State of Emergency: Washington’s Use of Emergency Clauses and the People’s Right to Referendum

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With all due respect, and with the earnest desire not to seem either censorious or facetious, we feel that we must say frankly and in all seriousness that the custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent, within the meaning of the test laid down in [Article II, § 1(b) of the Washington Constitution], has become so general as to make it appear, in the light of recent experience, that a number of those statements can no longer be deemed controlling.¹

I. INTRODUCTION

Importing a simulcast race of regional or national interest on horse race days; exempting a horse racing license from public inspection; farmland preservation; metropolitan park districts; resolving manufactured/mobile home landlord and tenant disputes; and hosting the national conference of lieutenant governors are just a few subjects of recent legislation in which the Washington Legislature included an emergency clause after deciding prompt action was needed.² While prompt legislative action to problems is desirable, in Washington the inclusion of emergency clauses in bills comes at a price to democracy. A bill that is emergent, as defined in the Washington Constitution, is exempt from the people’s power of referendum.³ Since the adoption of the referendum in Washington, conflict has existed between the legislature’s desire for bills to take effect immediately and the people’s power of referendum.⁴

When faced with a bill relating to the unification of control and jurisdiction over the sale, reforestation, and administration of state timber that included an emergency clause, the Washington Supreme Court voiced its frustration with the legislature’s “custom of attaching emergency clauses to all sorts of bills.”⁵ The court found the emergency clause in the bill invalid and strongly rebuked the legislature for its practice of including emergency clauses in too many bills that could not be deemed emergent under the constitution.⁶ Unfortunately, this was

³. See WASH. CONST. art. II, § 1(b).
⁵. Kennedy, 22 Wash. 2d at 683, 157 P.2d at 724.
⁶. Id. at 683-84, 157 P.2d at 724.
not the only time legislatures have been criticized for the overuse of emergency clauses, and such criticism continues today.

Before the popular referendum was adopted in Washington, legislative declarations of emergency were of little concern. The legislature could freely legislate and had discretion to put a law into effect immediately. However, that changed in 1912 when the people amended the constitution to provide for the initiative and referendum. Two types of referendum exist: (1) the popular referendum is the power of the people themselves to petition to ratify a law passed by the legislature, and (2) the legislative referendum is the power of the legislature to pass a law and then refer it to the people for ratification. While the Washington Constitution provides for both types of referendum, declarations of emergency are only at odds with the popular referendum.

7. See Legislation—Emergency Legislation, 44 HARV. L. REV. 851, 854 (1931) [hereinafter Emergency Legislation] (emergency clause “abuse has been widespread and striking”); Legislation—The Repeal of the Referendum in Colorado, 43 HARV. L. REV. 813, 816 (1930) [hereinafter Referendum in Colorado] (“Resort to the safety clause became more frequent as a means of avoiding popular review of the acts of the General Assembly . . . . Any notion that there are secret proper motives for the use of the clause must disappear when its frequent occurrence is observed.” (citation omitted)); Limitations on Initiative and Referendum, 3 STAN. L. REV. 497, 502 (1951) [hereinafter Limitations] (“[Frequent use of emergency clauses is a severe limitation on direct legislation . . . .”)


9. Washington’s original constitution stated the following regarding when bills take effect: “No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of emergency . . . the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house . . . .” WASH. CONST. art. II, § 31, repealed by WASH. CONST. amend. 7.


11. See WASH. CONST. art. II, § 1, amended by WASH. CONST. amend. 7.


13. WASH. CONST. art. II, § 1(b) (referendum may be ordered “either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted”).

With the popular referendum, the people reserved to themselves the power of referendum over *any* act, bill, or law passed by the legislature.\(^{15}\) Also, specific limitations were included on the types of laws that could be put into effect immediately and excluded from the people's power of popular referendum.\(^{16}\) Only bills that are "necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions" may be exempt from referendum.\(^ {17}\) The legislature has fashioned emergency clauses parroting this constitutional language to mark bills that are excluded from referendum and take effect immediately.\(^ {18}\) Over the years, the validity of emergency clauses have been challenged by citizens seeking to assert their right to referendum over bills they feel do not fit into the two enumerated exceptions to referendum.\(^ {19}\)

However, since the referendum was adopted in Washington, courts have been marred in confusion when deciding cases challenging the validity of emergency clauses.\(^ {20}\) Courts have struggled to find a balance between the people's right to referendum and the legislature's need for the ability to declare laws immediately

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15. WASH. CONST. art. II, § 1(b).
17. WASH. CONST. art. II, § 1(b).
19. See, e.g., Wash. State Farm Bureau Fed’n *v.* Reed, 154 Wash. 2d 668, 115 P.3d 301 (2005) (finding a valid invocation of emergency on an act that suspended requirement of supermajority approval to raise state revenue); State *ex rel.* Blakeslee *v.* Clausen, 85 Wash. 260, 148 P. 28 (1915) (finding a valid invocation of emergency on an act that provided highway appropriations).
20. The confusion surrounding the validity of legislative declarations of emergency has been noted throughout the years. See Andrews *v.* Munro, 102 Wash. 2d 761, 767, 689 P.2d 399, 402 (1984) (Dorc, J., dissenting) (quoting State *ex rel.* Howell *v.* Superior Court, 97 Wash. 569, 577, 166 P. 1126, 1129 (1917)) (noting that other courts have observed a divergence of judicial opinion regarding the meaning of the initiative and referendum provisions); State *ex rel.* Humiston *v.* Meyers, 61 Wash. 2d 772, 778, 380 P2d 735, 739 (1963) ("It would be inaccurate to say that our former decisions have been consistent in discussing and announcing the rule to be applied."); State *ex rel.* Pennock *v.* Coe, 42 Wash. 2d 569, 572, 257 P.2d 190, 193 (1953) ("We do not attempt here to reconcile several inconsistent statements of the rules of law applicable thereto stated in our prior decisions."); State *ex rel.* Kennedy *v.* Reeves, 22 Wash. 2d 677, 679, 157 P.2d 721, 722 (1945) ("That there is a great deal of confusion of thought as to [emergency clauses and their effects], has been amply demonstrated by recent events, a confusion to which this court has in some measure contributed . . ."); State *ex rel.* Burt *v.* Hutchinson, 173 Wash. 72, 77, 21 P.2d 514, 515 (1933) (Holcomb, J., dissenting) ("Our cases are now in hopeless confusion [regarding judicial review of legislative declarations of emergency]."); see also Thomas W. Top, *Judicial Review of Legislative Declaration of Emergency*, 39 WASH. L. REV. 155, 156 (1964) ("With the decision in *Humiston* the Washington case law on this point has been thrown into confusion.").
effective.\textsuperscript{21} What must be realized is that the people’s general power of referendum serves as an important check on the legislative branch of government, enhances legislative accountability, and increases public participation in government.\textsuperscript{22} Any attempts to weaken the referendum process should be rejected, and steps should be taken to prevent the unwarranted intrusion upon the people’s right to referendum.

This article discusses the history and current use of emergency clauses in Washington. It finds that the frequent use of emergency clauses at best leads to a perception of their improper use, and at worst is evidence that the people’s right to referendum is being frustrated. The referendum is a vital part of Washington’s political system, providing a check on unrepresentative legislatures and allowing direct public participation on important policy matters. Therefore, reforms are needed to ensure the referendum process is not weakened by the legislature’s use of emergency clauses, including more stringent judicial review of such clauses, requiring facts supporting the emergency to be included in bills, and requiring supermajority approval of bills containing emergency clauses.

Part II of this article describes the history of the initiative and referendum movement, both nationally and in Washington, and explains why the referendum is an important part of government. Part III outlines the current legal doctrine on the people’s right to referendum and the legislature’s power to declare laws emergent, exempting them from referendum. Part IV analyzes the long and tortured history of judicial review of legislative declarations of emergency in Washington. Part V analyzes the legislature’s use of emergency clauses, including the recent trends and current use of emergency clauses, the use of the governor’s veto power to strike suspect emergency clauses, and public criticism of the use of emergency clauses. Finally, Part VI outlines reforms needed to prevent the people’s right to referendum from being weakened.

II. BACKGROUND

A. The Original Provisions of Washington’s Constitution

Article I, § 1 of Washington’s Constitution, adopted in 1889, provides that “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”\textsuperscript{23} However, despite vesting all political power in the

\begin{itemize}
\item \textsuperscript{21} See Humiston, 61 Wash. 2d at 777, 380 P.2d at 738 (“[T]here is a most delicate balance between the emergent powers of the legislature and the people's right of referendum.”).
\item \textsuperscript{22} See infra Part II.D.
\item \textsuperscript{23} WASH. CONST. art. I, § 1. This provision states the fundamental democratic idea dating back to John Locke that the people are the source of all governmental power, and works to preserve individual rights by limiting governmental power. \textit{Robert F. Utter & Hugh D. Spitzer, The...
people, the original constitution contained no provisions for the people to directly participate in government through the initiative, referendum, or recall process. The constitution merely provided that “The legislative power shall be vested in a senate and house of representatives, which shall be called the legislature of the State of Washington.” Therefore, before adoption of the initiative and referendum, the people exercised political power only through the regular election of state and local representatives.

In addition to lacking provisions for the initiative and referendum, Washington’s original constitution also differed from its current version with respect to the effective dates of legislation. The original constitution provided that all laws except appropriation bills would take effect ninety days after the adjournment of the legislative session in which enacted. Emergency bills could take effect before the ninety day period if the emergency was expressed in the preamble or body of the act and the act was approved by a two-thirds vote of each house of the legislature. Interestingly, the seventh amendment adopting the initiative and referendum repealed the provision requiring an expression of the emergency in the bill and the provision requiring emergency measures to be approved by two-thirds of each house.

24. See WASH. CONST. art. II, § 1, amended by WASH. CONST. amend. 7.
25. WASH. CONST. art. II, § 1, amended by WASH. CONST. amend. 7. This language was borrowed from the California constitution, the Michigan constitution, and a proposed constitution drafted by Seattle resident W. Lair Hill published in an Oregon newspaper. UTTER ET AL., supra note 23, at 50; see also W. Lair Hill, Washington: A Constitution Adapted to the Coming State, MORNING OREGONIAN, July 4, 1889.
26. Compare WASH. CONST. art. II, § 41 (“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.”), with WASH. CONST. art. II, § 31, repealed by WASH. CONST. amend. 7 (“No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house; said vote to be taken by yeas and nays and entered on the journals.”).
27. WASH. CONST. art. II, § 31, repealed by WASH. CONST. amend. 7. Postponing the effective date of an act gives a reasonable time for promulgation of the new law and for people to adjust their conduct according to it. See Emergency Legislation, supra note 7, at 851. After the referendum process was adopted, the postponement also afforded time to collect the signatures necessary to file a referendum petition. See id. at 852. See generally id. at 851-53 for a discussion of the history of effective dates of legislation.
28. WASH. CONST. art. II, § 31, repealed by WASH. CONST. amend. 7. A provision giving the legislature power to declare laws immediately effective is necessary to allow the legislature to avert immediate danger to the public peace. See State ex rel. Kennedy v. Reeves, 22 Wash. 2d 677, 681, 157 P.2d 721 (1945).
29. Initiative and Referendum, ch. 42, 1911 Wash. Sess. Laws 136 (repealing WASH. CONST. art. II, § 31). The constitution currently does not require supermajority approval by the
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The adoption of the seventh amendment brought about the current tension between the people’s power of referendum and the legislature’s ability to declare bills effective before the ninety day waiting period has run.30 Under the current constitution, all political power is still vested in the people,31 and the legislative authority is vested in the house and senate.32 On one hand, the seventh amendment strengthened the people’s political power by reserving to the people the power of initiative and referendum.33 However, the people’s political power was weakened because the seventh amendment gave the legislature carte blanche authority to pass emergency legislation by no longer requiring a statement of the emergency or supermajority approval.

The seventh amendment revised the constitution to provide that a referendum may be ordered on any act “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.”34 No law subject to referendum may take effect “until ninety days after the adjournment of the session at which it was enacted.”35 Consequently, for measures the legislature wants to take effect before the ninety day waiting period, it has adopted the practice of including emergency clauses that parrot the constitutional language concerning the types of laws exempt from referendum.36 As a result, after fighting hard to win the right to repeal laws enacted by unrepresentative legislatures, the people are still struggling to maintain the power of referendum in the face of legislative declarations of emergency exempting bills from referendum.

legislature for a bill to be declared “necessary for the immediate preservation of the public peace, health or safety, [or] support of state government and its existing public institutions.” See WASH. CONST. art. II, § 1(b); see also UTTER ET AL., supra note 23, at 52 (omitting any discussion of a supermajority approval of emergency clauses).

30. The constitution currently states that “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.” WASH. CONST. art. II, § 1(c); WASH. CONST. art. II, § 41. 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, support of the state government and its existing public institutions . . . .” WASH. CONST. art. II, § 1(b).

32. Id. art. II, § 1.
33. Id.
34. Id. art. II, § 1(b).
35. Id. art. II, § 41.
36. See, e.g., Top, supra note 20, at 155-56, 156 n.2 (discussing the passage of an act allowing the maintenance and operation of certain mechanical devices, sales boards, bingo equipment and cardrooms).
B. The History of the Initiative and Referendum

Direct democracy provisions, such as the initiative and referendum, have been around as long as government itself.\(^3^7\) Direct democracy was used in the governance of ancient Greek city-states.\(^3^8\) Likewise, the Swiss have used forms of direct democracy for centuries and continue to do so today.\(^3^9\)

However, direct democracy was not initially popular in the United States despite its presence here in some form since the 1600s.\(^4^0\) The United States Constitution guarantees a republican form of government to each state.\(^4^1\) Some argue that this guarantee clause makes any form of direct democracy unconstitutional.\(^4^2\) Given the guarantee clause in the United States Constitution,

41. U.S. CONST. art. IV, § 4. A republic is defined as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them." MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1058 (11th ed. 1997). Democracy is defined as "a government in which supreme power is vested in the people and exercised by them directly or indirectly through a system of representation." Id. at 331.
it is not surprising that the framers of the Constitution had a distaste for direct democracy.\footnote{See THE FEDERALIST NO. 10 (James Madison) ("Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction... By a faction, I understand a number of citizens... who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community... From this view of the subject, it may be concluded that a pure democracy... can admit of no cure for the mischiefs of faction."); Hsiao, supra note 42, at 1301-03. However, some founding fathers, such as Thomas Jefferson, did express support for direct democracy. See State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 264-65, 148 P. 28, 30 (1915); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 40 (1989) (noting Jefferson as the forerunner of direct democracy advocates); Gavin M. Rose, Taking the Initiative: Political Parties, Primary Elections, and the Constitutional Guarantee of Republican Governance, 81 IND. L.J. 753, 756 (2006) (noting that Jefferson penned the theory underlying the movement for direct democracy in the United States).}

Despite this general aversion for direct democracy in the United States by the governing class, direct democracy ideas took hold in the late 1800s with the rise of the Populist and Progressive movements.\footnote{See Carolyn N. Long, Direct Democracy in Washington, in WASHINGTON STATE GOVERNMENT AND POLITICS 73 (Cornell W. Clayton et al. eds., 2004); JOSEPH F. ZIMMERMAN, THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY 4-5 (2001).}

While the platforms of the Populist and Progressive movements differed slightly, both sought to implement direct democracy provisions.\footnote{See Long, supra note 44, at 73-74 (noting the differences for supporting direct democracy between the Populists and the Progressives). Populism arose out of rural and farming concerns with the economic changes of the late nineteenth century leading to the concentration of wealth and power in hands of large industrial organizations. See Gerard N. Magliocca, Constitutional False Positives and the Populist Moment, 81 NOTRE DAME L. REV. 821, 834-45 (2006); Jenni Parrish, Litigating Time in America at the Turn of the Twentieth Century, 36 AKRON L. REV. 1, 38-39 (2002). In contrast, Progressivism was based among more well-off urban leaders who were concerned with returning individual and economic responsibility to the people and with lessening the political influence of large economic interests. See Michael L. Rustad, Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers, 48 RUTGERS L. REV. 673, 725-27 (1996); Cynthia L. Fountaine, Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 733, 735-37 (1988).}

Populists were greatly influenced by the idea that large businesses, particularly railroads, had gained too much control over state governments and were using that power to their private benefit.\footnote{TALLIAN, supra note 39, at 34-35 (chronicling the work of Dr. John R. Haynes to institute the initiative and referendum in California in order to rid the state legislature of undue influence from the Southern Pacific Railroad); ZIMMERMAN, supra note 44, at 4-5.}

The belief that corporate interests held control of state legislatures was not unfounded in Washington as it was practically impossible "to get the [state] legislature to enact a statute creating a railroad commission."\footnote{See Claudioius O. Johnson, The Adoption of the Initiative and Referendum in Washington, 35 PAC. NW. Q. 291, 294 (1944). Ultimately, popular demand was so strong that legislation created a railroad commission was enacted in 1905. Id.}
Therefore, Populists supported direct democracy as a means to solve the problem of unresponsive state governments by putting in place a political scheme whereby the people could make and reject laws on their own.  

Likewise, Progressives also had a disdain for political machinery that failed to respond to the will of the people. However, Progressives supported direct democracy out of belief in the Protestant ideal of personal responsibility and the idea that individuals, disassociated from all special interests, would vote in the common good. In short, the Progressives were seeking to “democratize” government. 

Despite having different political underpinnings, Populists and Progressives shared the goal of altering the existing political structure. That goal was accomplished through the implementation of direct democracy at the state level.

The Populist and Progressive movements achieved great success in getting direct democracy provisions adopted in the United States. South Dakota became the first state to adopt the statewide initiative and referendum in 1898. Thereafter, direct democracy spread quickly to other states. Of the twenty-five states that allow for the referendum, twenty-two of those states adopted the referendum between 1898 and 1918.

The reasons for implementing direct democracy provisions remain relevant today. Twenty-seven states have adopted provisions for the initiative, the

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48. Long, supra note 44, at 73; ZIMMERMAN, supra note 44, at 5-6.
50. Long, supra note 44, at 74; TEXAS ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INITIATIVE AND REFERENDUM: AN INFORMATIONAL REPORT 3 (June 1979) [hereinafter INFORMATIONAL REPORT]; ZIMMERMAN, supra note 44, at 6; Persily, supra note 39, at 18.
51. SHELDON ET AL., supra note 49, at 8.
52. See Richard L. Hasen, Parties Take the Initiative (and vice versa), 100 COLUM. L. REV. 731, 733 (2000) (“the initiative began as part of the populist and progressive movements that aimed in part to weaken the power of political parties”).
53. See Cornell W. Clayton & Stephen Meyer, Washington’s Constitution: History and the Politics of State Constitutional Jurisprudence, in WASHINGTON STATE GOVERNMENT AND POLITICS 97 (Cornell W. Clayton et al. eds., 2004) (discussing how democratic control of government was further enhanced by adoption of initiative and referendum); Richard H. Pildes, Forward, The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 28, 36-38 (2004) (finding that the rise in direct democracy can be traced to efforts to change democratic politics by, for example, reforming campaign finance, restructuring primary elections, and imposing term limits; these types of initiatives are currently experiencing a higher passage rate than other initiatives).
54. S.D. CONST. art. III, § 1 (1898); Emergency Legislation, supra note 7, at 852. In 1897, Nebraska became the first state to provide for the initiative and referendum at the local level. HISTORY OF I&R, supra note 40.
55. Persily, supra note 39, at 15.
popular referendum, or both.\textsuperscript{57} However, none of these states has opted to do away with established initiative and referendum provisions.\textsuperscript{58} Interestingly, most of the states providing for direct democracy are located in the western United States.\textsuperscript{59} Therefore, it is not surprising that the Populist and Progressive ideas resonated well in Washington.

\section*{C. Adoption of the Initiative and Referendum in Washington}

Washington\'s adoption of the initiative and referendum was influenced by the national Populist and Progressive movements as well as the adoption of the devices by other states.\textsuperscript{60} However, despite the strong national movement for direct democracy, it took a great deal of lobbying by farm and labor organizations in Washington to bring about reform to the state.\textsuperscript{61}

Efforts to adopt direct democracy in Washington first began in 1895.\textsuperscript{62} In 1900, the Washington State Grange garnered support from a state senator and a state representative to sponsor a measure adopting the initiative and referendum in their respective chambers.\textsuperscript{63} However, the measures never made it out of

\begin{footnotesize}
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\item[57.] Initiative & Referendum Institute, State-by-State List of Initiative and Referendum Provisions, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Oct. 12, 2008) [hereinafter State I&R]. Twenty-two states provide for both the initiative and the popular referendum. \textit{Id.} Three states provide for only the initiative. \textit{Id.} Three states provide only for the popular referendum. \textit{Id.}
\item[58.] John G. Matsusaka, Direct Democracy Works, 19 J. Econ. Persp. 185, 186 (2005), available at http://www-rcf.usc.edu/-amatsuk/Papers/Matsusaka%20JEP%202005.pdf.
\item[59.] See, e.g., CAL. CONST. art. IV, § 1; OR. CONST. art. IV, § 1; WASH. CONST. art. II, § 1. For discussion of why direct democracy took hold in the West much more than any other region of the country, see Shaun Bowler & Todd Donovan, Direct Democracy and Political Parties in America, 12 Party Pol. 649, 651-52 (2006), available at http://ppq.sagepub.com; Persily, supra note 39.
\item[60.] See Sheldon et al., supra note 49, at 8 (\"The initiative, referendum, and recall process were added to Washington\'s Constitution in 1912 during the height of the Progressive Movement.\"); Johnson, supra note 47, at 294. \textit{But see} State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 265, 148 P. 28, 30 (1915) (\"The state of Washington . . . did not borrow the idea [of direct legislation] from any of the states which had adopted it.\")
\item[61.] Johnson, supra note 47, at 303. Farm and labor organizations played integral roles in the Populist and Progressive movements, and lead the fight for direct democracy as a means to bypass \textquoteleft\textquoteleft legislatures and enact needed laws on behalf of the downtrodden farmer, debtor, or laborer.\textquoteright\textquoteright\ Cronin, supra note 43, at 45.
\item[62.] See Long, supra note 44, at 74.
\end{itemize}
\end{footnotesize}
committee. Despite this early defeat, the Grange continued to voice its approval for direct democracy provisions and supported legislative candidates who agreed to shepherd passage of a bill providing for direct democracy. Quantifiable success was finally achieved in 1907 when the legislature enacted a direct primary law and the House of Representatives approved a measure for direct legislation. The direct legislation measure never became law, however, failing in the Senate by a 2 to 1 margin. No direct evidence exists as to why the measure was not approved by the Senate, but personal accounts suggest corporate railroad and lumber interests saw to its defeat.

Despite failing to secure passage in the Senate, the push for direct democracy in Washington grew stronger. In 1910, the President of the Washington Federation of Labor joined with the Grange to secure adoption of direct legislation. With a labor and farm coalition built, few people of prominence were willing to publicly voice their opposition to direct democracy. The coalition's hard work finally paid off in 1911.

Seven state representatives from different parts of the state, including six Republicans and one Democrat, sponsored House Bill 153 in 1911. The measure amended article II, section 1 of the state constitution to reserve to the

64. Johnson, supra note 47, at 295.
65. See id. at 295-96.
68. SENATE JOURNAL, 10th Leg., Reg. Sess., at 801-02 (Wash. 1907).
69. See Johnson, supra note 47, at 297 (quoting Mr. C.B. Kegley, the head of the Washington's Grange at the time of the amendment's defeat, as stating, "It passed the House and was only defeated by a small margin in the Senate after the bosses representing the railroad and milling [lumber] interests had traded away much that they wanted in order to accomplish its defeat.").
70. Long, supra note 44, at 74; Johnson, supra note 47, at 297-99 (documenting the expansion of support for the direct legislation amendment).
71. Johnson, supra note 47, at 297-98. The Farmer's Union, a business organization of farmers, also joined the battle to secure direct democracy in Washington. Id. at 298.
72. Id. The President of the Washington Federation of Labor could only think of two men who publicly opposed direct democracy—the governor and the president of the state bar association. Id. at 298-99.
73. The sponsors of the bill were Governor Teats (R-Pierce), Hugh C. Todd (D-Whitman), Hubert D. Buchanan (R-King), George L. Denman (R-Spokane), Harve H. Phipps (R-Spokane), Elmer E. Halsey (R-Asotin), and Edgar J. Wright (R-King). HOUSE JOURNAL, 12th Leg., Reg. Sess., at 131 (Wash. 1911) (listing sponsors of bill); id. at 3-5 (listing counties of House members); THOMAS C. HOEMANN & RICHARD NAFZIGER, STATE OF WASHINGTON, MEMBERS OF THE WASHINGTON STATE LEGISLATURE: 1889-2005 15-16, 22, 24, 29, 98, 116 (2005) [hereinafter HOEMANN & NAFZIGER], available at http://www.leg.wa.gov/documents/common/historypage/2005_Members_of_the_Legislature.pdf (listing political party of House members).
people the initiative and referendum power.\textsuperscript{74} The measure also repealed article II, section 31, which required emergency legislation to include a statement of the emergency and be approved by a two-thirds majority.\textsuperscript{75} Initially, the committee reviewing House Bill 153 hesitated in reporting the bill out of committee.\textsuperscript{76} The bill was only favorably reported out of committee after a lobbyist convinced a majority of representatives in the House to sign a petition demanding a report.\textsuperscript{77} Once on the floor of the House for final passage, various amendments were proposed to weaken the bill's provisions.\textsuperscript{78} All of these amendments were rejected.\textsuperscript{79} The House passed the bill by a final vote of seventy-nine to twelve.\textsuperscript{80} House Bill 153 was then sent to the Senate.\textsuperscript{81}

The bill's progression through the Senate was a little rougher than in the House of Representatives; it was unable to pass the Senate without being amended. The Senate made the following amendments to the measure designed to weaken its effect: (1) increased the percentage of voters required to sign initiative petitions from eight percent to ten percent; (2) increased the percentage of voters required to sign referendum petitions from five percent to six percent; (3) reduced the time the legislature was precluded from amending or repealing an act initiated by the people from four to two years; and (4) added a provision that an initiative or referendum would not be effective unless one-third of the voters participating in the general election voted on the initiative or referendum at the election.\textsuperscript{82} The Senate approved the amended bill by a final vote of 32 to 7.\textsuperscript{83}

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\textsuperscript{74} Initiative and Referendum Act, ch. 42, 1911 Wash. Sess. Laws 136-38 (amending WASH. CONST. art. II, § 1).
\textsuperscript{75} Id. at 136 (repealing WASH. CONST. art. II, § 31).
\textsuperscript{76} Johnson, \textit{supra} note 47, at 300.
\textsuperscript{77} Id.; see also HOUSE JOURNAL, 12th Leg., Reg. Sess., at 253 (Wash. 1911) (noting the passage of a motion that required a report on Bill 153). A majority of the committee recommended passing the bill with twenty amendments mostly strengthening its effect, while a minority recommended passing the bill without amendment. HOUSE JOURNAL, 12th Leg., Reg. Sess., at 341-43 (listing proposed amendments); Johnson, \textit{supra} note 47, at 300. The minority recommendation was approved by a vote of 49 to 42, with 5 members absent or not voting. HOUSE JOURNAL, 12th Leg., Reg. Sess., at 344.
\textsuperscript{78} HOUSE JOURNAL, 12th Leg., Reg. Sess., at 345-48; Johnson, \textit{supra} note 47, at 300.
\textsuperscript{79} HOUSE JOURNAL, 12th Leg., Reg. Sess., at 345-48. One amendment did pass, however, but this amendment strengthened the effects of the bill. See HOUSE JOURNAL, 12th Leg. Reg. Sess., at 346.
\textsuperscript{80} HOUSE JOURNAL, 12th Leg., Reg. Sess., at 349 (noting that five representatives were excused or absent from voting).
\textsuperscript{81} SENATE JOURNAL, 12th Leg., Reg. Sess., at 536-37 (Wash. 1911).
\textsuperscript{82} SENATE JOURNAL, 12th Leg., Reg. Sess., at 641-42, 790; Johnson, \textit{supra} note 47, at 300. Of note is the narrow failing of one major amendment that would have gutted the effectiveness of the direct legislation amendment by requiring that the initiative or referendum "petition shall be placed on file for signature in the office of the county auditor of each county in this state and in no other
The amended bill received final legislative approval when the House acceded to the Senate's amendments.\textsuperscript{84} The bill was then submitted to the people for ratification at the general election in 1912.\textsuperscript{85}

The people overwhelmingly approved House Bill 153 by a vote of 110,110 to 43,905.\textsuperscript{86} Inspired by the Populist and Progressive concerns nationally at the time, the initiative and referendum were adopted in Washington in response to frustrations that the state government was controlled by corporate interests and the political machines they supported.\textsuperscript{87} Direct democracy gave citizens a device to help curb these powerful influences.\textsuperscript{88} One court stated that direct democracy was approved in Washington because the people "had become impressed with a profound conviction that the Legislature had ceased to be responsive to the popular will."\textsuperscript{89} As a result, the referendum was specifically designed to "democratize legislation, to enable [the] people to assume control of affairs, and to insure responsible as well as responsive government."\textsuperscript{90}

Several conclusions are notable from the history of Washington's adoption of the initiative and referendum process.\textsuperscript{91} First, the initiative and referendum process...
measure passed due in large part to the persistent lobbying efforts of the farm and labor organizations. Second, support for the measure was stronger in rural areas than urban areas. Third, those opposing the measure were unable to amend the proposal to the point of rendering it completely useless, thus allowing the initiative and referendum process in Washington to become an integral part of governing in the state. Finally, the removal of the requirement that emergency legislation be approved by two-thirds of members in both the House of Representatives and Senate foretold the tension that would soon arise between the people's power of referendum and the legislature's desire to declare bills emergent and exempt from referendum.

D. Why the Referendum is an Important Part of Government

Several reasons exist that illuminate why maintaining the strength of the people's right to referendum is important. Direct democracy serves as an important check on the legislature and limits the influence of entrenched political parties. Also, a vibrant referendum process enhances legislative accountability.

Republicans and four Democrats. Id. No Democrats voted against the bill on final passage in either house, leaving a select group of Republicans in opposition to the measure. Compare HOUSE JOURNAL, 12th Leg., Reg. Sess., at 349 (Wash. 1911), and SENATE JOURNAL, 12th Leg., Reg. Sess., at 790 (Wash. 1911), with HOEMANN & NAFFZIGER, supra note 73, at 12, 15, 20, 50, 52, 66, 71, 76, 78, 80, 86, 91, 114, 120, 126, 134 (listing political parties of House and Senate members).

92. Johnson, supra note 47, at 303 (noting that less than half of electors voted on the measure at the general election, and that the measure would probably not have been adopted if not for the campaigns of farm and labor organizations); see also Long, supra note 44, at 74 (noting that the majority of the members of the legislature did not know much about the amendment, that "the issue did not capture the attention of a majority of voters," and that "[m]any of the state newspapers paid little attention"); supra notes 61-90 and accompanying text.

93. See Johnson, supra note 47, at 301 (noting representatives from rural areas were more likely to vote in favor of the bill while representatives from urban areas were more likely to vote against it, and stating that the only group strongly in favor of the bill was the farm delegation); Long, supra note 44, at 74-75 ("The few newspapers that favored adoption were from rural areas."). But see Johnson, supra note 47, at 301-02 (noting rural senators were split on the measure, and urban and farmer senators did not decidedly vote for or against it).

94. See SENATE JOURNAL, 12th Leg., Reg. Sess., at 787-88 (rejecting an amendment that would have required voters to go to the office of a county auditor to sign an initiative or referendum petition); HOUSE JOURNAL, 12th Leg., Reg. Sess., at 345-48 (rejecting floor amendments that would have weakened the bill's effect, including those seeking to raise the number of signatures required to get a petition on the ballot).

95. The people may have removed the supermajority requirement as unnecessary out of a belief that any legislative declaration of emergency exempting a bill from referendum would be subject to judicial review, just like any other measure subject to attack on the grounds that it is unconstitutional. See State ex rel. Brislawn v. Meath, 84 Wash. 302, 307-10, 147 P. 11, 13-14 (1915) (reviewing the constitutionality of an emergency clause).

96. See infra notes 98-113 and accompanying text.
and increases public awareness of vital policy issues and public participation in resolving those issues. 97

First, the referendum operates as an important check on the legislative branch of government, despite being used infrequently. 98 In reserving the right to reject laws passed by the legislature, the people operate as a fourth branch of government in voicing their concerns with and overturning unpopular legislation. 99 As an integral part of this fourth branch of government, the referendum offers "a valuable safety valve to regulate the [political] system's nondemocratic elements." 100

The referendum forces the legislature to think about how the people will react to legislation if enacted. Legislatures are often reluctant to pass bills that might mobilize referendum efforts to strike down the law. 101 A good example of

97. See infra notes 114-22 and accompanying text.

98. HUGH A. BONE, THE INITIATIVE AND THE REFERENDUM 7 (2d ed., 1975) ("One of the most important contentions of [direct democracy] advocates is the check on the legislative assembly. The potential threat to take issues to the voters keeps legislatures on their toes."). Popular referendums are rare partly because of the legislature's frequent use of emergency clauses. Dale A. Oesterle, The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right, 116 YALE L.J. POCKET PART 122, 124 (2006), http://yalelawjournal.org/content/view/70/14/. Between 1914 and 2006, sixty-six popular referenda were filed in Washington, but only thirty-four acquired enough signatures to qualify to appear on the ballot. WASHINGTON SECRETARY OF STATE, ELECTIONS: SUMMARY OF INITIATIVES AND REFERENDA: 1914-2006, http://www.secstate.wa.gov/elections/initiatives/statistics_summary.aspx (last visited Sept. 17, 2008). Of the thirty-four referenda appearing on the ballot, twenty-eight were successful in preventing the referred legislation from becoming law. Id. In contrast, during the same period 1,331 initiatives were filed, 156 qualified for the ballot, and 82 were successfully enacted. Id. The referendum has experienced a dramatic resurgence recently, with the number of measures appearing on ballots steadily increasing. DuVivier, supra note 40, at 833-34.


100. Louis J. Sirico, Jr., The Constitutionality of the Initiative and Referendum, 65 IOWA L. REV. 637, 646 n.75 (1980).

101. See DuVivier, supra note 40, at 846 (noting "the threat of a referendum [in Italy]... has often motivated the parliament to act...[and] that it 'has done much to serve the long-term interests of the Italian people'... [, transforming] Italy from a 'partyocracy to democracy.'" (quoting Vernon Bogdanor, Western Europe, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 69 (David Butler & Austin Ranney eds., 1994)); Chip Lowe, Public Safety Legislation and the Referendum Power: A Reexamination, 37 HASTINGS L.J. 591, 608 (1986) (quoting Hugh A. Bone & Robert C. Benedict, Perspectives on Direct Legislation: Washington State's Experience 1914-1973, 28 W. POL. Q. 330, 331-32 (1975)) (discussing that the legislature has been reluctant to pass bills that might invite a referendum); Matussaka, supra note 58, at 192-93 (arguing that "the threat of a ballot proposition can cause elected officials to choose different policies than they would have if direct democracy were unavailable"). California is particularly concerned about legislative
the effects initiatives and referendum have had on the Washington State Legislature is the use of direct democracy by Tim Eyman, Washington's "initiative king." Eyman is a co-director of Voters Want More Choices, a taxpayer-protection organization that has sponsored many statewide initiatives in Washington. Eyman's use of direct democracy to shape policy in Washington has changed the way politicians view voters. For instance, in one case a threat of a referendum kept legislators from raising the gas tax.

Second, the referendum process also serves to limit the influence of political parties. At the time the initiative and referendum amendment was adopted in Washington, a single political party controlled state government. A dominant political party created concern that a powerful and politically entrenched party who controlled state government would not be responsive to the interests of all people, but rather beholden to special interests. The strong fights against the initiative and referendum put up by state senators and representatives from the dominant political party, presumably in an effort to avoid significant power being taken from the legislature and given to the people, evidences this legislative.


105. In 1911, there were seventy-five Republicans and twelve Democrats in the House of Representatives, and thirty-eight Republicans and four Democrats in the Senate. HOEMANN & NAFFZIGER, supra note 73, at 6. The governor at the time was also a member of the Republican Party. WASHINGTON SECRETARY OF STATE, WASHINGTON TERRITORIAL AND STATE GOVERNORS, http://www.secstate.wa.gov/library/governor/gov_table.htm (last visited Oct. 15, 2008).

106. See BONE, supra note 98, at 1 ("Many civic leaders felt that the initiative and referendum could be used to discipline state legislatures and to bring about public policies where the legislature was insensitive to needs and refused to do so."); Long, supra note 44, at 73; Johnson, supra note 47, at 294 (recounting how the Washington legislature failed to enact a railroad commission despite popular demand).
unresponsiveness. Therefore, one of the main goals of the Populist and Progressive movements in implementing direct democracy was to scale back the power of political parties over government and to prevent the entrenchment of future dominant political parties.

As promised by direct democracy advocates, political parties were weakened by the implementation of direct democracy and the reforms that resulted from its use. Direct democracy was used in attempts to strip political parties of power by adopting reforms such as direct election of United States Senators, direct primaries, procedures for the recall of elected officials, new elections laws, and the elimination of straight party ballots. Specifically in Washington, direct democracy has been used to weaken political party control of government by adopting the state's open government law, civil service system, blanket primary election system, and reapportionments of the legislature. Additionally, the referendum has operated as an effective double veto system in states where one political party dominated and voters felt the gubernatorial veto offered little protection because the governor was indebted to the same special interest groups as the majority party in the legislature. Therefore, direct democracy institutions, including the referendum, must be maintained in order to continue to provide another check on control of government by political parties.

107. See Long, supra note 44, at 74 (summarily describing the seventeen years between initial support for direct democracy in Washington and the passage of the constitutional amendment providing for initiative and referendum).

108. RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 255 (1955) (explaining that popular reforms like the initiative and referendum were expected to “deprive machine government of the advantages it had in checkmating popular control, and make government accessible to the superior disinterestedness and honesty of the average citizen”); Bowler et al., supra note 59, at 651.

109. See Bowler et al., supra note 59, at 661 (noting that, in the twentieth century, use or adoption of the initiative resulted in weaker political parties).

110. Id. at 649.

111. See BONE, supra note 98, at 9-10.

112. ZIMMERMAN, supra note 44, at 244.

Finally, the use of the referendum and direct democracy encourages people's involvement with government.\textsuperscript{114} The referendum can "promote public discussion and debate, educate voters on important policy matters, and cause voters to pay attention to the actions of their elected representatives."\textsuperscript{115} Public involvement via the referendum can also "decrease the polarization of law on controversial questions."\textsuperscript{116} Many critics of direct democracy argue that voters are not competent to make informed choices on complex policy questions posed by initiatives and referendums.\textsuperscript{117} However, recent studies show that voters use readily available cues to help them decide on initiatives, and such cues can lead voters to make choices as if they were fully informed.\textsuperscript{118} One notable study found that uninformed voters, who merely knew the position of interest groups concerning certain legislation, "could emulate the voting patterns of informed voters."\textsuperscript{119} Additionally, the rapidly improving means of communication allows a larger percentage of the public to become better informed and more concerned with policy issues facing the state, thereby facilitating better decision making on measures put before the voters.\textsuperscript{120} Commentators have noted that "Washington's experience [with direct legislation] has been positive and that the '[i]nitiative and referendum provide additional channels for political expression, linking the citizen to state government.'"\textsuperscript{121} Limiting the public's participation in government may lead to citizen apathy and a weakening of our democracy.\textsuperscript{122}

\textsuperscript{114} See Bone, supra note 98, at 7.
\textsuperscript{115} Oesterle, supra note 98, at 123.
\textsuperscript{116} See id.
\textsuperscript{117} E.g., Matsusaka, supra note 58, at 197-98.
\textsuperscript{119} Matsusaka, supra note 58, at 198 (citing Arthur Lupia, Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections, 88 AM. POL. SCI. REV. 63 (1994)).
\textsuperscript{120} See Fritz v. Gorton, 83 Wash. 2d 275, 284, 517 P.2d 911, 917 (1974) ("With improved means and methods of communication there is little reason to doubt that a substantial percentage of the public is better informed, more alert, interested, and, in fact, concerned today with matters of government than ever before in our history.").
\textsuperscript{121} Lowe, supra note 101, at 605 (quoting Bone & Benedict, supra note 101, at 349).
\textsuperscript{122} See Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 19, 2005) ("The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 74 (1980) (noting that during Chief Justice Warren's tenure, the United States Supreme Court believed that citizens' open participation in the political process is an essential part of our representative government); Ascanio Piomelli, The Democratic Roots of Collaborative Lawyering, 12 CLINICAL L. REV. 541, 558 (2006) (explaining that direct participation in government allows citizens to better themselves, and allows communities to maximize their potential).
Concerning the relative value of the referendum vis-à-vis the initiative, some argue that the referendum is of little importance because, if the referendum is unavailable, the people may use the initiative to repeal unpopular laws passed by the legislature. However, in Washington, the initiative is not an adequate substitute for the referendum. It takes twice as many valid signatures to qualify an initiative for the ballot as it does a referendum. Furthermore, a bill referred to the people does not take effect until a majority of votes cast have approved the bill, whereas an emergency bill that passes the legislature is exempt from referendum and will take effect before it can be repealed by initiative. Additionally, if the people thought the initiative was an adequate substitute for the referendum, there would have been no need to adopt both the initiative and referendum. The initiative does not provide the people with the same powers and checks over the legislature as the referendum. No other adequate substitute exists for the referendum. Therefore, the substantial deference Washington courts now give to legislative declarations of emergency exempting bills from referendum is particularly troubling.

III. HISTORY OF JUDICIAL REVIEW OF DECLARATIONS OF EMERGENCY IN WASHINGTON

The first challenge to a legislative declaration of emergency in Washington came only three years after adoption of the referendum. Since the first

123. Wash. State Farm Bureau Fed'n v. Reed, 154 Wash. 2d 668, 680, 115 P.3d 301, 307 (2005) (Madsen, J., concurring) ("Since the referendum is unavailable in this case, should people want to overrule their elected officials they can do so by initiative as they have done in the past.").

124. The number of valid signatures required to place an initiative on the ballot is "equal to eight percent of the votes cast for the office of governor at the last gubernatorial election." WASH. CONST. art. II, § 1(a). Whereas, the number of signatures required to place a referendum on the ballot is only equal to "four percent of the votes cast for the office of governor in the last gubernatorial election." Id. § 1(b).

125. WASH. CONST. art. II, § 1(d).

126. See WASH. CONST. art. II, § 1(a) (providing that an initiative must "be filed with the secretary of state . . . [at least] four months before the election at which . . . [it is] voted upon").


128. See State ex rel. Brislawn v. Meath, 84 Wash. 302, 318,147 P. 11, 17 (1915) ("We have treated the question [of whether the legislature can properly declare an emergency in the instant case] as original or of first instance in this court.").
decision addressing the validity of a legislative declaration of emergency, the Washington Supreme Court has struggled to decide when an act declared emergent by the legislature falls within the exceptions to the people's right to referendum. Often times, the decision whether to uphold an emergency clause hinges on the court's view of the relative powers of the different branches of government. The problem originates in conflicting statements laid out in the first case to address the issue, State ex rel. Brislawn v. Meath, and has continued ever since. However, recently the Washington Supreme Court has been consistent in giving significant deference to legislative declarations of emergency.

What follows is a discussion of early jurisprudence on the validity of legislative declarations of emergency exempting bills from referendum, continuing with the progeny of cases throughout the years developed on those early cases. Examining the history of the judicial review of declarations of emergency illustrates that the court's opinions have not been consistent throughout the years, but that the court has recently settled on giving substantial deference to the legislature.

A. State ex rel. Brislawn v. Meath and the Early Cases

The validity of a legislative declaration of emergency was first challenged in State ex rel. Brislawn v. Meath. The controversy involved a bill that altered the

129. Id. at 323, 147 P. at 18 (invalidating an emergency clause).
131. Compare Wash. State Farm Bureau Fed'n v. Reed, 154 Wash. 2d 668, 680, 115 P.3d 301, 307 (2005) (Madsen, J., concurring) (noting that the people speak first through their representatives and that the court is not the proper forum to resolve disputes of a political nature), and Brislawn, 84 Wash. at 324-25, 147 P. at 19 (Mount, J., dissenting) (arguing for deferential review of emergency declarations because the legislature is the only branch of government competent to find the existence of an emergency), with Wash. State Farm Bureau Fed'n 154 Wash. at 687, 115 P.3d at 311 (Johnson, J.M., J., dissenting) (arguing that the validity of an emergency clause is a judicial question resolving the strain between the power of the people and the power of the legislature), and Brislawn, 84 Wash. at 314, 147 P. at 15 (arguing that the validity of an emergency declaration is a question of power rather than legislative discretion, and thus is a judicial question).
132. See infra notes 152-54 and accompanying text.
133. Compare Wash. State Farm Bureau Fed'n, 154 Wash. 2d at 688, 115 P.3d at 311 (Johnson, J.M., J., dissenting) (relying on Brislawn for the proposition that any doubt about the validity of emergency clauses is to be resolved in the people's favor), with Wash. State Labor Council, 149 Wash. 2d at 58, 63 P.3d at 1209 (citing Brislawn for the proposition that deference should be given to the legislature's decision to declare laws emergent).
135. 84 Wash. 302, 147 P. 11 (1915).
membership of the board of state land commissioners by substituting the secretary of state and the state treasurer for the state fire warden, the state forester, and the state board of tax commissioners. The legislature declared the act emergent and that it was to take effect immediately. The state fire warden and state board of tax commissioners challenged the rights of their replacements to hold their positions on the board of state land commissioners by arguing that the bill was not emergent under the constitution despite the legislative declaration to the contrary. It is interesting to note that, in this seminal case regarding the intersection of the people’s right to referendum and a legislative declaration of emergency, those challenging the emergency clause were not seeking a referendum on the act at all, but merely wanted a declaration that they were the rightful holders of offices on the board of state land commissioners. The court chose to address the single question of “Whether the Legislature can declare an emergency in the instant case, so as to free the act of the restraints contained in the recent amendment to the Constitution, known as the initiative and referendum amendment.”

In a five to four ruling, the court struck down the emergency clause as being in violation of article II, section 1(b) of the constitution. The majority’s reasoning focused heavily on the differences in the state’s political structure before and after the adoption of the referendum. The argument that declarations of emergency are subject to legislative discretion was dismissed as being outmoded and not taking into account the changes to the constitution implemented by the seventh amendment. Before the seventh amendment gave the people the power of referendum over the legislature, the legislature acted “under a free license to legislate” and the “declaration of an emergency was final and conclusive.” However, the seventh amendment reserved the power of referendum to the people as a fourth branch of government, and limited the legislature’s power to declare emergencies. Therefore, a legislative declaration

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136. Id. at 304, 147 P. at 12.
137. Id. at 305, 147 P. at 12.
138. Brislawn, 84 Wash. at 305, 147 P at 12.
139. Id.
140. Id.
141. See id. at 323, 147 P at 18.
142. See id. at 309-18, 147 P at 13-17.
143. See id. at 305-06, 317-18, 147 P. at 12, 16.
144. Id. at 312-13, 147 P. at 15.
145. Id. at 305-06, 147 P. at 12 ("[W]here the people have put upon the Legislature a limitation in the way of a specific definition of its power and an elimination of acts of a certain
of emergency that did not conform to the requirements of the constitution could be declared unconstitutional by the court.146

The dissent in Brislawn approached the issue quite differently than the majority. While the majority saw the case as presenting an issue of the power of the legislature,147 the dissent viewed the case as calling into question the discretion of the legislature in determining facts that constitute an emergency.148 The dissent asserted that the legislature was the only branch that could determine facts upon which a law is based.149 It cautioned that judicial review of declarations of emergency “will create confusion and doubt in every case” because the court has no knowledge of the facts and conditions considered by the legislature.150 In taking issue with the majority’s characterization of the issue as the intersection of legislative power with the people’s right to referendum, the dissent foreshadowed the continuing struggle in each case over the amount of deference to be granted to legislative declarations of emergency. The warning of confusion arising from the dissenting opinion was most apt given the majority’s failure to articulate a clear rule for reviewing legislative declarations of emergency.151

While the majority was clear that emergency clauses in legislation are subject to judicial review,152 the majority was not clear in stating the standard by which emergency clauses should be reviewed. First, the majority seemed to create a rebuttable presumption in favor of the people’s right to referendum by stating:

character, the rule is that the declaration of an emergency must conform to the constitutional requirement."); id. at 309-11, 317-18, 147 P. at 13-16.

146. See id. at 316-17, 147 P. at 16 (equating limit on legislature to declare law emergent with other constitutional limitations placed on the legislature).

147. Id. at 314, 147 P. at 15 (“[P]ower has been withheld, in so far as a withholding can be made by apt and certain words. It follows, then, that it is a question of power rather than of discretion. The limitation of that power must be found in the terms of the Constitution construed in connection with the intent of the people in incorporating such a provision in the Constitution.”).

148. Id. at 32425, 147 P. at 19 (Mount, J., dissenting).

149. Id. at 324, 147 P. at 19 (Mount, J., dissenting).

150. Id. at 323-25, 147 P. at 18-19 (Mount, J., dissenting).

151. Compare id. at 315, 147 P. at 15 (stating that any doubt about legislature’s right to declare emergency take away people’s right to referendum should be resolved in favor of people’s power of referendum), with id. at 318, 147 P. at 16 (also stating that any doubt about whether legislation is emergent should be resolved in favor of legislative declaration of emergency).

152. Id. at 312-14, 147 P. at 14-15 (rejecting argument that legislature is proper body to ultimately determine what laws are and are not emergent); see also Barnett, supra note 127, at 372 & n.7; Robert B. Gosline, “And To Declare An Emergency”, 1 OHio ST. L.J. 40, 42 (1935); Lowe, supra note 101, at 618-20; Emergency Legislation, supra note 7, at 855 n.41.
When, therefore, the question comes whether the Legislature has a right to declare an emergency which will take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people instead of in the admittedly unwarranted declaration by the Legislature.\textsuperscript{153}

Then, several pages later in the opinion, in an interesting reversal of sentiment, the court seemed to create a rebuttable presumption in favor of the legislature’s declaration of emergency when it wrote, “If the act be doubtful, the question of emergency will be treated as a legislative question and the doubt resolved in favor of the declaration of emergency made by the legislative body.”\textsuperscript{154} These conflicting rules expressed by the majority paved the way for years of confusing decisions regarding the validity of emergency clauses and the people’s right to referendum.

\section*{B. The Confusion Grows}

Three cases decided only one month after \textit{Brislawn} held true to the idea that whether an act falls within one of the two enumerated exceptions to the referendum is a judicial, not a legislative, question.\textsuperscript{155} Unlike \textit{Brislawn}, however, each of these cases dealt directly with a person’s right to file a petition for referendum on a bill declared emergent, and each case upheld the legislature’s declaration of emergency exempting the bill from referendum.\textsuperscript{156} Interestingly, these cases cited the second rule in \textit{Brislawn} for authority that deference would be given to the legislature’s declaration of emergencies and ignored the statement about resolving disputes in favor of the people’s power of referendum.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{153} \textit{Brislawn}, 84 Wash. at 315, 147 P. at 15. The court even more strongly stated that “no such declaration [of an emergency by the legislature] is final and should be given no immediate effect, unless it can be fairly said that the act is necessary to preserve the health, peace, or safety of the state or to support the government or its institutions.” \textit{Id.} at 313, 147 P. at 15.
  \item \textsuperscript{154} \textit{Id.} at 318, 147 P. at 16.
  \item \textsuperscript{155} \textit{See State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 270, 148 P. 28, 32 (1915); State ex rel. Case v. Howell (Case I), 85 Wash. 281, 287, 147 P. 1162, 1164 (1915); State ex rel. Case v. Howell (Case II), 85 Wash. 294, 297, 147 P. 1159, 1161 (1915).}
  \item \textsuperscript{156} \textit{Blakeslee}, 85 Wash. at 275, 148 P. at 33 (holding that items in highway appropriation bill were exempt from referendum); \textit{Case I}, 85 Wash. at 291-92, 147 P. at 1165 (holding that an act preventing depletion of municipal funds earmarked for special purposes was exempt from referendum); \textit{Case II}, 85 Wash. at 299-300, 147 P. at 1160-62 (holding that an act regulating common carriers of passengers was exempt from referendum).
  \item \textsuperscript{157} \textit{Case I}, 85 Wash. at 287, 147 P. at 1164; \textit{Case II}, 85 Wash. at 296-97, 147 P. at 1160-61; \textit{see Blakeslee}, 85 Wash. at 270, 148 P. at 32 (giving legislature deference by interpreting the word support as broadly as possible); \textit{see also Blakeslee}, 85 Wash. at 276, 148 P. at 34 (Fullerton, J., dissenting) (stating that the rule from the early cases is that if doubt exists about the fact of
Blakeslee is the most notable of the three cases, as it formed the controlling precedent that all appropriations bills "directed to the maintenance of the existing activities of the state," whether or not immediate, are exempt from referendum as being for the support of state government and its existing public institutions.\(^{158}\) Shorty thereafter, using the precedent of these early cases, the court unanimously upheld an emergency clause in a bill instituting fees for the licensing of motor vehicles.\(^{159}\) However, the uniformity of precedent from the cases following Brislawn did not last long.\(^{160}\)

In 1921, the court issued another fractured five to four decision in *State ex rel. Short v. Hinkle*, this time regarding the boundaries of the exception to the referendum for bills that are in support of state government.\(^{161}\) The bill containing the emergency clause at issue in *Short* adopted the administrative code to provide a more efficient method of carrying on state government in the face of insufficient revenues.\(^{162}\) Despite not implementing a tax or appropriating any money, the court upheld the emergency clause by finding that the act fit within the liberal construction of the term "support" from Blakeslee\(^{163}\) because adoption of the administrative code was designed to give the state "the greatest benefit from the revenues . . . actually received."\(^{164}\) However, the dissent could not distinguish the act in question here from that struck down in Brislawn because both abolished existing institutions and substituted new ones in their place.\(^{165}\)

emergency the law will be upheld).

160. *See supra* note 20 (detailing cases discussing confusion of the courts addressing the validity of emergency clause).
162. *Short*, 116 Wash. at 2-3, 198 P. at 535. Perhaps foreseeing the tenuousness of the emergency clause, the legislature stated the facts constituting the emergency in the clause itself rather than just reciting language from article II, § 1(b) of the constitution. The emergency clause appeared as follows:

> Whereas the revenues of the state are insufficient to support the state government and its existing public institutions as at present organized, and whereas it is necessary that the existing administrative agencies of the state government be consolidated and co-ordinated in order to bring the cost of supporting the state government and its existing institutions within the possible revenues of the state, therefore this act is necessary for the support of the state government and its existing public institutions, and shall take effect immediately.

*Id.*

163. *See Blakeslee*, 85 Wash. at 270, 148 P. at 32.
164. *See Short*, 116 Wash. at 9-12, 198 P. at 538.
165. *See id.* at 18-26, 198 P. at 541-43 (Holcomb, J., dissenting).
The dissent's reasoning ultimately prevailed when *Short* was overruled in 1943.\(^{166}\)

The court returned to its reasoning in *Brislawn* in the next case that challenged the validity of an emergency clause. In *State ex rel. Satterthwaite v. Hinkle*, the court held an emergency clause invalid in a bill abolishing the state highway committee and substituting in its place a department of highways.\(^{167}\) The court said it was impossible to distinguish the bill in *Satterthwaite* from the bill examined in *Brislawn*, finding that both cases dealt with acts that "took from one board or set of officers certain duties and placed them upon another board or set of officers," and thus found that the bill in *Satterthwaite* was subject to referendum.\(^{169}\) Despite reverting to reasoning from *Brislawn*, the court's prior precedent remained unsettled.

Over the next thirty-four years, the court upheld six emergency clauses and struck down four.\(^{171}\) For the most part, these ten cases adhered to the now entrenched rule from *Brislawn* that deference would be given to the legislature and an emergency clause would be found invalid only if it can be said from the face of the act and judicial knowledge that the emergency declaration is obviously false.\(^{173}\) However, when the court in *State ex rel. Kennedy v. Reeves*...
placed the burden on the party defending the validity of an emergency clause to prove that it fit within one of the exceptions to the referendum, the court adhered to Brislawn's statement that any doubt about the validity of an emergency clause should be resolved in favor of the people's right to referendum.

Reversion back to Brislawn's main theme of maintaining the people’s right to referendum in the face of legislative encroachment was emphasized again in 1963. In State ex rel. Humiston v. Meyers, the court struck down an emergency clause in a bill authorizing certain gambling activities. The court's decision emphasized the people’s right to referendum and the legislature’s inability to take that right away except in the specifically enumerated circumstances found in article II, section 1 of the constitution. The court found the people, in adopting the initiative and referendum amendment, intended that “the legislature has no right to tack an emergency clause onto an act in order to prevent the people from exercising their right of referendum, unless that act is clearly within the exception set forth in the [seventh] amendment.” In deciding whether the bill fit into either of the two exceptions to the referendum, the court placed significant emphasis on the fact that the text of the act itself did not suggest any reason for an emergency clause. Despite this clear pronouncement that the people’s right

cf. McLeod, 22 Wash. 2d at 674, 157 P.2d at 719 (giving great weight to legislative declaration of emergency); Robinson, 17 Wash. 2d at 213-14, 135 P.2d at 4 (giving great weight to legislative declaration of emergency); Burt, 173 Wash. at 75, 21 P.2d at 514-15 (finding an emergency clause invalid merely by looking at the face of the act).

174. See Kennedy, 22 Wash. 2d at 682, 157 P.2d at 723 (“Unless we can say that the act is, in fact, necessary for the immediate preservation of the public peace, or for the immediate preservation of the public health, or for the support of the state government and its existing public institutions, the relators are of right entitled to the writ prayed for.”). The court in Kennedy stated the following in support of its divergence from the deferential precedent:

With all due respect, and with the earnest desire not to seem either censorious or facetious, we feel that we must say frankly and in all seriousness that the custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent, within the meaning of the test laid down in paragraph (b) of the seventh amendment, has become so general as to make it appear, in the light of recent experience, that a number of those statements can no longer be deemed controlling.

Id. at 683, 157 P.2d at 724.

175. Compare id. at 682, 157 P.2d at 723 (failing to defer to the legislature's declaration of emergency), with State ex rel. Brislawn v. Meath, 84 Wash. 302, 315, 147 P. 11, 15 (1915) (stating that any doubt about an emergency clause should be resolved in the people's favor).

176. 61 Wash. 2d 772, 773, 780, 380 P.2d 735, 736, 740 (1963) (finding that pinball machines, punchboards, bingo, and cardrooms do not create a threat).

177. Id. at 776, 380 P.2d at 738.

178. Id.

179. Id. at 778, 780, 380 P.2d at 739, 740 (“The face of the act is patently devoid of any facts
to referendum should be given effect unless an act on its face clearly falls within the enumerated exceptions contained in article II, section 1(b) of the state constitution, courts after *Humiston* continued to stress that deference should be given to the legislature such that emergency clauses will be valid unless obviously false on their face. In fact, no emergency clause has been struck down since *Humiston*, and recently the court has strongly adhered to precedent giving substantial deference to the legislature.

C. CLEAN v. State and Other Recent Cases

Given the precedent in *Burt* and *Humiston* striking emergency clauses in bills relating to horse racing and gaming activities, one might have predicted that an emergency clause in a bill aimed to keep professional baseball in Seattle would be held invalid. However, in *CLEAN* the court distinguished legislation authorizing a previously prohibited activity from legislation keeping a current activity in place and reaffirmed the rule that substantial deference would be given to legislative declarations of emergency.

Longtime Seattle baseball fans and King County residents will be familiar with the facts. In years leading up to 1995, the Seattle Mariners became “concern[ed] about the viability of the Kingdome as a facility for major league baseball,” indicating that a state-of-the-art facility was needed “to achieve financial stability and to ... [remain] competitive with other major league baseball clubs.” To address the problem, the legislature passed a law in 1995 authorizing King County to increase the sales and use tax rate within the county by 0.1 percent, subject to voter approval. King County voters narrowly

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180. See, e.g., *CLEAN* v. State, 130 Wash. 2d 782, 807-08, 928 P.2d 1054, 1066 (1996) (quoting State ex rel. *Humiston* v. Meyers, 61 Wash. 2d 772, 778, 380 P.2d 735, 778 (1963)) (legislative declarations of fact are deemed conclusive unless obviously false, and if there is any doubt it will be resolved in favor of the legislature).


183. *CLEAN*, 130 Wash. 2d at 808-09, 928 P.2d at 1067.

184. *Id.* at 807, 928 P.2d at 1066.

185. *Id.* at 787, 928 P.2d at 1056.

186. *Id.* at 787-88, 928 P.2d at 1056-57.
rejected the proposed tax increase.\textsuperscript{187} Rejection by voters led the Mariners' CEO to write the King County Executive that without a new stadium, the Mariners would be put up for sale after October 30, 1995, which most likely would have meant relocation of the team away from Seattle.\textsuperscript{188} In response, the governor called the legislature into special session in October 1995 solely to address the issue of stadium financing.\textsuperscript{189} During the special session, the legislature passed Engrossed House Bill 2115,\textsuperscript{190} which provided a way for the state and King County to generate additional tax revenues to help pay for a "major portion of the costs of [building] the new baseball stadium."\textsuperscript{191} The legislature saw the possibility of losing the Mariners as an emergency and included an emergency clause in the bill making it effective immediately.\textsuperscript{192}

The governor signed the act into law soon after its passage, and three days later a Washington citizen went to file a petition for referendum with the Secretary of State to refer E.H.B. 2115 to a popular vote.\textsuperscript{193} The Secretary of State refused to accept the petition on the grounds that the emergency clause in the bill exempted it from referendum.\textsuperscript{194} Two lawsuits were then filed challenging the validity of the emergency clause under article II, section 1 of the state constitution.\textsuperscript{195}

In holding the emergency clause valid and the bill exempt from referendum, the Washington Supreme Court made two critical rulings reaffirming the substantial deference given to legislative declarations of emergency: (1) the court greatly expanded the definition of police powers by holding that building a publicly owned professional sports stadium is within the general police powers of the state; and (2) the determination of the existence of an emergency is better left to the legislature unless that determination is obviously false.\textsuperscript{196}

\begin{itemize}
\item \textsuperscript{187} Id. at 788, 928 P.2d at 1057.
\item \textsuperscript{188} See id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Baseball Stadium Financing, ch. 1, 1995 Wash. 3rd Spec Sess. Laws 1 (enacting E.H.B. 2115).
\item \textsuperscript{191} CLEAN, 130 Wash. 2d at 790-91, 928 P.2d at 1058.
\item \textsuperscript{192} Baseball Stadium Financing, ch. 1, § 310, 1995 Wash. 3rd Spec. Sess. Laws 13; see also CLEAN, 130 Wash. 2d at 808-09, 928 P.2d at 1067 ("[T]he Legislature acted to maintain major league baseball in this state in the face of a clear and present danger that this State's existing major league baseball franchise, the Seattle Mariners, would depart this state if prompt action was not taken to assure that a new publicly owned stadium would be developed in King County.").
\item \textsuperscript{193} Id. at 791, 928 P.2d at 1058.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id. at 791-92, 928 P.2d at 1058-59.
\item \textsuperscript{196} Id. at 806, 812, 928 P.2d at 1066, 1068-69.
\end{itemize}
First, the court's ruling expanded the types of state activities that fall within its police powers. The court first found the term "public peace, health or safety" in article II, section 1(b) to be the same as the exercise of the state's police powers. However, no definition of police power was cited. The court merely stated that the only limitation upon the police power of the state was that the state's actions "must reasonably tend to promote some interest of the State and not violate" the constitution. The court then conclusively decided that if the existence of a professional sports stadium improves the state's economy and the life of its citizens, building a publicly owned stadium is within the police powers of the state. No effort was made to explain how a publicly funded stadium preserves the "public peace, health or safety" as required by the constitution or how it fits into traditional police powers of protecting public health and safety. Ultimately, the court held that it is up to the legislature to determine if the existence of a major league baseball team improves the local economy, and if the legislature does make such a determination, it is within the police powers of the state to publicly finance construction of a stadium. In effect, the court's decision expanded the "public peace, health or safety" exception to the referendum to include any state action that benefits the general welfare.

Second, the court left the determination of the existence of emergencies to the legislature, ruling that emergency clauses should be upheld "where there is nothing before [the court] that suggests that the Legislature acted improperly or that the declaration was a mere ruse to avoid the people's power of referendum." The court distinguished the Stadium Act from the act reviewed in Humiston legalizing pinball machines, punchboards, bingo, and cardrooms, by reasoning that there is a difference between an emergency necessitating the authorization of previously illegal activities as in Humiston and an emergency necessitating the authorization of actions to keep a current activity in place.

198. CLEAN, 130 Wash. 2d at 804, 928 P.2d at 1065.
199. Id. at 805, 928 P.2d at 1065.
200. Id. at 806, 928 P.2d at 1066.
201. See Spitzer, supra note 197, at 506.
202. CLEAN, 130 Wash. 2d at 806, 928 P.2d at 1066.
203. Id. at 813, 928 P.2d at 1069. The court also stated that it "is required to grant considerable deference to the Legislature's determination that an emergency exists, giving it every favorable presumption and deferring to its judgment unless it is obvious that the declaration of emergency is false." Id. at 812, 928 P.2d at 1068-69.
204. Id. at 808-09, 928 P.2d at 1067. The emergency associated with keeping the existent Mariners team in Seattle was expressed in the following manner:

[T]he Legislature acted to maintain major league baseball in this state in the face of a
The court dismissed the argument that there was no indication of an emergency surrounding the passage of the act, other than a bare declaration of emergency in the act itself, by finding the following judicially noticed facts indicating immediate legislative action was needed: (1) the governor "called a special session of the legislature for the sole purpose of dealing with the stadium issue;" (2) the necessity of quick action was stressed on the floor of the House and Senate; and (3) recorded evidence showed that a sale of the Mariners was probable if the legislature failed to take action by October 30, 1995. According to the court, the legislature was faced with the emergency of losing the Mariners and the public purposes behind the Stadium Act in keeping the Mariners in Seattle could not have been maintained without quickly assuring the owners that a new stadium would be built. In closing, the court noted that substituting its judgment for that of the legislature "would be most unwise and would constitute a major assault on the historic balance of powers," a theme expanded upon by Justice Talmadge's concurrence.

Justice Talmadge's concurring opinion repeats the concerns raised by the dissent in Brislawn. Justice Talmadge argued that the legislature, with the benefit of committee hearings and public testimony, is the best branch of government to determine the factual question of when an emergency exists. Justice Talmadge, like the dissent in Brislawn, also stressed that the court should be wary of violating the separation of powers principles and invading the province of a coordinate branch of government (the legislature). He concluded that the people could challenge the bill through the initiative process, and if the clear and present danger that this State's existing major league franchise, the Seattle Mariners, would depart this state if prompt action was not taken to assure that a new publicly owned stadium would be developed in King County. The specter of this loss was a circumstance that the Legislature reasonably could believe would result in a loss of jobs, tax revenue, recreational opportunities, while at the same time diminishing the quality of life for a substantial number of this state's citizens.

Id.

205. Id. at 809-10, 928 P.2d at 1067-68.
206. Id. at 811, 928 P.2d at 1068.
207. Id. at 809, 928 P.2d at 1067.
208. Id. at 813, 928 P.2d at 1069.
209. See id. at 813-20, 928 P.2d at 1069-72 (Talmadge, J., concurring).
210. Compare id. at 817, 928 P.2d at 1071 (opining that "Fact-finding is left to the Legislature"), with State ex rel. Brislawn v. Meath, 84 Wash. 302, 324, 147 P. 11, 19 (1915) (Mount, J., dissenting) (opining that legislature is to determine facts upon which law is based).
211. See CLEAN, 130 Wash. 2d at 815, 817, 928 P.2d at 1070-71 (Talmadge, J., concurring).
212. Compare id. at 814, 928 P.2d at 1070 (Talmadge, J., concurring) (declaring that it is proper for the court to avoid intrusion upon the decision-making of a coordinate branch of government), with Brislawn, 84 Wash. at 323-25, 147 P. at 18-19 (stating that the court should be mindful of overturning factual conclusions made by a coordinate branch of state government).
people do not agree with the legislators' declaration of emergency in a bill the
people may vote the legislators out of office.\textsuperscript{213}

While Justice Talmadge viewed the issue as the separation of powers
between the court and the legislature, Justice Guy saw the issue as the separation
of powers between the legislature and the people.\textsuperscript{214} Justice Guy refused to give
deference to a legislative declaration of emergency where no facts are cited in the
bill, apparent from the bill's subject, or judicially known to the court, that would
support the existence of an emergency.\textsuperscript{215} Instead, he would have deference
given to emergency declarations only when the emergency is stated "in the
preamble of the [bill] or in the emergency clause itself, or is apparent from the
nature of the act."\textsuperscript{216} Requiring a statement of reasons for an emergency clause
would help the courts properly conduct review of such clauses and provide other
useful purposes.\textsuperscript{217}

Nonetheless, the majority opinion in \textit{CLEAN} garnered great weight in
subsequent cases challenging the validity of emergency clauses.\textsuperscript{218} For instance,
a few years after \textit{CLEAN}, the court declared valid an emergency clause in a bill
that provided funding for a football stadium for the Seattle Seahawks.\textsuperscript{219} The
reasoning in \textit{Brower} was eerily similar to that in \textit{CLEAN}; the \textit{Brower} court
upheld the emergency clause because the public purpose of keeping the Seattle
Seahawks in town could not be achieved without immediate assurance to the
team that financing for a new stadium would be provided.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{213} See \textit{CLEAN}, 130 Wash. 2d at 819, 928 P.2d at 1072 (Talmadge, J., concurring).
\item \textsuperscript{214} See \textit{CLEAN}, 130 Wash. 2d at 821, 928 P.2d at 1073 (Guy, J., concurring in part and
dissenting in part) (stating that, in giving deference to a declaration of emergency, the court has the
duty to scrutinize an emergency clause against the right to referendum secured by the constitution);
see also id. at 826-27, 928 P.2d at 1076 (Sanders, J., dissenting).
\item \textsuperscript{215} See id. at 821, 938 P.2d at 1073 (Guy, J., concurring in part and dissenting in part).
\item \textsuperscript{216} See id. Justice Talmadge seems to agree that citing reasons for the emergency clause
would be prudent. See id. at 820, 928 P.2d at 1072 ("it is certainly true the Legislature should
generally assist the courts by clarifying the basis for declaration of a fact, like an emergency, in
the legislation itself or the legislative history").
\item \textsuperscript{217} See infra Part VI.B.
\item \textsuperscript{218} See, e.g., \textit{Brower v. State}, 137 Wash. 2d 44, 49, 969 P.2d 42, 46-47 (1998) ("In reaching
this conclusion, we note that our recent decision in \textit{CLEAN v. State} . . . dictates the result on a number
of issues \textit{Brower} has raised."); Wash. State Farm Bureau Fed'n v. Reed, 154 Wash. 2d 668, 676, 115
P.3d 301, 305 (2005) ("We affirmed our decision in \textit{CLEAN} in \textit{Brower v. State}."); see also \textsc{Utter ET
AL., supra} note 23, at 52 (noting that the Washington Supreme Court originally "took a narrow view
of what constituted an emergency," but that with the decision in \textit{CLEAN} the court indicated it would
give more judicial deference to legislative declarations of emergency).
\item \textsuperscript{219} \textit{Brower}, 137 Wash. 2d at 74-76, 969 P.2d at 59-60.
\item \textsuperscript{220} See id. at 73-74, 969 P.2d at 58-59. The then current owners of the Seattle Seahawks
wanted to move the team to California. \textit{Id.} at 49, 969 P.2d at 47. Football Northwest, Inc. was
formed and secured an option to buy the team, but declared it would not exercise the option unless
public financing for a new stadium was provided. See id. The legislature passed a bill providing for
Since *CLEAN*, the Washington Supreme Court has declined to abandon its deferential standard of review of legislative declarations of emergency. In its most recent and ironic ruling on the issue, the court upheld an emergency clause exempting from referendum a bill that suspended the requirement that all measures raising taxes be approved by a two-thirds majority that was first adopted by initiative. The court stressed that even though the people are recognized as a fourth branch of government, their power is not without limitations because the legislature was given the power to exempt bills from referendum. Thus, the court found the emergency clause valid because it could not say it was "obviously false [or] a mere ruse to deprive the voters of their referendum power.

In total, the Washington Supreme Court has decided twenty-four cases specifically dealing with the issue of the validity of an emergency clause. The court upheld emergency clauses in seventeen cases and found them invalid in financing, but decided to refer the bill to the people for ultimate approval. See *id.* at 50, 969 P.2d at 47. In order for the public vote on the referendum to take place before Football Northwest's option to purchase the team expired, the legislature included an emergency clause on the part of the act referring it to the people. See *id.* at 50-51, 969 P.2d at 47. The court found the purpose of the act would not have been achievable without the emergency clause. *Id.* at 73-74, 969 P.2d at 58-59.


222. See Wash. State Farm Bureau Fed'n, 154 Wash. 2d at 670-71, 678, 115 P.3d at 302-03, 306. In 1993, the people approved an initiative that required any measure that raised taxes to be approved by a two-thirds majority in each house of the legislature. *Id.* at 670, 115 P.3d at 302-03 (quoting WASH. REV. CODE ANN. § 43.135.035(1) (2007)). The legislature amended the provision in 2005 to provide that between the bill's effective date and June 30, 2007, any action that raised taxes needed only majority approval. *Id.* at 671, 115 P.3d at 303 (quoting State Expenditure Limits, ch. 72, § 2, 2005 Wash. Sess. Laws 216). The bill contained an emergency clause making it effective immediately and after the bill passed, the legislature enacted four bills that increased taxes with less than two-thirds approval. See *id.* at 671-72, 115 P.3d at 303 (quoting State Expenditure Limits, ch. 72, § 7(1), 2005 Wash. Sess. Laws 221).

223. *Id.* at 676-77, 115 P.3d at 305-06.

224. *Id.* at 676-78, 115 P.3d at 305-06.

seven.\textsuperscript{226} In upholding emergency clauses, the court has relied much more on the "support of state government" exception than the "public safety" exception.\textsuperscript{227} These numbers and the analysis of the court's jurisprudence show that judicial sentiment towards the validity of emergency clauses has ebbed and flowed since the referendum was adopted in 1912. However, the court has recently been consistent in giving substantial deference to the legislature's declarations of emergency.\textsuperscript{228} Despite this deference, there still exist limits on the legislature's use of emergency clauses.\textsuperscript{229}

IV. CURRENT LIMITATIONS ON THE USE OF EMERGENCY CLAUSES

The Washington Constitution vests all political power in the people\textsuperscript{230} while the legislative authority is given to the legislature.\textsuperscript{231} The initiative and referendum are explicitly reserved to the people from the legislature’s

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227. Eleven emergency clauses have been upheld on "support" grounds. Wash. State Farm Bureau Fed'n, 154 Wash. 2d at 677-78, 115 P.3d at 306; Andrews, 102 Wash. 2d at 765-66, 689 P.2d at 401; Farris, 99 Wash. 2d at 337, 662 P.2d at 827; Helm, 82 Wash. 2d at 313, 320, 510 P.2d at 1115, 1119; Hoppe, 58 Wash. 2d at 327, 329-31, 363 P.2d at 126-27; Pennock II, 42 Wash. 2d at 584-85, 587, 257 P.2d at 200-01; Shelor, 162 Wash. at 702, 298 P. at 1070; Reiter, 161 Wash. at 663-64, 297 P. at 1075; Short, 116 Wash. at 11-12, 198 P. at 538; Anderson, 106 Wash. at 547-48, 181 P. at 39; Blakeslee, 85 Wash. at 263, 148 P. 28. However, only four emergency clauses have been upheld on "public peace, health or safety" grounds. See Brewer, 137 Wash. 2d at 72-76, 969 P.2d at 58-60; CLEAN, 130 Wash. 2d at 812-13, 928 P.2d at 1068-69; Hamilton, 173 Wash at 259, 23 P.2d at 5; Case II, 85 Wash. at 298-300, 147 P. at 1161-62. Two cases have upheld emergency clauses on both grounds. See Pennock I, 27 Wash. 2d at 744, 179 P.2d at 963-64; Case I, 85 Wash. at 291-92, 147 P. at 1165-66.

228. See, e.g., Wash. State Farm Bureau Fed'n, 154 Wash. 2d at 678, 115 P.3d at 306 ("Given the substantial deference to the legislature in a legislative declaration of emergency, we find that the emergency clause . . . is valid.").

229. See infra Part IV.


authority. The initiative and referendum provide a broad base for the people to exercise their political power. Through the referendum, the people have the right and the ability to assert their will over the legislature. In this regard, the people’s referendum power serves “as a powerful check . . . on the other branches of government.” To be an effective check on the other branches of government, the initiative and referendum provisions in the state constitution should be liberally construed. However, when the validity of an emergency clause is challenged, the burden is on the challenging party to prove that the bill does not fit within one of the exceptions to the referendum.

Washington courts have consistently held that there are two distinct exceptions to the referendum: (1) legislation necessary for the immediate preservation of the public peace, health, or safety; and (2) legislation for the support of state government and its existing institutions. Although the exact phrase in the constitution states all laws are subject to referendum except those that “may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions,” Washington courts have uniformly held that the word “or” was inadvertently omitted between the two exceptions. This interpretation arose after Oregon’s unfortunate experience with its referendum provision.

232. See Wash. Const. art. II, § 1(a) (“The first power reserved by the people is the initiative.”); id. art. II, § 1(b) (“The second power reserved by the people is the referendum . . . . ”).


238. See Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 673, 115 P.3d at 304 (citing Farris v. Munro, 99 Wash. 2d 326, 335-36, 662 P.2d 821, 827 (1983)).

239. Wash. Const. art. II, § 1(b).

240. E.g., Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 673 n.3, 115 P.3d at 304 n.3; CLEAN, 130 Wash. 2d at 804 n.7, 928 P.2d at 1064 n.7; Farris v. Munro, 99 Wash. 2d 326, 335, 662 P.2d 821, 827 (1983).

241. See Even, supra note 127, at 280-82 (giving an overview of the problem faced by Oregon).
Several years before Washington adopted the initiative and referendum, Oregon "adopted the initiative and referendum with practically no limitations."\(^{242}\) In 1905 and 1907, the Oregon State Legislature appropriated money to the state university to avoid it being financially crippled.\(^{243}\) However, referenda were subsequently filed on both of the appropriation bills, thus delaying their effective dates and ultimately denying the university much needed funds.\(^{244}\) The Washington State Supreme Court has observed that the people of Washington had no intention of going through the same embarrassing experience as Oregon.\(^{245}\) Thus, laws for the support of state government and its existing institutions were included as a second exception to the right to referendum.\(^{246}\)

In determining whether an act falls within one of the two exceptions to referendum, the entire act is considered as a whole, not just the parts that are being referred.\(^{247}\) For example, in *Andrews* a referendum was filed on several sections of a bill relating to the taxation of timber.\(^{248}\) The sections seeking to be referred set the tax rate on the harvesting of timber and provided for yearly incremental reductions in the tax rate from 1985 to 1988.\(^{249}\) In light of the exception from referendum for revenue-raising bills,\(^{250}\) those in favor of the referendum argued that because these sections reduced the timber tax rate, they could not be necessary for the *support* of state government.\(^{251}\) The court rejected this argument by finding the act as a whole contemplated a "comprehensive

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242. *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 267, 148 P. 28, 30 (1915). Oregon's constitution exempted only "laws necessary for the immediate preservation of the public peace, health or safety" from referendum. *Id.* (quoting OR. CONST. art. IV, §1 (repealed and replaced in 1968)).


248. *See Andrews*, 102 Wash. 2d at 762, 689 P.2d at 400.


250. *See Blakeslee*, 85 Wash. at 270-71, 148 P. at 32.

system of taxation on timber, with the clear purpose of raising revenue."\textsuperscript{252} The court made clear that while any part of a law that has been approved by the legislature is subject to referendum, such laws that as a whole are necessary to support the state government and its existing institutions are exempt from referendum.\textsuperscript{253} Therefore, no part of a bill is subject to referendum if the bill as a whole is "necessary for the [immediate preservation of the public peace, health or safety, or the] support of state government and its existing public institutions."\textsuperscript{254}

Each of the two exceptions to the referendum are examined next.

\textbf{A. Laws Preserving the Public Peace, Health or Safety}

To qualify under the first exemption to referendum, a bill must be (1) necessary (2) for the immediate preservation (3) of the "public peace, health or safety."\textsuperscript{255} The "public peace, health or safety" element, the necessity requirement, and the immediacy requirement will be discussed in that order.

The term "public peace, health or safety" has been interpreted to be synonymous with the state's police powers.\textsuperscript{256} Under its police power, the state can regulate the "public peace, health, or safety," so long as it "reasonably tend[s] to promote some interest of the State, and [does] not violate any constitutional mandate."\textsuperscript{257} However, this does not mean that the "public peace, health, or safety" exception extends to all legislation touching the general welfare or

\begin{itemize}
\item \textsuperscript{252} \textit{Id.} at 765, 689 P.2d at 401.
\item \textsuperscript{253} \textit{Id.} (quoting WASH. CONST. art. II, § 1(b)).
\item \textsuperscript{254} See Andrews, 102 Wash. 2d at 765-66, 689 P.2d at 401 (quoting WASH. CONST. art. II, § 1(b)). Despite the clear pronunciation in Andrews, this point may still be debatable. Turning to the history of this issue, in \textit{State ex rel. Pennock v. Reeves (Pennock I)} the court held that "[a] partial referendum may not be had on a law which admittedly contains emergent matter." 27 Wash. 2d 739, 742, 179 P.2d 961, 963 (1947), \textit{overruled in part by State ex rel. Pennock v. Coe (Pennock II)}, 42 Wash. 2d 569, 575-76, 257 P.2d 190, 194-95 (1953). However, six years later this holding in \textit{Pennock I}, was expressly overruled. \textit{Pennock II}, 42 Wash. 2d at 575-76, 257 P.2d 194-95 ("In so far as the majority opinion in [Pennock I] holds that there can never be a referendum of a part of a law which obviously contains any emergent matter, it is hereby expressly overruled.") (emphasis included). In light of \textit{Pennock I} being overruled by \textit{Pennock II}, Andrews favorably cited \textit{Pennock II} to support its holding that the sections of the timber act to be referred were part of an overall scheme to raise revenue despite these sections individually reducing the timber tax, even though \textit{Pennock II} had explicitly left open the possibility of a referendum on part of an act. Andrews, 102 Wash. 2d at 765, 689 P.2d at 401 (holding that the sections sought to be referred were integral parts of the comprehensive timber tax system enacted to raise revenues) (quoting \textit{Pennock II}, 42 Wash. 2d at 585, 257 P.2d at 200).
\item \textsuperscript{255} WASH. CONST. art. II, § 1(b).
\item \textsuperscript{256} CLEAN v. State, 130 Wash. 2d 782, 804, 928 P.2d 1054, 1065 (1996).
\item \textsuperscript{257} \textit{Id.} at 805, 928 P.2d at 1065. \textit{But see Spitzer, supra} note 197, at 505-06 (arguing that the court in \textit{CLEAN} "stretch[ed] the scope of the police power well beyond the regulatory field").
\end{itemize}
enacted for public convenience.\textsuperscript{258} For example, the court has found emergency clauses invalid in bills relating to the authorization of certain gambling activities,\textsuperscript{259} making the appointment and removal of state gaming commissioners subject to the pleasure of the governor,\textsuperscript{260} and authorizing horse racing.\textsuperscript{261} On the other hand, over the years the "public peace, health or safety" exception has been stretched by the court to find emergency clauses valid in bills relating to regulating the common carriers of passengers by motor vehicles,\textsuperscript{262} prohibiting cities from diverting revenues secured for special purposes,\textsuperscript{263} and financing professional sports stadiums.\textsuperscript{264} These varied decisions illustrate the "delicate balance between the emergent powers of the legislature and the people's right of

\begin{itemize}
  \item See \textit{CLEAN}, 130 Wash. 2d at 805, 928 P.2d at 1065 (quoting State \textit{ex rel.} Case \textit{v.} Howell, 85 Wash. 281, 285, 147 P. 1162, 1163 (1915)).
  \item See \textit{State \textit{ex rel.}} Humiston \textit{v.} Meyers, 61 Wash. 2d 772, 780, 380 P.2d 735, 740 (1963) (holding an emergency clause invalid where the act at issue authorized the operation of pinball machines, punchboards, bingo, and cardrooms).
  \item See \textit{State \textit{ex rel.}} McLeod \textit{v.} Reeves, 22 Wash. 2d 672, 674-75, 157 P.2d 718, 720 (1945).
  \item See \textit{State \textit{ex rel.}} Burt \textit{v.} Hutchinson, 173 Wash. 72, 75-76, 21 P.2d 514, 514-15 (1933); see also \textit{State \textit{ex rel.}} Kennedy \textit{v.} Reeves, 22 Wash. 2d 677, 682-83, 157 P.2d 721, 723-24 (1945) (invalidating an emergency clause on an act unifying control and jurisdiction over state timber); \textit{State \textit{ex rel.}} Robinson \textit{v.} Reeves, 17 Wash. 2d 210, 216-17, 135 P.2d 75, 78 (1943) (invalidating an emergency clause on an act providing a long term program for acquiring existing public utilities currently owned by private entities), \textit{overruled sub silentio} in part on other grounds by \textit{State \textit{ex rel.}} Pennock \textit{v.} Reeves, 22 Wash. 2d 728, 757-76, 257 P.2d 190, 193-94 (1953), as recognized in \textit{State \textit{ex rel.}} Hoppe \textit{v.} Meyers, 58 Wash. 2d 320, 329, 363 P.2d 121, 127 (1961); \textit{State \textit{ex rel.}} Satterthwaite \textit{v.} Hinkle, 152 Wash. 222, 222-25, 277 P. 837, 838-39 (1929) (invalidating an emergency clause on an act substituting a director of highways for the state highway committee); \textit{State \textit{ex rel.}} Brislawm \textit{v.} Meath, 84 Wash. 302, 304, 306, 147 P.11, 12 (1915) (invalidating an emergency clause on an act substituting the secretary of state and state treasurer for the state fire warden, state forester and the state board of tax commissioners on the board of state land commissioners).
  \item See \textit{State \textit{ex rel.}} Case \textit{v.} Howell (\textit{Case I}), 85 Wash. 294, 297-300, 147 P. 1159, 1160-62 (1915); see also \textit{State \textit{ex rel.}} Pennock \textit{v.} Reeves (\textit{Pennock I}), 27 Wash. 2d 739, 740, 744, 179 P.2d 961, 961, 963 (1947) (upholding an emergency clause on an act modifying old-age assistance programs), \textit{overruled in part on other grounds} by \textit{Pennock II}, 42 Wash. 2d at 575-76, 257 P.2d at 194-95; \textit{State \textit{ex rel.}} Hamilton \textit{v.} Martin, 173 Wash. 249, 250, 259, 23 P.2d 1, 1-2, 4 (1933) (upholding an emergency clause on an act authorizing the issuance of bonds to combat unemployment).
  \item See \textit{State \textit{ex rel.}} Case \textit{v.} Howell (\textit{Case I}), 85 Wash. 281, 291-92, 147 P. 1162, 1165 (1915).
  \item See Brower \textit{v.} State, 137 Wash. 2d 44, 72-76, 969 P.2d 42, 58-60 (1998) (upholding an emergency clause on an act providing financing for a new football stadium); \textit{CLEAN \textit{v.}} State, 130 Wash. 2d 782, 803-13, 928 P.2d 1054, 1064-69 (1996) (upholding an emergency clause on an act providing financing for a baseball stadium).
referendum” that must be dealt with when deciding whether a law is an emergency measure and exempt from referendum. 265

The necessity requirement is quite lax. An act may fit within the exception even if it merely authorizes, rather than requires, certain actions. 266 However, legislation that is merely expedient or convenient is not exempt from referendum. 267

Finally, a bill must be for the immediate preservation of the public peace, health, or safety to fit under the first exception. 268 The Court has stated that the word “immediate” does not necessarily mean instantly, and latitude is given to the significance of the word such that “it may mean close to the time of enacting the law.” 269 Additionally, a bill may still be emergent and exempt from referendum even if its effective date is not immediate, but rather sometime after being enacted but before the default ninety day effective date provided by the constitution. 270

B. Laws for the Support of State Government and its Existing Public Institutions

The second type of laws exempt from referendum are those for the “support of state government and its existing public institutions.” 271 Unlike the first exception, laws that support the state government do not require immediacy in order to be exempt from referendum. 272 Also unlike the first exception,

266. See Hoppe, 58 Wash. 2d at 328-30, 363 P.2d at 126-27 (strongly disagreeing with the dictum in Robinson, 17 Wash. 2d at 216, 135 P.2d at 78, which suggested that the permissive nature of an act is conclusive as to whether an act is emergent).
267. See CLEAN, 130 Wash. 2d at 805, 928 P.2d at 1065 (quoting Case I, 85 Wash. at 285, 147 P. at 1163).
268. See CLEAN, 130 Wash. 2d at 807, 928 P.2d at 1066. Additionally, courts have held the immediacy requirement is met when the public purpose sought to be achieved by the bill can only be realized if the legislation takes effect immediately. See Brower, 137 Wash. 2d at 73-74, 969 P.2d at 58-59 (finding that a referendum election required by a bill financing a football stadium was emergent because the Seattle Seahawks would likely have moved out of town if the public did not approve the stadium financing, thus defeating the bill’s purpose of keeping the team in Seattle); CLEAN, 130 Wash. 2d at 809, 928 P.2d at 1067 (holding a bill providing financing for a baseball stadium to be emergent because the public purpose of the bill, which was to keep the Seattle Mariners in town, would have been unattainable if financing was not approved by a specific date).
270. See id. at 299-300, 147 P. at 1161-62 (finding a law still emergent even though it was passed on March 10, 1915, but was not effective until April 10, 1915).
emergency clauses are not necessary in bills for the support of state government273 although it is current practice for the legislature to include them.274

This exception for the support of state government applies to legislation that offers financial support to the government’s existing institutions.275 Any laws generating revenue for the state, not just appropriation measures, fit within the exception.276 The exception is also not limited to measures that cover only current expenses; all appropriations and revenue generating bills are exempt from referendum.277 While “support” does not mean any law that has a beneficial purpose,278 the court remains committed to reading the term broadly279 and in its fullest sense.280 Consistent with this broad definition, the court has held a measure that merely facilitated the passage of separate revenue-generating bills281 as well as a measure that reduced timber taxes but as a whole was intended to raise revenue to be in support of state government.282

A bill must not only generate revenue to fit within the support exception, it must generate that revenue for the support of the government’s existing public institutions.283 This phrase has been held to contemplate those institutions “existing at the time the [initiative and referendum] amendment was adopted, or which, if newly created by the legislature, have not been rejected by resort to the referendum.”284 Revenue generating bills that are merely incidental to public

273. Helm, 82 Wash. 2d at 313, 510 P.2d at 1115 (quoting State ex rel. Pennock v. Reeves (Pennock I), 22 Wash. 2d 739, 743, 179 P.2d 961, 963 (1947), overruled in part on other grounds by State ex rel. Pennock v. Coe (Pennock II), 42 Wash. 2d 569, 575-76, 257 P.2d 190, 194-95 (1953)).


275. See State ex rel. McLeod v. Reeves, 22 Wash. 2d 672, 674, 157 P.2d 718, 720 (1945) (citing State ex rel. Satterthwaite v. Hinkle, 152 Wash. 221, 277 P. 837 (1929)).

276. Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 674, 115 P.3d at 304.


280. See Blakeslee, 85 Wash. at 270, 148 P. at 32, cited with approval in Ballasiotes, 97 Wash. 2d at 199, 642 P.2d at 401.

281. See Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 677-78, 115 P.3d at 306 (holding that a bill, which suspended two-thirds vote requirement for any bill raising state revenues, supported state government because it provided for the passage of revenue generating bills by a simple majority).


283. Wash. Const. art. II, § 1 (b).

284. State ex rel. Burt v. Hutchinson, 173 Wash. 72, 75, 21 P.2d 514, 514-15 (1933) (quoting Blakeslee, 85 Wash. at 274, 148 P. at 33); see also State ex rel. Robinson v. Reeves, 17 Wash. 2d 210,
institutions created during the same legislative session do not meet this requirement. However, the court held a bill creating a state lottery to be in support of state government because the lottery was “designed to produce revenue for the state general fund which in turn supports all of the existing state institutions.” Therefore, a bill generating revenue supports state government and its existing institutions so long as it is designed to fund government institutions in operation at the time the revenue-generating bill is passed and does not make any unnecessary policy changes.

C. Current Judicial Review of Legislative Declarations of Emergencies

Washington has long held that legislative declarations of emergency exempting bills from referendum are subject to judicial review. However, that judicial review is very limited. Courts currently “give substantial deference to the legislature” when reviewing emergency clauses.

For instance, “a legislative declaration of the existence of an emergency is deemed conclusive unless it is ‘obviously false and a palpable attempt at dissimulation.’ Courts will not conduct a factual inquiry in determining whether a legislative declaration of emergency is true or false, but must consider only the face of the act and the court’s judicial knowledge.” If there is any

217, 135 P.2d 75 (1943) (holding that a bill providing revenue for public institutions created by the same bill was not exempt from referendum), overruled sub silentio in part on other grounds by State ex rel. Pennock v. Coe (Pennock II), 42 Wash. 2d 569, 572-76, 257 P.2d 190, 193-94 (1953), as recognized in State ex rel. Hoppe v. Meyers, 58 Wash. 2d 320, 329, 363 P.2d 121, 127 (1961).

285. See Burt, 173 Wash. at 75-76, 21 P.2d at 514 (holding that a bill authorizing horse racing and directing revenue generated therefrom into an old-age pension fund created during the same session was not for the support of existing state institutions).


287. See Ballasiotes v. Gardner, 97 Wash. 2d 191, 199, 642 P.2d 397, 401 (1982) (holding that a county ordinance permanently changing county voting system from lever machines to punch cards when existing voting equipment was adequate was a change in substantive policy, not an appropriation for existing government functions, and therefore subject to referendum); Blakeslee, 85 Wash. at 271, 148 at 32 (noting that laws bringing the state into new activities or providing for new functions that do not support government as then organized are subject to referendum).


289. E.g., Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 675, 115 P.3d at 305.

290. Id. (quoting CLEAN v. State, 130 Wash. 2d 782, 808, 928 P.2d 1054, 1066 (1996)).

291. Wash. State Farm Bureau Fed’n, 154 Wash. 2d at 675, 115 P.3d at 305 (quoting CLEAN, 130 Wash. 2d at 808, 928 P.2d at 1066). “Judicial notice, of which courts may take
doubt about the validity of an emergency clause, it will be resolved in favor of the legislature.\textsuperscript{292}

Legislation containing an invalid emergency clause is not void \textit{ab initio}.\textsuperscript{293} Rather, a bill containing an invalid emergency clause is subject to referendum like all other bills and therefore takes effect ninety days after conclusion of the legislative session in which it was passed.\textsuperscript{294} If the invalid emergency clause in a bill threatens a person’s right to petition for a referendum on the measure, only the constitutionality of the emergency clause will be examined.\textsuperscript{295} Upon the expiration of the ninety day period during which a referendum may be requested, the ability to challenge the unconstitutional abrogation of the right of referendum also expires as it becomes moot.\textsuperscript{296}

Washington courts have tasked themselves with reviewing the validity of emergency clauses and have fashioned rules and principles to determine when a bill is exempt from referendum.\textsuperscript{297} However, under these standards of review and to the chagrin of some involved in Washington state policy and politics, the legislature continues to place emergency clauses in a large number of bills each year.

V. THE WASHINGTON LEGISLATURE’S USE OF EMERGENCY CLAUSES

The frequent use of emergency clauses by legislatures has been suggested by courts and commentators for years, both in Washington and other states.\textsuperscript{298} In cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.” \textit{Humiston}, 61 Wash. 2d at 779, 380 P.2d at 739. Similarly, Washington Evidence Rule 201 states the following:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

\textit{WASH. R. EVD.} 201(b) (2007).

\textsuperscript{292} \textit{Wash. State Farm Bureau Fed’n}, 154 Wash. 2d at 675-76, 115 P.3d at 305.


\textsuperscript{294} Hayes, 108 Wash. 2d at 346-47, 738 P.3d at 277 (“Washington legislation with an invalid emergency clause takes effect when standard legislation takes effect, provided that the passage procedures of standard legislation are followed in all other respects.”).

\textsuperscript{295} \textit{Id.} at 347-48, 738 P.3d at 277-78.

\textsuperscript{296} \textit{Id.} at 348-50, 738 P.3d at 278-279.

\textsuperscript{297} \textit{See Wash. State Farm Bureau Fed’n}, 154 Wash. 2d at 675-77, 115 P.3d at 305-06 (detailing current standard of judicial review of legislative declarations of emergency).

\textsuperscript{298} \textit{See State ex rel. Kennedy v. Reeves}, 22 Wash. 2d 677, 683, 157 P.2d 721 (1945) (noting that the legislature’s use of emergency clauses became so frequent that heightened judicial scrutiny was warranted); Lowe, \textit{supra} note 101, at 597; Medina, \textit{supra} note 8, at 412-13; Waldo Schumacher,
Washington the use of emergency clauses is still common (roughly 11% of all bills passed during the 2007-08 biennium contained emergency clauses), although it has been declining in recent years. This part discusses recent trends in the legislature's use of emergency clauses and pinpoints suspect emergency clauses from the 2007 legislative session. It then analyzes the governor's use of veto power to strike emergency clauses. Finally, this part outlines current criticism of the legislature's use of emergency clauses by politicians, policy organizations, and newspapers.

**Recent Statutes - The Emergency Clause**, 19 Or. L. Rev. 73, 76 (1939) (noting that nine tenths of bills with emergency clauses do not cover emergencies in strict sense); **Emergency Legislation, supra** note 7, at 854 (discussing widespread abuse of emergency clauses); **Limitations, supra** note 7, at 502 (noting that “frequent use of emergency clauses is a severe limitation on direct legislation”); **Referendum in Colorado, supra** note 7, at 816 (1930) (noting that prevalent use of emergency clauses is a subterfuge).

299. See infra Figures 1 and 2, at pp. 263-264. Washington's current use of emergency clause legislation is down dramatically over the previous two decades; during the 1985-86 biennium 30 percent of bills passed by the legislature contained emergency clauses (61 out of 204). The numbers from the 1985-86 biennium were derived from two searches performed on the Washington State Legislative Search System, found at http://search.leg.wa.gov/advanced /3.0/main.asp (last visited Oct. 24, 2008). To find all bills that had been passed with emergency clauses in the 1985-86 biennium, a search was performed in the “House Passed Legislature” and “Senate Passed Legislature” databases, which utilized the phrase “necessary for the immediate”; the search engine returned sixty-one bills. To find all bills that had been passed in 1985-86 biennium, a search was performed in the “House Passed Legislature” and “Senate Passed Legislature” databases, which utilized the phrase “be it enacted by the legislature”; the search engine returned 204 bills.

Washington's use of emergency clauses is slightly less than that of California. In 2006, California passed 911 bills and 126, or 13.8%, contained emergency clauses. These numbers were derived from two searches performed on www.westlaw.com on October 24, 2008. To derive the number of bills passed in California in 2006, a search was performed in the database, “CA-Legis-old”, which utilized the phrase “filed with secretary of state” and which was limited to the period from January 1, 2006 to December 31, 2006. To derive the number of bills passed in California in 2006 containing emergency clauses, a search was performed in the database, “CA-Legis-old”, which utilized the phrases “filed with secretary of state” & “urgency statute necessary” and which was limited to the period from January 1, 2006 to December 31, 2006.

However, Washington's use of emergency clauses is much less than Oregon's. In 2005, Oregon passed 839 bills and 305, or 36.4%, contained emergency clauses. These numbers were derived from two searches performed on www.westlaw.com on October 24, 2008. To derive the number of bills passed in Oregon in 2005, a search was performed in the database, “OR-Legis-old”, which utilized the phrase “be it enacted” and which was limited to the period from January 1, 2005 to December 31, 2005. To derive the number of bills passed in Oregon in 2005 containing emergency clauses, a search was performed in the database, “OR-Legis-old”, which utilized the phrases “declaring an emergency” & "be it enacted" and which was limited to the period from January 1, 2005 to December 31, 2005.
A. Legislation Containing Emergency Clauses

Each year, the legislature attaches emergency clauses to a large number of bills. During the 2007–08 biennium, almost 9 percent of all bills introduced contained emergency clauses (559 out of 6470), and just over 11 percent of the bills passed contained emergency clauses (97 out of 856). In every biennium since 1995, the percentage of bills passed with emergency clauses has always been equal to or higher than the percentage of bills introduced with emergency clauses. Those skeptical of the use of emergency clauses may argue this is further proof that the legislature is going out of its way to exempt many bills from referendum. On the other hand, the larger percentages of bills passed than introduced with emergency clauses may merely show that the legislature has focused its efforts on matters it feels require immediate attention.

Despite the frequent use of emergency clauses, skeptics should take solace in the fact that both the percentage of bills introduced and the percentage of bills passed with emergency clauses has been declining. Since 1995, the relative number of bills introduced with emergency clauses has declined 57 percent (from 20% of bills in 1995–96 to 8.6% in 2007–08), while the relative number of bills passed with emergency clauses has declined 54 percent (from 24.5% in 1995–96 to 11.3% in 2007–08). This may be due, in whole or in part, to the criticism and negative publicity regarding the legislature’s use of emergency clauses. The decline may also be related to the recent absence of lengthy special legislative sessions. The governor may only call special sessions “on

300. See infra Figure 1, at p. 263.
301. See infra Figure 2, at p. 264. See BECHTLE, supra note 8, for a complete list of bills passed by the legislature during the 2007 Regular Session that contained emergency clauses. Additionally, during the 1st Special Session in 2007, the legislature passed one bill that contained an emergency clause. Property Tax – Deferral Program, ch. 2, § 14, 2007 Wash. 1st Spec. Sess. Laws 2, 5.
302. See infra Figures 1 and 2, at pp. 263-264.
303. See infra Figures 1 and 2, at pp. 263-64.
304. See Chris McGann, I-960 Aims to Curtail No-Vote Tax Bills: Lawmakers Abuse Special Clause, EYMAN SAYS, SEATTLE POST-INTELLIGENCER, Oct. 1, 2007, at B1, available at http://seattlepi.nwsource.com/local/333793_initiative01.html (“We are more conscious of emergency clauses now and they are used in fewer bills than they were in the past.” (quoting Washington State Senator Karen Keiser)).
extraordinary occasions;\textsuperscript{306} therefore, legislation passed during special sessions is more likely to address immediate needs and thus contain an emergency clause.\textsuperscript{307}

**Figure 1.**\textsuperscript{308} Emergency Clauses in Bills Introduced\textsuperscript{1}

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<td>5397</td>
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<td>5730</td>
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<td>830</td>
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<td>903</td>
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<td>8.6%</td>
<td>14.8%</td>
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<td>14.2%</td>
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\textsuperscript{306} See Wash. Const. art. III, § 7.


\textsuperscript{308} The numbers in Figure 1 were gathered using the Washington State Legislative Search System, available at http://search.leg.wa.gov/advanced/3.0/main.asp (last visited Oct. 24, 2008). The number of “bills introduced” was derived by performing searches in the “House Bills” and “Senate Bills” databases for the appropriate biennium using the search term “be it enacted by the legislature.” The number of “bills introduced with emergency clauses” was derived by performing searches in the “House Bills” and “Senate Bills” databases for the appropriate biennium using the search term “necessary for the immediate.”
Whether one sees the frequent use of emergency clauses as a legislative abuse of power used to take away the people’s right to referendum or as evidence that the legislature is addressing the most pressing needs of the state, the regular use of emergency clauses raises the issue of the intersection between the people’s power of referendum and the legislature’s ability to circumvent that power. There is no doubt that the frequent use of emergency clauses deprives the people of their right to referendum. An inquiry into bills recently declared emergent by the legislature will reveal that criticism about the legislature’s encroachment on the general referendum power of the people is, at times, valid.

An analysis of the specific bills passed during the 2007 legislative session reveals several instances of legislative abuse of emergency clauses. The most suspect emergency clause may be the one found in Senate Bill 5389, a bill approving the importing of one simulcast horse race of regional or national interest. The legislature included an emergency clause in this bill, providing it would take effect immediately, despite the clear precedent in State ex rel. Burt v. Hutchinson striking down an emergency clause in legislation creating the horse racing commission and authorizing horse racing. House Bill 1813, changing

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309. The numbers in Figure 2 were gathered using the Washington Legislative Search System, available at http://search.leg.wa.gov/advanced/3.0/main.asp (last visited Oct. 24, 2008). The number of “bills passed” was derived by performing searches in the “House Passed Legislature” and “Senate Passed Legislature” databases for the appropriate biennium using the search term “be it enacted by the legislature.” The number of “bills passed” with emergency clauses was derived by performing searches in the “House Passed Legislature” and “Senate Passed Legislature” databases for the appropriate biennium using the search term “necessary for the immediate.”


the name of the Interagency Committee for Outdoor Recreation to the Recreation and Conservation Funding Board, also contains a dubious emergency clause.\textsuperscript{313} The bill does not fit into either exception to the referendum\textsuperscript{314} and is directly at odds with \textit{State ex rel. Satterthwaite v. Hinkle} where the court found a bill substituting a director of highways for the state highway commission not to be emergent.\textsuperscript{315} As another example, at first look, House Bill 1888, regarding \textit{Brassica} seed production, may not seem to fit within the emergency clause exception either.\textsuperscript{316} However, if the emergency clause were challenged it would mostly likely be upheld given the court’s substantial deference to legislative determinations of emergencies and given that the legislative findings seem to place the bill within the court’s broad definition of public peace, health, or safety.\textsuperscript{317}

The legislature’s high use of emergency clauses is encouraged by the standard recitation of the emergency clause that is included in all bills. The emergency clause included in every bill is identical.\textsuperscript{318} No distinction is usually made between which of the two exemptions from referendum a bill falls under.\textsuperscript{319} The Washington State Bill Drafting Guide even advises the use of a standard declaration of emergency that parallels the language in the state constitution “if it is desired that the act take effect sooner than ninety days after adjournment sine
gawing on horse racing. \textit{See Burt}, 173 Wash. at 76, 21 P.3d at 515.


\textsuperscript{314} \textit{Compare id.} § 1, 2007 Wash. Sess. Laws at 1034 (“The legislature does not intend this act to make any substantive policy changes other than to change or clarify the names of relevant entities.”), \textit{with CLEAN} v. State, 130 Wash. 2d 782, 805, 928 P.2d 1054, 1065 (1995) (quoting \textit{State ex rel. Case v. Howell (Case 1)}, 85 Wash. 281, 285, 147 P. 1162, 1163 (1915) (exceptions do not extend to matters of “mere public expediency or public convenience”)), \textit{and State ex rel. McLeod v. Reeves}, 22 Wash. 2d 672, 674, 157 P.2d 718, 720 (1945) (holding that the meaning of “support” is limited to financial support).


\textsuperscript{317} \textit{Compare Brassica Seed Production}, ch. 181, § 1, 2007 Wash. Sess. Laws 680, 681 (finding that \textit{Brassica} seed production “is in the interest of the public welfare,” without the regulation of which there could be significant loss in seed production), \textit{with CLEAN}, 130 Wash. 2d at 807, 819-20, 928 P.2d at 1066, 1072 (giving substantial deference to the legislature and upholding the public financing of a baseball stadium).


Moreover, the Bill Drafting Guide suggests that “[a]n emergency clause may be used to prevent a bill from being subject to a referendum under Article II, section 1(b) of the state Constitution.” This routine inclusion of standardized emergency clauses in legislation does not force the legislature to consider the constitutional limitations of exempting bills from referendum and may lead to overuse, and perhaps even abuse, of emergency clauses. However, the possibility of a veto by the governor can provide a significant check on any improper use.

B. The Governor’s Disdain for Specious Emergency Clauses

With the legislature continuing to include emergency clauses in a significant number of bills and the court granting substantial deference to those declarations of emergencies, the governor’s veto power becomes an important check on any potential or actual abuse by the legislature. In Washington, the governor has the power to veto all or part of any bill. Recently, Washington governors have used this power to veto emergency clauses that they find to be improper.


(k) Emergency Clause. The following standard emergency clause is based on the language of Article II, section 1(b) of the state Constitution:

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 or a specific date).

Id.

321. Id.
322. See supra Figures 1 & 2, at pp. 263-64.
323. See supra notes 289-92 and accompanying text.
324. WASH. CONST. art. III, § 12. “Historically, governors generally vetoed entire bills, entire numbered sections, or entire appropriation items.” Wash. State Grange v. Locke, 153 Wash. 2d 475, 487, 105 P.3d 9, 15-16 (2005) (citing Wash. State Motorcycle Dealers Ass’n v. State, 111 Wash. 2d 667, 671, 763 P.3d 442, 444 (1988)). However, from the 1950s until the early 1970s, “governors increasingly vetoed items that were less than entire sections of nonappropriation bills.” Id. Washington voters responded by enacting Amendment 62 to the Washington Constitution, which permits the governor to veto whole sections of any bill, but limited the item veto power to appropriation bills. Id. The constitution states that when presented with a multi-section bill, the governor may object to one or more sections or appropriation items while approving other portions of the bill: Provided, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items.

WASH. CONST. art. III, § 12 (emphasis in original).
Notable trends can be gathered from the recent use of gubernatorial vetoes to strike emergency clauses. First, use of the veto power spiked in the years immediately following the decision in CLEAN strongly pronouncing the Court’s deference to legislative declarations of emergency (percentage of emergency clauses vetoed jumped from 5.6% in 1995–96 to 8.4% in 1997–98). However, the veto’s use fell out of favor after the 1997–98 biennium.

Second, there has been a significant increase in the use of the veto since Governor Christine Gregoire took office in 2005. Her predecessor, Governor Gary Locke, vetoed only one emergency clause during the last biennium he was in office, while Governor Gregoire vetoed five such clauses during her first biennium in office. In the second half of her first term, Governor Gregoire has already vetoed 16 emergency clauses. Governor Gregoire’s use of the veto power may be attributed to her desire to play a visible role in the legislative process and the increased political pressure to decrease the use of emergency clauses.

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325. Compare CLEAN v. State, 130 Wash. 2d 782, 807, 928 P.2d 1054, 1066 (1996) (pronouncing deference to the legislature), with infra Figure 3, at p. 267 (showing increase in percentage of emergency clauses vetoed between the 1995-96 and 1997-98 bienniums).

326. See infra Figure 3, at p. 267.

327. The numbers in Figure 3 were gathered using the Washington Legislative Search System, available at http://search.leg.wa.gov/advanced/3.0/main.asp (last visited Oct. 24, 2008). The number of “bills passed with emergency clauses” was gathered by searching in the “House Passed Legislature” and “Senate Passed Legislature” databases for the appropriate biennium using the search term “necessary for the immediate.” The number of “emergency clauses vetoed” was gathered by performing two sets of searches: (1) performing searches in the “Vetoes” database for bienniums from 2003-04 to 2007-08 using the following search term: “emergency* clause*” veto*; and (2) performing searches in the “Bills” database for bienniums from 1995-96 to 2001-02 using the following search term: “emergency* clause*” veto*.

328. See supra Figure 3, at p. 267.

329. See supra Figure 3, at p. 267.

330. See supra Figure 3, at p. 267.


332. See infra Part V.C.
Governor Gregoire’s veto messages provide some insight into her reasons for vetoing emergency clauses. In some cases, the governor thought the emergency clause was “not essential to the bill’s proper and timely implementation” or was simply “unnecessary.” She also hinted that one bill was not really emergent at all by stating that “the issues in this legislation do not rise to the level of an emergency that requires the immediate revision of state laws.” Governor Gregoire’s vetoes of emergency clauses are driven by her belief that “[e]mergency clauses should be used sparingly and only when necessary” and that “[e]mergency clauses should be restricted to bills that address public emergencies.” She also agrees with the Washington Supreme Court that bills merely addressing public convenience are not emergency measures for the purpose of being exempted from referendum. Most importantly, Governor


Gregoire vetoed suspect emergency clauses because of her concern about limiting the people's right to referendum on laws not falling within one of the two enumerated exceptions in the constitution.\footnote{Governor's Veto Message on H.B. 1000, 60th Leg., Reg. Sess. (Wash. 2007), in Porphyria - Special Parking, ch. 44, 2007 Wash. Sess. Laws 167, 171, \textit{available at} http://www.governor.wa.gov/billaction/2007/veto/1000.pdf (emergency clauses "should be used sparingly because [their] application has the effect of limiting citizens' right to referendum").}

However, despite the governor's strong stance against the improper use of emergency clauses, the legislature still includes these clauses in a significant percentage of bills each year.\footnote{See supra Figures 1 & 2, at p. 263-264.} Therefore, it is not surprising to see a public outcry about the right to referendum being denied the people by the legislature.\footnote{See infra Part V.C.}

C. Public Criticism on Use of Emergency Clauses

Recently, the Washington State Legislature's use of emergency clauses has received increasing public scrutiny. In 2005, a Washington political commentator stated that few bills containing an emergency clause passed during the 2005 session addressed "palpable emergencies like hurricanes or terrorist attacks. Most were enacted to allow relatively harmless and amusingly mundane regulations to take effect immediately . . . "\footnote{Stefan Sharkansky, \textit{Sound Bite: State of Emergency}, THE STRANGER, May 19, 2005, http://www.thestranger.com/seattle/Content?oid=21434.} Further criticism of, and opposition to, the Legislature's use of emergency clauses has come from public policy organizations such as the Evergreen Freedom Foundation and the Washington State Grange.\footnote{See supra note 8.}

Elected representatives have also expressed their frustration with the legislature's use of emergency clauses. Then State Senator Stephen Johnson stated in 2006 that "there has been a growing misuse of the emergency clause."\footnote{Johnson, \textit{supra} note 8. In 2006, then Senator Stephen Johnson announced he would not seek reelection as senator and unsuccessfully ran for state supreme court justice. See Susan Kelleher, \textit{Owens Wins Another Term After Unusually Costly Race}, THE SEATTLE TIMES, Nov. 8, 2006, at B5, \textit{available at} http://seattletimes.nwsource.com/html/localnews/2003367292_supreme08m.html; Jason Mercier, \textit{2005 Legislative Session Full of 'Emergencies'}, May 11, 2005, http://www.effwa.org/main/article.php?article_id=928 (last updated May 12, 2005) (noting that the use of emergency clauses in a number of bills in 2005 was questionable, and "appears to be weighted more toward political consideration and denying the people the right of a referendum, rather than meeting the constitutional threshold for use of an emergency clause").}
Johnson found the need to curb the legislature’s use of emergency clauses so dire that he proposed to amend internal Senate rules to require a supermajority approval of all bills containing emergency clauses. State Representative Barbara Bailey joined Johnson’s disapproval of the use of the emergency clause to subvert the people’s right to referendum. Representative Bailey proposed an even stronger fix than Senator Johnson in the form of a constitutional amendment requiring supermajority approval of legislation containing emergency clauses.

Additional criticism has come from nonpartisan sources as well. Many newspapers across the state have opposed the overuse of emergency clauses. This widespread criticism of the use of emergency clauses from the governor, politicians, policy organizations, and newspaper editorial boards should not go unnoticed. Reforms are needed to prevent the improper use of emergency

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clauses and to ensure the people's right to referendum and its benefits are not weakened.

VI. ENSURING THE RIGHT TO REFERENDUM AND THE PROPER USE OF EMERGENCY CLAUSES

As seen above, the people's right to referendum is being limited by the legislature's frequent use of emergency clauses.\textsuperscript{348} Therefore, the legislature's power to exempt bills from referendum "should be checked."\textsuperscript{349} If reforms are not implemented to prevent the legislature from impeding on the people's right to referendum, the fundamental purpose of the referendum as a check on the legislature will be subverted. This part discusses changes that should be implemented to ensure the legislature does not unreasonably declare bills emergent and intrude on the people's right to referendum. Specifically, reforms should include more stringent judicial review, a requirement that the reasons for an emergency clause be stated in the bill itself, and a requirement that a supermajority in both houses of the legislature approve bills containing an emergency clause.

A. More Stringent Judicial Review

Unlike many states, Washington has held that the validity of emergency clauses is a judicial question.\textsuperscript{350} In fact, Washington has long been noted as the leader among jurisdictions providing for judicial review of legislative declarations of emergency.\textsuperscript{351} However, despite providing for judicial review, courts currently give great deference to legislative declarations of emergencies.\textsuperscript{352} Recently, some judges and commentators have noted that courts are giving too much deference to the legislature.\textsuperscript{353}

\begin{itemize}
  \item \textsuperscript{348} See, e.g., Oesterle, supra note 98, at 124 ("Popular referenda are rare in part because legislatures frequently attach such clauses (or the 'support clauses,' if pertinent) to their new acts.").
  \item \textsuperscript{349} Limitations, supra note 7, at 502.
  \item \textsuperscript{350} Compare State ex rel. Brislawn v. Meath, 84 Wash. 302, 307-16, 147 P. 11, 13-16 (1915) (this is the first Washington case after the adoption of initiative and referendum that held emergency clauses are subject to judicial review), with Lowe, supra note 101, at 617 n.158 (listing states that do not provide for judicial review).
  \item \textsuperscript{351} See, e.g., Lowe, supra note 101, at 618-20 (noting Brislawn as the leading case advocating judicial review); accord Medina, supra note 8, at 421 (noting Brislawn as the leading case "subjecting all declarations of emergency to judicial review"); Top, supra note 20, at 157-58 (noting Brislawn as the first case to hold that an act within a referendum exception was subject to review); Emergency Legislation, supra note 7, at 855 n.41 (citing Brislawn as the case that declared that the safety clause is subject to review).
  \item \textsuperscript{352} See supra notes 289-292 and accompanying text.
  \item \textsuperscript{353} See, e.g., Wash. State Farm Bureau Fed'n v. Reed, 154 Wash. 2d 668, 682, 115 P.3d
\end{itemize}
Too much judicial deference to the legislature may be harmful to the distribution of political power contemplated by the people as laid out in the Washington constitution. When courts refuse to review legislative declarations of emergency or give too much deference to those declarations, the amount of power the people retain in controlling the legislature is severely reduced, thus negating the benefits of the referendum. Similarly, the likelihood of legislative abuse in the absence of meaningful judicial review is great. Consequently, Washington courts should provide more stringent judicial review of emergency clauses for several reasons.

First, meaningful judicial review of legislative declarations of emergency is needed to maintain the separation of powers in Washington’s political system. As was first noted in Brislawn, the people made themselves a fourth branch of government by adding the initiative and referendum amendment to the state’s constitution. The referendum was adopted to curb the freedom of legislators. A declaration of emergency by the legislature prevents the people from executing their right to referendum. Therefore, any improper use of emergency clauses by the legislature threatens or invades the prerogatives of the people in their general right to referendum. Ensuring against improper encroachment upon the people’s right to referendum is a role that naturally falls

301, 309 (2005) (Chambers, J., dissenting) (“If funding for a baseball stadium is an emergency, then very little is not.”); Oesterle, supra note 98, at 123-25; Richard B. Sanders, Battles for the State Constitution: A Dissenter’s View, 37 Gonz. L. Rev. 1, 9 (2002) (stating that the judiciary must determine whether an emergency exists).

354. Cf. Bone et al., supra note 101, at 348 (“[T]he referendum has been an important instrument of popular control.”); Limitations, supra note 7, at 498 (limitations on referendum “after interpretation by the courts [is] a measure of the amount of power presently available to the people in controlling their legislatures”).


356. Cf. Limitations, supra note 7, at 502 (failure of courts to strictly review legislative declarations of emergency “vitiates the purpose of initiative and referendum”). The test to determine a separation of powers violation in Washington is “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” State v. Moreno, 147 Wash. 2d 500, 505-06, 58 P.3d 265, 268 (2002) (quoting Carrick v. Locke, 125 Wash. 2d 129, 135, 882 P.2d 173, 177 (1994)).


358. See Referendum in Colorado, supra note 7, at 816.

359. See Wash. Const. art. II, § 1(b).

360. See Limitations, supra note 7, at 502 (“The frequent use of emergency clauses is a severe limitation on direct legislation by the people. The abuse of the emergency power should be checked.”); Lowe, supra note 101, at 625 (stating that the availability of referendum is a conflict between branches of government—the people and the legislature); cf. Moreno, 147 Wash. 2d at 505-06, 58 P.3d at 267 (quoting Carrick, 125 Wash. 2d at 135, 882 P.2d at 177) (holding that the separation of powers test is “whether the activity of one branch threatens the independence or integrity of invades the prerogatives of another.”).
to the courts, as the arbiters of constitutionality, who routinely intervene in interbranch disputes. Judicial review of emergency declarations does not intrude upon the decision making process of a coordinate branch of state government, but seeks to limit the legislature’s improper encroachment upon the people’s right to referendum. As a result, the courts can, and should, act as independent arbiters between the people’s power of referendum and the legislature’s need to declare some laws emergent.

Second, meaningful judicial review is needed to prevent the emergency exception from swallowing the general rule that all laws are subject to referendum. As mentioned earlier, all political power in Washington is vested in the people. To effectuate this power, the people reserved to themselves the right to referendum on “any act, bill, law, or any part thereof.” There exist only two exceptions to this general referendum power. The constitution could

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361. See Brown v. State, 155 Wash. 2d 254, 261-62, 119 P.3d 341, 345 (2005) (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)) (“However, it is uniquely within the province of this court to interpret this state’s constitution and laws”); Wash. State Labor Council v. Reed, 149 Wash. 2d 48, 62, 65 P.3d 1203, 1211 (2003) (Chambers, J., concurring) (“The ultimate power to interpret, construe, and enforce the constitution of this state belongs to the judiciary... This is so even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.”) (citations omitted)); cf. Spokane County v. State, 136 Wash. 2d 663, 667-68, 966 P.2d 314, 317 (1998) (quoting Carrick, 125 Wash. 2d at 135, 882 P.2d at 177 ) (addressing a question of separation of powers by asking “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.”).

362. Lowe, supra note 101, at 625.


364. Cf. WASH. CONST. art. I, § 1 (“All political power is inherent in the people . . . .”); id. art. II, § 1 (providing that legislative authority is vested in the legislature, but that the people reserve the independent power to reject laws at the polls); id. art. II, § 1(b) (providing that the second power reserved to the people is the referendum, which may be ordered on any law except those “necessary for the immediate preservation of the public peace, health or safety, [or] the support of state government”) (emphasis added).

365. Id. art. I, § 1.

366. See id. art. II, § 1(b) (emphasis added).

367. The constitution states that the people may order a referendum on any “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, support of the state government and its existing public institutions.” Id. art. II, § 1(b) (emphasis added). For more on the general nature of exceptions to various states’ constitutional rights of referendum, see Lowe, supra note 101, at 623 (noting that the “public safety restriction is intended to set off a special class of subject matter in which the legislature, in the best interest of all the people, can operate free from a referendum threat”); Limitations, supra note 7, at 498 (noting that “constitutions usually . . . [exempt from the people’s right to referendum] laws necessary for the immediate preservation of the public health, safety, and peace,” but failing to mention an exception for support of state government).
have been drafted to give discretion to the legislature in exempting bills from referendum, but it was not. Such discretion could not "rationally [be vested] in the same body that the referendum process seeks to control."368 More stringent judicial review would ensure emergency clauses are attached to bills addressing true emergencies under the constitution and that the benefits of the referendum process are realized.369

Third, meaningful judicial review of legislative declarations of emergency is needed because Washington lacks any other safeguards to control the legislature’s use of the emergency clauses. In many states where courts give great deference to legislative declarations of emergency, other provisions are in place to ensure emergency clauses are not overused.370 For example, Ohio courts will not review legislative declarations of emergency.371 However, Ohio requires emergency legislation to be approved by two-thirds of the members of each house of the legislature and to include a statement of reasons for the emergency.372 These two safeguards prevent emergency clauses from being used as frequently as they are in Washington.373 With Washington lacking safeguards such as those used by

368. Lowe, supra note 101, at 622-23; see also Wash. State Labor Council v. Reed, 149 Wash. 2d 48, 64, 65 P.3d 1203,1212 (2003) (Chambers, J., concurring) ("It is an essential safeguard of our system of separation of powers that the legislative branch cannot determine whether it has exceeded its own authority. To permit branches to measure their own authority would quickly subvert the principle that state governments . . . must govern by the consent of the people as expressed by the constitution.").

369. See Oesterle, supra note 98, at 125.

370. See INFORMATIONAL REPORT supra note 50, at 8 (noting that declarations of emergency usually require approval by a supermajority of legislators); Limitations, supra note 7, at 499-500 (noting that some states require declarations of emergency be approved by a supermajority and that most states require a description of the emergency in a section of the law).


372. Ohio Const. art. II, § 1d.

Ohio and other states to limit the overuse of emergency clauses, Washington courts must provide meaningful judicial review of emergency clauses to ensure their proper use.\(^{374}\)

Washington courts should fashion a clear rule under which declarations of emergency may be evaluated in light of the people’s right to referendum.\(^{375}\) Four approaches to reviewing declarations of emergency have been fashioned by courts in various states:\(^{376}\) (1) the declaration is considered final and the courts do not determine if an actual emergency exists;\(^{377}\) (2) the legislative finding of emergency is not conclusive but is held to be a rebuttable presumption;\(^{378}\) (3) the existence of an emergency is completely reexamined by the courts;\(^{379}\) or (4) a rebuttable presumption runs in favor of the people’s power of referendum rather than the existence of an emergency.\(^{380}\) It is purported that Washington follows the second approach.\(^{381}\) However, it is questionable whether the presumption in


374. Cf. Referendum in Colorado, supra note 7, at 816 (noting that any notion of proper motives in using emergency clauses disappears when they are used frequently).

375. See Wash. State Labor Council v. Reed, 149 Wash. 2d 48, 66, 65 P.3d 1203, 1213 (2003) (Chambers, J., concurring) (“I would have this court set forth a clear and predictable standard by which we can meaningfully determine whether an act satisfies the emergency or ‘necessary for the support of government’ requirements of the Seventh Amendment.”).

376. Limitations, supra note 7, at 500-01.

377. See, e.g., Multnomah County v. Mittleman, 275 Or. 545, 549 552 P.2d 242, 244 (Or. 1976) (citing Kadderly v. Portland, 44 Or. 118, 148-49 74 P.710, 721 (Or. 1903)).

378. See, e.g., Wash. State Farm Bureau Fed’n v. Reed, 154 Wash. 2d 668, 675, 115 P.3d 301, 305 (2005) (holding that substantial deference is to be given to the legislature, and that an emergency declaration is conclusive unless it is obviously false on its face).

379. See, e.g., State ex rel. Charleston v. Holman, 355 S.W.2d 946, 950-51 (Mont. 1962) (quoting State ex rel. Westhues v. Sullivan, 224 S.W. 327, 333-339 (Mo. 1920)) (holding that Missouri courts are “vested with right and duty to measure [an] act ‘by the yardstick of the constitution’ and determine whether in fact its provisions are ‘necessary for the immediate preservation of the public peace, health or safety’.”).

380. See, e.g., State ex rel. Goodman v. Stewart, 187 P. 641, 649 (Mont. 1920); see also Barnett, supra note 127, at 383 (“[T]he action of the court in nullifying the legislative exception of laws from the referendum is . . . a negation of a negation of a popular right, and the presumption should therefore here favor the people rather than the agent of the people.” (emphasis in original)).

381. Limitations, supra note 7, at 500, 502.
favor of emergency clauses may ever be rebutted given the recent upholding of emergency clauses in bills providing public money to build professional sports stadiums\textsuperscript{382} as well as the fact that an emergency clause has not been found invalid since 1963.\textsuperscript{383} Washington courts should take care that future decisions do not prevent the presumption of an emergency clause’s validity from being rebutted. Otherwise, the people’s right to referendum will be completely in the hands of the legislature.

In helping with this task, the court may look to the following five factors in balancing the people’s right to referendum against the need for laws to take effect immediately: (1) any effects in delaying the law; (2) whether the law is directed at a specific occurrence that poses a substantial threat to public peace, health, or safety, or is it aimed at a chronic problem requiring long-term solutions; (3) whether the law is narrowly drawn to the problem or represents a broad policy shift; (4) whether the subject of the act is regulated by existing law; and (5) whether the law is concerned with administrative effectiveness or control of a short-term problem.\textsuperscript{384} Another suggestion is that courts should “strictly review the legislative findings of an emergency.”\textsuperscript{385}

Perhaps the best approach is for Washington courts to draw upon Brislawn and fashion a rebuttable presumption in favor of the people’s power of referendum.\textsuperscript{386} Parties challenging the presumption could be required to prove that “[b]y the exercise of reasonable judgment ... the minds of reasonable men [would agree], in light of the needs and necessities of the present,” that the act is necessary for the immediate preservation of the public peace, health, or safety, or for the support of state government.\textsuperscript{387} A coherent approach to reviewing

\textsuperscript{382} See Brower v. State, 137 Wash. 2d 44, 72-76, 969 P.2d 42, 58-60 (1998); CLEAN v. State, 130 Wash. 2d 782, 812, 928 P.2d 1054, 1068-69 (1996); see also Wash. State Farm Bureau Fed’n, 154 Wash.2d at 682-83, 115 P3d at 309 (Chambers, J., dissenting) (CLEAN should be overruled because the court “has moved from an appropriate level of deference to [the legislature] ... to a near total abdication of its constitutional responsibility to review legislative action”).


\textsuperscript{384} Lowe, supra note 101, at 628-35.

\textsuperscript{385} See Limitations, supra note 7, at 502; see also Oesterle, supra note 98, at 125 (“Courts should take a careful look at the bona fides of emergency declarations under a more restrictive test than what is essentially “the legislature must, beyond a doubt, be lying.””). While the commentator did not define what was meant by “strict review,” he was probably referring to the traditional federal constitutional review principle of strict scrutiny, such that an emergency clause would only be upheld if it “is narrowly tailored to further a compelling state interest.” See Amunrud v. Bd. of Appeals, 158 Wash. 2d 208, 220, 143 P.3d 571, 576 (2006) (laying out when strict scrutiny applies).

\textsuperscript{386} State ex rel. Brislawn v. Meath, 84 Wash. 302, 315, 147 P. 11, 15 (1915) (“[D]oubt, if there be any, should be resolved in favor of the reserved power of the people instead of” the legislative declaration of emergency).

\textsuperscript{387} See id. at 319, 147 P. at 17.
declarations of emergency can be established by combining this clear rule with Justice Guy's suggestion that the reason for any emergency clause be explained in the bill.\textsuperscript{388} Including the reasons for an emergency clause in a bill would aid the court in deciding whether the facts constituting an emergency meet the constitutional test for an emergency and would help keep that question separate from the question of whether those facts actually exist.\textsuperscript{389} Many states constitutionally require the facts establishing the emergency to be stated in the bill. That requirement will be discussed next.

\section*{B. Requiring Facts Constituting the Emergency to be Stated in the Bill}

In addition to courts conducting judicial review of emergency clauses, the legislature should itself adopt regulations that would limit the use of emergency clauses. Reforms to restrict the use of emergency clauses will help prevent emergency clauses from being used to subvert the people's right to referendum. One such reform is to require the facts that constitute an emergency to be stated in the bill itself. Several states with the referendum require a recitation of the specific facts constituting the reason for the emergency legislation.\textsuperscript{390} Such a clause was adopted in Arkansas\textsuperscript{391} in response to the state legislature attaching emergency clauses to almost every bill.\textsuperscript{392} A similar approach has been proposed in Washington. Several members of the Washington Supreme Court have suggested that specific reasons justifying an emergency clause should be laid out in the bill.\textsuperscript{393} Additionally, several Washington Court of Appeals decisions have

\begin{itemize}
\item \textsuperscript{388} See CLEAN v. State, 130 Wash. 2d 782, 821, 928 P.2d 1054, 1073 (1996) (Guy, J., concurring in part and dissenting in part).
\item \textsuperscript{389} See Morris v. Goss, 147 Me. 89, 98 83 A.2d 556, 561 (Me. 1951) (holding that whether a fact constituting an emergency exists is a question of fact, whereas whether existing facts constitute an emergency is a question of law); Barnett, supra note 127, at 380 (a compromise solution to judicial review of emergency clauses "distinguishes questions of fact from questions of law . . . and allots the final determination of the one to the legislature and the other to the courts.").
\item \textsuperscript{390} See, e.g., ARIZ. CONST. art. IV, pt. 1, § 1(3); ARK. CONST. art. V, § 1; CAL. CONST. art. IV, § 8(d); MASS. CONST. art. XLVIII, The Referendum, pt. II; ME. CONST. art. IV, pt. 3, § 16; MO. CONST. art. III, § 29; NE. CONST. art. III, § 27; N.M. CONST. art. IV, § 23; OHIO CONST. art. II, § 1(d); see also KY. CONST. § 55 (requiring a statement of emergency be set out in the journals of the legislature).
\item \textsuperscript{391} See ARK. CONST. art. 5, § 1 ("It shall be necessary, however, to state the fact which constitutes such emergency.").
\item \textsuperscript{392} Gentry v. Harrison, 194 Ark. 916, 920 110 S.W.2d 497, 501 (Ark. 1937); Jumper v. McCollom, 179 Ark. 837, 839 18 S.W.2d 359, 361 (Ark. 1929) (holding that the requirement that facts constituting an emergency be stated was intended to stop the legislature’s practice of placing emergency clauses indiscriminately on legislation).
\item \textsuperscript{393} See Wash. State Farm Bureau Fed’n v. Reed, 154 Wash. 2d 668, 691, 115 P.3d 301, 313 (2005) (Johnson, J.M., J., dissenting) (suggesting that the act was devoid of a recitation of facts
required that a statement of the reasons for the emergency be included in local
municipal ordinances that are emergent and exempt from local referendum.394

A statement of the reasons for an emergency clause would serve several
useful purposes. First, such a factual statement would be useful in a “bill’s
construction and application.”395 Second, requiring the legislature to enumerate
its reasons why a bill is an emergency would keep the legislature honest.396
Requiring a statement of the reasons for the emergency in the bill forces the
legislature to think more deeply about the need for an emergency clause and the
effect such clauses has on the people’s right to referendum.397 Finally, this
requirement would help calm the fears of those who believe that the legislature is
putting emergency clauses on bills solely to exempt them from the people’s right
to referendum. If the people disagree with the legislature’s reasons for the
emergency, they may vote their representatives out of office.398

A statement of reasons would not be burdensome on the legislature to draft
or implement. A simple recitation of why the bill must take effect immediately
would suffice. The following is an example of a typical emergency clause from
California containing a short statement of why the bill is emergent:

SEC. 10. This act is an urgency statute necessary for the immediate
preservation of the public peace, health, or safety within the meaning of
Article IV of the Constitution and shall go into immediate effect. The facts
constituting the necessity are:
In order to meet deadlines for the bid process for the 2016 Olympic Games,
it is necessary that this act go into immediate effect.399

(1991) (holding that an emergency ordinance must contain a statement of the underlying emergent
facts); Swartout v. City of Spokane, 21 Wash. App. 665, 672, 586 P.2d 135, 140 (1978) (holding that
the statement of urgency required under the city charter means a statement of the “basic facts
that create the emergency”).

395. Medina, supra note 8, at 425. See also Koenig v. City of Des Moines, 158 Wash. 2d 173, 181-82, 182 n.6 142 P.3d 162, 165 (Wash. 2006) (using a statement of legislative intent to assist
in the interpretation of a statute).

396. See Medina, supra note 8, at 425.

397. See Greenburg v. Lee, 196 Or. 157, 177 248 P.2d 324, 333 (Or. 1952) (finding that the
purpose of a city ordinance requiring a statement of reasons for an action was to cause the person
compelling the action to reflect and ponder on the reasons for the act).

398. See id. at 178-82, 248 P.2d at 333-35.

Including such a simple phrase in emergency clauses in Washington legislation would not require a large increase in legislative time or resources. Requiring reasons for the emergency to be stated in an emergency bill could be adopted in several ways: the factual statements could be voluntarily included in emergency clauses by legislators themselves; the legislature could pass joint rules governing both chambers that would require such a statement; or the constitution could be amended to require such statements. A constitutional amendment is most preferred because of its permanency and authoritativeness.

C. Supermajority Approval of Bills Containing Emergency Clauses

Another legislative reform that should be adopted to help guard against the improper use of emergency clauses is a requirement that bills with emergency clauses be approved by a supermajority (either two-thirds or sixty percent) of members in both the House of Representatives and Senate. Washington finds itself among the minority of states that do not require a supermajority to approve emergency legislation that is exempt from referendum. However, there have recently been calls to move Washington into the majority of jurisdictions. The adoption of a supermajority voting requirement has been proposed in various forms, including constitutional amendments, a new state statute, and internal House and Senate rules. Of all these proposals, only one of the constitutional amendments ever garnered enough interest to receive a legislative hearing, but it was never brought up for a vote in committee after the hearing.

Requiring a supermajority to approve a bill with an emergency clause would be beneficial in reducing the likelihood that the legislature would attach emergency clauses to bills solely to exempt those bills from referendum. If a contracts to support bid for 2016 Olympic Games).

400. See Medina, supra note 8, at 403-04 & n.19-20 (listing 18 states that require either a two-thirds vote or three-fifths vote of all members in each house, and listing 10 states that only require a majority vote).

401. See, e.g., Johnson, supra note 8.


405. BECHTLE, supra note 8.

406. See BONE, supra note 98, at 15 ("By requiring a two-thirds majority in the state legislature in order to declare an emergency, the public can be protected.").
supermajority vote were required, the number of bills attracting enough votes to attach an emergency clause would be reduced, thus increasing the number of bills the people could petition for referendum. 407 Additionally, creating a supermajority requirement would protect the people’s right to referendum on legislation on which the people would most likely want to vote—contentious policy bills that only pass by a simple majority. 408 A supermajority requirement would not dilute the legislature’s need or ability to declare bills effective immediately that are in response to an emergency. If an emergency actually exists, a compelling and bipartisan policy solution should be easy to find. 409 Therefore, requiring a supermajority vote to approve bills containing emergency clauses would help guard against the possibility that the legislature may attach an emergency clause to a bill solely to exempt it from referendum. A supermajority requirement would also return to law a piece of Washington’s original constitution that was repealed when the referendum was adopted. 410

VII. CONCLUSION

The legislature’s ability to declare bills emergent conflicts with the people’s right to referendum by denying Washington citizens the benefits associated with a meaningful referendum process. Legislative declarations of emergency have been controversial since the citizens of Washington adopted the referendum in 1912. The Washington State Legislature’s use of emergency clauses has decreased in recent years, due in part to the increased public scrutiny the issue has received. However, a large percentage of bills passed still include emergency clauses thereby exempting them from referendum. Although each emergency clause may be justified by sound policy and currently existing facts, the frequent use of emergency clauses leads to suspicion that the clauses are included in some bills solely to exempt them from referendum.

The potential for the improper use of emergency clauses in Washington is very real given that few political and institutional checks are in place to guard against such legislative abuse. Washington should reaffirm its historical approach to providing meaningful judicial review to legislative declarations of emergency when they are challenged. 411 The legislature should also enact additional safeguards, such as requiring a statement of reasons detailing why a bill is emergent and requiring a supermajority in each house to approve emergent

407. See Medina, supra note 8, at 427.
408. BECHTLE, supra note 8.
409. See Johnson, supra note 8.
410. See WASH. CONST. art. II, § 31, repealed by WASH. CONST. amend. 7.
411. See Editorial, Olympia Sees Emergencies, supra note 347, at B6 (Washington Supreme Court should overrule CLEAN and “once again subject legislative emergencies to rational thought”).
measures, in order to shed more light on the reason why a bill is being exempted from referendum and to forestall any idea that controversial bills are being improperly exempted from referendum.412 These safeguards will help guarantee that the people's right to referendum remains an influential check on legislative power, as the initial supporters of direct democracy hoped.

At the very least, legislators should be mindful of (1) the value of direct democracy as the fourth branch of government, (2) Washington's long history of using direct democracy to improve government, and (3) the effect emergency clauses have in denying the people their right to referendum. Ultimately,

The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the expression of a passion or sentiment rather than of sound reason; but it is the people's government and, until changed by them, must be observed by the legislature and protected by the courts.413

If the legislators and the courts refuse to protect the people's right to referendum, the people are responsible to vote into office those officials who will protect the people's referendum rights, thereby providing an additional check on the government and allowing the people to govern themselves.414

412. See Barnett, supra note 127, at 383 (advocating a combination of provisions devised to protect the referendum against legislative abuse).


414. See Referendum in Colorado, supra note 7, at 818 (stating that the people can refuse to elect public officials who do not obey the people's mandate of the right to referendum).