

Method, Procedure, Means, and Manner¹: Washington's Law of Law-Making²

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1. We may resort to . . . [legislative history] to ascertain legislative intent when a statute is ambiguous or its meaning doubtful or obscure, but we will not go behind an enrolled enactment to determine the method, the procedure, the means or the manner by which it was passed in the houses of the legislature.

State *ex rel.* Bugge v. Martin, 232 P.2d 833, 836-37 (Wash. 1951).

2. An earlier version of this paper was presented at a continuing legal education course sponsored by the Government Lawyers' Bar Association on November 20, 2003, in Olympia, WA.

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I. INTRODUCTION—THE FRAMERS’ VIEW OF THE LEGISLATIVE POWER

The relevance of Washington’s state Constitution increases with each legislative session and each election season. The legislature and the governor spar over exercise of the governor’s veto authority, while the courts must deliberate over the

legislature's ability to pass omnibus legislation or its refusal to make statutorily required appropriations. Separation of powers debates, formerly three-cornered, now must also consider the electorate's law-making power. These disputes demonstrate the need for public understanding of the state constitution and its provisions governing the exercise of the law-making power. This article provides a survey of the state constitutional provisions that establish the law of law-making, along with illustrative cases and other sources of law and procedure.

Both state and federal constitutions impose a variety of limits on the substantive laws that may be enacted by their respective legislative branches.³ In the area of procedural restrictions on the legislative power, however, the federal and state constitutions differ substantially.⁴ The United States Congress enjoys great freedom in setting its own rules of legislative procedure.⁵ The state constitutions, in contrast, contain a variety of restrictions on the legislative process.⁶ For the most part, such restrictions did not appear in state constitutions as originally drafted.⁷ Instead, states adopted constitutional amendments throughout the 1800s in response to perceived legislative abuses:

Last-minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions to bills in the amendment process—to name a few of these abuses—led to the adoption of constitutional provisions restricting the legislative process. These constitutional provisions seek generally to require a more open and deliberative state legislative process, one that addresses the merits of legislative proposals in an orderly and rational manner.⁸

A. *Political and Historical Context at Adoption of Washington's Constitution*

When the framers of the state constitution assembled in 1889, Washington was no exception to this trend of suspicion toward the legislature. In contrast to the Federalists, who were influenced by a fear of populist majorities, the framers of the Washington Constitution believed in popular sovereignty and an open, democratic government.⁹ The Washington Constitution evinces fear of not majoritarian tyranny, but of the power of corporations and special interests that might capture or corrupt

3. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Williams, *supra* note 3, at 798.

9. Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 66 (2001/2002).

public institutions.¹⁰ According to the 1889 *Tacoma Daily Ledger*, “wholesale corruption of state legislatures was laughed at by honest men throughout America.”¹¹

This skepticism resulted in four distinct but related characteristics of Washington’s Constitution. While only one of these is the focus of this article, the others should be kept in mind. First, the framers adopted a very broad declaration of rights, many of which are phrased broadly and are not limited to infringement by the government.¹²

Second, the Washington Constitution provides for democratic checks on all three branches through direct, popular, and separate election of legislators, judges, and most major executive branch officials.¹³ Additionally, amendment 7, enacted in 1912, enhanced direct democratic control of the government by providing for direct legislation through the initiative and referendum processes;¹⁴ amendment 8, passed the same year, made state-wide elected officials subject to recall.¹⁵ Third, the framers devoted an entire article to restricting the powers of private corporations, and as a corollary to these provisions, also added requirements to protect labor.¹⁶

Finally, and not surprisingly, the framers included a variety of provisions imposing restrictions on the legislative branch.¹⁷ Many of these were intended to

10. *Id.*

11. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 51 (G. Alan Tarr ed., Greenwood Press 2002) (quoting *TACOMA DAILY LEDGER*, July 19, 1889).

12. *See generally* Clayton, *supra* note 9.

13. WASH. CONST. art. II, §§ 1, 33.

14. § 1.

15. § 33.

16. UTTER & SPITZER, *supra* note 11, at 69; *see also* WASH. CONST. art. II, § 29 (prohibiting leasing of convict labor); WASH. CONST. art. II, § 35 (protecting those in dangerous occupations). A proviso to article I, section 24’s right to bear arms prohibits corporations from employing bodies of armed men; this prohibition stemmed from attacks on striking workers in the 1880s. UTTER & SPITZER, *supra* note 11, at 69-70 (summarizing WASH. CONST. art. I, § 24). In *Water Jet*, the court analyzed the historical and political climate at statehood to conclude that article II, section 29’s prohibition on leased convict labor was intended to protect private sector labor as well as prisoners. *Water Jet Workers’ Ass’n v. Yarbrough*, 90 P.3d 42, 44 (Wash. 2004). Based on additional historical analyses provided on rehearing, the state Supreme Court reversed its own earlier interpretation of the constitutional prison labor restriction. *Id.* First, the court examined the systems of convict labor in place at statehood. *Id.* at 46-47. It then considered contemporaneous definitions of the constitutional phrase “let out by contract.” *Id.* at 47-48. Second, to ascertain the intent of the framers, the court considered the historical context at the time the constitution was adopted. *Id.* at 49-52. In so doing, it reviewed the discussion at the constitutional convention, the populist political climate at statehood, and the historical influence of the labor movement. *Id.* In addition, the court considered the pluralist sources of Washington’s constitution and compared article II, section 29 to corresponding provisions and decisions of other states. *Id.* at 53-57.

17. UTTER & SPITZER, *supra* note 11, at 50 (“In the late nineteenth century and on into the early twentieth century, the trend in state constitutions was toward greater

prevent enactment of special interest legislation: article VIII, section 5 prohibits lending of the state's credit;¹⁸ article II, section 28 prohibits a variety of private or special legislation;¹⁹ article II, section 35 directs the legislature to adopt laws to protect persons in dangerous jobs;²⁰ article II, section 29 prohibits the leasing of convict labor;²¹ article II, sections 13 and 14 restrict legislators from holding certain other public employment;²² and article II, section 30 directs the legislature to adopt laws punishing bribery of public officers.²³ In addition to these specific substantive prohibitions, and in the same spirit, the framers adopted a number of structural and procedural restrictions on legislation.²⁴ These procedural requirements affect how the legislature may enact its intent, regardless of the subject of legislation.²⁵

B. *Constitutional Pluralism—The Sources of the State Constitution*

Washington's Constitution was drafted under far different circumstances than the U.S. Constitution and the Bill of Rights. According to one commentator, a "spirit of comparative constitutional experimentation" animated the drafting of Washington's Constitution.²⁶ While the drafters incorporated many features of the federal Constitution, the convention delegates afforded significant relevance to the constitutions of other states, with those of California and Oregon being particular influences.²⁷ In what they believed to be a "scientific, comparative process of constitution building," the framers drew from recent constitutional experiences in other states to produce the Washington Constitution.²⁸ Procedural restrictions on the legislative power emerged through examination of other state constitutions.

restrictions on the legislative process by constitutions and by the people."). In contrast, constitutional amendments adopted in Washington during the post-Watergate 1970s act as curbs on the executive power. See WASH. CONST. art. III, § 12 (amended 1974) (restricting the veto power and authorizing the legislature to call itself into a special session to override vetoes); WASH. CONST. art. II, § 12 (amended 1979) (establishing annual legislative sessions and authorizing the legislature to call itself into special session).

18. WASH. CONST. art. VIII, § 5.

19. WASH. CONST. art. II, § 28.

20. *Id.* § 35.

21. *Id.* § 29.

22. *Id.* §§ 13-14.

23. *Id.* § 30.

24. See, e.g., WASH. CONST. art. II, §§ 2-11.

25. *Id.*

26. Clayton, *supra* note 9, at 84.

27. *Id.* at 83-85.

28. *Id.* at 83.

C. *Structural Purpose of the State Constitution—Restriction
on Otherwise Plenary Power*

Finally, procedural restrictions on the legislative power stem from the structural function of state constitutions. Constitutions may serve as either “sources of political power or limitations on political power.”²⁹ In this respect, Washington’s Constitution differs substantially from the federal Constitution. It is commonly agreed that the Framers of the federal Constitution believed their document created a government of enumerated powers.³⁰ Regardless of the evolution and controversy over this concept, it is still true that when Congress wishes to regulate it must find within the Constitution an express or implied grant of legislative authority.

State constitutions, on the other hand, operate as a limit on the otherwise unfettered power of the state; the state may enact any law not forbidden by the state constitution or federal law.³¹ The breadth of the state’s “police power” is undoubtedly one reason for the variety of substantive and procedural limitations placed upon the state legislature’s power.³²

D. *Judicial Enforcement of the Law of Law-Making*

As discussed *infra*, courts may decline to enforce many constitutional requirements for legislative procedure on the ground that the enrolled bill doctrine prevents the courts from scrutinizing the procedures behind the enactment of duly enrolled legislation.³³ On the other hand, challenges to legislative procedure, particularly under the title/subject rule of article II, section 19, appear to be made with increasing frequency.³⁴ This may be part of a national trend.³⁵ One commentator has identified three possible reasons behind this trend.³⁶ First, challenges such as constitutional title/subject sufficiency are easy to make since they require reference only to the statute itself.³⁷ Second, each case depends on the particular statute, so each is *sui generis*, and failure on one challenge does not preclude success in the future.³⁸ Third, procedural challenges offer opponents of legislation one last chance

29. *Id.* at 72 (emphasis omitted).

30. *Id.* at 73 (quoting *State v. Gunwall*, 720 P.2d 808, 815 (Wash. 1986)).

31. Clayton, *supra* note 9, at 73.

32. *Id.*

33. *See infra* pp. 16-21.

34. *See* Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 106-07 (2001).

35. *See id.* at 105-06.

36. *Id.* at 106.

37. *Id.*

38. *Id.*

to attack an act they were unable to defeat in the political process.³⁹ In addition, here in Washington the invalidation of several popular, high-profile initiatives may have generated increased interest in the procedural provisions of the state constitution.

II. NATURE OF THE LAW-MAKING AUTHORITY; RIGHTS OF INITIATIVE AND REFERENDUM

A. *Article II, Section 1 (Amendment 7); Article II, Section 41*

The legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.⁴⁰

No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution [presentment and veto], and no amendatory law adopted in accordance with this provision shall be subject to referendum.⁴¹

B. *Nature of the Legislative Power*

Before adoption of the Washington Constitution, courts in the Washington Territory defined legislative power as the power to make law.⁴²

But [legislative] powers are not specially defined by the constitution, nor are they, strictly speaking, granted by that instrument. The people in framing the constitution committed to the legislature the whole law-making power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule.⁴³

39. Dragich, *supra* note 34, at 106.

40. WASH. CONST. art. II, § 1.

41. *Id.* § 41.

42. Maynard v. Valentine, 3 P. 195, 197-98 (Wash. 1880); see UTTER & SPITZER, *supra* note 11, at 50.

43. State v. Fair, 76 P. 731, 733 (Wash. 1904) (citations and internal quotations omitted).

Law is “a rule of action.”⁴⁴ Legislation may also include “policy fluff,” however, which does not constitute a rule of law.⁴⁵ The legislature cannot delegate its legislative authority: “it is unconstitutional for the legislature to abdicate or transfer to others its legislative function.”⁴⁶ In addition to the power to enact legislation, the legislature has the power to investigate.⁴⁷ The constitution also vests a portion of the legislative authority in the governor, whose veto is a legislative act.⁴⁸

C. *The People’s Legislative Power*

Much recent judicial discussion of the scope of the legislative power has arisen in the context of the people’s legislative power, the rights of initiative and referendum. With the adoption of amendment 7 in 1912, the people conferred upon themselves a right to legislate; a right that appears all but coextensive with the legislature’s.⁴⁹ Measures to establish direct democracy had their roots in both the Populist and the Progressive movements of the day.⁵⁰ As stated by the Washington Supreme Court, some of the same social and political conditions that prompted the addition of initiative and referenda powers to state constitutions are still in existence in more modern times.⁵¹

44. *Pierce County v. State*, 78 P.3d 640, 648 (Wash. 2003) (quoting *State ex rel. Berry v. Superior Court*, 159 P. 92, 96-97 (Wash. 1916)).

45. *Id.*

46. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 796 (Wash. 2000) (quoting *Keeting v. Pub. Util. Dist. No. 1*, 306 P.2d 762, 767 (Wash. 1957)).

47. *State ex rel. Robinson v. Fluent*, 191 P.2d 241, 245 (Wash. 1948), *cert. denied*, 335 U.S. 844 (1948); see *UTTER & SPITZER*, *supra* note 11, at 51.

The Legislative Ethics Board considers an “ombudsman and community leader” role within legislative duties:

Is [a legislator’s] authority limited to carrying out legislative functions that fall within a strict reading of the State Constitution’s legislative article, Article II, or does it also include the community or public purpose functions that legislators increasingly exercise, but that are not mentioned in the legislative article? With this opinion, we decide that legislators do possess expansive authority to carry out these community or public purpose functions. We reach this conclusion for a number of reasons. First, we believe that the public expects legislators to exercise these functions. Second, we believe that these functions bring citizens in touch with their government and can serve to increase trust in government, especially in the legislative branch. Third, and most important, we believe that these functions have been firmly established by historical custom and practice within the legislative branch.

Legislative Ethics Board, *Advisory Opinion* 1995 No. 17.

48. *Gottstein v. Lister*, 153 P. 595, 601 (Wash. 1915); see *UTTER & SPITZER*, *supra* note 11, at 51.

49. Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the People’s Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 252 (1996/1997).

50. *Id.* at 253.

51. *Fritz v. Gorton*, 517 P.2d 911, 917 (Wash. 1974). According to one commentator,

Although some state supreme court decisions have characterized the role created by amendment 7 for the people as "closely akin to that of a fourth branch of government,"⁵² the power exercised by the people is equal only to that which the legislature exercises in enacting legislation. Amendment 7 placed the power of initiative and referendum within the legislative department, not within a special constitutional provision relating to initiatives.⁵³ Legislation enacted through initiative or referendum must comply with the substantive and procedural requirements of the state constitution.⁵⁴ Additionally, as the court held in striking down term limits and "universal referendum" initiatives in *Gerberding* and *Amalgamated*, an initiative may not amend the constitution, because initiative power is limited to subjects that are legislative in nature, whereas constitutional amendments are governed by an entirely separate constitutional provision.⁵⁵

Amalgamated held that the power to condition legislation on voter approval was not within the legislative power reserved to the people by amendment 7, because at statehood the referendum power did not exist even for the legislature.⁵⁶ What *Amalgamated* did not directly address is whether there are some powers that are legislative in nature but that may only be exercised by the legislature itself, either because the constitution gives those powers exclusively to the legislature or because they are not included within the powers reserved to the people. Numerous cases have held that the people, when legislating, exercise the same power as the legislature.⁵⁷ *Fritz* noted that "the power . . . via initiative . . . extends to the enactment of legislation in a very broad context unless specifically reserved to the legislature by the constitution."⁵⁸ Yet even after *Amalgamated*, Washington's highest court has yet to squarely address whether the people's initiative power is exactly coextensive with the legislature's plenary authority.

present-day "Progressives," as typified by "good government" groups such as Common Cause and the League of Women Voters, might no longer embrace the initiative power to the same extent as their tax-cutting modern "Populist" counterparts. Kenneth P. Miller, *Courts As Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1058-62 (2001).

52. *Fritz*, 517 P.2d at 916.

53. *See id.* at 942.

54. *Id.*

55. *Gerberding v. Munro*, 949 P.2d 1366, 1377 n.11 (Wash. 1998); *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 794 (Wash. 2000) (citing *Gerberding*).

56. *Amalgamated Transit Union Local 587*, 11 P.3d at 798.

57. *Id.* at 779; *Wash. Fed'n of State Employees v. State*, 901 P.2d 1028, 1034 (Wash. 1995).

58. *Fritz*, 517 P.2d at 916 (emphasis added); *see also* UTTER & SPITZER, *supra* note 11, at 51 ("Except for a few constitutionally mandated provisions, the right of the people to create, approve, or reject legislation through the initiative and referendum process places them on par with the Legislature."). The constitution reserves to the legislature some acts that are "legislative" but not "law-making" in nature. *See* WASH. CONST. art. II, § 9 (adoption of rules of legislative procedure and expulsion of members); WASH. CONST. art. II, § 10 (election of legislative officers).

D. Constitutional Restrictions on Legislation Affecting Ballot Measures

After the people approve a measure, whether through initiative or referendum, it receives “protection” against amendment. Amending such a measure within two years of its enactment requires a two-thirds vote of both houses.⁵⁹ Courts distinguish between “amendments” and “supplemental act[s]”; the latter do not require a two-thirds vote.⁶⁰

The legislature may order, or the voters may seek, a referendum on all or part of an act.⁶¹ Where the legislature refers a measure to the people, the governor’s veto power does not extend to the referred material.⁶²

III. THE ENROLLED BILL DOCTRINE

The enrolled bill doctrine is an unusual facet of the separation of powers principle. Under its principles:

[an] enrolled bill on file in the office of the Secretary of State, which is duly signed by the presiding officers of both houses (as required by Const. art. 2, § 32, and art. 3, § 17) and otherwise appears fair on its face, is conclusive evidence of the regularity of all proceedings necessary for its proper enactment in accordance with the constitutional provisions.⁶³

Unless an enrolled bill “carries its death warrant in its hand,”⁶⁴ an “investigation of the antecedent history of the passage of a bill will not be made except as may be necessary in case of ambiguity in the bill when the legislative intent must be determined.”⁶⁵ This is based on the constitutional principle that the three branches of government are co-equal, and thus no one branch is entitled to scrutinize the properly certified records of another.⁶⁶ Or, as was exemplified in *Power, Inc. v. Huntley*:

Appellants do not deny that . . . [article II, section 38, scope and object] was violated. Their position, briefly stated, is “So what? There isn’t anything the court can do about it because, under its repeated decisions, there is no way it can

59. WASH. CONST. art. II, § 1, cl. c.

60. 25 Op. Wash. State Att’y Gen. 7-8 (1988).

61. *Brower v. State*, 969 P.2d 42, 50 (Wash. 1998) (quoting WASH. CONST. art. II, § 1(b)), *cert. denied*, 526 U.S. 1088 (1999); *State ex rel. Pennock v. Coe*, 257 P.2d 190, 195 (Wash. 1953) (quoting WASH. CONST. art. II, § 1 (b)).

62. *State ex rel. Lofgren v. Kramer*, 417 P.2d 837, 838 (Wash. 1966).

63. *Citizens Council Against Crime v. Bjork*, 529 P.2d 1072, 1076 n.1 (Wash. 1975); *see* 10 Op. Wash. State Att’y Gen. 3-4 (1965).

64. *State ex rel. Dunbar v. State Bd. of Equalization*, 249 P. 996, 1000 (Wash. 1926).

65. *Citizens Council Against Crime*, 529 P.2d at 1076 n.1.

66. *Id.*

know what happened. . . . It may or may not be, as argued, that the limitations of Art. II, §§ 12 [duration of legislative session] and 38 [scope and object], are binding only upon the legislative conscience, and that the courts must perpetually remain in ignorance of what everybody else in the state knows.⁶⁷

The court has declined to review legislative history to determine whether an amendment changed the scope and object of a bill in violation of article II, section 38 of the state constitution,⁶⁸ to determine whether members of the Senate were confused by the title of a bill,⁶⁹ or to determine whether a bill was passed after expiration of the constitutional session deadline.⁷⁰ It is conceivable that many other constitutional procedural requirements could be "binding only upon the legislative conscience" through operation of the enrolled bill doctrine.⁷¹ For example, would a litigant have standing to contest a law on the ground that a legislator with a private interest in the bill voted on it in violation of article II, section 30?⁷² On the other hand, some procedural violations would be obvious from the face of the bill. For instance, if a bill were passed by one body in one session and the other in a separate session, that violation would be obvious from the bill's face.⁷³

Washington's enrolled bill doctrine may be contrasted with the journal entry rule employed in other states.⁷⁴ Under the journal entry rule, the filing of an enrolled bill constitutes *prima facie* evidence of the legislature's compliance with its procedural requirements, but this presumption may be rebutted with evidence from legislative journals.⁷⁵ Washington's Supreme Court has specifically declined to reject the enrolled bill doctrine and substitute the journal entry rule.⁷⁶ In so reasoning, the Court noted that Justice Hoyt, whose opinion first announced the enrolled bill doctrine in *State ex rel. Reed v. Jones*,⁷⁷ had served as president of the Washington Constitutional Convention only four years earlier.⁷⁸ The *Reed* court rejected the journal entry rule as potentially confusing to the public:

67. *Power, Inc. v. Huntley*, 235 P.2d 173, 180-81 (Wash. 1951) (resolving the matter on other grounds).

68. *State ex rel. Bugge v. Martin*, 232 P.2d 833, 836-37 (Wash. 1951).

69. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 377 P.2d 466, 470 (Wash. 1962).

70. *State ex rel. Daschbach v. Meyers*, 229 P.2d 506, 507 (Wash. 1951).

71. *Power, Inc.*, 235 P.2d at 180-81.

72. Compare WASH. CONST. art. II, § 30, with WASH. STATE HOUSE RULE 19(D) (2004), and WASH. STATE SENATE RULE 22 (2004).

73. See 12 Op. Wash. State Att'y Gen. 1-4 (1965).

74. See, e.g., *People v. Dunigan*, 650 N.E.2d 1026, 1034 (Ill. 1995); *Minnehaha County v. S.D. Bd. of Equalization*, 176 N.W.2d 56, 58 (S.D. 1970).

75. *Roehl v. Pub. Util. Dist. No. 1*, 261 P.2d 92, 95 (Wash. 1953).

76. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 377 P.2d 466, 470 (Wash. 1962).

77. 34 P. 201, 202-03 (Wash. 1893).

78. *Wash. Toll Bridge Auth.*, 377 P.2d at 470.

There is enough injustice in requiring the citizen to take notice of the statute law, when to do so he only has to determine the legal effect of the enrolled acts on file in the office of the secretary of state, and if he is further required to take notice of all that is shown by the journals of the legislature which may affect the regularity with which such acts have been passed, he will indeed be in a sorry condition.⁷⁹

Notwithstanding the enrolled bill doctrine, courts have, in a variety of cases, reviewed legislative history and the sequence of amendments and bills to make constitutional determinations about a particular bill. In *Patrice v. Murphy*⁸⁰ and *State Legislature v. State* (“*Locke*”),⁸¹ the court reviewed legislative history to reach the conclusions that the legislation in question violated article II, section 19 (title/subject rule). Arguably, it is appropriate for the court to determine whether addition of amendments resulted in the “logrolling” that article II, section 19 is intended to prevent.⁸²

On the other hand, one could argue that violations of the title/subject rule ought to be apparent from the title and language of the bill, and that the court need not resort to legislative history to determine that the bill contains a second subject, or a subject outside the title. In the context of an initiative to the people, *Amalgamated* states that an article II, section 19 analysis of an initiative requires only examination of the ballot title and the measure itself—not the initiative’s “legislative history” of ballot description and statements.⁸³ Additionally, the review of legislative history in *Patrice*, for example, was probably not essential to the court’s conclusion that a requirement to provide interpreters for the hearing-impaired in law enforcement proceedings was outside the title of “an act relating to court costs.”⁸⁴ Nonetheless, *Patrice* and *Locke* may indicate judicial interest in scrutinizing the manner in which the laws were enacted.⁸⁵

79. *Reed*, 34 P. at 202.

80. 966 P.2d 1271, 1275 (Wash. 1998).

81. 985 P.2d 353, 363 (Wash. 1999).

82. *See Flanders v. Morris*, 558 P.2d 769, 772-73 (Wash. 1977) (evincing previous use of legislative history to find Article II, Section 19 violation); *Wash. Toll Bridge Auth.*, 200 P.2d at 472 (noting that Article II, Section 19 was designed to prevent logrolling, among other evils).

83. *Amalgamated Transit Union v. State*, 11 P.3d 762, 784 (Wash. 2000).

84. *Patrice*, 966 P.2d at 1274.

85. In one significant case, the court reviewed legislative history to reach a *substantive* conclusion of the bill’s unconstitutionality. In *DeYoung v. Providence Medical Center*, 960 P.2d 919 (Wash. 1998), the court invalidated, on equal protection grounds, an eight-year old statute of repose in medical malpractice cases. *Id.* at 925. Because one of the documents “before the Legislature” was a study showing that only a tiny percentage of such cases arose from claims reported more than eight years after the incident, the court concluded that the eight-year statute of repose lacked a rational relationship to the statute’s stated purpose of reducing malpractice premiums. *Id.*

IV. PARLIAMENTARY RULES: ARTICLE II, SECTION 9

“Each house may determine the rules of its own proceedings[.]”⁸⁶

Notwithstanding the various constitutional restrictions on the process of law-making, for the most part the quotidian activities of the legislature are shaped by the rule-making power of both bodies.⁸⁷ Compliance with parliamentary rules is essential to the orderly flow of legislation through the law-making process.

In many instances, parliamentary rules mirror the language of constitutional requirements, such as scope and object,⁸⁸ amendment without setting forth,⁸⁹ and title/subject.⁹⁰ When interpreting these rules, however, the presiding officer⁹¹ makes parliamentary rulings, not constitutional rulings.⁹² A parliamentary objection is waived if not timely raised,⁹³ but failure to raise a parliamentary objection, or even a favorable parliamentary ruling, does not prevent a court from considering the constitutional issue, subject, of course, to the enrolled bill doctrine.⁹⁴ Determinations of constitutional sufficiency may always be reviewed by a court.

Parliamentary rulings may also interact with constitutional requirements on the issue of the number of votes needed to enact legislation. For example, the presiding officer may be asked to determine whether a bill requires a two-thirds vote on the

86. WASH. CONST. art. II, § 9.

87. See 10 Op. Wash. State Att’y Gen. 2 (1965).

88. WASH. CONST. art. II, § 38; WASH. STATE SENATE RULE 66 (2004); WASH. STATE HOUSE RULE 11(E) (2004).

89. WASH. CONST. art. II, § 37; WASH. STATE SENATE RULE 26 (2004); WASH. STATE HOUSE RULE 11(F) (2004).

90. WASH. CONST. art. II, § 19; WASH. STATE SENATE RULE 25 (2004). The House does not have a comparable rule. Additionally, House Rule 11(G) prohibits the amendment of the substantive portion of a bill’s title, but such amendment is permitted in the Senate. WASH. STATE HOUSE RULE 11(G) (2004).

91. In the Senate it is either the President of the Senate, who is the Lieutenant Governor, or the President Pro Tempore of the Senate. WASH. STATE SENATE RULE 1, 2 (2004). In the House it is the Speaker of the House or the Speaker Pro Tempore. WASH. STATE HOUSE RULE 3 (2004).

92. Senate Journal, 55th Leg., Reg. Sess. 776 (Wash. 1998) (“The President does not normally respond to constitutional questions. However, the President cannot avoid interpreting a Senate Rule.”); see also Senate Journal, 57th Leg., 1st Spec. Sess. 1712 (Wash. 2001) (it may be “appropriate to rely on decisions by the Supreme Court interpreting Article II, Section 19.”).

93. Thomas B. Reed, Reed’s Parliamentary Rules # 112, page 58. Except as otherwise provided in the House and Senate Rules, Reed’s Rules govern procedure in the Washington legislature. WASH. STATE SENATE RULE 40 (2004); WASH. STATE HOUSE RULE 29 (2004).

94. Compare Senate Journal, 32nd Leg. Ex. Session 68 (Wash. 1951) (Under Senate’s title-subject rule, Senate president ruled against a bill that combined appropriations and taxes; this ruling was overridden by the Senate and the bill passed) with Power, Inc. Huntley, 235 P.2d 173, 198-99 (Was. 1951) (invalidating same legislation on art. II, sec. 19 grounds).

ground that it amends a ballot measure enacted within the last two years,⁹⁵ or whether a bill requires a three-fifths vote, on the ground that it expands gambling.⁹⁶ Again, the court retains authority to review the constitutional sufficiency of the votes. In the case of a vote total, the constitutional defect would be apparent from the enrolled bill's face, so the enrolled bill doctrine would likely not apply.

V. THE TITLE/SUBJECT RULE

A. Article II, Section 19

"No bill shall embrace more than one subject, and that [subject] shall be expressed in . . . [its] title."⁹⁷

Article II, section 19 encompasses two rules. First, under the "subject" rule, a bill must not have more than one subject.⁹⁸ This test is satisfied if there is "rational unity" between subparts of the bill.⁹⁹ Second, under the "subject in title" rule, the bill's subject must be expressed in the title.¹⁰⁰ The title must give notice of the bill's objective so as to reasonably indicate its contents.¹⁰¹

Article II, section 19 is intended to protect legislators and the people acting with legislative capacity against undisclosed subjects in bills, to apprise the public of the subjects under consideration, and to prevent "logrolling."¹⁰² This rule has been the source of much litigation in recent years,¹⁰³ particularly in light of the large number of initiatives challenged under the subject requirement. Initiatives receive the same degree of scrutiny under the title/subject rule as do bills passed by the legislature, notwithstanding arguments that initiatives pose a greater risk of title/subject violations.¹⁰⁴

95. WASH. CONST. art. II, § 41; see Senate Journal, 56th Leg., Reg. Sess. 842 (Wash. 2000).

96. WASH. CONST. art. II, § 24; see Senate Journal, 57th Leg., Reg. Sess. 420 (Wash. 2001).

97. WASH. CONST. art. II, § 19.

98. See *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 650, 652 (Wash. 2003).

99. *Id.* at 652.

100. *Id.* at 653.

101. *Id.*

102. *Wash. State Leg. v. State*, 985 P.2d 353, 362 (Wash. 1999) (quoting *Serv. Employees Int'l Union v. Superintendent of Pub. Instruction*, 705 P.2d 776, 781 (Wash. 1985)); *Patrice v. Murphy*, 966 P.2d 1271, 1274 (Wash. 1998); *Wash. Fed'n of State Employees v. State*, 901 P.2d 1028, 1040 (Wash. 1995) (Talmadge, J., concurring).

103. See cases cited *supra* note 102.

104. *Citizens for Responsible Wildlife Mgmt.*, 71 P.3d at 649; see *State v. Broadaway*, 942 P.2d 363, 368 (Wash. 1997); *Wash. Fed'n of State Employees*, 901 P.2d at 1039-40; *Fritz v. Gorton*, 517 P.2d 911, 944 (Wash. 1974); *Miller*, *supra* note 51, at 1063-64, 1071-84.

When analyzing an article II, section 19 question, it is important to remember that this section does not contain an actual prohibition on logrolling *per se*.¹⁰⁵ Rather, it requires a single subject and a subject expressed in the title.¹⁰⁶ Compromise is crucial to lawmaking, and both implicit and explicit compromises are contained in the majority of bills. Even when a bill contains trade-offs of the “crying evil”¹⁰⁷ or “you-scratch-my-back-and-I’ll-scratch-yours”¹⁰⁸ variety denounced by the courts, a violation of this provision does not necessarily follow.¹⁰⁹

B. Relevant Title for Article II, Section 19 Analysis

The requirements in article II, section 19 apply to both ballot initiatives and legislative bills. For bills, the title provides legislators with notice of the bill’s content and may affect the scope of amendments.¹¹⁰ For initiatives, the title informs voters both during the petition stage, when citizens decide whether to sign the measure and thereby place it before the other voters, and in the voting booth itself.¹¹¹

For a bill enacted by the legislature, the relevant title is the legislative title, specifically the portion of the title before the first semicolon.¹¹² House rules prohibit amendment of this portion of the title,¹¹³ Senate procedures permit such amendment.¹¹⁴ According to the court, article II, section 19 does not prohibit amendment of a bill’s title to cover the broadened scope of the bill; additional inquiry into title amendments is likely prohibited by the enrolled bill doctrine.¹¹⁵

For an initiative to the people, the relevant title for the article II, section 19 inquiry is the ballot title.¹¹⁶ The three reasons for this are: “because not all initiatives

105. Cf. *Pierce County v. State*, 78 P.3d 640, 647 (Wash. 2003) (referring to “the constitutional prohibition against legislative vote swapping”).

106. *Wash. Fed’n of State Employees*, 901 P.2d at 1042.

107. *Power, Inc. v. Huntley*, 235 P.2d 173, 178 (Wash. 1951).

108. *Id.*

109. See *Broadaway*, 942 P.2d at 369. See generally *Power, Inc.*, 235 P.2d at 178. Perhaps the most blatant logrolling occurs as trade-offs within the bill title, particularly in the case of the state construction budget, in which one member may support another’s project in order to ensure that his or her own district’s project is funded. See David Postman, *How All the Pet Projects Got Into Budget*, SEATTLE TIMES, Apr. 2, 2002, at A1, available at 2002 WL 3895702. In addition, the bond bill needed to support the expenditures authorized in the capital budget requires a 60% supermajority, per article VIII, section 1. *Id.* This means that the writers of the capital budget may load the bill up with projects to ensure the supermajority vote for the bond bill. *Id.* In addition, legislators may negotiate passage of other, unrelated legislation to secure votes for the bond bill. *Id.*

110. *Broadaway*, 942 P.2d at 367.

111. *Id.* at 368.

112. *Id.*

113. WASH. STATE HOUSE RULE 11(G) (2004).

114. WASH. STATE SENATE RULE 26 (2004).

115. *Schwarz v. State*, 531 P.2d 1280, 1282 (Wash. 1975).

116. The Attorney General prepares the ballot title for initiatives pursuant to WASH. REV.

have legislative titles; because it is the ballot title with which the voters are faced in the voting booth; and because it is the ballot title which can be appealed before an election and which thereafter appears on petitions and the ballot.”¹¹⁷

Where the legislature enacts an initiative certified to the legislature, “courts consider the legislative title, [because the legislative title,] not the ballot title” appears before the legislators.¹¹⁸ Again, since the purpose is to provide legislators with notice of the bill’s content, “[l]egislators who must decide whether to enact an initiative measure will be given notice within the meaning of article II, section 19, by the legislative title on the proposed bill.”¹¹⁹ This is true even though initiative signers may not read the entire text or explanatory statement of the petition and will rely on the ballot title in order to sign the initiative and thus place it before the legislature.¹²⁰

Where a bill is referred in whole or in part to the people, the ballot title is the operative title.¹²¹ “Because the people made the final decision as to whether Referendum 48 would be the law, the ballot title is the relevant title to assess that part of the legislation for compliance with art. II, § 19 [.]”¹²² For the portions not referred, the legislative title is the relevant title, because the ballot title was not before the legislature.¹²³

C. *The Single Subject Rule*

Simply put, article II, section 19 prohibits legislation from having more than one subject.¹²⁴ A classic example of the single subject rule is the “dognapping” case *Barde v. State*.¹²⁵ The bill in that case was entitled “AN ACT relating to the taking or withholding of property.”¹²⁶ One portion of the bill specifically criminalized dognapping, and the other section authorized attorneys’ fees in civil replevin cases against pawnbrokers.¹²⁷ While both sections fit technically within the title of the bill,

CODE § 29A.72.050 (2004) and WASH. REV. CODE § 29A.72.060. The title is limited to a 30-word description of the measure, with the question, “Should this measure be enacted into law?” *Id.*

117. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 783 (Wash. 2000); *see also* *Wash. Fed’n of State Employees v. State*, 901 P.2d 1028, 1034 (Wash. 1995).

118. *State v. Holm*, 957 P.2d 1278, 1283 (Wash. Ct. App. 1998).

119. *State v. Broadaway*, 942 P.2d 363, 368 (Wash. 1997).

120. *Id.*

121. WASH. REV. CODE § 29A.72.050(6) (establishing that the legislature may prepare the ballot title for a bill that is referred to the people).

122. *Brower v. State*, 969 P.2d 42, 57 (Wash. 1998).

123. *Id.* at 56-57.

124. *See Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 780-81 (Wash. 2000); *see also* *Wash. Fed’n of State Employees v. State*, 901 P.2d 1028, 1042 (Wash. 1995).

125. 584 P.2d 390 (Wash. 1978).

126. *Id.* at 390.

127. *Id.* at 390-91.

it violated the single subject rule due to the lack of a “nexus” connecting the two subparts.¹²⁸

Given the proliferation of high-profile title/subject challenges, however, analysis under article II, section 19 has grown more complicated in the last decade. Under the current analysis, the first inquiry is whether the title is general or restrictive.¹²⁹ “A general title is one which is broad rather than narrow.”¹³⁰ A general title receives a liberal construction, and “any subject reasonably germane to such title may be embraced within the body of the bill.”¹³¹ “[A]ll that is required is rational unity between the general subject and [its subdivisions].”¹³² The next step is to determine whether the subparts bear a rational relationship to each other.¹³³ In a restrictive title, “a particular part or branch of a subject is carved out and selected as the subject of the legislation.”¹³⁴ Provisions “not fairly within” a restrictive title will not be given force.¹³⁵

The “rational relationship” has formed the center of much of the court’s recent article II, section 19 analysis. In *Amalgamated*, the court framed this question as whether one part of the bill might be considered necessary to implement the other.¹³⁶ *Amalgamated* considered Initiative 695, and held, notwithstanding the general title, that the initiative’s tax repeals lacked an appropriate connection to the future restrictions on tax increases.¹³⁷ Both the title and the body of the act indicated that it had two subjects.¹³⁸ Initiative 722, which contained both future tax restrictions and an attempt to retrospectively nullify tax increases, was also stricken on the ground that it included two subjects “not germane” and “unnecessary and entirely unrelated” to each other.¹³⁹

Use of the term “necessary” was potentially in conflict with past cases. Many legislative enactments that have survived single subject rule challenges have contained subtopics that were related and complementary, but by no means

128. *Id.* at 391.

129. *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 650 (Wash. 2003) (quoting *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 781 (Wash. 2000)).

130. *See Amalgamated Transit Union Local 587*, 11 P.3d at 781 (citing examples of general titles).

131. *See id.* (quoting *De Cano v. State*, 110 P.2d 627, 634 (Wash. 1941)).

132. *Id.* at 782.

133. *Id.*

134. *State v. Broadaway*, 942 P.2d 363, 369 (Wash. 1997) (quoting *Gruen v. State Tax Comm’n*, 211 P.2d 651, 664 (Wash. 1949)); *see Amalgamated Transit Union Local 587*, 11 P.3d at 782-83.

135. *See Amalgamated Transit Union Local 587*, 11 P.3d at 782 (citing *Broadaway*, 942 P.2d at 369).

136. *Id.* at 786.

137. *Id.*

138. *Id.*

139. *City of Burien v. Kiga*, 31 P.3d 659, 664 (Wash. 2001).

“necessary,” to the other topics. For example, the *In re Boot* decision upheld an omnibus youth violence act, including juvenile and adult sentencing, firearms regulation, social services, media restrictions, and an implementing tax referendum as appropriate subparts of “violence prevention.”¹⁴⁰ Similarly, courts in the past have upheld initiatives against single-subject challenges. In *Fritz v. Gorton*, the court found “rational unity” between the subparts of an initiative that governed lobbying, campaign finance, public records disclosure, and disclosure of officials’ financial records.¹⁴¹ Likewise, the diverse campaign reform provisions of Initiative 134 satisfied the rational unity test in *Federation of State Employees v. State*.¹⁴²

As the *Wildlife Management* court later framed it, *Amalgamated* and *Burien* violated the single subject rule because their incidental subjects were not germane to one another.¹⁴³ In *Amalgamated*, the court identified the subparts as setting license tabs at \$30 and providing a continuing method of approving tax increases.¹⁴⁴ In *Burien*, the court said the subparts were nullifications of tax increases, a one-time refund, and a change of property tax assessments.¹⁴⁵ In both of those cases, the court said that the incidental subjects were unrelated and not germane to each other, even when there was the overarching subject of tax reduction.¹⁴⁶ Specifically, in *Amalgamated*, the court stated that “neither subject is necessary to implement the other.”¹⁴⁷

In *Wildlife Management*, the court receded somewhat from this position.¹⁴⁸ According to the court, Initiative 713 involved a general subject of regulating the methods of trapping and killing animals; its subparts were body-gripping traps and poisons.¹⁴⁹ In so holding, the court felt the need to clarify its earlier reasoning:

An analysis of whether the incidental subjects are germane to one another does not necessitate a conclusion that they are necessary to implement each other, although that may be one way to do so. . . . It is more likely that the statements made in *Amalgamated* and *City of Burien* in regard to the dual subjects being

140. 925 P.2d 964, 971-72 (Wash. 1996); see also *State v. Acevedo*, 899 P.2d 31, 33 (Wash. 1995), review denied, 911 P.2d 1343 (1996) (omnibus alcohol and controlled substances act, including treatment, involuntary commitment, sentencing, new crimes, and wiretapping).

141. 517 P.2d 911, 920-21 (Wash. 1974).

142. 901 P.2d 1028, 1034-35 (Wash. 1995).

143. *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 652-53 (Wash. 2003).

144. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 786 (Wash. 2000).

145. *City of Burien v. Kiga*, 31 P.3d 659, 664 (Wash. 2001).

146. See *Amalgamated Transit Union Local 587*, 11 P.3d at 786; *City of Burien*, 31 P.3d at 664.

147. *Amalgamated Transit Union Local 587*, 11 P.3d at 786.

148. 71 P.3d at 653.

149. *Id.* at 651-52.

unnecessary to implement the other were made to further illustrate how unrelated the two were.¹⁵⁰

Arguably, if subparts were required to be “necessary” to each other, then they would not be separate subdivisions in the first place. The *Wildlife Management* court buttressed this reasoning with the conclusion that *Burien*, *Amalgamated*, and *Toll Bridge I* all contained dual subjects, but each had one subject that was “more broad, long term and continuing than the other, a characteristic that suggests logrolling may be at issue.”¹⁵¹

The state supreme court recently held in *Pierce County v. State* that “policy fluff,” such as precatory or “intent” statements, does not constitute an “additional subject” within the meaning of this section.¹⁵² Initiative 776 contained provisions relating to vehicle licensing fees; it also contained a statement of “policy and purpose” regarding politicians’ need to keep their promises, and a statement of “legislative intent” relating to repayment of existing bonds.¹⁵³ The court concluded that article II, section 19 was intended to prevent combination of “unrelated laws.”¹⁵⁴ Since the precatory statements were “indisputably devoid of any legal effect,” they were not additional subjects.¹⁵⁵ The dissent expressed concern that “proponents of future legislation will be encouraged to add inoperative subjects to sell their proposal with empty (and probably unfunded) promises.”¹⁵⁶

D. Remedies for Violation of the Single Subject Rule

If legislation contains more than one subject, the sole remedy is invalidation of the entire measure, since there is no basis for the court to determine the “real” subject of the legislation, and there is no way to tell whether either subject would have passed on its own.¹⁵⁷

150. *Id.* at 653.

151. *Id.*

152. 78 P.3d 640, 648-49 (Wash. 2003).

153. *Id.* at 646-48.

154. *Id.* at 647 (emphasis in original) (quoting *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 784 (Wash. 2000)).

155. *Id.* at 652. A question, however, is whether the lack of legal effect would be “indisputably” clear to the average informed voter.

156. *Id.* at 653 (Chambers, J., dissenting); *cf.* *Wash. Ass’n of Neighborhood Stores v. State*, 70 P.3d 920, 930 (Wash. 2003) (Sanders, J., dissenting) (opining that Initiative 773 should have been invalidated as having a title that did not declare its subject; since the majority determined that the initiative did not constitute an appropriation, the initiative’s promise of funding was invalid).

157. *City of Burien v. State*, 31 P.3d 659, 664 (Wash. 2001).

E. *The Subject-in-Title Rule*

Legislation complies with the subject-in-title rule if it “gives notice to voters which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind.”¹⁵⁸ “But the title need not be an index to the contents, nor must it provide details of the measure.”¹⁵⁹ There is some judicial variation on what constitutes the title for this purpose. In most cases, courts look at the “substantive” provisions of the title, or the portion before the first semicolon.¹⁶⁰ In other cases, courts have been willing to look at the “technical” portions of a title as well.¹⁶¹

The purpose of the subject-in-title rule is to notify legislators, or voters, of the legislation’s subject matter.¹⁶² This requirement is particularly important in the context of initiatives because voters will often not reach the text of a measure or the explanatory statement, but will instead cast their votes based on the ballot title.¹⁶³

Again, the general versus restrictive title analysis applies. “A restrictive title expressly limits the scope of the act to that expressed in the title.”¹⁶⁴ Where a title is restrictive, the entire bill is considered restrictive, meaning that the provisions of the act that are not fairly within the title will not be given force.¹⁶⁵

F. *What Must Be Expressed in the Title*

Most technical items need not be expressed in the substantive portion of a bill’s title.¹⁶⁶ For purposes of an article II, section 19 analysis, the court looks to “the narrative description. . . , not to the ministerial recital of the sections of the bill.”¹⁶⁷ For example, repeal of a statute may be a subject of the legislation without being

158. *Citizens for Responsible Wildlife Mgmt v. State*, 71 P.3d 644, 653 (Wash. 2003).

159. *Id.* at 653-54 (citing *Amalgamated Transit Union Local 587*, 11 P.3d at 786).

160. *See Retired Pub. Employees Council v. Charles*, 62 P.3d 470, 485 (Wash. 2003).

161. *Id.*

162. *Amalgamated Transit Union Local 587*, 11 P.3d at 786.

163. *Id.*; *Wash. Fed’n of State Employees v. State*, 901 P.2d 1028, 1033 (Wash. 1995). Additionally, an incomplete or misleading ballot title potentially confuses voters into signing the measure and thereby placing it on the ballot. *State v. Broadway*, 942 P.2d 363, 368 (Wash. 1997).

164. *Amalgamated Transit Union Local 587*, 11 P.3d at 783; *Broadway*, 942 P.2d at 369.

165. *State v. Thorne*, 921 P.2d 514, 524 (Wash. 1996); *State v. Cloud*, 976 P.2d 649, 655 (Wash. Ct. App. 1999).

166. *State v. Thomas*, 14 P.3d 854, 860 (Wash. Ct. App. 2000).

167. *Id.* (citing *Sorenson v. Kittitas Reclamation Dist.*, 127 P. 102, 104 (Wash. 1912) (“enumeration of the numbers of the sections in the title of the amendatory act is unnecessary and may be treated as surplusage.”)).

expressly indicated in the title.¹⁶⁸ The substance of the repealed section, however, must be within the title's expressed subject.¹⁶⁹

Nor can substantive changes be made in the guise of technical corrections. The *Fray* case involved a recodification contained in an act relating to "technical corrections."¹⁷⁰ In *Fray*, the legislature had recodified a right to sue provision that was intended to apply only to members of LEOFF Retirement Plan 1 but had been codified under a portion of the LEOFF Chapter that pertained to both plans 1 and 2.¹⁷¹ The court held that readers would be misled into thinking that the bill merely contained technical corrections, when it in fact made a substantive change that eliminated the apparent right of plan 2 members.¹⁷²

No violation of article II, section 19 occurs when the title contains material not embraced in the bill: "The short and simple answer is that we will not embark upon such an investigation because the enrolled-bill doctrine, long a citadel in our law, forbids, and matter embraced in the title not included in the body of the act is disregarded as surplusage."¹⁷³ Likewise an overly broad title does not violate this section: "a title may be broader than the statute and still be good as to the subject it fairly indicates."¹⁷⁴

G. Remedies for Violation of Subject-in-Title

Any section containing a subject that is *not* expressed in the title may be stricken without affecting those that *are* expressed in the title "unless they are so inextricably intertwined."¹⁷⁵ For example, where the ballot title of the "three-strikes" initiative referred to three-time offenders, under the rule its provisions relating to first-time offenders were stricken.¹⁷⁶ Similarly, where a statute repealing the criminal profiteering laws was itself repealed in "an act relating to insurance fraud," the

168. *Wash. Fed'n of State Employees*, 901 P.2d at 1035.

169. *See, e.g., Thomas*, 14 P.3d at 860. In *Thomas*, a bill entitled "AN ACT Relating to insurance fraud" repealed a law that established the automatic repeal of criminal profiteering statutes. *Id.* at 809-10. The title did "not inform even the most intelligent, astute reader that the effect of the bill is to continue the life" of the criminal profiteering laws. *Id.*

170. *Fray v. Spokane County*, 952 P.2d 601, 609 (Wash. 1998).

171. *Id.* at 608-09.

172. *Id.* at 609.

173. *Wash. Toll Bridge Auth. v. Yelle*, 377 P.2d 466, 470 (Wash. 1962) (citing *Whitfield v. Davies*, 138 P. 883 (Wash. 1914)).

174. *Howlett v. Cheetham*, 50 P. 522, 525 (Wash. 1897); *see also Gruen v. State Tax Comm'n*, 211 P.2d 651, 664 (Wash. 1949) ("It is not an objection that . . . [the title] covers more than the subject of the body of the act, but it must not, in any event, cover less.").

175. *Charron v. Miyahara*, 950 P.2d 532, 538 (Wash. Ct. App. 1998).

176. *State v. Cloud*, 976 P.2d 649, 655-56 (Wash. Ct. App. 1999).

criminal profiteering laws remained in effect, but only as to crimes relating to insurance fraud.¹⁷⁷

H. *Unique Status of the Budget Bill Under the Title/Subject Rule*

Because the operating budget bill must fund the diverse needs of the entire state government, courts have traditionally given the legislature a fair amount of latitude under article II, section 19 for "AN ACT Relating to fiscal matters."¹⁷⁸ At the same time, this section restricts the legislature's ability to include substantive law in budget legislation.

Washington's legislature does not produce a line-item operating budget document.¹⁷⁹ Instead, the budget contains lump sum appropriations to individual agencies and uses budget provisos to condition, limit, or earmark the lump sum appropriations.¹⁸⁰ Because the budget is one of the few pieces of legislation that must pass in every session, the courts consider it a "tempting target" for the sort of logrolling that article II, section 19 was designed to prevent.¹⁸¹

In various cases that considered budget legislation under article II, section 19, courts have concluded that this section prohibits substantive law in the budget. "[A] budget bill, by its nature, appropriates funds for a finite time period—two years—while substantive law establishes public policy on a more durable basis."¹⁸² In the court's view, substantive law could include anything from an income tax,¹⁸³ to a proviso that conflicted with codified law,¹⁸⁴ to a proviso that placed limits on the right to access benefits created in the budget.¹⁸⁵ In particular, courts have disapproved of "law which could not pass on its own merit, under a proper title, bec[oming] law by being slipped into . . . a [lengthy] appropriations bill."¹⁸⁶

177. *State v. Thomas*, 14 P.3d 854, 862 (Wash. Ct. App. 2000).

178. *See Retired Pub. Employees Council v. Charles*, 62 P.3d 470, 484-85 (Wash. 2003); *Flanders v. Morris*, 558 P.2d 769, 771, 773 (Wash. 1977) ("expenditures by state agencies and offices of the state").

179. *See Wash. State Leg. v. Lowry*, 931 P.2d 885, 892 (Wash. 1997); *see also* Stephen Masciocchi, Comment, *The Item Veto in Washington*, 64 WASH. L. REV. 891, 895-96 (1989).

180. Masciocchi, *supra* note 179, at 895-96.

181. *Wash. State Leg. v. State*, 985 P.2d 353, 362 (Wash. 1999); *see also Flanders*, 558 P.2d at 773.

182. *Wash. State Leg.*, 985 P.2d at 362.

183. *Power, Inc. v. Huntley*, 235 P.2d 173, 180 (Wash. 1951) (regarding operating appropriations and corporate excise tax).

184. *Flanders*, 558 P.2d at 774-75. *Flanders* noted that, "It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to prevent the enactment of a certain provision, even though he would have voted against it if it had been presented as independent legislation." *Id.* at 772.

185. *Wash. State Leg.*, 985 P.2d at 363.

186. *Flanders*, 558 P.2d at 772.

In *Locke*, the court established a three-prong, non-exhaustive test to determine when the legislature had improperly placed substantive law in the budget bill: the proviso affected rights or liabilities, the proviso had previously been contained in other legislation, or the proviso appeared to outlast the biennium covered by the budget.¹⁸⁷ The court used this reasoning to invalidate a budget proviso that required a co-payment for state-funded child care.¹⁸⁸ The court was suspicious of the proviso, given that it had previously passed the legislature in a separate bill that was vetoed by the governor.¹⁸⁹

More recently, the court seems inclined to grant additional flexibility to the legislature without scrutinizing the prior legislative history of budget items. In the *Charles* decision, the court upheld inclusion of revisions to pension contribution rates in the budget on the grounds that the changes fit within the title, "AN ACT Relating to fiscal matters."¹⁹⁰ The changes did not affect individual rights or liabilities, and the budget had incorporated and amended the relevant codified statutes.¹⁹¹ Despite having previously included the contribution rate changes in separate legislation, the court found there "are any number of reasons why" the section changing the rates was deleted from the other bill; accordingly this past treatment of the rate change did not show that the change was substantive legislation incapable of being passed on its own merits.¹⁹²

Finally, mere inclusion of an appropriation in a bill does not render it an "appropriations" bill for purposes of the heightened concern under this section.¹⁹³ So long as a substantive bill otherwise satisfies rational unity, it may contain appropriations to execute the purposes of the bill without violating the single subject requirement.¹⁹⁴

187. *Wash. State Leg.*, 985 P.2d at 363; see *Flanders*, 558 P.2d at 773 (adding restrictions to public assistance eligibility); *Wash. Toll Bridge Auth. v. Yelle*, 342 P.2d 466, 592 (Wash. 1962) (diverting excise tax proceeds).

188. *Wash. State Leg.*, 985 P.2d at 363.

189. *Id.*

190. *Retired Pub. Employees Council v. Charles*, 62 P.3d 470, 488 (Wash. 2003).

191. *Id.* at 485-86; see also 6 Op. Wash. State Att'y Gen. 6 (1987) (noting that legislature could set policy in the budget by amending the relevant codified law in the budget bill); cf. *In re Matteson*, 12 P.3d 585, 589-90 (Wash. 2000) (In that case, the legislature included a budget section that amended a statute regarding prisoner transfer. The following year, the legislature passed a separate "clarifying" bill that retroactively granted the authority contained in the budget section. This curative amendment negated the "substantive" element of the budget proviso.).

192. *Charles*, 62 P.3d at 485.

193. *State v. Acevedo*, 899 P.2d 31, 34 (Wash. Ct. App. 1995).

194. *Id.*

I. *Procedural Rules and Article II, Section 19*

Senate Rules contain a restriction that parallels the requirements of article II, section 19. Senate Rule 66 recites the constitutional language verbatim and, at various times, has been used as a basis for a procedural title/subject challenge on the Senate floor.¹⁹⁵ The House rules do not contain a similar requirement. In contrast, House Rule 11(G) prohibits amendments of the substantive portion of the title.¹⁹⁶

VI. STYLE OF LAWS: ARTICLE II, SECTION 18

“The style of the laws of the state shall be: ‘Be it enacted by the Legislature of the State of Washington.’ And no law shall be enacted except by bill.”¹⁹⁷

A measure cannot become law unless it is either passed as an initiative; proposed as a bill, passed by a constitutional majority in both houses, presented to the governor, and either signed by the governor or re-passed over the governor’s veto; or proposed as a bill, passed by a constitutional majority of both houses, referred to the voters, and adopted by a majority of those voting.¹⁹⁸ A resolution of one house is not law.¹⁹⁹ Even a joint resolution lacks the force of law, since it has not been approved by the governor (or passed over the governor’s veto).²⁰⁰ This means, for example, that in the face of a budget impasse the legislature could not use resolutions to provide funding for the continued operation of government.²⁰¹

Insistence on an enacting clause pre-dates the state constitution. In territorial times, the legislative assembly enacted a bill making Vancouver the capital; during the same session, it passed another bill placing the question of the state capital’s location before the voters.²⁰² The vote pursuant to that bill chose Olympia.²⁰³ After that legislative session ended, both statutes were found to be missing enacting clauses and dates of enactment.²⁰⁴ The resulting dispute was brought directly to the Territorial Supreme Court in the form of a challenge to the court’s jurisdiction to hear any of the cases that had been docketed for that term in Olympia.²⁰⁵ The grounds of

195. WASH. STATE SENATE RULE 66 (2004); Senate Journal, 55th Leg., Reg. Sess. 776 (Wash. 1998); Senate Journal, 57th Leg., 3rd Sp. Sess. 1712 (Wash. 2001).

196. WASH. STATE HOUSE RULE 11(G) (2004).

197. WASH. CONST. art II, § 18.

198. *State ex rel. Todd v. Yelle*, 110 P.2d 162, 165-66 (Wash. 1941).

199. *Id.*

200. *See id.*

201. *See* 11 Op. Wash. State Att’y Gen. 4 (1977). Additionally, article VIII, section 4 requires all appropriations to be in the form of laws. WASH. CONST. art. VIII, § 4.

202. *See* Gerry L. Alexander, *The Courts of the Washington Territory 1853-1889*, WASHINGTON STATE BAR NEWS, Nov. 2003, at 23-25.

203. *See id.*

204. *Id.* at 24.

205. *The Seat of Gov’t Case*, 1 Wash. Terr. 115 (1861).

the challenge were that Olympia, due to the action of the legislature, was not the legal seat of government.²⁰⁶ The court concluded that the Vancouver statute should be struck down because of the absence of an enacting clause and date of passage, describing it as "born into the world without date, without an enacting clause, and without paternity[.]"²⁰⁷ and further stating that "[a] conflict of opinion between the legislative and judicial branches of the government is always to be regretted,"²⁰⁸ but that if an act is "wanting in the essential formalities and solemnities ... it is inoperative and void[.]"²⁰⁹

VII. AMENDMENT WITHOUT SETTING FORTH

A. Article II, Section 37

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."²¹⁰

This provision requires that legislation be complete in itself or show explicitly how it relates to the statutes it amends.²¹¹ Article II, section 37 is intended to inform the public and the legislature of the nature and effect of proposed changes, to protect against fraud and deception, and to avoid the confusion that would result from disconnected sections scattered throughout the code.²¹² The purpose of article II, section 37, applies equally to initiatives and bills.²¹³ Whether an act is an amendment within the meaning of this section does not require the section to appear amendatory on its face; rather, the question is whether it changes a prior act in scope or effect.²¹⁴ The article does not apply to repealers, however, because by its own text it pertains only to acts that are "revised or amended."²¹⁵ Also, it does not prohibit reference statutes which refer to and adopt by reference other statutes.²¹⁶

A classic example of the article II, section 37 violation is a budget proviso that conflicts with, or modifies, codified law.²¹⁷ The court has reasoned that budget language which conflicted with codified law violated this provision of the

206. *Id.* at 116.

207. *Id.* at 117.

208. *Id.* at 119.

209. *Id.* at 123.

210. WASH. CONST. art. II, § 37.

211. *See Retired Pub. Employees Council v. Charles*, 62 P.3d 470, 486 (Wash. 2003).

212. *See id.* at 486 (quoting *Spokane Grain & Fuel Co. v. Lyttaker*, 109 P. 316, 319 (Wash. 1910)).

213. *State v. Thome*, 921 P.2d 514, 521 (Wash. 1996) (citing *Yelle v. Kramer*, 520 P.2d 927, 932 (Wash. 1974)); *see also Flanders v. Morris*, 558 P.2d 769, 773 (Wash. 1977).

214. *Weyerhaeuser Co. v. King County*, 592 P.2d 1108, 1114 (Wash. 1979).

215. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 805 (Wash. 2000).

216. *Gruen v. State Tax Comm'n*, 211 P.2d 651, 665 (Wash. 1949).

217. *See Flanders*, 558 P.2d at 774.

constitution because the codified statute would never reflect the change; the problem being that the “[o]ne seeking the law on the subject would have to know one must look under an ‘appropriations’ title in the *uncodified* session laws to find the amendment.”²¹⁸

The court continues to recite a two-part test to analyze article II, section 37.²¹⁹ First, is the new enactment so complete that the scope of the rights or duties created or affected can be determined without referring to any other statute or enactment?²²⁰ Second, would a straightforward determination of the scope of rights or duties under existing statutes be rendered erroneous by the new statute?²²¹

More recently, the court in *Amalgamated* emphasized the first prong of this test, reasoning that the second prong should not be used “in isolation,” because an act that is complete in itself may still result in the reader of an existing statute being unaware that there is new law on the subject.²²² The *Amalgamated* court returned to the inquiry of whether an act is complete in itself, rather than whether existing statutes would be rendered erroneous by the new enactment.²²³ Consequently, the court now appears to focus on a distinction between “complete” and “amendatory” acts.²²⁴ “[A]n act is exempt from the requirements of article II, section 37 . . . [if it] ‘is complete in itself, independent of prior acts, and stands alone as the law on the particular subject of which it treats.’”²²⁵

On the other hand, an act is amendatory and hence subject to article II, section 37 if it changes the scope or effect of a prior statute,²²⁶ even though nearly every piece of general legislation modifies existing statutes to some extent.²²⁷ Codifying the modifications within the same chapter may negate the argument that an act does not show how it modifies existing law.²²⁸ This section does not prohibit the passage of a

218. *Id.* at 774 (emphasis in original); *see also* Wash. Educ. Ass’n v. State, 604 P.2d 950, 952 (Wash. 1980) (budget proviso invalidated this provision when it purported to limit school districts’ ability to set salaries; this was a modification of school district’s codified authority to set salaries).

219. Retired Pub. Employees Council v. Charles, 62 P.3d 470, 486 (Wash. 2003) (citing Wash. Educ. Ass’n v. State, 652 P.2d 1347, 1349 (Wash. 1982)).

220. *Id.*

221. *Id.*

222. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 804 (Wash. 2000).

223. *Id.* at 804.

224. *Id.* at 800.

225. *Id.* (quoting *State ex rel. Living Servs., Inc. v. Thompson*, 630 P.2d 925, 927-28 (Wash. 1981)).

226. *Charles*, 62 P.3d at 486 (citing *State ex rel. Arnold v. Mitchell*, 104 P. 791, 793 (Wash. 1909)); *see* *Weyerhaeuser Co. v. King County*, 592 P.2d 1108, 1114 (Wash. 1979).

227. *Charles*, 62 P.3d at 486 (citing *Holzman v. City of Spokane*, 157 P. 1086, 1089 (Wash. 1916)); *see also* Wash. Ed. Ass’n v. State, 652 P.2d 1347, 1351 (Wash. 1982).

228. *See, e.g., Wash. Ed. Ass’n*, 652 P.2d at 1351.

law that fully declares its terms without direct reference to other laws, even though its effect may be to enlarge or restrict the operation of other statutes.²²⁹

As a practical matter, it is difficult to apply the tests set forth in the cases interpreting this section. If the test is no longer whether the new enactment renders an existing statute erroneous,²³⁰ then it is hard to judge when an act is sufficiently complete in itself. The opinions seem to conflate analyses regarding *exemption* from article II, section 37 with laws that are presumptively subject to, but do not *violate*, that provision.²³¹ Furthermore, it is difficult to determine how this constitutional drafting provision relates to standard principles of statutory construction such as the duty to harmonize and the presumption against implied repeal.

B. *Recent Application of the Tests*

The *Amalgamated* court held that voter approval requirements for Initiative 695 were incomplete since the requirement did not stand alone on the subject.²³² Specifically, the court reasoned that the effect of these requirements on existing local government voter approval provisions was unclear, making the initiative incomplete.²³³ If, for example, the initiative had said that its requirements supplemented, but did not replace, the existing requirements, would the initiative have been complete? The initiative also failed the second prong of the test since it did not set forth the existing affected statutes, nor did it show how they were impacted.²³⁴

In *Wildlife Management*, opponents of the initiative argued that its restrictions on trapping and poisoning were not complete because they did not show how those restrictions affected a landowner's existing right to trap or kill damage-causing wildlife.²³⁵ They also argued, under the second prong, that the initiative rendered the existing statute ambiguous.²³⁶ The court rejected the "completeness" argument, stating that the rights created and affected by Initiative 713 were complete in themselves because they could be determined without referring to other statutes.²³⁷ As to the second prong, the court rejected the opponents' argument by concluding that the initiative did not affect the statutory *right* to trap, but merely the *manner* of

229. Wash. Citizen Action v. Office of Ins. Comm'r, 971 P.2d 527, 529 (Wash. Ct. App. 1999).

230. See *Amalgamated Transit Union Local 587*, 11 P.3d at 801.

231. See *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 656 (Wash. 2003); see also *Wash. Citizen Action*, 971 P.2d at 529 (finding the complete act "not subject" to article II, section 37).

232. *Amalgamated Transit Union Local 587*, 11 P.3d at 806.

233. *Id.*

234. *Id.*

235. *Citizens for Responsible Wildlife Mgmt.*, 71 P.3d at 655.

236. *Id.*

237. *Id.*

trapping.²³⁸ Ultimately, the court employed this reasoning to conclude that the existing statute covered *whether* animals may be trapped or killed, and the initiative governed the *manner* in which animals may be trapped or killed, thus the initiative did not violate the constitution.²³⁹

In the recent *Charles* case, the court dealt with the issue of statutory amendments in the budget bill, upholding budget language against an article II, section 37 challenge.²⁴⁰ If amendments of existing law are required to implement the budget, and if those amendments may be made in the budget bill under the title/subject rule, the legislature has a practice of incorporating those amendatory sections into the budget bill. In *Charles*, for example, the legislature amended the pension rate statutes in the budget bill.²⁴¹ The court upheld this practice under article II, section 37, concluding that anyone referencing the codified law would see that the statute had been modified, so the changes did not contravene the purposes of the provision.²⁴²

C. Remedy for Violation

In *Amalgamated*, the state argued that if the initiative violated article II, section 37, the remedy should be a declaration that the other affected statutes remain in force rather than an invalidation of that section of the initiative.²⁴³ The court rejected this reasoning and held that invalidation of the unconstitutional section is the only remedy for a violation of article II, section 37.²⁴⁴

VIII. SCOPE & OBJECT

A. Article II, Section 38

“No amendment to any bill shall be allowed which shall change the scope and object of the bill.”²⁴⁵

The framers adopted this provision to give notice of changes to the law and to protect the legislature and the public from deceptive practices by preventing the change in scope and object of bills before either legislative chamber.²⁴⁶ In the view of the courts, “scope of a bill refers to the boundaries or limits of the legislation,

238. *Id.*

239. *Id.* at 656.

240. *See generally* Retired Pub. Employees Council v. Charles, 62 P.3d 470 (Wash. 2003).

241. *Id.* at 476.

242. *Id.* at 487.

243. Amalgamated Transit Union Local 587 v. State, 11 P.3d 762, 806 (Wash. 2000).

244. *Id.*

245. WASH. CONST. art. II, § 38.

246. *In re Metcalf*, 963 P.2d 911, 922 (Wash. Ct. App. 1998); UTTER & SPITZER, *supra* note 11, at 71.

sometimes referred to as a bill's ultimate intention. The object of legislation is its aim, purpose, end, or goal.²⁴⁷ This prohibition applies only to proposed changes to a bill (including amendments and substitute bills); it does not prevent the legislature from subsequently enacting any change to a statute.²⁴⁸ Using the enrolled bill doctrine, the state supreme court has indicated that article II, section 38 may or may not be "binding only upon the legislative conscience,"²⁴⁹ so it is unclear whether the court would recognize a legal challenge to legislation based on the scope and object rule. Regardless of the enrolled bill doctrine's limitations on article II, section 38, the courts may still consider whether the amendment results in a second subject or a subject outside the title in violation of article II, section 19.

B. *Parliamentary Rulings*

As a practical matter, the scope and object issue is important on the floors of both legislative bodies due to the procedural rules that prohibit amendments from exceeding a bill's scope and object.²⁵⁰ Although the rules replicate the constitutional language, it is important to remember that the presiding officer interprets parliamentary procedure, not constitutional law.²⁵¹ Similarly, the above-cited judicial definition of scope and object is not necessarily binding on the presiding officer.²⁵²

The parliamentary scope and object analysis may consider, among other things, the bill's title, the text of the bill, and the chapters and statutes amended by the bill.²⁵³ Prior scope and object rulings in committee or in the other body are not necessarily relevant.²⁵⁴ One presiding officer explained that amendments should be for the purpose of perfecting the bill rather than expanding it.²⁵⁵

IX. ORIGIN AND AMENDMENT OF BILLS: ARTICLE II, SECTION 20

"Any bill may originate in either house of the legislature, and a bill passed by one house may be amended in the other."²⁵⁶

247. *In re Metcalf*, 963 P.2d at 922 (quoting Senate Journal, 50th Leg., Reg. Sess. 761 (Wash. 1988)).

248. *Ex parte Hulet*, 292 P. 430, 434 (Wash. 1930).

249. *Power, Inc. v. Huntley*, 235 P.2d 173, 180-81 (Wash. 1951) (declining to reach the issue of whether the scope and object restriction was violated).

250. WASH. STATE SENATE RULE 66 (2004); WASH. STATE HOUSE RULE 11(E) (2004).

251. *See* Senate Journal, 55th Leg., Reg. Sess. 776 (Wash. 1998).

252. *See* Senate Journal, 56th Leg., Reg. Sess. 1078 (Wash. 2000).

253. *See, e.g.*, Senate Journal, 56th Leg., Reg. Sess. 1078 (Wash. 2000); Senate Journal, 56th Leg., Reg. Sess. 1067 (Wash. 1999); House Journal, 54th Leg., Reg. Sess. 357 (Wash. 1995).

254. Senate Journal, 56th Leg., Reg. Sess. 1078 (Wash. 2000).

255. House Journal, 52nd Leg., Reg. Sess. 273 (Wash. 1991).

256. WASH. CONST. art II, § 20.

Under this section, the non-originating body may have the opportunity to amend a bill before it can validly be passed.²⁵⁷ This section may be contrasted with the federal Constitution, which requires that revenue generating legislation originate in the U.S. House of Representatives.²⁵⁸

Legislation recommended by a "free conference committee" was challenged under this provision because, per joint rules of the legislature, bills produced by such a joint committee may not be amended in either body.²⁵⁹ The state supreme court rejected this challenge since the conference committee procedure did not interfere with either body's ability to amend the bill when it first appeared before the respective body.²⁶⁰ "The necessity of compromise is inherent in the legislative system, and we cannot conceive that the framers of the constitution intended to forbid the resolution of differences."²⁶¹

X. APPROPRIATION AUTHORITY AND THE MYTH OF THE CONSTITUTIONAL "BALANCED BUDGET REQUIREMENT"

A. Article VIII, Section 4

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.²⁶²

B. The Appropriation Requirement

An appropriation is an authorization to incur a maximum expenditure.²⁶³ Under article VIII, section 4, any expenditure from funds and accounts in the treasury demands a piece of legislation that authorizes the expenditure²⁶⁴ and that has been

257. *Id.*

258. U.S. CONST. art. I, § 7, cl. 1.

259. *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 492 P.2d 1012, 1014 (Wash. 1972).

260. *Id.* at 1014-15.

261. *Id.* at 1015.

262. WASH. CONST. art. VIII, § 4.

263. *See id.*

264. *Id.*

enacted according to all the procedural requirements that apply to legislation.²⁶⁵ According to the state supreme court, article VIII, section 4 contains three requirements.²⁶⁶ First, it prohibits payment of moneys out of the state treasury without an appropriation.²⁶⁷ Second, it renders appropriations temporary in nature by "requir[ing] payments pursuant to an appropriation to be made within one calendar month after the end of the biennium [for] which the appropriation is made."²⁶⁸ Third, it requires each appropriation to specify an amount and a purpose.²⁶⁹

The finite nature of appropriations bills means that the state government would virtually come to a halt if a budget were not enacted by the beginning of the fiscal biennium on July 1 of odd-numbered years.²⁷⁰ Actually, the Budget and Accounting Act requires the new biennial budget to be enacted by May 31 of odd-numbered years,²⁷¹ but fortunately this requirement does not subject legislators to individual liability.²⁷²

In *Neighborhood Stores*, the court addressed Initiative 773, which generated new tax revenue and earmarked it for particular public health purposes, specifying that certain amounts shall be appropriated for those purposes.²⁷³ Opponents of the measure challenged these provisions, claiming that they created an unconstitutional continuing appropriation in violation of article VIII, section 4's single biennium requirement.²⁷⁴ The court disagreed:

A direction to the legislature (even the use of the word "shall") to make an appropriation is not itself an appropriation. Critically, the direction is not self-

265. WASH. CONST. art. II, § 19 (title/subject rule); *Id.* § 22 (passage of bills by majority of members); WASH. CONST. art. II, § 37 (amendment without reference); *Id.* § 38 (prohibiting amendments that alter scope and object); WASH. CONST. art. III, § 12 (presentment to governor and governor's veto powers).

266. *Wash. Ass'n of Neighborhood Stores v. State*, 70 P.3d 920, 923 (Wash. 2003).

267. *Id.*

268. *Id.* In legislative sessions held during odd-numbered years, the legislature adopts a biennial budget for the ensuing fiscal biennium. *See* WASH. REV. CODE § 43.88.020(7) (2004): For example, in the 2003 legislative session, the legislature adopted a budget for the two-year period beginning July 1, 2003; under article VIII, section 4, expenditures made pursuant to these appropriations must be paid by August 1, 2005. WASH. CONST. art. VIII, § 4. In the following two years of the fiscal biennium, the legislature may enact supplemental budgets to adjust these appropriation levels. *Id.*

269. *Wash. Ass'n of Neighborhood Stores*, 70 P.3d at 923.

270. *See* WASH. REV. CODE § 43.88.130 (2004) (prohibiting state agencies from expending money in excess of appropriations); 11 Op. Wash. State Att'y Gen. 3 (1977) (outlining consequences of failure to timely adopt a budget).

271. *See* WASH. REV. CODE § 43.88.080 (2004).

272. *See* 21 Op. Wash. State Att'y Gen. 2-3 (1979) (noting that statute is directory rather than mandatory and is directed at the legislature as a whole rather than members individually).

273. 70 P.3d at 923.

274. *Id.* at 922.

executing and it is up to the legislature to make an appropriation every biennium. The legislature retains the power to appropriate or not.²⁷⁵

C. "Binding" a Future Legislature

In *Neighborhood Stores*, the court found that the statute in question did not create an unlawful continuing appropriation which would extend over multiple biennia, and hence over multiple legislatures.²⁷⁶ The presumptive unconstitutionality of such a continuing appropriation has led to the oft-cited principle that you cannot bind a future legislature.²⁷⁷ This concept is not entirely true. It would be more accurate to say that most things done by one legislature can be undone by another legislature. For example, some legislation rises to the level of a contract that receives the constitutional protection of article I, section 23, which prohibits the impairment of contracts.²⁷⁸ But absent contractual protection or some other form of constitutional restriction,²⁷⁹ nothing prevents one legislature from amending the work of a previous legislature.²⁸⁰

D. Spending Without an Appropriation

Some processes permit state agencies to make expenditures without appropriations.²⁸¹ Although the constitution requires tax revenue to be deposited into the treasury,²⁸² non-appropriated accounts are deemed in the custody of the treasurer and hence not subject to the constitutional appropriation requirements.²⁸³ Most often, non-appropriated accounts are either "proprietary" or "revolving" accounts that are replenished by payments from other agencies or receipts from fee-for-service activities, or accounts from which statutory benefits are paid, such as pension and

275. *Id.* at 924.

276. *Id.* at 923-24.

277. *See generally id.*

278. WASH. CONST. art. I, § 23; *see Weaver v. Evans*, 495 P.2d 639, 649-50 (Wash. 1972).

279. School funding may be one example of a constitutional restriction. Under a decision of the Thurston County Superior Court, once the legislature has defined and fully funded a program of basic education as required by article IX, section 1 and the first *Seattle School District v. State* ruling, its duty to fund that definition is not suspended during times of fiscal crisis, though presumably the legislature retains the ability to make a commensurate adjustment in the basic education definition. Findings and Conclusions at 60-62, *Seattle Sch. Dist. v. State*, (Thurston County Super. Ct. 1983) (No. 81-2-1713-1) (citing *Seattle Sch. Dist. v. State*, 585 P.2d 71, 95 (Wash. 1978)).

280. *Cf.* WASH. CONST. art. II, § 20.

281. 4 Op. Wash. State Att'y Gen. 1-2 (1959-60).

282. WASH. CONST. art. VII, § 6.

283. *Yelle v. Bishop*, 347 P.2d 1081, 1091-92 (Wash. 1959); 4 Op. Wash. State Att'y Gen. 1-2 (1959-60).

workers' compensation accounts.²⁸⁴ Additionally, the unanticipated receipts process permits expenditure of some non-state moneys without an appropriation if the moneys were not anticipated in the budget.²⁸⁵

E. *The Myth of the "Balanced Budget Amendment"*

Contrary to popular belief, neither Washington's Constitution nor its Budget and Accounting Act require the legislature to enact a balanced budget. At times, even the state's supreme court²⁸⁶ and governor²⁸⁷ have appeared to share this belief. On the contrary, Washington's Constitution expressly contemplates borrowing for operating expenditures.²⁸⁸ As a practical matter, the state's Budget and Accounting Act requires the governor to submit a balanced budget and to make across-the-board reductions in allotments if a cash deficit is projected in any account.²⁸⁹

Controversy has arisen regarding the governor's ability to make across-the-board reductions. In the 1981-82 budget crisis, the legislature passed an amendment to the Budget and Accounting Act that delegated to the governor the authority to make selected reductions in allotments of appropriations²⁹⁰ in order to avoid a deficit in the general fund.²⁹¹ A previous decision of the state supreme court upheld the general constitutionality of the Budget and Accounting Act, including the governor's authority to make uniform allotment reductions in order to ensure that expenditures did not exceed appropriations and to keep expenditures within available revenues.²⁹² A legislator, then-Senator and future state Supreme Court Justice Phil Talmadge, challenged the legislation on the grounds that it unconstitutionally delegated the legislature's budgeting authority to the governor.²⁹³ In an opinion that has since formed a key part of the "common law" of legislative budgeting, the Thurston County Superior Court agreed, rejecting the statute's attempt to give the governor

284. See WASH. REV. CODE § 43.88.020(9) (2004).

285. § 43.79.270(1).

286. *Lowry*, 131 Wn.2d at 316.

287. Office of Governor Gary Locke, Press Release, January 15, 2002 (discussing State of the State Address); Governor Gary Locke, State of the State Address, January 15, 2002).

288. See WASH. CONST. art. VIII, § 1.

289. WASH. REV. CODE § 43.88.110(8).

290. See § 43.88.020(23) (explaining that allotments are an expenditure plan approved by the office of Financial Management); § 43.88.110 (8).

291. See § 43.88.110(8).

292. *Yelle v. Bishop*, 347 P.2d 1081, 1090-91 (Wash. 1959); see also Court's Oral Opinion at 7, *Wash. Fed'n of Pub. Employees v. State*, (Thurston County Super. Ct. Oct. 15, 1982) (No. 82-2-1014-3).

293. Court's Oral Opinion at 9, *Wash. Fed'n of Pub. Employees* (No. 82-2-1014-3).

discretion over reduction of allotments.²⁹⁴ The court reasoned that under article VIII, section 4, the legislature:

in fixing the appropriation for an office or agency of state government, must exercise its judgment as to the apportionment of available revenue to the needs of existing state agencies and offices. Of necessity, this requires the exercise of legislative judgment in establishing priorities in respect to available funds. Once fixed through the legislative budget-making process, the priorities established therein in the budget or appropriation act cannot be altered by the Governor except by uniformed [sic] reduction of allotments, which presumably would preserve the priorities as earlier established.²⁹⁵

The court ruled that the legislature may not delegate to the governor the ability to use discretion, nor may it substitute the governor's judgment for the collective judgment of the lawmaking body.²⁹⁶

XI. PASSAGE OF LEGISLATION: ARTICLE II, SECTION 22

No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.²⁹⁷

In several instances, the constitution requires super-majority votes to enact legislation,²⁹⁸ but this provision establishes the number of votes ordinarily required to pass a bill.²⁹⁹ In the event of a special session or sessions, this section requires separate passage by both houses during a single session.³⁰⁰

A significant question is whether this section merely sets a minimum, allowing statutes to require super-majority votes for specific types of legislation, or whether it establishes a constitutional standard that may not be supplemented by statute. *Amalgamated Transit* and *Gerberding* both held that certain constitutional requirements are exclusive and may not be supplemented by statute.³⁰¹ Initiative

294. *Id.* at 7-14, 21.

295. *Id.* at 13-14.

296. *Id.* at 20.

297. WASH. CONST. art. II, § 22.

298. *See* WASH. CONST. art. II, § 1(c) (two-thirds vote to amend ballot measure within two years after enactment); *Id.* sec. 24 (sixty percent vote to authorize lottery); *Id.* art. III, sec. 12 (two-thirds vote to override a veto); *Id.* art. VIII, sec. 1(i) (sixty percent vote to authorize debt)."

299. *Id.* § 22.

300. 12 Op. Wash. State Att'y Gen. 9 (1965-66).

301. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 796-98 (Wash. 2000) (constitution establishes exclusive process for referendum; legislation may not require statewide

601, which established state general fund expenditure limits, contains a two-thirds vote requirement to increase revenue or exceed the expenditure limit.³⁰² Legislators and others challenged this super-majority requirement shortly after it was enacted in 1993, but the state supreme court declined to address the issue, reasoning the question was presented prematurely.³⁰³

Although a variety of questions could be raised under this section, none have been presented to the courts. For example, if the vote count was manifestly insufficient, yet the documents were duly certified, would the court apply the enrolled bill doctrine and uphold the legislation? Would the court consider a challenge to a statutory super-majority requirement if legislation received a constitutional majority, but the presiding officer refused to sign because the a statutory vote requirement had not been met?

XII. DURATION OF LEGISLATIVE SESSION

A. *Article II, Section 12 (Amendment 68)*

During each odd-numbered year, the regular session shall be not more than one hundred five consecutive days. During each even-numbered year, the regular session shall not be more than sixty consecutive days. . . . Special legislative sessions may be convened for a period of not more than thirty consecutive days by proclamation of the governor pursuant to Article III, section 7 of this Constitution. Special legislative sessions may also be convened for a period of not more than thirty consecutive days by resolution of the legislature[.]³⁰⁴

B. *Article III, Section 7*

[The governor] may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened.³⁰⁵

Prior to amendment 68, regular sessions took place in odd-numbered years only, but by the 1970s special sessions in even-numbered years had become commonplace.³⁰⁶ After Governor Ray declined to call a special session in 1978, the

referendum); *Gerberding v. Munro*, 949 P.2d 1366, 1367-68 (Wash. 1998) (constitutional qualifications for legislative office may not be supplemented in statute).

302. 1994 Wash. Laws ch. 2, §§ 3-4; WASH. REV. CODE § 43.135.035 (2004).

303. *Walker v. Munro*, 879 P.2d 920, 933 (Wash. 1994).

304. WASH. CONST. art. II, § 12.

305. WASH. CONST. art. III, § 7.

306. WASH. CONST. art. II, § 12 (amended by WASH. CONST. amend. 68).

legislature passed and the voters adopted a new version of article II, section 12.³⁰⁷ The revised version established sixty day regular sessions in even-numbered years, and authorized the legislature to call itself into special session.³⁰⁸ Additionally, amendment 68 stated the governor's declared purpose in calling an extra session pursuant to article III, section 7 "shall be considered by the legislature but shall not be mandatory."³⁰⁹

Special or extraordinary sessions are considered new sessions rather than continuation of prior sessions.³¹⁰ This means that legislation must be passed separately by both bodies in the same session.³¹¹ The legislature may provide by resolution that all measures introduced but not enacted or adopted during the prior session be reintroduced at the new session.³¹²

In 1971, several pieces of legislation allegedly passed well after the clock struck midnight on the last day of the special session.³¹³ Reportedly, the clocks in both bodies were stopped at 11:55 P.M.³¹⁴ When asked about the likely validity of these bills, the attorney general opined that the enrolled bill doctrine would be a defense, and had been so in earlier cases.³¹⁵ In *dicta*, *Power, Inc. v. Huntley* stated that article II, section 12 might be "binding only upon the legislative conscience."³¹⁶

XIII. EMERGENCY CLAUSES AND THE RIGHT OF REFERENDUM

A. Article II, Section 1 (Amendment 7)

[A referendum] may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions[.]³¹⁷

307. *See id.*

308. *Id.*

309. *Id.*

310. 12 Op. Wash. State Att'y Gen. 3 (1965).

311. *Id.* at 9.

312. 10 Op. Wash. State Att'y Gen. 7-8 (1965).

313. 73 Op. Wash. State Att'y Gen. 1, 5-6 (1971) (citing *Morrow v. Henneford*, 47 P.2d 1016, 1020 (Wash. 1935)).

314. *Id.* at 1.

315. *Id.* at 4-5.

316. *Power, Inc. v. Huntley*, 235 P.2d 173, 180-81 (Wash. 1951).

317. WASH. CONST. art.II, § 1(b).

B. *Article II, Sections 1 (Amendment 7) and 41 (Amendment 26)*

No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted.³¹⁸

Standard Emergency Clause :

This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.³¹⁹

C. *Creation of Exceptions from the Referendum Power*

The filing of a referendum petition suspends the operation of a statute, and if successful, can entirely overturn it; consequently, the constitution includes two exceptions from the referendum power: emergency police power legislation and legislation needed for the support of state government and its existing institutions.³²⁰

Courts and historians have concluded that Washington included this provision in amendment 7 because the voters of Oregon had created difficulties for that state by passing referenda rescinding the appropriations for the University of Oregon.³²¹ The Washington court explained that the referendum exemptions were intended to avoid the "error that Oregon had made [so that Washington] . . . should not be put to the embarrassments that might follow an agitation which could be supported and a vote compelled by a number of the electors so small that it may be said to be merely nominal."³²²

The standard emergency clause derives from the previously stated constitutional language on the referendum power. Although earlier cases indicate the legislature may not thwart the referendum power by tacking an emergency clause onto an act,³²³ the legislative decision to attach an emergency clause is now subject only to minimal judicial scrutiny.³²⁴ Such declarations "are deemed conclusive unless they are

318. *Id.* §§ 1(c), 41.

319. WASH. OFFICE OF THE CODE REVISER, BILL DRAFTING GUIDE pt. II, § 10(k) (2003).

320. *See Even, supra* note 49, at 281 (quoting WASH. CONST. art. II, § 1(b)).

321. *Id.*

322. *State ex rel. Blakeslee v. Clausen*, 148 P. 28, 31 (Wash. 1915).

323. *State ex rel. Humiston v. Meyers*, 380 P.2d 735, 738 (Wash. 1963).

324. An interesting question is whether the legislature may order a referendum on a matter that would otherwise be exempt if the referendum were sought by the voters. *See Even, supra* note 49, at 289-90. For example, if the legislature needed to enact new taxes to balance the budget, could the tax legislation, which undoubtedly would be for the support of the state government, be referred to the people? The purpose of the exceptions to the referendum power is to avoid the disruptions to government that would occur if emergent legislation were delayed by a referendum campaign, and arguably this disruption does not occur if the legislature itself sends the measure to the voters. *Id.; cf.*

'obviously false and a palpable attempt at dissimulation.'"³²⁵ Washington courts have never required the legislature make express findings of fact regarding an emergency.³²⁶ Nonetheless, legislative drafters should consider including findings of fact regarding emergent conditions.³²⁷

The legislature may order a referendum on only part of an act,³²⁸ and the people may seek a referendum on only part of an act.³²⁹ In the latter case, the ability to seek the referendum is still limited by the deference given to the legislature's declaration of emergency.³³⁰

D. *Exceptions from the Referendum Power*

Although the text of the constitution omits the "or" between the two clauses, courts have historically read the constitutional language to encompass two separate exemptions.³³¹ This means the word "immediate" does not modify the governmental support exception.³³² The current "emergency clause" includes both conditions, emergency police power and support of government, even though conceivably only one of the two conditions may apply to any particular bill.³³³

E. *Emergent "Police Power" Exception*

Courts generally equate the constitutional phrase "public peace, health or safety" with the state's police power.³³⁴ "The police power . . . is an attribute of sovereignty, an essential element of the power to govern, and this power exists without declaration, the only limitation upon it being that it must reasonably tend to promote some interest of the State, and not violate any constitutional mandate."³³⁵ Again, this

In re Boot, 925 P.2d 964, 970-72 (Wash. 1996) (upholding RCW 13.04.030(1)(e)(iv) against multiple-subject challenge; the omnibus bill included public health, firearms regulation, adult and juvenile sentencing, and a tax referendum; sentencing changes were contingent on enactment of tax referendum). On the other hand, if a fiscal crisis is looming, could the legislature be said to have abandoned its role by referring a crucial tax or budget measure to the voters?

325. *City of Tacoma v. Luvenc*, 827 P.2d 1374, 1387 (Wash. 1992) (quoting *State ex rel. Hamilton v. Martin*, 23 P.2d 1, 4 (Wash. 1933)); see also *CLEAN v. State*, 928 P.2d 1054, 1066-67 (Wash. 1996); *Brower v. State*, 969 P.2d 42, 58-59 (Wash. 1998).

326. See Even, *supra* note 49, at 285-86 n.293.

327. See *CLEAN*, 928 P.2d at 1073 (Guy, J., concurring and dissenting).

328. *Brower*, 969 P.2d at 50.

329. *State ex rel. Pennock v. Coe*, 257 P.2d 190, 195 (Wash. 1953).

330. See, e.g., *id.*

331. *State ex rel. Hoppe v. Meyers*, 363 P.2d 121, 125 (Wash. 1961).

332. *Id.*

333. *Id.*

334. *CLEAN v. State*, 928 P.2d 1054, 1065 (Wash. 1996).

335. *Id.*

goes back to the constitutional principle that the legislature is free to legislate on any topic, subject only to constitutional limitations.³³⁶ Even the right of the people to place referenda on legislation does not override an emergency legislative use of the police power.³³⁷

F. *Support of State Government Exception*

The exception from the referendum power for the "support of the state government and its existing public institutions"³³⁸ is perhaps even more broad than the police power exception. Both appropriations³³⁹ and tax³⁴⁰ bills fall within this category, as do other revenue measures like lotteries.³⁴¹ In the past, the support of state government exception has protected an act from referendum even when the legislature did not include an express emergency clause in the bill.³⁴² Yet, just as the court will give great deference to legislative intent to include an emergency clause, the court will also give weight to any legislative intent expressed in the *omission* of an emergency clause. In a recent example, the legislature attached an emergency clause to one portion of a bill revising unemployment insurance taxes, but did not apply an emergency clause to the remainder:³⁴³ The court inferred the legislature did not intend to exclude the tax revisions from the people's referendum power.³⁴⁴

XIV. FREEDOM OF DEBATE

A. *Article II, Section 17*

No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.³⁴⁵

336. *Id.*

337. *Id.*

338. WASH. CONST. amend. VII, § 1(b). †

339. *See, e.g., State ex rel. Helm v. Kramer*, 510 P.2d 1110, 1119 (Wash. 1973) (noting appropriations for state officials' salaries).

340. *See State ex rel. Reiter v. Hinkle*, 297 P. 1071, 1073 (Wash. 1931) ("[s]tatutes levying taxes are laws for the 'support of the state government and its existing public institutions' to the same or even a greater extent than are appropriation bills.").

341. *See, e.g., Farris v. Munro*, 662 P.2d 821, 827 (Wash. 1983).

342. *State ex rel. Pennock v. Reeves*, 179 P.2d 961, 963 (Wash. 1947) (overruled on other grounds).

343. *Wash. State Labor Council v. Reed*, 65 P.3d 1203, 1208-09 (Wash. 2003).

344. *Id.* at 1210.

345. WASH. CONST. art. II, § 17.

B. *Article II, Section 11*

Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other.³⁴⁶

Although many elements of article II indicate the framers' intent to promote legislative openness, at the same time some provisions of the state constitution demonstrate the framers' understanding that a legislature may also need to operate in a confidential environment.³⁴⁷ Given modern public disclosure expectations, as well as current trends in litigation, Washington courts may be called upon to decide whether the state constitution creates a legislative privilege that is insulated from judicial interference.

Article II, section 17 of the Washington Constitution provides that "No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate."³⁴⁸ At the federal level and in other states, similar constitutional "Speech and Debate" clauses have provided a privilege against discovery of non-public legislative documents.³⁴⁹ This provision may also protect legislators and their staff from being compelled to provide testimony.³⁵⁰

Washington's courts have yet to determine whether article II, section 17 creates a comparable privilege. No appellate Washington decision examines the extent to which litigants may seek discovery of legislative records other than those already made public, nor whether legislators or staff may be permitted, or even required, to testify about the history of legislative acts.³⁵¹ Conceivably, litigants could make

346. *Id.* § 11.

347. *Id.*

348. *Id.* § 17.

349. *See, e.g.,* *MINIPECO, S.A. v. Conticommodity Serv., Inc.*, 844 F.2d 856, 856 (D.C. Cir. 1988) (quashing subpoena for committee staff director and document custodian to testify and produce documents). *See generally* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221 (2003).

350. *See, e.g.,* *Gravel v. United States*, 408 U.S. 606, 616 (1972) (granting protective order to prohibit questioning senator's aide about legislative acts); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983) (quashing subpoena for former congressman to testify regarding material placed in Congressional Record); *State v. Beno*, 341 N.W.2d 668, 680 (Wis. 1984) (subpoena quashed).

351. In the first round of Washington's school funding litigation, plaintiffs deposed legislators as part of their challenge to the school financing system. *Seattle Sch. Dist. v. State*, 585 P.2d 71 (Wash. 1978). Apparently, no attempt was made to quash these subpoenas on the basis of legislative privilege. It does not appear that this particular aspect of discovery provided information useful to the court. Judge Doran's oral opinion cites legislative history, including floor speeches, Court's Mem. Opinion, at 48, 63-64 *Seattle Sch. Dist. v. State*, (Thurston County Super. Ct. Jan. 14, 1977)

discovery requests for draft legislation, preliminary recommendations, legal memoranda, and similar non-public documents in an attempt to demonstrate legislative purpose, intent, or motivation.³⁵²

Article II section 17, though framed in an article that imposes many procedural restrictions on the act of legislating, should be viewed as a positive constitutional liberty accorded by the framers to the legislative branch. In conjunction with this constitutional liberty, Washington ethics statutes,³⁵³ public disclosure laws,³⁵⁴ and

(Cause No. 53950), failed legislation, *id.* at 41-42, 48, and resolutions enacted by one body, *id.* at 42-44, n.15A, but its reasoning does not appear to rely directly on deposition testimony of members or staff. (Judge Doran did cite deposition testimony of House Ways & Means Chairman John Bagnariol for the well-recognized proposition that reliance on levies had increased. *Id.* at 26-27.). Legislative staffers were also deposed in the *City of Ellensburg v. State* case, which involved a legislative decision to fund a service at less than the level apparently required by the applicable statute; though the Supreme Court considered legislative history, it did not appear to rely on the testimony of staff. 826 P.2d 1081 (Wash. 1992).

352. Under the public records laws, for the Secretary of the Senate and the Chief Clerk of the House of Representatives, "public records" are "legislative records" as defined under the state archiving statutes, along with budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated as a public record by official action of the Senate or the House. *See* WASH. REV. CODE §§ 40.14.010, 40.14.120, 40.14.140 (2002). The archiving statutes define "legislative records" as:

[C]orrespondence, amendments, reports, and minutes of meetings *made by or submitted to legislative committees or subcommittees* and transcripts or other records of hearings or supplementary written testimony or data thereof *filed with committees or subcommittees* in connection with the exercise of legislative or investigatory functions, *but does not include* the records of an official act of the legislature kept by the secretary of state, bills and their copies, published materials, digests, or multi-copied matter which are routinely retained and otherwise available at the state library or in a public repository, *or reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature.*

WASH. REV. CODE § 40.14.100 (emphasis added).

353. WASH. REV. CODE § 42.52.050(2)-(3) prohibits state officials and employees from making unauthorized disclosure of confidential information acquired by the official or employee in an official capacity, nor may an official or employee disclose confidential information to any person not authorized or entitled to receive the information. "Confidential information" is "specific information, rather than generalized knowledge, that is not available to the general public on request" or is "information made confidential by law." WASH. REV. CODE § 42.52.010(6).

354. WASH. REV. CODE § 42.17.310(i) establishes an exemption from otherwise applicable public disclosure requirements for "[p]reliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action." *See generally* Progressive Animal Welfare Soc. v. Univ. of Wash., 884 P.2d 592, 599-600 (Wash. 1994) (quoting *Hearst Corp. v. Hoppe*, 580 P.2d 246, 252 (Wash. 1978)) (purpose of the exemption is to "protect the give and take of deliberations necessary to formulation of agency policy"; it only protects "documents which are part of 'a deliberative or policy-making process . . . Moreover, unless disclosure would reveal and expose the deliberative process, as distinct from the facts upon which a decision is based, the exemption does not apply.'").

House and Senate employment standards³⁵⁵ create an expectation of confidentiality that may establish legal protection for the confidentiality of non-public documents and information. This protection promotes the full and free discussion of public policy issues and options.

Above all, article II, section 17 creates a privilege that is constitutional in nature and thus superior to public disclosure statutes. Because the essential legislative act, passing legislation, is conducted in open chambers, courts may lack understanding of the discussion and deliberation that take place prior to a bill's being made public. Analysis of the deliberative process exemption from the public disclosure laws must not be the end of the inquiry. Unlike actions of executive branch agencies, or even the judicial branch, where individuals' rights are assessed and determined, the only truly relevant legislative document is the enrolled bill:

Litigants disputing the meaning of a statute before an agency or in court might seek to revise or augment the legislative record by obtaining a draft of a legislative document or by questioning individual members and staff, when the legislative product instead should stand on its own merits, in whatever form and context the legislature as an institution has chosen to fashion it.³⁵⁶

This concern seems to weigh in favor of using article II, section 17 to apply a broad evidentiary privilege to non-public legislative documents and discussions.

Significantly, state public disclosure laws should not be viewed as a waiver of, or exception to, the constitutional privilege. The legislature has voluntarily subjected itself to the public disclosure laws, although the definition of a legislative public record differs from the general definition of a public record, resulting in potentially greater protection for legislative documents.³⁵⁷ The courts, in contrast, view themselves as exempt from the public disclosure laws, on the ground that the common law protects the openness of court files,³⁵⁸ notwithstanding the breadth of the statutory definition of agency.³⁵⁹ Given increased litigation against public entities

355. Memorandum from the House Office of Program Research 2 (Jan. 14, 2003) (on file with author) ("Staff vigorously guard confidentiality and members can be assured that confidential matters will not be disclosed."); Memorandum from the Wash. State Senate Comm. Serv. 1 (Nov. 2000) (on file with author) ("SCS staff should assume that information relating to matters of policy, if not publicly available, is confidential We are expected to maintain the confidentiality of all policy matters under development for Senators."); Legislative Ethics Board, Advisory Opinion No. 1 (1998) (on file with author) (advising that unauthorized disclosure of draft legislation and other confidential information is a violation of the state ethics laws).

356. Huefner, *supra* note 349, at 276-77.

357. Compare WASH. REV. CODE § 42.17.020(36) (2004) (general definition refers to legislative public record definition), with WASH. REV. CODE § 40.14.100 (legislative public record definition).

358. *Nast v. Michels*, 730 P.2d 54, 58 (Wash. 1986).

359. WASH. REV. CODE § 42.17.020(1) (2004) states:

under the state's public disclosure laws, it is important that the courts recognize the significance of this constitutional provision.

XV. THE GOVERNOR'S LEGISLATIVE POWERS: PRESENTMENT AND VETO

A. Article III, Section 12

Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If . . . he approves, he shall sign it; but if not, he shall return it, with his objections . . . If [the] bill presented to the governor contain[s] several sections or appropriation items, he may object to one or more sections or appropriation items while approving other portions of the bill: *Provided*, That [sic] he may not object to less than an entire section, except that if the section contain[s] one or more appropriation items he may object to any such appropriation item or items.³⁶⁰

The extent of the governor's veto power was one of the most debated subjects at the constitutional convention.³⁶¹ Originally, article III, section 12 authorized the governor to individually veto "one or more sections or items while approving other portions of the bill."³⁶² Amendment 62, adopted in 1974, attempted to clarify the veto power by restricting the item veto power to appropriations items while clarifying that in other bills the governor may not veto less than an entire section.³⁶³ According to the court, the framers intended the item veto power to both permit the governor to achieve fiscal restraint by eliminating "pork barrel" programs and "permit the governor to disentangle issues so that they will be considered on their individual merits."³⁶⁴ The court explained that the latter consideration is consistent with the framers' fear of logrolling and other abuses of legislative power.³⁶⁵

'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

Before the legislature added an express reference to legislative records in 1995, a superior court held that "agency" included the legislature even where it did not include the courts. *Libertarian Party of Wash. State v. Brown*, (Thurston County Super. Ct. July 12, 1995) (No. 92-2-03278-1) at 2 (mem.).

360. WASH. CONST. art. III, § 12.

361. See UTTER & SPITZER, *supra* note 11, at 86-87 (citing contemporary news articles).

362. WASH. CONST. art. III, § 12 (amended 1974).

363. *Id.*

364. *Wash. State Leg. v. Lowry*, 931 P.2d 885, 889-90 (Wash. 1997).

365. *Id.* at 890.

For a bill to become law, article III, section 12 requires it to be presented to the governor, and thus risk the governor's disapproval.³⁶⁶ The legislature may avoid the presentment requirement, and hence the governor's veto power, only if it refers the legislation to the people for a vote.³⁶⁷ Washington does not have a pocket veto.³⁶⁸ If the governor does not sign or veto the legislation within the constitutionally prescribed period, it becomes law without the governor's signature.³⁶⁹ When vetoing legislation, the governor acts in a legislative capacity, and the governor's intent cannot be considered apart from the legislature's intent.³⁷⁰ The governor's veto message provides evidence of the governor's intent when acting in this legislative capacity.³⁷¹

In recent years, the *Legislature v. Lowry* and *Legislature v. State* ("Locke") opinions have provided clarification of the governor's veto powers, though they did not create *per se* tests. In general, the governor may not veto less than an entire section of a bill.³⁷² In a bill containing appropriations, the governor may generally not veto less than an entire proviso (typically a subsection of the bill).³⁷³ The court will defer to the legislative determination of what constitutes an individual section or proviso unless "it is obviously designed to circumvent the Governor's veto power and is a 'palpable attempt at dissimulation.'"³⁷⁴ Where drafting "so alters the natural sequences and divisions of a bill to circumvent the Governor's veto power," the court may permit the governor to veto less than a full section or item.³⁷⁵

The governor's veto of budget items may result in a change in the level of appropriations. Budget provisos constitute appropriation "items" that may be individually vetoed; for example, veto of "dollar provisos," which earmark funds within lump sum appropriations, result in reduction of the overall appropriation.³⁷⁶

366. WASH. CONST. art. III, § 12.

367. See *State ex rel. Lofgren v. Kramer*, 417 P.2d 837, 838 (Wash. 1966); see also 18 Op. Wash. State Att'y Gen. 4 (1965-66) (any portion not referred must be presented for the governor's signature and is subject to veto).

368. See generally WASH. CONST. III. 3, § 12.

369. *Id.*

370. *Spokane County Health Dist. v. Brockett*, 839 P.2d 324, 331 (Wash. 1992); *State v. Brasel*, 623 P.2d 696, 699-700 (Wash. Ct. App. 1981).

371. *State Dep't of Ecology v. Theodoratus*, 957 P.2d 1241, 1247 (Wash. 1998); *State v. Anderson*, 501 P.2d 184, 188 (Wash. 1972).

372. *Wash. State Leg. v. Lowry*, 931 P.2d 885, 891-92 (Wash. 1997) (modifying *Wash. State Motorcycle Dealers Ass'n v. State* 763 P.2d 442 (Wash. 1988)).

373. *Wash. State Leg. v. State*, 985 P.2d 353, 358-59 (Wash. 1999); *Lowry*, 931 P.2d at 892-93 n.8.

374. *Lowry*, 931 P.2d at 891 (quoting *State ex rel. Hamilton v. Martin*, 23 P.2d 1, 4 (Wash. 1933)).

375. *Id.*

376. *Id.* at 892-94.

Similarly, if the governor vetoes a reduction of an appropriation, as in a supplemental budget, the appropriation returns to the previous level.³⁷⁷

B. *Comments on the Veto Power from an Article II Perspective*

According to the Washington Supreme Court, there “is no more difficult and controversial aspect of relations between our branches of government than the Governor’s use of the veto.”³⁷⁸ The court declined to offer a “bright line” definition of when impermissible manipulation of a section or subsection has occurred,³⁷⁹ but it is interesting to see how quickly the court will infer legislative manipulation. For example, in a noncontroversial bill involving milk products, the legislature repealed numerous sections by drafting a single repealer with multiple subsections, each repealing a separate section.³⁸⁰ The legislature followed standard drafting format in constructing this section.³⁸¹ Inadvertently, the repealer section repealed two sections that were amended elsewhere in the bill, rendering the act internally inconsistent.³⁸² The governor vetoed two of the individual section repealers found in the subsections, and all parties agreed that the governor’s veto was ministerial in nature.³⁸³

Because each subsection repealed an entire existing act or section, the court found it:

difficult to understand how the repeal of an entire section of the Revised Code of Washington can escape the Governor’s section veto power simply because the Legislature designated the repeal a “subsection” of a larger section of a bill. Each of the “subsections” of § 513 was previously a “section” of a bill.³⁸⁴

The court therefore deemed that the legislature had drafted this section to evade the governor’s veto power.³⁸⁵ According to the court, the governor would have been

377. *Id.* at 896.

378. *Id.* at 888.

379. *Lowry*, 931 P.2d at 891-92.

380. 1994 Wash. Laws ch. 143, § 513; *see Lowry*, 931 P.2d at 891.

381. *See* STATUTE LAW COMMITTEE, BILL DRAFTING GUIDE 11 (2003), *available at* <http://slc.leg.wa.gov/BillDraftingGuide/RCWBDG.htm>.

382. *See Lowry*, 931 P.2d at 891.

383. *Id.* The final bill report for the legislation described the veto as “correct[ing] a technical error in the repealer section,” SSB 6096, 1994, ch. 143 (Wash. 1994), *reprinted in* FINAL LEG. REP., at 173 (1994), and the governor’s veto message stated his purpose to be curing “internal inconsistency,” Governor’s veto message to SSB 6096, 1994, ch. 143 (Wash. 1994), *reprinted in* Sess. Laws, pamphlet 2, at 705 (1994). *See also* Wash. Fed’n of State Employees, AFL-CIO, Council 28, *AFSCME v. State*, 682 P.2d 869, 873-74 (Wash. 1984) (upholding the veto of isolated references to a vetoed section as a “ministerial act,” and deleting “manifestly obsolete” references).

384. *Lowry*, 931 P.2d at 891.

385. *Id.*

faced with the Hobson's choice of vetoing the "entire legislation" [sic]³⁸⁶ when the other 100 subsections were plainly acceptable to the governor, or "letting the entire legislation [sic] become law."³⁸⁷ While the court here reasonably concluded that the governor should be able to veto subsections under these circumstances, it is interesting how quickly the court assumed legislative disingenuity.³⁸⁸

The court has indicated that the remedy for overly expansive vetoes is found within the constitution,³⁸⁹ not with the judicial branch: "Henceforth, should a governor in such situations wish to veto anything in any section, the governor should veto the 'entire section' containing the material considered to be objectionable; then the Legislature may or may not attempt to override the gubernatorial veto as it deems fit."³⁹⁰ Commentators have also urged increased overrides as the best way for the legislature to assert its role in the balance of powers.³⁹¹ More recently, in *Lowry*, the court stated that the legislature should have attempted an override of the allegedly flawed vetoes before it sought to have the court overturn them on constitutional grounds.³⁹²

A later article by Justice Talmadge elaborated on this theory, claiming that "under proper principles of exhaustion, the litigants in *Washington Legislature v. Lowry* should have first resorted to available political remedies by seeking an override of the governor's veto."³⁹³ In the same paragraph, he noted that the plaintiffs in *Gerberding v. Munro* may have "failed the exhaustion test by not introducing a bill to amend the term limits initiative."³⁹⁴ He added that the *Gerberding* litigants "had a strong futility argument where the initiative measure could only be ended by a two-thirds vote of both houses of the legislature,"³⁹⁵ but evidently this same futility argument would not apply to the equally high vote threshold for a legislative attempt to override a veto.

386. *Id.* Presumably the court meant "the entire *section*" because the bill contained multiple sections. *Id.*

387. *Id.* at 891. Again, presumably the court meant "section."

388. *Id.*

389. WASH. CONST. art. III, § 12.

390. Wash. State Motorcycle Dealers Ass'n v. State, 763 P.2d 442, 448 (Wash. 1988).

391. See, e.g., Heidi A. Irvin, Comment, *Washington's Partial Veto Power: Judicial Construction of Article III, Section 12*, 10 U. PUGET SOUND L. REV. 699, 718-19 (1986); Masciocchi, *supra* note 179, at 909-10.

392. 931 P.2d at 897.

393. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 735 (1999). Perhaps the most recent instance of a politically charged case in which the court actually used the abstention doctrine to refrain from reaching a decision is *Walker v. Munro*, 879 P.2d 920 (Wash. 1994), in which the court declined to invalidate various provisions of Initiative 601.

394. Talmadge, *supra* note 393, at 735.

395. *Id.* at 735 n.152.

Given the extraordinary nature of the override remedy, it is important that the courts refused to consider legislative acquiescence in improper vetoes as constituting precedent-setting approval. It is also important that the legislature assert its constitutional prerogatives. Recently, Governor Locke conceded that he had exceeded his authority in vetoing partial sections in three non-appropriation bills enacted during the 2003 legislative session.³⁹⁶ According to press reports, sponsors of the affected bills had requested or agreed to the partial vetoes as an alternative to outright veto of the entire legislation.³⁹⁷ In a letter to members of the legislature, however, legislative leaders stated that:

While none of the specific language stricken by the governor's actions from these bills may seem particularly significant, the Senate Facilities and Operations Committee and House Executive Rules Committee both decided that it is appropriate to take this action to safeguard the Legislature's prerogatives and assure that the veto power is exercised within the limits set forth in the constitution.³⁹⁸

XVI. CONCLUSION

It remains an open question whether the Washington Constitution's procedural restrictions on law-making power have achieved their intended goal. The public continues to express widespread incredulity at the Washington Supreme Court's willingness to invalidate popular initiatives. At the same time, legislators may be frustrated by the people's attempts to use their law-making power to hamstring the people's elected representatives, and the supreme court expresses its exasperation at having to referee disputes between the legislature and the governor. Additionally, with the departure of Justices Andersen and Talmadge from the court, no former legislators sit on the Washington Supreme Court bench for the first time in recent history. This creates opportunities for further interbranch confusion on the law of law-making.

The most significant move toward an open and deliberative legislative process may be the legislature's 1994 decision to allow the live broadcast of committee and floor discussions and debate.³⁹⁹ More than any constitutional restriction or court

396. Stipulated Judgment, *Legislature v. Governor*, Thurston Co. Sup. Court Case No. 03-2-10988-4.

397. David Ammons, *Legislature Takes Legal Action Against Locke's Veto Use*, THE OLYMPIAN, Oct. 7, 2003, at B2, www.theolympian.com/home/news/20031007/northwest/118146_Printer.shtml.

398. Letter from James E. West, Senate Majority Leader, Lisa Brown, Senate Minority Leader, Frank Chopp, House Speaker, and Richard DeBolt, House Minority Leader, to members of the Wash. State Legislature (Oct. 3, 2003).

399. 1994 Wash. Laws 1st Spec. Sess. ch. 6, § 116(2)(a) (funding for contract to establish "gavel-to-gavel television coverage of state government deliberations and other events of statewide

decision, live cable television broadcasts may promote the framers' goal of open discussion of legislation.