroom is made available, the parties should be charged a reasonable rental fee for the use of the facility, equipment, and personnel. The jurors should not be informed as to the private nature of the proceeding.

However, if the remainder of the proceeding is held outside the courthouse, jurors should be instructed that the location of the proceeding does not affect their responsibilities or the importance of their service. Parties should be responsible for offering transportation from the courthouse to the location of the trial. Such transportation should be at no cost to the jurors or the State of Ohio. Furthermore, the parties should be required to obtain sufficient liability insurance to assure that any injury to a juror related to such transportation is covered without expense to the State of Ohio. The insurance should name the State of Ohio as an additional insured. The parties should also be responsible for providing facilities, equipment, and personnel.

Within three days following the conclusion of their service as jurors, the parties should pay the jurors at the statutory rate. The parties should also pay all related expenses such as meals for the jurors and reasonable transportation costs. Payments should be made directly from the parties to the jurors, without going through the court.

or the state of Ohio. Any payments due to the court should also be paid within three days.

This system effectively enables litigants in privately-judged proceedings to obtain the benefits of a jury trial. It strikes a balance between respecting the burdens of taxpayers and ensuring that the privately-judged proceeding remains cost-effective. The Ohio legislature should adopt this system and rewrite section 2701.10 accordingly.

CONCLUSION

Ohio courts have seen dramatic increases in the number of filings. Congested dockets result in substantial delay—costing litigants time and money and eroding public confidence in the system. Alternative-dispute-resolution methods help to alleviate the burden on the courts. Moreover, providing litigants with an array of alternatives to the traditional courts empowers them to choose the method best-tailored to resolve their dispute.

Privately-judged proceedings can offer substantial advantages to the private litigant, the traditional court system, and the public litigant: cost-efficiency, tailored expertise, appellate review, privacy, convenience, and reduced caseloads. The common public policy and constitutional concerns aimed at private judging are tenuous at best. Private judging can also offer a jury trial—combining the many advantages of private judging with the commonsensical diligence of the civil jury. While a privately-judged jury trial is not the ideal resolution method for all disputes, it is, undeniably, an appropriate choice for some litigants.

The growing popularity of privately-judged jury trials was brought to a screeching halt by the Ohio Supreme Court’s interpretation of an ambiguous statute. Although that interpretation was plausible, the resulting policy implications negatively affect Ohio’s judicial system. The Ohio legislature should rewrite section 2701.10 to explicitly authorize private judges to conduct jury trials in accordance with the recommendations of this Note.

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