

NO. 39457-o-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

SKAGIT COUNTY PUBLIC HOSPITAL
DISTRICT NO. 2, d/b/a ISLAND
HOSPITAL,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

APPELLANT'S REPLY BRIEF

Carla M. DewBerry, WSBA #15746
Roger L. Hillman, WSBA #18643
Jamal N. Whitehead, WSBA #39818
GARVEY SCHUBERT BARER
Attorneys for Appellant

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
(206) 464-3939

10 JAN 17 PM 1:34
COURT OF APPEALS
DIVISION II
BY MS
STATE OF WASHINGTON

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	3
A. Standard of Review.....	3
B. Medicare is Responsible for Paying Medicare Covered Charges.	3
C. The Court Must Discern Legislative Intent from the Plain Language of RCW 82.04.4297 Because the Statute is Unambiguous.	4
1. Dictionary definitions are used in their first and primary sense.....	5
D. Only If the Court Finds RCW 82.04.4297 Ambiguous Should It Resort to Means Beyond the Plain Language of the Statute to Determine Legislative Intent.	7
1. The definition of “instrumentality” used in cases involving tax immunities rooted in the federal Constitution does not apply in circumstances concerning Washington state tax deductions.	8
2. The definition argued for by the department would render other terms within RCW 82.04.4297 superfluous.	10
3. The legislative history of RCW 82.04.4297 supports a more expansive reading of the term “instrumentality.”.....	11
4. Subsequent amendments to RCW 82.04.4297 further define what constitutes an “instrumentality.”	12
5. A more inclusive reading of the term “instrumentality” will not upset the larger statutory scheme and lead to absurd results.	16
E. Island is Entitled to an Award of Fees and Costs.....	17

III. CONCLUSION18

TABLE OF AUTHORITIES

Page

CASES

<u>City of Spokane ex rel. Wastewater Mgmt. Dept. v. State Dept. of Revenue</u> , 145 Wn.2d 445, 38 P.3d 1010 (2002).....	3
<u>Hallauer v. Spectrum Prop., Inc.</u> , 143 Wn.2d 126, 18 P.3d 540 (2001).....	16
<u>Heinmiller v. State Dept. of Health</u> , 127 Wn.2d 595, 903 P.2d 433 (1995).....	3
<u>Homestreet, Inc. v. State Dept. of Revenue</u> , 166 Wn.2d 444, 210 P.3d 297 (2009)	1, 2, 5, 12
<u>In re Detention of Martin</u> , 163 Wn.2d 501, 182 P.3d 951 (2008).....	5
<u>In re Marriage of Barber</u> , 106 Wn. App. 390, 23 P.3d 1106 (2001).....	10
<u>Irwin Memorial Blood Bank v. American Nat’l Red Cross</u> , 640 F.2d 1051 (9 th Cir. 1981).....	9
<u>McAvoy v. Weber</u> , 198 Wash. 370, 88 P.2d 448 (1939).....	10
<u>McCulloch v. Maryland</u> , 17 U.S. 316 (1819).....	8
<u>State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n</u> , 140 Wn.2d 615, 999 P.2d 602 (2000).....	12
<u>State ex rel. Macri v. City of Bremerton</u> , 8 Wn.2d 93, 111 P.2d 612 (1941)	17
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	10
<u>State v. Sullivan</u> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	1
<u>Tunstall ex rel. Tunstall v. Bergeson</u> , 141 Wn.2d 201, 5 P.3d 691 (2000)	16
<u>United Parcel Service, Inc. v. Dept. of Revenue</u> , 102 Wn.2d 355, 687 P.2d 186 (1984)	10
<u>United States v. City of Spokane</u> , 918 F.2d 84 (9 th Cir. 1990).....	8, 9

STATUTES

RCW 34.05.570(3)(d) 3
RCW 4.84.030 17
RCW 82.04.4297 passim
RCW 82.04.4311 14, 15, 16, 17

OTHER AUTHORITIES

§ 19.7(12) Washington Appellate Practice Deskbook
(Wash. State Bar Assoc. 3d ed. 2005)..... 17
Final Bill Report, Substitute H.B. 302 11
Laws of 2002, ch. 314, § 2 14
Webster’s Third New International Dictionary 1172
(1981)..... 6

RULES

RAP 14.3.....18
RAP 18.1 17, 18

APPENDICES

Appendix 1.....	Timeline of Amendments to RCW 82.04.4297
Appendix 2	Additional Cases
Appendix 3	Additional Statutes
Appendix 4	Additional Other Authorities

I. INTRODUCTION

The parties agree that Island may deduct amounts received from the “United States or any instrumentality thereof” from the measure of its taxes under RCW 82.04.4297. The parties also agree that the phrase “instrumentality thereof” is unambiguous, but they differ on what meaning the Court should accord to those words and whether payments received from Medicare patients and Medigap insurers meet that definition.

The Department asks the Court to adopt and apply a definition of “instrumentality” culled from inapposite case law:

[A]n instrumentality of a government is not merely something that assists a government purpose, but must be more closely associated with the government itself so as to be considered part of it.

Respondent’s Brief at 11.

But this definition has no statutory basis and ignores the Washington State Supreme Court’s most recent pronouncement regarding questions of statutory interpretation. Indeed, the general rule is that absent ambiguity and a statutory definition, a court will apply a dictionary one. Homestreet, Inc. v. State Dept. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); see also State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (“In the absence of a

statutory definition, [a court] will give the term its plain and ordinary meaning ascertained from a standard dictionary.”).

Under its plain and ordinary dictionary meaning, an “instrumentality” is a person or an entity used to accomplish the ends of another. Here, Medicare copayments and deductibles along with payments from Medigap insurers are the government’s means—or instrumentality—used to compensate Island for a portion of the health and social welfare services it renders to Medicare patients.¹

In cases such as this—where all parties acknowledge that the statutory language is plain and unambiguous—there is no need to construe the statute to glean legislative intent because the legislature’s will is derived exclusively from the words of the statute itself, regardless of any contrary or self-serving interpretation by the Department. Homestreet, 166 Wn.2d at 452.

Accordingly, RCW 82.04.4297 permits Island to deduct monies received from Medicare patients and Medigap insurers from its gross income subject to the B&O tax as they are acting as instrumentalities of the federal government when paying the Hospital for rendering Medicare services.

¹ In its opening brief, Island details the ways in which Medicare uses patient copayments and deductibles and payments from Medigap insurers to reimburse Island for services rendered to Medicare patients.

II. ARGUMENT

A. Standard of Review.

In as much as this appeal concerns only questions of law and statutory interpretation, the lower court's conclusions are subject to de novo review. City of Spokane ex rel. Wastewater Mgmt. Dept. v. State Dept. of Revenue, 145 Wn.2d 445, 451, 38 P.3d 1010 (2002). The Board of Tax Appeals did not enter findings of fact, so the "substantial evidence" standard does not apply on appellate review. Heinmiller v. State Dept. of Health, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995). Instead, this Court must grant relief from the BTA's order if it finds the agency erroneously interpreted or applied the law. Wastewater Mgmt. Dept. at 451; RCW 34.05.570(3)(d).

B. Medicare is Responsible for Paying Medicare Covered Charges.

The Department characterizes the Medicare system as one in which Medicare is actually paying for services. In reality, private insurance companies and patients make interim payments as instrumentalities of the Medicare program, subject to a year-end true-up process conducted by a third-party actor.

To be sure, Medicare is contractually bound to pay the Island for its costs incurred in caring for Medicare patients; however, Medicare relies on third parties to administer the Medicare program and to make Medicare payments. Medicare compensation

is complex and the law establishes various ways in which Medigap insurers and Medicare patients are integrated into the Medicare-coverage system. For example, Medicare patients can enroll in a Medicare HMO or a competitive health plan, in which the HMO/insurance plan makes payments for services rendered to the Medicare patient (the Department concedes that such payments are not taxable). In this way, the government relies on a series of third parties acting between the government and healthcare providers to pay Island.

The Department claims that the Hospital's argument concerning third parties as Medicare instrumentalities is ridiculous because, by analogy, all highly-regulated entities would then be government agents. However, it is not the fact that these third-party actors operate in a highly regulated environment which makes them instrumentalities of the government. It is the fact that they discharge a governmental function that defines them instrumentalities of the government within the meaning of RCW 82.04.4297.

C. The Court Must Discern Legislative Intent from the Plain Language of RCW 82.04.4297 Because the Statute is Unambiguous.

It is axiomatic that "where statutory language is plain and unambiguous, courts will not construe the statute but will glean the

legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency.” Homestreet, 166 Wn.2d at 451-52. This is true even where the court believes the legislature intended something else but failed to express it adequately. Id. at 455; see also In re Detention of Martin, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).

The parties agree that RCW 82.04.4297 is unambiguous (see Respondent’s Brief at 6; CP 99), but rather than confront the ordinary dictionary meaning of “instrumentality,” the Department ignores the actual dictionary definition of the term and instead resorts to tools of statutory construction and interpretation, which are used only when a statute’s meaning is ambiguous. The Court should not consider legislative history or other tools of statutory construction because the scope of the deduction is best discerned from its plain language and a dictionary.

1. *Dictionary definitions are used in their first and primary sense.*

A single term often describes a number of similar, yet distinguishable, situations. Such is true of the term “instrumentality.” Each dictionary definition cited by Appellant and Respondent defined an instrumentality as an entity acting as an intermediary. Further, each dictionary definition defined instrumentality to include an entity which is a functional part of

another entity. The Department argues that only the second type of instrumentality is contemplated by RCW 82.04.4297.

There is no authority supporting the notion that a court should resort exclusively to a secondary or subsidiary meaning for a term while ignoring the first and most accepted entry found in the dictionary.

As Island indicates, the word “intermediary” is included in the first entry for the “instrumentality” found in each respective dictionary, save for the definition found in Webster’s Third New International Dictionary. The first entry found in Webster’s, however, only strengthens Island’s argument. Under Webster’s, instrumentality in its first sense means “the quality or state of being instrumental: a condition of serving as an intermediary, the agreement was reached through the ~ of the governor>.” Webster’s Third New International Dictionary 1172 (1981). Although Medigap insurers and Medicare patients are clearly instrumental to the adjudication of Medicare claims, Medicare bears ultimate responsibility for compensating Island for healthcare services rendered to Medicare patients. Medicare uses Medicare beneficiaries and Medigap insurers as instrumentalities (i.e., intermediaries) to accomplish this end.

The court should decline the Department's invitation to bypass the clear and logical application of the primary definition of "instrumentality" in favor of its third or fourth meaning.

D. Only If the Court Finds RCW 82.04.4297 Ambiguous Should It Resort to Means Beyond the Plain Language of the Statute to Determine Legislative Intent.

The Department concedes that RCW 82.04.4297 is unambiguous and, thus, further analysis of statutory intent is inappropriate. The Legislature took unusual care to clarify the statute by including an explanation of the scope of the exemption within the statute itself. Because the statute is clear on its face, the Court need not adopt the definition of "instrumentality" found in inapposite case law or the one cobbled together by the Department from the legislative history or the structure of the statute's chapter.

Even if the statute were ambiguous, however, the legislative history of the deduction, subsequent amendments thereto, and the rules of construction all favor the Hospital's definition of the term "instrumentality." In the event that the Court looks past the language of the statute, it will find little support for the Department's contentions.

1. *The definition of “instrumentality” used in cases involving tax immunities rooted in the federal Constitution does not apply in circumstances concerning Washington state tax deductions.*

The question of whether Medicare patients and Medigap insurers are performing sufficient secondary or derivative government functions to insulate money paid to the Hospital from state taxation under McCulloch v. Maryland, 17 U.S. 316 (1819), is a far different question from whether these entities are making payments to Island as instrumentalities of the government within the meaning of a specific tax statute. Yet the Department ignores this distinction in its discussion of inapposite case law, which addresses the power of the States to tax the federal government.

For instance, in the primary case cited by the Department, United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), the Ninth Circuit frames the issue presented as whether the Red Cross, a private entity, is sufficiently aligned with the federal government so as to become an instrumentality thereof fully immune under the federal Constitution from state taxation. The Court held that the Red Cross was an “instrumentality” of the federal government for purposes of evaluating whether the state could tax monies raised by the Red Cross in the first instance.

The definition used by the Ninth Circuit to assess the Red Cross's tax immunity, however, cannot be ported over to this dispute because this case does not concern constitutional limits on state taxation; rather, it concerns whether the Legislature carved out a specific tax deduction for monies received from persons or entities acting in place of the government. Indeed, the Ninth Circuit explicitly rejected the argument that the meaning of "instrumentality" for intergovernmental tax immunity purposes could be equated to the meaning of a government "instrumentality" in other contexts. Id. at 88. As the court explained, it is a "fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context." Id.

The legal effect of the word "instrumentality" varies depending on the context in which it has been examined. Compare City of Spokane, 918 F.2d 84 (holding that the Red Cross is a government instrumentality immune from local taxation), with Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051 (9th Cir. 1981) (holding that the Red Cross is *not* a government instrumentality for purposes of the Freedom of Information Act). Since the question at bar is whether Washington created by legislative action a tax deduction for certain monies received by the

Hospital,² the language of the statute must control the scope of the deduction, not the case law cited by the Department.

2. *The definition argued for by the department would render other terms within RCW 82.04.4297 superfluous.*

The Legislature is presumed not to have used superfluous words and courts “are bound to accord meaning, if possible, to every word in a statute.” In re Marriage of Barber, 106 Wn. App. 390, 394-395, 23 P.3d 1106 (2001). “Statutes are to be construed, wherever possible, so that no clause, sentence or word shall be superfluous, void, or insignificant.” United Parcel Service, Inc. v. Dept. of Revenue, 102 Wn.2d 355, 361, 687 P.2d 186 (1984). Courts may not rewrite or delete the plain language of an unambiguous statute. State v. Roggenkamp, 153 Wn.2d 614, 632, 106 P.3d 196 (2005).

RCW 82.04.4297 carves out a deduction from the B&O tax for monies received from the “United States or any instrumentality thereof,” but the deduction also extends to amounts received from the “state of Washington or any ... political subdivision thereof.”

² The Department’s discussion of McAvoy v. Weber, 198 Wash. 370, 88 P.2d 448 (1939)—the only Washington authority cited by the Department on this score—is similarly distinguishable. In McAvoy, the court considered the term instrumentality in the context of private citizens suing out a writ of garnishment against a government-owned corporation, not whether the corporation was an instrumentality within the meaning of a specific statute-based tax deduction.

The Legislature's choice to refer to both government instrumentalities and political subdivisions (within the same statute) was deliberate and meaningful, and clearly establishes that these terms each have a different meaning.

Placed in the context of the current dispute, it becomes clear that the Legislature intended the scope of the deduction to extend beyond monies received from political subdivisions and to include payments from those entities acting in the government's stead.

3. *The legislative history of RCW 82.04.4297 supports a more expansive reading of the term "instrumentality."*

The plain language of RCW 82.04.4297 proves that the Legislature intended a more expansive reading of the term that was suggested by the Department. The only legislative history cited by the Department concerning the creation of the deduction is the 1979 Session Law and the Final Bill Report accompanying the legislation. Respondent's Brief 14-15. The Bill Report described the new deduction as one for "[a]mounts received from the United States or any governmental unit..." Final Bill Report, Substitute H.B. 302. From this language, the Department concludes that "the deduction applies only to governmental payments." Respondent's Brief 14. The final version of the law ultimately passed by the Legislature, however, provided that the deduction applies to

amounts received from the United States or any instrumentality thereof or from the State of Washington or any Municipal corporation or political subdivision. Thus, the statute allows a deduction for not only payments received from governmental units, but payments from instrumentalities or intermediaries thereof as well.

The Department would render the difference between the Bill and the plain language of the statute meaningless, but “[w]hen words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written.” State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n, 140 Wn.2d 615, 631, 999 P.2d 602 (2000); Homestreet, 166 Wn.2d at 452. Here, the Legislature clearly and unambiguously included payments from the U.S. government and instrumentalities thereof, and not merely payments from governmental units, in the plain language of the statute. Thus, the language as written is the beginning and end of the Legislature’s intent.

4. *Subsequent amendments to RCW 82.04.4297 further define what constitutes an “instrumentality.”*

In 2001, the Legislature took the unusual step of codifying in RCW 82.04.4297 an explanation of what the section always meant.

The 2001 legislation makes plain that the deduction under RCW 82.04.4297 always applied to monies received from the government and from entities or persons making payment on the government's behalf as instrumentalities thereof. See Appendix 1 (Timeline of Amendments to RCW 82.04.4297). The 2001 amendment added language to RCW 82.04.4297 to clarify that amounts received from the U.S. government included "amounts received from" managed-care organizations or other entities under contract to manage healthcare benefits under the Medicare statute. The Legislature added an explanation of the meaning of RCW 82.04.4297; the clarifying language was as follows:

The legislature finds that the deduction under the business and occupation tax statutes for compensation from public entities for health or social welfare services was intended to provide government with greater purchasing power when government provides financial support for the provision of health or social welfare services to benefited classes of persons.

The legislature further finds that the objective of these changes is again to extend the purchasing power of scarce government health care resources, but that this objective would be thwarted to a significant degree if the business and occupation tax deduction were lost by health or social welfare organizations solely on account of their participation in managed care for government-funded health programs. In keeping with the original purpose of the health or social welfare deduction, it is desirable to ensure that compensation received from

government sources through contractual managed care programs also be deductible.

Laws of 2001, 2nd Spec. Sess., ch. 23, § 1 (emphasis added).

A subsequent amendment followed in 2002, eliminating a deduction for Medicare deductibles and copayments received from patients, but allowing a retroactive refund back to 1998 for amounts received “as compensation for healthcare services covered under the federal Medicare program.” Laws of 2002, ch. 314, § 2 (codified at RCW 82.04.4311). The Legislature stated that this retroactive amendment was necessary to put to rest the dispute between hospitals and the Department, stating that “it would be inconsistent with the government function [of providing subsidized healthcare benefits because of age, disability or lack of income] to tax amounts received by a . . . nonprofit hospital . . . when the amounts are paid under a health service program subsidized by federal or state government. Further, the tax status of these amounts should not depend on whether the amounts are received directly from the qualifying program or through a managed care organization.” Id.

From these subsequent changes to RCW 82.04.4297, the Legislature has clearly stated that (1) the purpose of the deduction under RCW 82.04.4297 has always been to provide the government with greater purchasing power of health or social welfare services,

and (2) the Legislature intended for the deduction to extend to all monies received under a health plan for the aged, sick or poor (such as Medicare) even if the government only subsidizes the plan and does not pay 100-percent of the plan's costs.

The Department places great import upon the 2002 enactment of RCW 82.04.4311, which beginning in 2002, excluded from tax-deductible income amounts received from patients as copayments and deductibles. While it is true that patient copayments and deductibles ceased to be deductible beginning in 2002, the change did not take effect until after the tax period at dispute here.

Moreover, the Department's argument on this score is inconsistent logically. It asks on the one hand, "why would the Legislature amend RCW 82.04.4297 in 2001 to include a deduction for Medicare payments received from government intermediaries if that right already existed?" While on the other hand, it asks us not to consider why the Legislature would have removed a deduction for patient copayments and deductibles if that deduction did not already exist. These competing arguments cannot be reconciled under the Department's theories concerning the recent amendments to RCW 82.04.4297.

5. *A more inclusive reading of the term “instrumentality” will not upset the larger statutory scheme and lead to absurd results.*

The Department’s concern about absurd results is overblown. First, the notion that the Legislature created two separate statutory deductions dealing with Medicare copayments and deductibles paid by patients is not so “absurd” as to warrant rewriting the words of the statute and ignoring the plain language as written.

Second, to the extent that a conflict exists between RCWs 82.04.4297 and .4311, the Court has developed additional cannon’s of construction to deal with the wording found in competing statutes. See, e.g., Tunstall ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (“Another well-established principle of statutory construction provides that apparently conflicting statutes must be reconciled to give effect to each of them.”); Hallauer v. Spectrum Prop., Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (“If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls.”). Thus, despite the Department’s argument, taxpayers and the Department are not lost if the statutes are somehow deemed “incongruous” as the Department argues.

Finally, since the limits found in RCW 82.04.4311's did not take effect until after the tax period in question, the conflict with RCW 82.04.4297 described by the Department was not yet ripe and could not possibly lead to an absurd result when .4297 was the only statute in effect.

E. Island is Entitled to an Award of Fees and Costs.

The argument for fees should be as succinct as possible, so that it does not detract from the underlying merits of the appeal. § 19.7(12) Washington Appellate Practice Deskbook (Wash. State Bar Assoc. 3d ed. 2005). RAP 18.1 requires that the party requesting fees “devote a section of its opening brief to the request for the fees or expenses.” To the extent that the Court finds an award of fees is warranted, the procedural requirements of RAP 18.1 are met because Island included a request for fees in its Opening Brief.

As for the substantive claim of fees, RCW 4.84.030 entitles Island to its attorney fees as the prevailing party before the Superior Court should this Court reverse the lower court's Order. As for Island's fees on appeal, even in the absence of express statutory authority or contract, the Court may award fees on equitable grounds as it sees fit. See, e.g., State ex rel. Macri v. City of Bremerton, 8 Wn.2d 93, 111 P.2d 612 (1941).

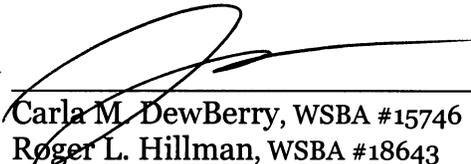
The Department concedes that if Island prevails on appeal, Island is entitled to appellate costs under RAP 14.3.

III. CONCLUSION

Island respectfully requests the Court to reverse the Board of Tax Appeals' final decision, and the Superior Court order affirming that decision and remand, for entry of judgment in Island's favor for the refund sought plus pre-judgment interest, court costs, and applicable attorney's fees, if any. Island also asks for an award of any applicable appellate costs and attorney's fees under RAP 14.3. and RAP 18.1.

DATED this 14th day of January 2010.

GARVEY SCHUBERT BARER

By 
Carla M. DewBerry, WSBA #15746
Roger L. Hillman, WSBA #18643
Jamal N. Whitehead, WSBA #39818
Attorneys for Appellant Skagit County
Public Hospital District No. 2 d/b/a
Island Hospital

CERTIFICATE OF SERVICE

I, Antionette Williams, certify under penalty of perjury under the laws of the State of Washington that I caused the original of the foregoing APPELLANT’S REPLY BRIEF to be filed with the Washington State Court of Appeals, Division Two, by U.S. Mail, on January 14, 2010, at the address listed below:

Clerk/Administrator
Washington State Court of Appeals,
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I further certify under penalty of perjury under the laws of the State of Washington that I caused a copy of the foregoing APPELLANT’S REPLY BRIEF to be served, via U.S. Mail and e-mail, on January 14, 2010, on the Attorneys for Respondent listed below:

Peter Gonick, AAG
David Hankins, AAG
AG Office – Revenue Division
7141 Cleanwater Drive S.W.
P.O. Box 40123
Olympia, WA 98504-0123
PeterG@ATG.WA.GOV
David.Hankins@atg.wa.gov

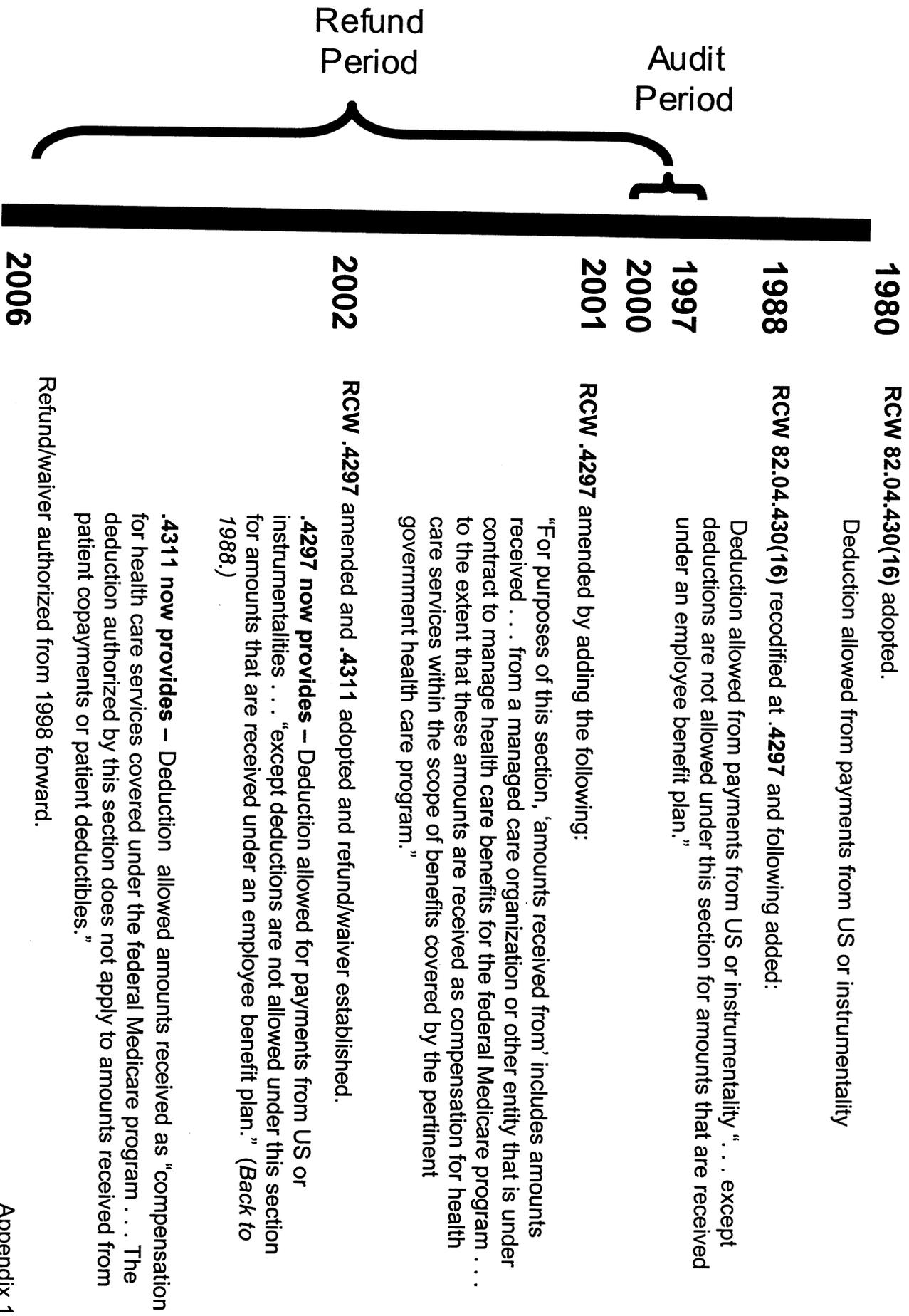
FILED
COURT OF APPEALS
DIVISION II
10 JAN 15 PM 2:47
STATE OF WASHINGTON
BY  DEPUTY

Dated at Seattle, Washington, this 14th day of January 2010.


Antionette Williams, Legal Assistant

SEA_DOCS:946815.4

Appendix 1
Timeline of Amendments to RCW 82.04.4297



Appendix 2
Additional Cases

P

Supreme Court of Washington,
En Banc.

Wilbur G. HALLAUER and Josephine Hallauer,
husband and wife; and Champerty Shores Owners
Association, a Washington nonprofit corporation,
Petitioners,

v.

SPECTRUM PROPERTIES, INC., a corporation,
Defendant,

Ernesto C. Del Rosario and Madeliene B. Del
Rosario, husband and wife, Respondents.

No. 68554-1.

Argued June 27, 2000.

Decided Feb. 22, 2001.

The holders of a certificated water right brought an action against adjacent landowners to condemn property for an easement to transport water for use in a heat pump, cooling system, and fish propagation. The Superior Court, Okanogan County, James M. Murphy, J., determined that the holders failed to show necessity for condemnation. Holders appealed. The Court of Appeals affirmed in an unpublished opinion. Review was granted. The Supreme Court, Madsen, J., held that: (1) the showing of necessity to condemn a right of way to transport water for a beneficial use is less than the showing required to condemn a private way of necessity and does not require landlocked property, overruling State ex rel. Henry, 155 Wash. 370, 284 P. 788; (2) fish propagation and heating and cooling of the holders' house were beneficial uses; and (3) condemning property for the right of way was necessary.

Reversed and remanded.

Sanders, J., dissented and filed opinion in which Alexander, C.J., joined.

West Headnotes

[1] Eminent Domain 148 ↪8

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k6 Delegation of Power

148k8 k. Construction and Operation of Legislative Acts in General. Most Cited Cases

The statutes governing eminent domain by corporations, rather than statute governing a condemnation for a private way of necessity, applied to certificated water right holders' suit to condemn property for a right of way to transport water across adjacent property for a heat pump, cooling system, and fish propagation ponds. West's RCWA 8.20.070, 8.24.010, 90.03.040.

[2] Eminent Domain 148 ↪67

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k65 Determination of Questions as to Validity of Exercise of Power

148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

The legislature can declare in the first instance that the beneficial use of water is a public use, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded. West's RCWA Const. Art. I, § 16; West's RCWA 90.03.040.

[3] Eminent Domain 148 ↪67

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k65 Determination of Questions as to Validity of Exercise of Power

148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

A legislative declaration of public use will be accorded great weight.

[4] Eminent Domain 148 ↪67

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k65 Determination of Questions as to Validity of Exercise of Power

148k67 k. Conclusiveness and Effect of Legislative Action. Most Cited Cases

The legislature's declaration that beneficial uses of water are public uses is entitled to deference. West's

RCWA 90.03.040.

[5] Waters and Water Courses 405 ↪ 139

405 Waters and Water Courses

405VI Appropriation and Prescription

405k139 k. Time of Vesting of Rights Under Appropriation. Most Cited Cases

Perfection of an appropriative water right requires that appropriation is complete only when the water is actually applied to a beneficial use.

[6] Waters and Water Courses 405 ↪ 133

405 Waters and Water Courses

405VI Appropriation and Prescription

405k133 k. Proceedings to Effect and Character and Elements of Appropriation in General. Most Cited Cases

The Department of Ecology has no authority to adjudicate private property rights when issuing a permit and water right certificate. West's RCWA 90.03.290.

[7] Eminent Domain 148 ↪ 56

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k54 Exercise of Delegated Power

148k56 k. Necessity for Appropriation.

Most Cited Cases

The showing of necessity to condemn a right of way to transport water for a beneficial use is less than the showing required to condemn a private way of necessity and does not require landlocked property; the statute permitting any person to condemn a right of way to transport water where necessary to apply the water to beneficial use governed over the earlier and more general statute providing for the right of eminent domain if the condemnor's land is so situated that a right of way across the land of another to transport water is necessary for the proper use and enjoyment of the condemnor's land; overruling *State ex rel. Henry v. Superior Court*, 284 P. 788. West's RCWA 8.24.010, 90.03.040.

[8] Statutes 361 ↪ 223.2(1.1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(1) Statutes That Are in Pari Materia

361k223.2(1.1) k. In General.

Most Cited Cases

The principle of reading statutes in pari materia applies where statutes relate to the same subject matter; such statutes must be construed together.

[9] Statutes 361 ↪ 223.2(1.1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(1) Statutes That Are in Pari Materia

361k223.2(1.1) k. In General.

Most Cited Cases

Statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.

[10] Statutes 361 ↪ 223.4

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.4 k. General and Special Statutes. Most Cited Cases

If statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls.

[11] Statutes 361 ↪ 223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to

Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(.5) k. In General. Most

Cited Cases

Courts consider the sequence of all statutes relating to the same subject matter.

[12] Eminent Domain 148 ↪ 17

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k16 Particular Uses or Purposes

148k17 k. In General. Most Cited Cases

Eminent Domain 148 ↪ 28

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k16 Particular Uses or Purposes

148k28 k. Water Supply in General. Most

Cited Cases

Fish propagation and heating and cooling of the certificated water right holders' house were "beneficial uses" recognized by the constitution as supporting condemnation for a private purpose and fell within the legislature's declaration that beneficial uses are public uses. West's RCWA Const. Art. 1, § 16; West's RCWA 90.54.020.

[13] Eminent Domain 148 ↪ 56

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k54 Exercise of Delegated Power

148k56 k. Necessity for Appropriation.

Most Cited Cases

The necessity for a right of way to transport water from adjacent property to the certificated water right holders' heat pump, cooling system, and fish propagation ponds was established under the statute permitting any person to condemn a right of way to transport water where necessary to apply the water to beneficial use. West's RCWA 90.03.040.

****541*129** Mansfield, Reinbold & Gardner, Owen M. Gardner, Okanogan, WA, Perkins, Cole, Charles W. Lean, Charles B. Roe, Olympia, WA, for petitioners.

Maxey Law Offices, Bevan Jerome Maxey, Spokane,

WA, Diane Marie Walker, Spokane, WA, for respondents.

MADSEN, J.

Wilbur G. and Josephine Hallauer, who hold a certificated water right to water from a spring on neighboring land, seek to condemn a way across that land for transporting water to their property for domestic use, and to ponds for fish propagation. The Court of Appeals held that because the Hallauers' property is not landlocked and alternative sources of water are available, the Hallauers failed to prove a reasonable necessity for condemnation. We reverse the Court of Appeals and hold that the Hallauers are entitled to proceed with their condemnation action.

FACTS

The Hallauers and respondents Ernesto C. and Madeleine *130 B. Del Rosario own adjacent property on the shore of Lake Osyoos **542 in Okanogan County. Donald Thorndike was the Del Rosarios' predecessor in interest. In the mid-1970's, part of a bluff on Thorndike's property collapsed, revealing a natural spring. In the early 1980's the Hallauers built a home on their property with a heat pump and cooling system that used water from a well. The first winter, the heat pump froze because the water from the well was too cold for its proper operation. Mr. Hallauer learned that the water from the spring on Mr. Thorndike's property would be satisfactory for operation of the heat pump as well as for supplying water to ponds intended for fish propagation.

Mr. Thorndike and Mr. Hallauer agreed that Mr. Hallauer would apply to the Department of Ecology for a water right entitling him to withdraw water from the spring on the Thorndike property, and when the water right was granted Mr. Hallauer would pay Mr. Thorndike \$500.^{FNI} In March 1982, Mr. Thorndike signed the application for the water right as owner of the property, and Mr. Hallauer signed as the applicant. In March 1984, Mr. Hallauer sent a letter to Mr. Thorndike saying the application had been approved and enclosed a check for \$500.

FNI. The parties dispute the details of the agreement; however, its terms are not important to resolution of this case.

Mr. Hallauer developed the spring and installed a pipeline to transport water from the spring to his property for the heat pump and fish ponds. The property on which the ponds are located was developed into the Champerty Shores development, a private community. In 1984, fish were added to the ponds. In October 1984, the Department of Ecology issued a certificate of water right.

Mr. Thorndike's property was acquired by Spectrum Properties, Inc. following foreclosure proceedings. In October 1989, Mr. Del Rosario entered into a real estate contract for the purchase of the property, took possession, and began managing an apple orchard on it. During roadwork on the property, the Hallauers' pipeline was discovered, and the *131 Del Rosarios demanded that the pipeline be removed.

Litigation ensued. Although the Hallauers originally obtained a judgment quieting title to a prescriptive easement across the Del Rosarios' property, that decision was reversed on appeal. On remand, the Hallauers sought, among other things, to condemn an easement for a pipeline to carry water from the spring to their property. Petitioner Champerty Shores Owners Association was added as a necessary party plaintiff because it had taken ownership of the fish ponds and an interest in the spring right. The trial court held that the Hallauers had failed to show a reasonable necessity for a private condemnation. On appeal, the Court of Appeals affirmed. This court granted discretionary review.

ANALYSIS

Although several other grounds for relief have been argued during litigation between the parties, the only matter before this court is whether the Hallauers are entitled to condemn an easement across the Del Rosarios' property for a pipeline to transport water from the spring to their property for use in the heat pump and cooling system and as a water supply for propagation of fish.

The authority to condemn a right of way to transport water has long existed in this state, both by constitutional and statutory provisions. The chief question posed by this case is whether the showing of necessity to condemn a right of way to transport water is identical to the showing required to condemn a pri-

vate way of necessity. The Court of Appeals held that "necessity" means the same in both contexts, relying on RCW 8.24.010. We disagree because RCW 8.24.010 does not apply in the context here.

[1] As we explain below, RCW 90.03.040 provides the statutory authority for condemnation in this case. Among other things, the statute directs that "property or rights shall be acquired [through condemnation] in the manner provided by law for the taking of private property for public use by *132 private corporations." RCW 90.03.040. Therefore, chapter 8.20 RCW (eminent domain by corporations), rather than chapter 8.24 RCW, **543 provides the procedures for condemnation. RCW 8.20.070 states that at the hearing on a petition to condemn where the contemplated use is a public use, the court will enter an order of public use and necessity if it is "satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use ... that the public interest requires the prosecution of such enterprise ... and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise."

In order to determine whether the Hallauers are entitled to an order of public use and necessity, we examine both public use and necessity, as the three conditions set out in RCW 8.20.070 are interrelated. See State v. Belmont Improvement Co., 80 Wash.2d 438, 442-43, 495 P.2d 635 (1972); State v. Dawes, 66 Wash.2d 578, 583, 404 P.2d 20 (1965). Also, the public interest condition and the necessity condition "are generally subsumed under the definition of 'necessity'." City of Seattle v. Mall, Inc., 104 Wash.2d 621, 623, 707 P.2d 1348 (1985). The interrelatedness of the conditions is particularly apparent where water rights or rights of way to transport water are concerned. This is because of the adoption of the prior appropriation doctrine in this state for acquisition of new water rights; condemnation of rights of way to transport water is an integral component of application of water to beneficial use.

Accordingly, we begin by discussing the public use condition as a predicate to discussion of the necessity condition.

Our analysis begins with article I, section 16 of the Washington State Constitution, which provides:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or *133 damaged for public or private use without just compensation having been first made....^{FN2}

FN2. In addition to Const. art. I, § 16, the constitution also provides that “[t]he use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.” Const. art. XXI, § 1.

As an initial matter, this constitutional provision does not require that condemnation for rights of way to transport water is subject to the same criteria as condemnation for private ways of necessity. The first sentence of article I, section 16 carves out two forms that a condemnation for “private” use may take. The constitution states the exceptions to the rule that private property may not be taken for private uses as: “except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.” Const. art. I, § 16 (emphasis added).

This distinction was carried out in enabling legislation. In 1913, Rem.Rev.Stat. § 936-7 (RCW 8.24.010) was enacted to replace certain earlier enabling statutes. It provides for condemnation of “lands of [another] sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.” RCW 8.24.010. The title of the 1913 act containing RCW 8.24.010, like the constitutional provision, also sets forth the two types of condemnation authorized for private uses: “AN ACT relating to the taking of private property for private ways of necessity and for drains, flumes and ditches on or across the lands of others for agricultural, domestic or sanitary purposes.” Laws of 1913, ch. 133, at 412 (emphasis added).

Thus, neither article I, section 16 nor some of the early enabling legislation mandates treating condemnation for a right of way to transport water the same as a condemnation for a private way of necessity.

Although RCW 8.24.010 was enacted as an enabling

provision for article I, section 16, it soon gave way to RCW 90.03.040 where condemnation of water rights or rights of way to transport water are concerned. Rem.Rev.Stat. *134 § 7354 (RCW 90.03.040) was enacted as part of the 1917 water code under which the prior appropriation doctrine became the sole method for acquisition of new water **544 rights. It provides in part that “[t]he beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use.”^{FN3} RCW 90.03.040.

FN3.RCW 90.03.040 provides in full:

The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this chapter and use the same in common with the former owner, and including the right and power to condemn an inferior use of water for a superior use. In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one: PROVIDED, That no property right in water or the use of water shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity where such land is situated. In any case, the court shall determine what is the most economical method of irrigation. Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private

corporations.

This statute was needed in order to implement the prior appropriation doctrine. Before adoption of the 1917 water code, two water rights doctrines applied in Washington. Under the doctrine of riparian rights, an owner of land on a stream or other body of water has the right to use the water. *Crook v. Hewitt*, 4 Wash. 749, 31 P. 28 (1892). The second doctrine, the prior appropriation doctrine, developed in the arid western states, and “provides that a right to water can be established only by putting water to beneficial use and that the first such use in time is the first such use in right.” Charles B. Roe & Peter R. Anderson, *Water Law*, in 1C Kelly Kunsch, *Washington Practice: Methods of Practice* § 91.4 (4th ed.1997). Both of these types of water rights could be acquired in Washington in its early history.

*135 Where a riparian water right was involved, the water right holder generally had access to sufficient water because water was adjacent to or within the holder's property.^{FN4} However, prior appropriation rights, by definition, do not require that the owner's land abut a stream or other water body. Where appropriative rights are concerned, there “need be no relationship between the source of the water and the locus of use.” A. Dan Tarlock, *Law of Water Rights and Resources* § 5.24, at 5-41 (2000). Accordingly, there must be some means of delivering the appropriated water to the owner's land. The authority to condemn property for rights of way to transport water is thus an essential part of the prior appropriation scheme: “Access to water open to appropriation can generally be acquired by eminent domain. To prevent de facto riparianism, western states passed statutes permitting a water rights claimant to condemn the necessary rights of way to bring the water from the stream to the place of his use.” *Id.* at 5-42.

FN4. However, even a riparian water right holder might not have sufficient frontage to obtain necessary water. Early statutes allowed for condemnation of rights of ways to obtain water for certain uses. For example, in *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 P. 429 (1910), the court addressed statutes permitting condemnation for rights of ways to transport water for irrigation and mining purposes. The statutes expressly granted the right to nonriparian

proprietors, and to riparian proprietors lacking sufficient frontage. *Id.* at 624, 110 P. 429.

The constitutionality of these statutes was originally at issue because the power of eminent domain was limited to public uses. *Id.* at 5-43. However, by the time RCW 90.03.040 was enacted the validity of such statutes was settled. In *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), the Court upheld a Utah statute granting the right to condemn land for the purpose of conveying water in ditches across that land for irrigation of the condemnor's land alone. The Court observed that

[w]here the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use **545 is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to *136 hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use clearly be private.

....

[Water rights] are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed....

Clark, 198 U.S. at 367-68, 370, 25 S.Ct. 676. It is now settled that “[e]minent domain may be used to transport water so long as the use is beneficial; beneficial uses are presumed public uses.” Tarlock, *supra*, § 5.24, at 5-42.

RCW 90.03.040, like statutes in other western states, declares that the beneficial use of water is a public use. This declaration of public use applies even if the water is used by an individual solely on that individual's private land. Article I, section 16 speaks both of condemning private property for private uses, includ-

ing “for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes,” and of private property for public purposes. However, “private use” as used in the constitutional provision is imbued with a public nature where condemnation of water rights and rights of ways to transport water are concerned. Taking private property for private purposes within the meaning of the constitutional provision has been explained as follows:

“[I]t is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature, that is, a use in which the public participates, directly or indirectly, as in the case of highways, railroads, public service plants and the like. It is sufficient that the use of the particular property for the purpose proposed, is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving water power or working a mine. In *137 such cases the public welfare is promoted by the increased prosperity which necessarily results from developing the natural resources of the country....” Lewis, *Eminent Domain* (3d ed.), § 1.

State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 587, 137 P. 994 (1914). The Colorado Supreme Court has similarly said that although the words “private use” appear in the state’s constitution and statutes, it “is obvious that they do not mean a strictly private use; that is to say, one having no relation to the public interest. The fact that the Constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi public....” Pine Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 11 P.2d 221, 225 (1932).

In Galbraith v. Superior Court, 59 Wash. 621, 629, 110 P. 429 (1910), the court discussed this principle in the context of beneficial use of water. The court noted that article I, section 16, provides for eminent domain for certain private purposes, including ditches for agricultural purposes. Although the provision

in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the

taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land.

59 Wash. at 629, 110 P. 429. The court explained that the reclamation through irrigation of one small field by an individual promotes the development and adds to the taxable wealth of the state as well as reclamation**546 by irrigation of large areas. Id. at 632, 110 P. 429.

The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character, is not public service, but is the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. Whether such development *138 and increased wealth comes from the effort of a single individual, or the united efforts of many, in our opinion does not change the principal upon which this right of eminent domain rests.

Id. at 631, 110 P. 429; see also, e.g., Prescott Irrig. Co. v. Flathers, 20 Wash. 454, 458-59, 55 P. 635 (1899); White v. Stout, 72 Wash. 62, 66, 129 P. 917 (1913). The same principle was discussed by the United States Supreme Court in Clark, quoted above.

While these state cases preceding enactment of RCW 90.03.040 treat transportation of water for irrigation as sufficiently public in nature to allow condemnation for conveying the water, the statute, like the constitution, encompasses other beneficial uses. Article I, section 16 specifically refers to agricultural, domestic, or sanitary purposes. Article XXI, section 1 states that “use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.” This latter provision makes the stated purposes public purposes, “but it does not preclude the state, through its legislature, from declaring other purposes to be also public in their nature.” State ex rel. Andersen v. Superior Court, 119 Wash. 406, 409-10, 205 P. 1051 (1922). As noted, RCW 90.03.040 declares that the beneficial use of water is a public use.

At present, the vast majority of this state’s citizens do not engage in agriculture. Yet the development and wealth of this state derived from nonagricultural en-

deavor is unquestionably dependent upon beneficial use of water, including domestic use of water.^{FN5} Our state's citizens must have use of water, not merely for economic development of their own land, but also that they can live and work throughout the *139 state in a wide variety of occupations. We live, more than ever, in a time of limited water resources and expanding growth. Application of water to beneficial use, as contemplated by our water codes, is a crucial factor in sustaining this state and its people.

FN5. Beneficial uses are defined in RCW 90.54.020(1), enacted as part of the Water Resources Act of 1971, chapter 90.54 RCW:

Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

[2][3] The legislative declaration in RCW 90.03.040 that beneficial use of water is a public use must also be viewed in light of other language in article I, section 16, which states that “[w]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.” This does not mean, however, that the Legislature cannot declare public uses. State ex rel. Andersen, 119 Wash. at 410, 205 P. 1051. “The Legislature can declare in the first instance that the purpose is a public one, and it remains the duty of the court to disregard such assertion if the court finds it to be unfounded.” *Id.* A legislative declaration will be accorded great weight. Port of Seattle v. Isernio, 72 Wash.2d 932, 936, 435 P.2d 991 (1967); Miller v. City of Tacoma, 61 Wash.2d 374, 383-84, 378 P.2d 464 (1963).

The Legislature's declaration that beneficial use of water is a public use is not unfounded. We turn again to the historical context. As noted, the prior appropriation doctrine developed in recognition of the value and scarcity of water in western states. Indeed,

the importance of beneficial use of water led to the decline of the riparian system in this state:

Strict application of the riparian rights doctrine led to problems. The riparian rights doctrine prevented appropriative or riparian development by others, even if the **547 riparian rights had never been exercised. As population density increased, demand for water grew and the vitality of the riparian doctrine began to wane. See Trelease, Coordination of Riparian and Appropriative Rights to the Use of Water, 33 Tex. L.Rev. 24, 25-26 (1954).

*140 Dep't of Ecology v. Abbott, 103 Wash.2d 686, 691, 694 P.2d 1071 (1985). Thus, condemnation of riparian rights was upheld in early cases. For example, in 1907 this court upheld an 1890 statute that authorized condemnation of riparian rights for irrigation, subject to the riparian's irrigation needs. *Id.* (citing State ex rel. Kettle Falls Power & Irrig. Co. v. Superior Court, 46 Wash. 500, 90 P. 650 (1907)); see also State ex rel. Liberty Lake Irrig. Co. v. Superior Court, 47 Wash. 310, 313-14, 91 P. 968 (1907) (“[i]f [the riparian] is not using the water and does not propose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted”).

RCW 90.03.040 allows, among other things, condemnation of a water right for a proposed superior use. Shortly after the statute's enactment in 1917, the court held that a nonriparian owner could condemn a riparian's right, where the nonriparian sought immediate use for power while the riparian intended future use. State ex rel. South Fork Log-Driving Co. v. Superior Court, 102 Wash. 460, 470, 173 P. 192 (1918).

Appropriative rights thus played an early and vital role in this state's water law, and, with erosion of the riparian rights doctrine, have become the dominant form of water rights in this state. This evolution occurred because of the enormous importance, given the limited availability of water, of actual beneficial use of water to develop land, and rejection of speculative interests. See, e.g., State ex rel. Liberty Lake Irrig. Co., 47 Wash. at 313-14, 91 P. 968. The importance of water in this state simply cannot be overstated.

[4] We conclude that the Legislature's declaration that beneficial uses are public uses, coinciding with its choice of prior appropriation as the sole basis for acquisition of new water rights in this state in 1917, is entitled to deference.

Our conclusion accords with the laws of other western states that provide that condemnation of any property or rights necessary to apply water to beneficial use is a *141 condemnation for a public use. The Idaho State Constitution provides that

[t]he necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose ... is hereby declared to be a public use....

Private property may be taken for public use [provided just compensation is paid]....

Idaho Const. art. I, § 14.

COLO.REV.STAT. § 37-86-102 provides that “[a]ny person owning a water right or conditional water right shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water for beneficial use in accordance with said water right or conditional water right.” The Colorado Supreme Court held in *In re Application for Water Rights of Bubb*, 200 Colo. 21, 610 P.2d 1343 (1980) that the owner of a conditional water right was authorized to condemn a right of way to transport water for beneficial uses. The court noted that the ultimate sources of the state statute were Colo. Const. art. II, § 14 and Colo. Const. art. XVI, § 7. The first of these constitutional provisions provides that private property shall not be taken for private use without the consent of the owner, “except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.” Colo. Const. art. II, § 14. The second provides for rights of ways across public, private and corporate lands for transportation of water for domestic purposes, irrigation, mining and manufacturing and drainage, upon payment of just compensation.

**548 In *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970), the court examined state constitutional and statutory law governing condemnation of rights of way to transport water. The court noted that N.M. STAT. ANN. § 75-1-3 provides a right in “ ‘any person, firm, association *142 or corporation’ ” to condemn land for a right of way for “ ‘construction, maintenance and operation’ ” of “ ‘canals, ditches ... pipelines or other works for the storage or conveyance of water for beneficial uses....’ ” *Kaiser Steel*, 467 P.2d at 988 (quoting statute). The court observed that the state constitution allows condemnation only for public uses. *Id.* The court then described the state's history of water rights, noting that the prior appropriation system had been adopted given that “[w]ater conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.” *Id.* at 989. The court held that it was not the ultimate use of the water that controlled the issue of public use, but rather beneficial use of the water. *Id.* at 991.

Significantly, the court said that while it had held that irrigation uses were public uses in earlier cases, “[w]e do not suppose for a moment that it is the use for growing crops or producing food that has moved this Court to hold as it has concerning irrigation as a public use. Rather, it must have been the fact of beneficial use of water which unquestionably is of the greatest importance to this state, that dictated the result.” *Id.* The court said that “[i]n view of our state's environmental situation, the distribution of water is of paramount importance, justifying the defining of such distribution as a ‘public use.’ ” *Id.* at 993.

The same is true in Washington. Where water is limited, where water rights do not depend upon riparian access to water, and where application of water to beneficial use is required to hold a water right, distribution of water is imperative and so is the ability to acquire a way to convey the water to its place of use.

The Del Rosarios complain, though, that if obtaining a certificated water right is all that is necessary to justify exercise of the power of eminent domain under RCW 90.03.040, then the Department of Ecology determines property rights issues which it has no right to determine.

[5] One seeking a water right in this state must apply for a *143 permit, which may be issued only if the Department finds (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare. RCW 90.03.290. (Appropriations of groundwater must comply with surface water code provisions, RCW 90.03.250 to .340, which are expressly incorporated into the groundwater code. RCW 90.44.060.) A permit, and ultimately a water right certificate, may be obtained only where water is applied to beneficial use. “The principle that water must be used for a beneficial purpose is a fundamental tenet of the philosophy of water law in the West.” Department of Ecology v. Acquavella, 131 Wash.2d 746, 755, 935 P.2d 595 (1997). “ ‘An appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land.’ ” Dep’t of Ecology v. Grimes, 121 Wash.2d 459, 468, 852 P.2d 1044 (1993) (quoting Neubert v. Yakima-Tieton Irrig. Dist., 117 Wash.2d 232, 237, 814 P.2d 199 (1991)). Perfection of an appropriative right requires that appropriation is complete only when the water is actually applied to a beneficial use. See, e.g., Ellis v. Pomeroy Improvement Co., 1 Wash. 572, 21 P. 27 (1889).^{FN6}

FN6. There is no question in this case that the Hallauers have a certificated water right. To provide for the possibility that there may ultimately be a determination that the party seeking condemnation of a right of way to transport water does not have a water right, or has lost the right through abandonment or statutory forfeiture, the trial court order can provide for reversion of the right of way interest to the landowner under appropriate circumstances. See State ex rel. Kirkendall v. Superior Court, 130 Wash. 661, 665-66, 228 P. 695 (1924).

The Department must, in reaching a decision on a water right application, consider beneficial use and the public welfare, as well as whether the proposed use would be consistent with the highest feasible use of the water and with achieving the maximum net **549 benefits to the people of the state, see RCW 90.03.290 and RCW 90.54.020(2).

The Legislature has delegated to the Department the

authority to issue water rights in compliance with the relevant statutes. The Department, in issuing a water right, makes no determination of any interests in land, but *144 instead carries out its delegated duties, as indeed it must.

As a separate matter, the Legislature has also declared that beneficial uses are public uses for purposes of eminent domain. Whether the power of eminent domain may be exercised is a constitutional and statutory issue legally distinct from the Department's acts in issuing water rights.

[6] Crescent Harbor Water Co. v. Lyseng, 51 Wash.App. 337, 340, 753 P.2d 555 (1988), relied upon by the Del Rosarios, actually supports our analysis. In Crescent Harbor, the question was whether a corporation organized to own and maintain an existing water supply system had acquired a prescriptive easement over Lyseng's property. Lyseng argued that the corporation had failed to allege compliance with provisions of the water code, had failed to join as a necessary party under the code, and had failed to exhaust administrative remedies under water rights statutes. The Court of Appeals rejected these arguments on the ground that a determination of a water right is a different legal matter from the determination whether a prescriptive easement was acquired. Crescent Harbor Water Co., 51 Wash.App. at 340, 753 P.2d 555. As the court correctly said, and as is true here, the Department has no authority to adjudicate private property rights. *Id.*

[7] Our discussion of the public use question sets the stage for discussion of the necessity question. RCW 90.03.040 provides that the right of eminent domain may be exercised by any person “to acquire any property ... when found necessary for ... the application of water to[] any beneficial use.” (Emphasis added.) “The word ‘necessary,’ when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case.” City of Tacoma v. Welcker, 65 Wash.2d 677, 683-84, 399 P.2d 330 (1965) (citing State ex rel. Lange v. Superior Court, 61 Wash.2d 153, 377 P.2d 425 (1963)).

However, rather than determining whether the Hallauers established that a right of way across the Del Rosarios' land was necessary in order to put water from the spring to beneficial use, as RCW 90.03.040

directs, the Court of Appeals *145 applied RCW 8.24.010. That court read RCW 8.24.010 as providing that an easement for transporting water may be condemned only where the land on which the water is to be used is landlocked: “An owner ... of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment” is authorized to condemn such an easement. RCW 8.24.010.^{FN7} The court reasoned that the Hallauers must show both a public use and reasonable necessity, and they had failed to show the latter because the Hallauers' property is not landlocked, other forms of energy are available to heat and cool their home, and alternate sources of water are available.

FN7.RCW 8.24.010 provides in full:

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term “private way of necessity,” as used in this chapter, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

This analysis overlooks the fact that RCW 90.03.040 does more than declare that beneficial use of water is a public use. The statute also provides that any person can condemn a right of way to transport water where necessary to apply the water to beneficial use. RCW 90.03.040; **550State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 P. 805 (1920) (Laws

of 1917, § 4 at 448 permits condemnation of ditch by one of its owners and cotenants for carrying additional water from another source to its lands); State ex rel. Gibson v. Superior Court, 147 Wash. 520, 266 P. 198 (1928) (RCW 90.03.040 and Const. art. I, § 16 provide for the right of condemnation of rights of way to transport water over the lands of another for domestic and irrigation purposes). Thus, in marked contrast to *146RCW 8.24.010, RCW 90.03.040 does not require necessity based upon the landlocked nature of the condemnor's property, but expressly states the relevant necessity as “*necessary for the storage of water for, or the application of water to, any beneficial use.*” (Emphasis added.)

We recognize that the Court of Appeals analysis is supported by State ex rel. Henry v. Superior Court, 155 Wash. 370, 284 P. 788 (1930). There, the court reasoned that Laws of 1917, ch. 117 is in pari materia with Laws of 1913, ch. 133, which include what is now RCW 8.24.010. 155 Wash. at 374-75, 284 P. 788. The court read the two statutes together, and concluded that the same analysis applies as to condemnation of rights of way for transporting water as applies to condemnation of property for a logging railroad easement. 155 Wash. at 375-76, 284 P. 788. The court therefore emphasized that in order to condemn a right of way to transport water, the condemnor's property must be landlocked with no other available water. 155 Wash. at 376, 284 P. 788.

[8][9][10][11] We conclude that the analysis in State ex rel. Henry is flawed. The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. In re Personal Restraint Petition of Yim, 139 Wash.2d 581, 592, 989 P.2d 512 (1999). Such statutes “ ‘must be construed together.’ ” Id. (quoting State v. Houck, 32 Wash.2d 681, 684-85, 203 P.2d 693 (1949)). “In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” State v. Wright, 84 Wash.2d 645, 650, 529 P.2d 453 (1974). If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls. Wark v. Nat'l Guard, 87 Wash.2d 864, 867, 557 P.2d 844 (1976); Pearce v. G.R. Kirk Co., 22 Wash.App. 323, 327, 589 P.2d 302 (1979). Courts also consider the sequence of all statutes relating to

the same subject matter. *Tunstall v. Bergeson*, 141 Wash.2d 201, 211, 5 P.3d 691 (2000), *pet. for cert. filed* (Wash. Jan. 4, 2001).

*147 In applying the same standard of necessity to condemnation of rights of way for transporting water as applies to private ways of necessity under RCW 8.24.010, the analysis in *State ex rel. Henry* failed to give any effect to RCW 90.03.040. Both statutes contemplate rights of way for transporting water. RCW 8.24.010 provides for the right of eminent domain if the condemnor's land is so situated that a right of way across the land of another to transport water for agricultural, domestic, and sanitary purposes is necessary for the proper use and enjoyment of the condemnor's land. RCW 90.03.040 provides for the right of eminent domain to any person if necessary for the application of water to beneficial use.

Although the goal is to read statutes related to the same subject together if possible, there is an obvious conflict between the statutes where rights of way to transport water are concerned. RCW 90.03.040 is the more specific of the statutes regarding condemnation for transportation of water and is also the later of the enactments. These two factors indicate that insofar as the statutes conflict, RCW 90.03.040 prevails. *Wark*, 87 Wash.2d at 867, 557 P.2d 844; *Pearce*, 22 Wash.App. at 327, 589 P.2d 302. This does not mean that RCW 8.24.010 is without import. That statute still applies insofar as condemnation of private ways of necessity are condemned, both prescribing whether eminent domain for such ways is authorized and defining such ways. It also may be relied upon where condemnation of a right of way for drains, flumes, or ditches for agricultural, domestic or sanitary purposes is necessary for the proper use and enjoyment of the condemnor's land, i.e., landlocked land. It cannot apply, however, to preclude condemnation of rights of ways to transport water as **551 authorized by RCW 90.03.040. To the extent that *State ex rel. Henry* is to the contrary, it is overruled.

Our reading of these statutes is bolstered by the last line of the proviso of RCW 90.03.040, which, as we noted above, provides that acquisition of property or rights under the statute shall be "in the manner provided by law for the *148 taking of private property for public use by private corporations." The Legislature plainly intended that actions for condemnation of water rights and rights of ways to transport water be

brought under RCW 90.03.040, with the procedures of chapter 8.20 RCW (eminent domain by corporations) applying, not those of chapter 8.24 RCW. Further, by directing that the manner for acquiring rights or property be the same as for takings for *public use*, the legislative intent that the "landlocked land necessity" expressed in RCW 8.24.010 not apply is apparent. This is because RCW 8.20.070 expressly addresses condemnation petitions for proposed public uses *and* for private ways of necessity. The Legislature's directive that the procedures and determinations for condemnation for public uses apply plainly indicates it did not intend that the procedures and determinations for private ways of necessity apply.^{FN8}

FN8.RCW 8.20.070 provides:

At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing that a jury be summoned, or called, in the manner provided by law, to ascertain the compensation which shall be made for the land, real estate, premises or other property sought to be appropriated, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law.

Our determination that RCW 90.03.040 applies in this case accords with most of this court's decisions in cases where condemnation has been sought for trans-

porting water for beneficial use. In these cases the court has considered only RCW 90.03.040^{FN9} and the state constitutional provisions, and has not relied on or referenced *149RCW 8.24.010. E.g., State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 P. 805 (1920); State ex rel. Andersen v. Superior Court, 119 Wash. 406, 205 P. 1051 (1922); State ex rel. Gibson v. Superior Court, 147 Wash. 520, 266 P. 198 (1928); State ex rel. Kirkendall v. Superior Court, 130 Wash. 661, 228 P. 695 (1924); Mack v. Eldorado Water Dist., 56 Wash.2d 584, 354 P.2d 917 (1960).^{FN10}

FN9. The codification of the statute has changed, although its wording has remained unchanged since the date of enactment.

FN10. There is also no question of the validity of RCW 90.03.040. First, it is a statute of the type approved by the United States Supreme Court in Clark v. Nash, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905). Second, the court has held that the statute is a valid exercise of legislative power. State ex rel. Gibson v. Superior Court, 147 Wash. 520, 266 P. 198 (1928).

This court has on several occasions addressed necessity as the need for the right of way to transport the water through the land of another in order to use it for a sufficiently public purpose. See State ex rel. Ballard v. Superior Court, 114 Wash. 663, 195 P. 1051 (1921); State ex rel. Kirkendall, 130 Wash. 661, 228 P. 695. In Mack, the appellants held two appropriate water rights. They acquired a right of way for transporting water under the first right over the respondent's property by adverse user. The system for conveying the water consisted of a small wooden dam and a two-inch pipeline. After acquiring the second water right, the appellants went on respondent's land and constructed a new concrete dam upstream from the diversion point used by respondent for withdrawing water under water rights held by respondent.

Appellants then commenced an action under RCW 90.03.040 seeking to obtain the **552 right to maintain the new dam and replace the two-inch pipe with a four-inch pipe. The trial court entered findings of fact, including the fact that as the stream entered the appellants' land, its height was such that the water

could easily be used by the appellants, and therefore there was no necessity for going upon the respondent's land which would give rise to a right for a decree of necessity. Mack, 56 Wash.2d at 586, 354 P.2d 917. This court upheld the trial court's determination based upon the comparative feasibility of taking the water from a point on the respondent's land or on appellants' land where the same *150 stream passed through the property. Id. at 588, 354 P.2d 917. Thus, we recognized the statutory necessity standard, i.e., reasonable necessity for the application of the water to beneficial use. See also Canyon View Irrig. Co. v. Twin Falls Canal Co., 101 Idaho 604, 610, 619 P.2d 122 (1980) (necessity requirement satisfied where alternate route would involve excessive cost and there was no natural waterway to transport water by gravity).

Because RCW 90.03.040 provides for condemnation of rights of way to transport water for application to beneficial use, the Del Rosarios and the Court of Appeals have mistakenly relied on cases involving private ways of necessity where necessity largely turned on the landlocked nature of the land of the party seeking condemnation.

[12] The Hallauers propose to use water under their certificated water right for use in their heat pump and cooling system, and for fish propagation. Their domestic use of water is clearly a beneficial use falling within the Legislature's declaration that beneficial uses are public uses. See RCW 90.54.020; State ex rel. Gibson, 147 Wash. at 523, 266 P. 198 (“[t]he advantageous use of the water on the lands for domestic purposes clearly appears”); State ex rel. Andersen, 119 Wash. 406, 205 P. 1051. It is also a use that the constitution expressly recognizes as supporting condemnation for a “private purpose.” See Const. art. I, § 16.

[13] The necessity for the right of way is obvious. The water right that the Hallauers hold allows withdrawal of water from the spring on the Del Rosarios land. The only way in which the water can be conveyed to the Hallauers' property is over or through the Del Rosarios' land.

Accordingly, the Court of Appeals' holding that necessity has not been established must be reversed.

The Del Rosarios contend, however, that the Hallau-

ers do not have the right to appeal the trial court's decision on their eminent domain claim. This is a new issue raised for the first time in supplemental briefing in this court. The Del Rosarios cite only one case from the 1950's, *151 and fail to address the rules for appellate procedure. In light of those rules, we have doubts about the correctness of their claim, but decline to address the issue in the absence of sufficient briefing. See *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 169, 876 P.2d 435 (1994); *State v. Hill*, 123 Wash.2d 641, 648, 870 P.2d 313 (1994).

The Del Rosarios also seek attorney fees in this court pursuant to RCW 8.24.030. The Hallauers maintain that if they prevail on this review, the award of attorney fees on appeal should be reversed. Chapter 8.24 RCW does not apply in this case. Accordingly, the statute does not serve as the basis for awarding attorney fees in this court, or in the Court of Appeals. For this reason, aside from any other considerations, we decline to award fees in this court and we reverse the Court of Appeals' award of attorney fees to the Del Rosarios.^{FN11}

FN11. Because chapter 8.24 RCW does not apply in this case, our comments do not have any bearing on when attorney fees might be awarded under RCW 8.24.030. Following remand and further proceedings, the Del Rosarios may be entitled to attorney fees under chapter 8.25 RCW. The provisions of that chapter obviously cannot be applied at this stage of proceedings.

The Court of Appeals is reversed, and this case is remanded for further proceedings.

SMITH, JOHNSON, IRELAND and BRIDGE, JJ., and GUY and TALMADGE, JJ. Pro Tem., concur. SANDERS, J. (dissenting).

Wilbur and Josephine Hallauer contend the trial court and Court of Appeals erred **553 when each dismissed their complaint to condemn a private way of necessity, and a majority of our court agrees a private right of condemnation is available under these circumstances. Specifically, the issue here is whether a certified water right entitles private parties to condemn land "necessary" to utilize that water right notwithstanding other sources of water available for their use absent condemnation.

A.Const. art. I, § 16, and chapter 8.24 RCW

The Washington Constitution generally prohibits the *152 taking of private property for private use. However, article I, section 16, expressly allows private property to be taken to create "private ways of necessity." This section states in part:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made.... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public....

Const. art. I, § 16. As this provision is not self-executing, conditions under which private property may be condemned for private ways of necessity are outlined in chapter 8.24 RCW. *Brown v. McAnally*, 97 Wash.2d 360, 366, 644 P.2d 1153 (1982). RCW 8.24.010 provides in part:

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct or maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be.

The public policy underlying this clause in article I, section 16, as well as RCW 8.24.010, is to prevent rendering landlocked property useless. *Sorenson v. Czinger*, 70 Wash.App. 270, 278, 852 P.2d 1124 (1993). That necessity required to condemn a private way of necessity is not absolute. Rather, the party seeking the private way must only show it be reasonably necessary under the particular facts of the case. *Brown*, 97 Wash.2d at 367, 644 P.2d 1153. However because this statute permits a landowner to take property from another *153 without any show-

ing of *public necessity*, it must be strictly construed and limited to that which is expressly conferred or necessarily implied. *Jobe v. Weyerhaeuser Co.*, 37 Wash.App. 718, 724, 684 P.2d 719 (1984) (“ ‘Whatever is not plainly given is to be construed as withheld.’ ”) (quoting 1 Julius L. Sackman, *Nichols on Eminent Domain* § 3.213 [1] (3d rev. ed.1981)).

The Hallauers correctly note property owners have a vested interest in water rights to the extent the rights have been beneficially used. See *Dep't of Ecology v. Adsit*, 103 Wash.2d 698, 705, 694 P.2d 1065 (1985) (citing *Dep't of Ecology v. Acquavella*, 100 Wash.2d 651, 655, 674 P.2d 160 (1983)). From this the Hallauers argue condemnation of a private way of necessity is required for the proper use and enjoyment of the underlying property right—the water right. Supp'l Br. of Pet'rs at 16-17. However this novel argument is neither supported by the plain language of RCW 8.24.010 nor the common law.

Contrary to the Hallauers' expansive reading of RCW 8.24.010, the plain language of this statute refers only to “land,” as opposed the more general concept of “property” which includes such things as water rights. See *Black's Law Dictionary* 1216 (6th ed. 1990) (“Property embraces everything which is or may be the subject of ownership....”). RCW 8.24.010 unequivocally provides:

An owner, or one entitled to the beneficial use, of *land* which is so situate with respect to the land of another that it is ****554** necessary for *its proper use and enjoyment* to have and maintain a private way of necessity ... may condemn and take lands of such other....

(Emphasis added.) This court has previously adopted the common meaning of the term “land”:

In Webster's Unabridged Dictionary (2d ed.), the first definition of the word land is given as “the solid part of the earth's surface; distinguished from *sea*.” A river bed would fall within this definition. Also, in Black's Law Dictionary, the definition is as follows:

***154** “Land, in the most general sense, comprehends any ground, soil, or earth whatsoever; as fields, meadows, pastures, woods, moors, waters, marshes, furzes, and heath.”

King County v. Tax Comm'n, 63 Wash.2d 393, 397, 387 P.2d 756 (1963). Accordingly, the terms “land” and “property right” are not interchangeable as the Hallauers suggest. Because RCW 8.24.010 must be strictly construed and limited to that which is expressly conferred or necessarily implied, the plain language of the statute does not support condemnation of a private way of necessity unless it is necessary to the proper use and enjoyment of one's *land*. *Jobe*, 37 Wash.App. at 724, 684 P.2d 719.

Just as the plain language of RCW 8.24.010 does not support the Hallauers' argument, there are no cases permitting condemnation of a private way of necessity to access water without a finding such water is necessary for the proper use and enjoyment of the land itself. The majority asserts the Court of Appeals “mistakenly relied on cases involving private ways of necessity where necessity largely turned on the landlocked nature of the land of the party seeking condemnation.” Majority at 552. I disagree. The Court of Appeals and Ernesto and Madeliene Del Rosario do rely on cases where private ways of necessity were granted to landlocked property owners, but it is not the landlocked nature of the property which is determinative. These cases turn on whether the property would be rendered useless but for the condemnation.

In *State ex rel. Henry v. Superior Court*, 155 Wash. 370, 284 P. 788 (1930), we reviewed an order of necessity for a pipeline easement to carry water to arid land requiring irrigation to produce commercial crops. There the fact the land to be irrigated was separated from the water source by another's land was not determinative. Rather, we emphasized the water was necessary for the proper use and enjoyment of the land because it would be rendered worthless without irrigation:

***155** Respondent's orchard land is so situated, with respect to the only source of water and the land of the relators, that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity for a pumping location and pipe line on and across relators' land to force and carry water for irrigation purposes to the respondent's orchard, else the orchard will become worthless.

Henry, 155 Wash. at 376, 284 P. 788. Because the only source of water was located on another's property and the orchard would be worthless without irri-

gation, we held the landowner adequately proved necessity of a private way for the use and enjoyment of his land. Here, however, it is uncontested the Hallauers have three alternative sources of water and several reasonably priced and readily available mechanical alternatives to heat and cool their home. Clerk's Papers at 830-31. Thus *Henry* is clearly distinguishable, as the Hallauers have not demonstrated the water from the Del Rosarios's spring is *necessary* for the proper use and enjoyment of their land.

Even the Hallauers rely on a line of cases similar to *Henry* to support their argument. See Br. of Appellant at 31-34 (citing *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 P. 429 (1910); *White v. Stout*, 72 Wash. 62, 129 P. 917 (1913); *State ex rel. Gibson v. Superior Court*, 147 Wash. 520, 266 P. 198 (1928); *State ex rel. Kirkendall v. Superior Court*, 130 Wash. 661, 228 P. 695 (1924)). Like *Henry*, these cases permit condemnation for a private way of necessity only when the water sought to be transported is *necessary* for the use and enjoyment of the condemnor's land.

****555** In *Galbraith* we reviewed a decision granting a right of way for an irrigation canal. *Galbraith*, 59 Wash. at 623, 110 P. 429. Significantly, we found: "These lands, without irrigation, will produce no crops of value and are of little value, but with irrigation will produce large and valuable crops of vegetables, grain, hay, fruits, and other agricultural products." *Id.* at 625, 110 P. 429. Because the other potential sources of water were impractical and expensive, we allowed condemnation to irrigate the land. *Id.* at 633-34, 110 P. 429; see also ***156** *State ex rel. Andersen v. Superior Court*, 119 Wash. 406, 408, 205 P. 1051 (1922) (condemnation allowed because water supply is the only one available and without water, the property will be uninhabitable).

Similarly, in *White* we considered a decision granting condemnation for a right of way for an irrigation ditch. There, two adjacent landowners had riparian rights to a stream flowing by both properties. In order to irrigate his property with this sole source of water the defendant placed a ditch across his neighbor's upland property. Citing *Galbraith* we noted, "[t]here can be no doubt of the defendants' right to condemn a right of way for irrigation over the plaintiff's lands," *White*, 72 Wash. at 66, 129 P. 917, because "the defendants alleged necessity for the ditches for irriga-

tion and for rights of way across plaintiff's lands." *Id.* at 63, 129 P. 917. Condemnation was therefore permitted.

In *Gibson* several landowners challenged an adjudication of public use and necessity allowing others to acquire by condemnation a right of way for a pipeline to transport water to which they had a state-permitted right. At the outset we stated:

They have acquired the right to take and divert from that point on the creek one cubic foot of water per second; this by permit duly issued to them by the state supervisor of hydraulics. So, their condemnation proceeding here on review is in no sense a seeking to acquire any water rights, but is alone a seeking to acquire the right of way in question.

Gibson, 147 Wash. at 522, 266 P. 198. Even though these landowners held a certified water right, the court did not automatically conclude they were entitled to condemn a right of way for the pipeline. Instead, we examined the necessity of the landowners' use of the water and concluded, "[t]he advantageous use of the water on the lands for domestic purposes clearly appears." *Id.* at 523, 266 P. 198.^{FN1}

FN1. With regard to necessity, we observed:

Burrowes' land has no fresh water upon it, and is almost surrounded by salt water. DeZemed's land has no fresh water upon it, other than a spring furnishing a quantity of fresh water so limited as to be insufficient for any practical purpose. The portion of the creek flowing the short distance across his land does not furnish him any fresh water supply thereon, by reason of the salt water tide coming into it there.

Gibson, 147 Wash. at 521, 266 P. 198.

***157** In *Kirkendall* the court reviewed a grant of condemnation for a right of way to convey water for irrigation purposes. Again, we initially noted the necessity of delivering water to the particular land at issue:

About 40 acres of Wiltz's land is capable of being irrigated by gravity from the waters of the creek, and thus its productiveness be very materially in-

creased, providing he can acquire a right of way for an irrigation ditch over Kirkendall's land from an intake on the creek above Kirkendall's land; otherwise, because of the nature of the creek, very little of Wiltz's land can be effectually irrigated by gravitation from the waters of the creek, and he has no other means of effectually irrigating any substantial portion of his land.

Kirkendall, 130 Wash. at 662, 228 P. 695 (emphasis added). Because of this necessity-and despite the fact the landowner did not conclusively have a right to take the necessary water-the court affirmed the grant of condemnation. *Id.* at 665-66, 228 P. 695.

Thus, these cases do not stand for the proposition that a private way of necessity for a water pipeline may be condemned simply if the right of way is "necessary" to use and enjoy a particular water right. Rather, Washington precedent clearly holds the *water itself* must be necessary to the use and **556 enjoyment of one's land before the courts will allow condemnation of a private way of necessity to transport the water. Accordingly, the trial court and the Court of Appeals did not err by considering whether the water to be transported onto the Hallauers' property is necessary to the proper use and enjoyment of their land.

B. Chapter 90.03 RCW

Alternatively, the Hallauers contend they are automatically entitled to access their water right by condemning a private way of necessity so long as they are putting their *158 water to beneficial use. Citing RCW 90.03.040, the Hallauers argue:

When a water right certificate has been issued pursuant to the 1917 water code, this section (RCW 90.03.040) does not require that questions of public welfare and necessity for the water right be reconsidered. Rather, the only prerequisite to condemnation of a pipeline easement under this section, is that it be "found necessary for ... the application of water to any beneficial use."

Suppl Br. of Pet'rs at 9 (footnote omitted). Washington precedent, however, does not support this argument.

RCW 90.03.040 provides in pertinent part:

The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use....

As the majority notes, the standards for issuing new water rights are contained in RCW 90.03.290 and require applicants to meet a four-part test. If the Department of Ecology finds (1) there is water available for appropriation, (2) the water is proposed to be utilized for a beneficial use, (3) the appropriation will not impair existing rights, and (4) the appropriation will not be detrimental to the public welfare, then it shall issue a water right permit. The majority takes pains to establish beneficial use is properly characterized as public use for purposes of the eminent domain statute. Majority at 547-549. While the Department may make a determination regarding whether a use is beneficial, it makes no determination regarding whether the use is necessary. The majority ignores that the terms "beneficial" and "necessary" are not synonymous when it concludes RCW 90.03.040 requires no showing of necessity apart from showing condemnation itself is necessary to apply water to a beneficial use.

In *Henry*, we held Rem.Rev.Stat. § 7354 (RCW 90.03.040) "is *in pari materia*" with Rem Rev. Stat. § 936.1 *159 RCW 8.24.010). 155 Wash. at 374, 284 P. 788. Statutes that are *in pari materia* must be read together as constituting one law. *Champion v. Shoreline Sch. Dist. No. 412*, 81 Wash.2d 672, 674, 504 P.2d 304 (1972). Thus, RCW 8.24.010 must be read in conjunction with RCW 90.03.040 and the Hallauers must demonstrate the water they seek to convey by private way is necessary for the proper use and enjoyment of their land. The majority summarily dismisses the precedent set by the *Henry* analysis as "flawed." Majority at 550. Further the majority seeks to draw a distinction between RCW 8.24.010 and RCW 90.03.040 by asserting condemnation under the former requires a showing of necessity to the use and enjoyment of the condemnor's landlocked property while condemnation under the latter is permitted if the water is being put to beneficial use. Majority at 550.

However it is incorrect to distinguish these statutes based on whether the property is landlocked. As previously noted, *Henry* did not find the landlocked nature of the property to be determinative. Rather the real issue presented by RCW 8.24.010 is whether the dominant estate would be rendered useless absent a condemnation. It makes no sense, and conflicts with case law, to apply RCW 8.24.010 only in cases where the property is landlocked.

Washington precedent defeats the argument RCW 90.03.040 automatically entitles access to a water right so long as the water is being beneficially used.

In *Mack v. Eldorado Water Dist.*, 56 Wash.2d 584, 354 P.2d 917 (1960), two landowners held water right permits issued by the state supervisor of hydraulics, but the appellant sought to obtain the right to maintain**557 a dam and pipeline across the other landowner's property. After considering former RCW 90.04.030, the predecessor of RCW 90.03.040, we explained:

[T]his court has held that the issuance of a water permit by the Supervisor of Hydraulics is not an adjudication of private rights. Thus, the fact that the Supervisor of Hydraulics had issued a permit authorizing appellants to appropriate .11 cubic feet of water per second from the stream in question did not *160 preclude the trial court, in the condemnation action, from determining which of the parties was making a better use of the available water.

Mack, 56 Wash.2d at 587, 354 P.2d 917 (citations omitted). Thus, RCW 90.03.040 does not automatically guarantee an individual the right to condemn private property in order to utilize a state-permitted water right. To the contrary, this determination is left to the judgment of the trial court. *Id.* at 588, 354 P.2d 917.

The majority asserts today's holding is supported by *Crescent Harbor Water Co. v. Lyseng*, 51 Wash.App. 337, 753 P.2d 555 (1988). Majority at 549. Not so. In *Crescent Harbor* a landowner sought a prescriptive easement for access to a well and water system on another's property. The trial court held the landowner was entitled to either a prescriptive or implied easement. On appeal appellant argued the landowner had no right to an easement because he had not alleged compliance with chapter 90.03 RCW and thus had no

valid water right in the well. Rejecting this argument the Court of Appeals reasoned:

Lyseng's water rights arguments overlook the differences between a determination of easement and a determination of a claim for water rights. The former, as applied to this case, concerns a well, pipes, pumping apparatus and access thereto. The latter concerns the water that flows within the well and pipes. The two subjects are physically distinct. The two subjects are also legally distinct. An easement is a privilege to use the land of another. It is a private legal interest in another's property. Water rights claims are limited to a determination by the Department of Ecology as to whether a water use permit should be granted and to whom. *Water rights claims do not and cannot involve property interest questions, as the Department of Ecology has no authority to adjudicate private rights in land.*

Crescent Harbor, 51 Wash.App. at 340, 753 P.2d 555 (citations omitted) (emphasis added). Although *Crescent Harbor*, did not involve a claim to a private way of necessity, the reasoning is applicable here. If we were to adopt the position advanced by the Hallauers, this court would be abdicating property right determinations to the Department of Ecology. As the *161 Del Rosarios persuasively explain:

The Legislatures could grant the authority to the Department of Ecology to resolve the issues of accessing the water right through someone's property. But the Legislatures have not spoken on that issue. A[s] it remains, the Department of Ecology cannot give away a neighboring property so that a water right may be utilized. Until the Legislatures speak to that issue this Court is left with having to deal with the application of RCW [8.24.010] to determine if access of the water is necessary for the proper use and enjoyment of the claimant's property.

Supp'l Br. of Resp'ts at 12.

Consequently the Hallauers' argument that they are, by virtue of having been issued a water permit by the Department, entitled to condemn a portion of the Del Rosarios's property must fail. The Department has authority to adjudicate water rights but not private property disputes. *Crescent Harbor*, 51 Wash.App. at 340, 753 P.2d 555. See also *Mack*, 56 Wash.2d at 587,

354 P.2d 917.

The majority asserts its ruling does not permit the Department to adjudicate private land disputes, majority at 549, but then concludes the issuance of a permit by the Department necessitates a taking of the Del Rosarios's land.

If obtaining a water permit from the Department under RCW 90.03.290 is the only condition an individual must satisfy before he takes the property of another pursuant to ~~**558~~RCW 90.03.040, I must conclude, protests of the majority notwithstanding, the Department is either adjudicating private rights in land or at least making a water right adjudication a *fait accompli* to establish a private right in land. Under the majority's opinion the property rights of all other parties automatically become subservient to the holder of a water permit issued by the Department of Ecology. This I cannot accept.

Accordingly I conclude neither the trial court nor the Court of Appeals erred in holding the Hallauers' state-permitted *162 water right does not grant them an automatic right of condemnation. Because the Hallauers failed to demonstrate the water sought to be transported was necessary for the proper use and enjoyment of their land, this court should affirm the decisions of the trial court and the Court of Appeals, deny condemnation, and grant the Del Rosarios reasonable attorney fees pursuant to RCW 8.24.030. See Sorenson v. Czinger, 70 Wash.App. 270, 279, 852 P.2d 1124 (1993).

For these reasons I respectfully dissent.

ALEXANDER, C.J., concurs.
Wash.,2001.
Hallauer v. Spectrum Properties, Inc.
143 Wash.2d 126, 18 P.3d 540

END OF DOCUMENT

▷

Supreme Court of Washington,
En Banc.

Joan K. HEINMILLER, Appellant,
v.

The DEPARTMENT OF HEALTH, Respondent.
No. 61901-8.

Oct. 5, 1995.

As Amended and Further Reconsideration Denied
Jan. 31, 1996.

Disciplinary proceedings were brought against social worker. Administrative law judge ruled that social worker had engaged in unprofessional conduct and imposed sanctions, and both parties appealed. Review judge affirmed but modified the sanctions, and social worker appealed. The Superior Court, King County, Robert Lasnik, J., affirmed, and social worker appealed. The Supreme Court, Dolliver, J., held that: (1) professional misrepresents or conceals material fact in license application if professional possesses constructive knowledge that application is false; (2) statute making act of "moral turpitude" unprofessional conduct was not unconstitutionally vague as applied; (3) social worker's sexual relationship with patient constituted act of moral turpitude; (4) social worker engaged in sexual contact with patient when social worker began sexual relationship with patient day after formal therapist-patient relationship ended; (5) finding that social worker sent threatening and harassing letters to patient was supported by the evidence; and (6) sanctions were not arbitrary or capricious.

Affirmed.

Pekelis, J., filed concurring opinion.

West Headnotes

[1] Administrative Law and Procedure 15A
683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Deci-

sions

15AV(A) In General

15Ak681 Further Review

15Ak683 k. Scope. Most Cited Cases

In reviewing administrative action, Supreme Court sits in same position as Superior Court, applying standards of Administrative Procedure Act directly to record before agency; to extent that they modify or replace administrative law judge's findings of fact and conclusions of law, review judge's findings and conclusions are relevant on appeal. West's RCWA 34.05.010 et seq.

[2] Health 198H 215

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk214 Disciplinary Proceedings

198Hk215 k. In General. Most Cited

Cases

(Formerly 299k11.1 Physicians and Surgeons)

Goal of statute regulating health professionals is to protect public from hazards of health care professional incompetence and misconduct. West's RCWA 18.130.010.

[3] Health 198H 215

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk214 Disciplinary Proceedings

198Hk215 k. In General. Most Cited

Cases

(Formerly 299k11.1 Physicians and Surgeons)

Since misconduct by health professional is not less harmful to public simply because health professional who engages in it fails to recognize it as such, imposition of discipline under statute regulating health professionals cannot be limited to situations in which professionals have actual knowledge of inappropriateness of their actions. West's RCWA 18.130.160.

[4] Health 198H 155

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk155 k. Application. Most Cited Cases

(Formerly 299k5(2) Physicians and Surgeons)

Health professional has misrepresented or concealed material fact in obtaining license if professional possesses either actual or constructive knowledge that response on application was false and, thus, health professional has engaged in unprofessional conduct. West's RCWA 18.130.180(2).

[5] Health 198H ↻210

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk201 Discipline, Revocation, and Suspension

198Hk210 k. Relationship with Patient; Sexual Conduct. Most Cited Cases

(Formerly 299k11.2 Physicians and Surgeons)

Social worker engaged in unprofessional conduct by misrepresenting material fact in obtaining professional license where social worker had constructive knowledge that her sexual relationship with patient was material conduct bearing upon decision to grant her license and social worker did not reveal such relationship. West's RCWA 18.130.180(2).

[6] Health 198H ↻105

198H Health

198HI Regulation in General

198HI(A) In General

198Hk102 Constitutional and Statutory Provisions

198Hk105 k. Validity. Most Cited Cases

(Formerly 299k2 Physicians and Surgeons)

Health 198H ↻204

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk201 Discipline, Revocation, and Suspension

198Hk204 k. Grounds in General. Most Cited Cases

(Formerly 299k11.2 Physicians and Surgeons)

Test for determining whether health professional engaged in unprofessional conduct by committing act of moral turpitude is if there is common understanding among health professionals that particular conduct constitutes unacceptable behavior and, thus, statute making act of "moral turpitude" unprofessional conduct was not unconstitutionally vague as applied. West's RCWA 18.130.180(1).

[7] Health 198H ↻218

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk214 Disciplinary Proceedings

198Hk218 k. Evidence. Most Cited Cases

(Formerly 299k11.3(3) Physicians and Surgeons)

Testimony that standard of care for social worker and social worker code of ethics prohibited social contacts and sexual relationship between social worker and clients supported conclusion that social worker's sexual relationship with patient constituted act of moral turpitude and rendered social worker unfit to practice. West's RCWA 18.130.180(1).

[8] Health 198H ↻210

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk201 Discipline, Revocation, and Suspension

198Hk210 k. Relationship with Patient; Sexual Conduct. Most Cited Cases

(Formerly 299k11.2 Physicians and Surgeons)

Since social worker, like family physician, psychiatrist, internist, or oncologist, is involved in ongoing relationship with patient, social worker who began sexual relationship with patient day after formal therapist-patient relationship ended committed unprofessional conduct by engaging in sexual contact with patient. West's RCWA 18.130.180(24).

[9] Health 198H ↻218

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk214 Disciplinary Proceedings

198Hk218 k. Evidence. Most Cited

Cases

(Formerly 299k11.3(3) Physicians and Surgeons) Agency's conclusion that social worker committed misconduct by sending letters to patient which were intended to harass or threaten was supported by contents of letters in which social worker attempted to discredit patient's therapists and attorney and threatened to charge therapists and attorney with conspiracy to obstruct justice and to expose to public that patient, a pre-school teacher, was lesbian. West's RCWA 18.130.180(22), 34.05.570(3)(e).

[10] Administrative Law and Procedure 15A
🔗763

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases Court can reverse agency order if order is arbitrary or capricious; harshness is not test for arbitrary and capricious action. West's RCWA 34.05.570(3)(i).

[11] Health 198H 🔗210

198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk201 Discipline, Revocation, and Suspension

198Hk210 k. Relationship with Patient; Sexual Conduct. Most Cited Cases

(Formerly 299k11.3(4) Physicians and Surgeons) Indefinite suspension of social worker's professional license which could only be stayed if social worker complied with certain conditions and which rendered social worker ineligible to reinstate license for six years conditioned upon completion of supervised practice was not arbitrary and capricious; sanctions were imposed after fair hearing and were necessary to protect public from social worker who had engaged in sexual contact with patient. West's RCWA 18.130.160, 34.05.570(3)(i).

****434*596** Joan K. Heinmiller, Seattle, pro se.

***597** Perkins & Coie, Ronald M. Gould, Seattle, Law Offices of Monte E. Hester, Montell Hester, Tacoma,

for appellant.

Christine Gregoire, Attorney General, Margaret Bichl, Asst., Olympia, for respondent.

DOLLIVER, Justice.

Appellant Joan Heinmiller (Heinmiller) challenges the Department of Health's decision to indefinitely suspend her social worker license because she engaged in a sexual relationship with a patient. The Department's decision is predicated upon its conclusion that the relationship constitutes unprofessional conduct within the meaning of provisions (1), (2), (22), and (24) of RCW 18.130.180 (Uniform Disciplinary Act).

In 1985, Heinmiller was a social worker and counselor in private practice, who performed counseling services for Valley Cities Mental Health Center under a service contract. In November of that year, Valley Cities assigned Heinmiller a female patient, M.B., who had complained of panic attacks. Through counseling, M.B. wanted to "sort out" concerns about her parenting skills and her relationships with her mother and boyfriend. M.B. began to meet with Heinmiller weekly starting on November 13, 1985.

During her therapy sessions M.B. persistently complained that she was unable to forge positive relationships with men. She indicated, however, that she had experienced "unique, warm, intimate, and supportive relationships with women." Finding of fact 1.16. During a session on May 14, 1986, Heinmiller asked M.B. if she had ever explored the possibility that she might be a lesbian. M.B. responded by indicating that she would not identify herself as a lesbian and that she was not physically attracted to women. However, after the May 14, 1986 session, M.B. ***598** began to develop a romantic interest in Heinmiller. That interest later evolved into a sexual interest. Although she did not inform Heinmiller of these emerging feelings, M.B. began to see sexual innuendos in Heinmiller's actions and language during therapy sessions.

****435** During the June 11, 1986, session Heinmiller suggested to M.B. that the two become friends after their therapist-patient relationship ended. Subsequently, M.B. began to envision herself in a romantic relationship with Heinmiller. During a session on July 23, 1986, M.B. and Heinmiller agreed that the

next session would be the final one. They also discussed activities in which the two would participate jointly after the therapy sessions ended and their social relationship began.

Three weeks later, on August 14, 1986, M.B. recorded an audio tape in which she detailed the feelings she had developed for Heinmiller over the previous months of therapy. After listening to the tape, Heinmiller noted that she believed it indicated that therapy had helped M.B., who now recognized her as a human being, and not merely a therapist. In response to the tape, Heinmiller wrote M.B. the following note, dated August 17, 1986:

Precious M.B.:

After the sound of your words on my being, I have been subdued and thoughtful-perhaps fuller than I was. I suppose I should be able to live without it-not what for once in my life I have heard someone speak truths that have touched my life with all the richness and rightness I crave-but must I? Will you truly allow me to continue receiving and interacting with your magnificent appreciation of this universe? You cannot possibly know how I marvel at you and your gift to me. I really must have you in my life-not to mention need when I consider responsibilities that might lie ahead. Now, as I think it might often be, I quietly anticipate our next meeting.

Joan

Finding of fact 1.45.

M.B.'s final counseling session took place on August 27, *599 1986. At that session, Heinmiller expressed her need to have M.B. as a friend. The conversation at the session was "exceedingly intimate with sexual overtones..." Finding of fact 1.49. The two agreed to meet socially the next day.

The following day, August 28, 1986, Heinmiller and M.B. met at Saltwater State Park. After hours of walking, talking and exchanging intimate thoughts, Heinmiller revealed to M.B. that she was a lesbian. Subsequently, M.B. disclosed that she was in love with Heinmiller and had physical yearnings for her. Later that day the two became involved physically.

Throughout the following 2-year period they maintained a sexual relationship. M.B. eventually began to believe the relationship abusive and ended it in August 1988. Shortly thereafter, she visited the Abused and Battered Lesbian Association where she was told that she had been abused by Heinmiller. She subsequently returned to therapy with another therapist.

In September 1989, M.B. filed a malpractice action against Heinmiller. That suit was eventually settled. Less than 1 year later, in July 1990, she filed a complaint against Heinmiller with the Department of Health (Department). On July 20, 1990, the Department notified Heinmiller about that complaint. Throughout 1990, Heinmiller wrote a number of long letters to M.B. suggesting reconciliation. Many of the letters written after July 1990, including those dated August 11, August 27, October 28, and Thanksgiving, contained disparaging statements about M.B.'s then current therapists and attorneys. M.B. felt threatened and frightened by these letters.

On July 19, 1991, the Director for Professional Licensing Services of the Department of Health (Director) filed a statement of charges against Heinmiller. In that pleading, the Director alleged that Heinmiller had engaged in unprofessional conduct pursuant to provisions (1), (2), (4), (22), and (24) of RCW 18.130.180. In February, April, and May 1992, the Department of Health held a hearing before *600 an Administrative Law Judge (ALJ) to determine whether Heinmiller had in fact engaged in unprofessional conduct as defined by those provisions. On September 25, 1992, the ALJ ruled that Heinmiller had engaged in unprofessional conduct within the meaning of provisions (1), (2), (22), and (24) of RCW 18.130.180, but not provision (4) of that statute. Consequently, **436 the ALJ ordered the suspension of Heinmiller's social worker license for 3 years, and the imposition of a \$1,000 fine. That order, however, permitted a stay of the suspension if Heinmiller informed those clinics with which she was associated about her status, did not treat patients with sexual identity problems, and did not violate in any way either RCW 18.130.180 or RCW 18.19, which regulates counselors.

On November 18, 1992, Heinmiller moved to have the ALJ's order reviewed. On that same day, the Director made a similar motion. On March 31, 1993, a

Department of Health review judge affirmed the ALJ's ruling that Heinmiller had engaged in unprofessional conduct under provisions (1), (2), (22), and (24) of RCW 18.130.180. That judge, however, modified the ALJ's sanctions. Instead of the previously described 3-year suspension and conditional stay, the review judge ordered an indefinite suspension which only can be stayed if Heinmiller submits to the Department: a detailed plan of her proposed practice, a current psychological evaluation by a licensed professional approved by the Department's Counselor Program, and a certificate verifying her completion of 30 hours of education on therapist-patient boundary issues. Moreover, the review judge's order also conditions reinstatement of Heinmiller's license upon her completion of 3 consecutive years of satisfactory practice under the supervision of a Counselor Program-approved mental health care professional. Furthermore, the order renders her ineligible for reinstatement until a period of 6 years has elapsed from the date of entry of the order.

On April 27, 1993, Heinmiller appealed the review judge's order to King County Superior Court. That court *601 affirmed the order on May 10, 1994. Subsequently, Heinmiller appealed to this court.

[1] Judicial review of a final administrative decision is governed by the Washington 1988 Administrative Procedure Act (WAPA) (RCW 34.05). "In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency." Tapper v. Employment Security Dep't, 122 Wash.2d 397, 402, 858 P.2d 494 (1993). To the extent that they modify or replace the ALJ's findings of fact and conclusions of law, the review judge's findings and conclusions are relevant on appeal. Tapper, at 406, 858 P.2d 494.

An agency's conclusion of law can be modified if "[t]he agency has erroneously interpreted or applied the law". RCW 34.05.570(3)(d). "Under this standard, we accord substantial weight to the agency's interpretation of the law, although we may substitute our judgment for that of the agency." Haley v. Medical Disciplinary Bd., 117 Wash.2d 720, 728, 818 P.2d 1062 (1991); see St. Francis Extended Health Care v. Department of Social & Health Servs., 115 Wash.2d 690, 695, 801 P.2d 212 (1990).

I

Under provision (2) of RCW 18.130.180, the "[m]isrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof" constitutes unprofessional conduct. In October 1988, Heinmiller filed an application with the Department of Licensing, requesting certification as a social worker. The application contained the following question:

WITHIN THE PAST TEN YEARS, HAVE YOU ENGAGED IN ANY OF THE CONDUCT DESCRIBED IN THE UNIFORM DISCIPLINARY ACT, 18.130.180 RCW, EXCLUDING THE CONDUCT DESCRIBED IN 18.130.180(6) AND 18.130.180(23)?

Finding of fact 1.2. Heinmiller answered this question in *602 the negative. The review judge concluded that in so doing, Heinmiller had misrepresented or concealed, within the meaning of RCW 18.130.180(2), the material fact of her sexual relationship with M.B. The judge concluded as a matter of law that:

[Heinmiller] knew or *should have known* that her negative response to the application question was false and that information concerning her counseling and social relationships with M.B. was material to the Counselor Program's determination of her **437 qualifications and fitness to practice counseling and social work.

(Italics ours.) Conclusion of law 2.42.

Heinmiller assigns error to this conclusion of law. First, she asserts that she did not actually know that her sexual relationship with M.B. was a material fact that could bear upon the Department's decision to issue her a license. Second, she maintains that even assuming arguendo that she "should have known" the relationship constituted such a material fact, she cannot be found to have misrepresented or concealed that relationship on her license application because constructive knowledge of a fact's materiality is an insufficient basis for a finding of misrepresentation or concealment within the meaning of RCW 18.130.180(2). We disagree.

Heinmiller draws support for her position primarily from the definitions of "misrepresentation" and "con-

cealment” provided in the dictionary. Admittedly, those definitions suggest that “misrepresentation” and “concealment” presuppose actual knowledge. See Black’s Law Dictionary 1001, 289 (6th ed. 1990). Courts are permitted to “resort to dictionaries to ascertain the common meaning of statutory language.” *Garrison v. State Nursing Bd.*, 87 Wash.2d 195, 196, 550 P.2d 7 (1976). However, they are not necessarily bound by those definitions.

[2][3] The goal of the Uniform Disciplinary Act, of which RCW 18.130.180 is a part, is to protect the public from the hazards of health care professional incompetence and *603 misconduct. See RCW 18.130.010. Disciplinary action is the tool provided by the Act for the achievement of this goal. See RCW 18.130.160. Misconduct is not less harmful to the public simply because the professional who engages in it fails to recognize it as such. Therefore, the imposition of discipline cannot be limited to those situations in which professionals have actual knowledge of the inappropriateness of their actions.

In *Tomlinson v. State*, 51 Wash.App. 472, 479-80, 754 P.2d 109 (1988), the Court of Appeals sanctioned the disciplinary action of a dentist despite the fact that he was unaware that his conduct was improper. The *Tomlinson* court upheld an agency’s decision to suspend the license of a dentist who inadvertently failed to comply with a regulation requiring such a professional to report the hospitalization of a patient.

Even before the Legislature enacted the Uniform Disciplinary Act in 1984, this court suggested that a professional who behaves improperly is subject to disciplinary action even if that professional was unaware of the impropriety of the conduct. See *In re Flynn*, 52 Wash.2d 589, 328 P.2d 150 (1958). In *Flynn*, a dentist unknowingly hired an unlicensed dentist as an employee. The court explained that

the inadvertent or negligent hiring of a nonlicensed dentist is reprehensible and a proper subject for disciplinary proceedings in order to prevent its repetition by the licensed dentist and to maintain the integrity of the licensing system....

Flynn, at 595-96, 328 P.2d 150.

[4] The provisions of RCW 18.130.180 must be in-

terpreted so as to preserve the integrity of the notion that a professional is subject to discipline for misconduct irrespective of that professional’s actual knowledge of the impropriety of the conduct. Heinmiller’s interpretation of provision (2), however, would function to subvert that notion, thus compromising public safety. Under Heinmiller’s narrow construction of the provision, disciplinary action would be *604 permitted only if the professional had actual knowledge at the time the license application was filled out that the conduct omitted from the application was improper. We therefore reject Heinmiller’s construction of RCW 18.130.180(2) and hold instead that a professional has misrepresented or concealed material conduct if that professional possesses either actual knowledge or constructive knowledge that the conduct is improper and hence material to a licensing decision.

[5] The Department found that when Heinmiller filled out her license application in October 1988 she had constructive knowledge that her sexual relationship with M.B. constituted material conduct bearing upon the Department’s decision to grant her a license. Accordingly, regardless of whether Heinmiller had actual knowledge that the sexual **438 relationship was material, the Department did not improperly conclude that she misrepresented or concealed the relationship on her license application.

II

Under provision (1) of RCW 18.130.180, “[t]he commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person’s profession” constitutes unprofessional conduct. The Department concluded that Heinmiller committed an act of moral turpitude within the meaning of this provision by engaging in a sexual relationship with M.B. Heinmiller assigns error to this conclusion of law, claiming that the phrase “moral turpitude” as used in RCW 18.130.180(1) is unconstitutionally vague as applied to her. This argument lacks merit.

In *Haley v. Medical Disciplinary Bd.*, *supra*, this court was presented with the identical argument on similar facts. We stated that

the term “moral turpitude”, standing alone and unapplied, has a meaning difficult to fathom. Reading

RCW 18.130.180(1) as a whole ... we interpret the statute as prohibiting conduct indicating unfitness to practice the profession....

*605 *Haley*, at 742, 818 P.2d 1062. Furthermore, noted the *Haley* court, whether particular conduct renders a professional unfit to practice is determined in light of the purpose of professional discipline and “the common knowledge and understanding of members of the particular profession....” *Haley*, at 743, 818 P.2d 1062.

[6][7] The primary purpose of professional discipline is to protect the public. *Haley*, at 743, 818 P.2d 1062; see RCW 18.130.010. The public is endangered by a particular social worker if that social worker has engaged in behavior considered to be unacceptable by the reasonable social worker. The critical inquiry in the present case is therefore whether it is the common understanding among social workers that a sexual relationship between a social worker and a former patient, which begins 1 day after the termination of the formal therapist-patient relationship, constitutes unacceptable behavior. Such is a question of fact for the trier of fact. After reviewing the evidence, the trier of fact in the instant case, the Department, answered that question in the affirmative. It noted:

Dr. Fink testified that the standard of care governing therapists during 1985 and 1986 was that a therapist and a client could not have social contact for a minimum of two years after the discontinuance of therapy.... [T]estimony at the hearing showed that the 1980 Code of Ethics of the National Association of Social Workers clearly prohibited sexual activities with clients under all circumstances.

Finding of fact 1.110. In light of this factual finding, the Department did not improperly conclude that Heinmiller's conduct constitutes moral turpitude within the meaning of RCW 18.130.180(1) and renders her unfit to practice social work.

III

Under provision (24) of RCW 18.130.180, “sexual contact with a client or patient” constitutes unprofessional conduct. The Department concluded that the sexual relationship between Heinmiller and M.B. constitutes sexual contact with a patient within the

meaning of this provision. Heinmiller assigns error to this *606 conclusion, contending that the sexual relationship at issue is not proscribed by this provision because M.B. was a former patient, not a current patient, when the relationship began. We reject this argument in light of the *Haley* court's explanation of the scope of the provision.

[8] In *Haley*, a physician began a sexual relationship with a former patient a number of months after the physician-patient relationship terminated. Although the court declined to find sexual contact within the meaning of RCW 18.130.180(24), it expressly stated that

were Dr. Haley a family physician, a psychiatrist, an internist, an oncologist, or almost any other type of physician who typically has an *ongoing relationship* with patients, we would conclude—under facts otherwise similar to those before us—that **439 the physician had engaged in sexual contact with a patient.

(Italics ours.) *Haley*, at 730, 818 P.2d 1062. A social worker, like a family physician, psychiatrist, internist, or oncologist, is involved in an ongoing relationship with a patient. Therefore, in accordance with *Haley*, a social worker who begins a sexual relationship with a patient the day after the formal therapist-patient relationship ends falls within the purview of RCW 18.130.180(24).

IV

Provision (22) of RCW 18.130.180 deems unprofessional conduct any

[i]nterference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action[.]

The Department concluded that Heinmiller sent threatening and harassing letters to M.B. in order to discourage *607 her from pursuing her complaint. Heinmiller assigns error to this conclusion of law, claiming that the finding of fact upon which it rests is

unsupportable. We disagree. The conclusion is based upon the Department's factual finding that:

[Heinmiller's] letters to M.B. contain repeated derogatory opinions and statements about M.B.'s therapists, evaluator and attorney and were clearly intended to discredit the advice and opinions of these individuals in M.B.'s mind. Although [Heinmiller] denies that the letters were meant to harass or threaten M.B., the language and tone of the letters themselves reject [Heinmiller's] claims of denial.

Finding of fact 1.100.

[9] A court can reverse an agency finding of fact if the finding "is not supported by evidence that is substantial when viewed in light of the whole record before the court..." RCW 34.05.570(3)(e). "Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'" *Nghiem v. State*, 73 Wash.App. 405, 412, 869 P.2d 1086 (1994) (quoting *Olmstead v. Department of Health*, 61 Wash.App. 888, 893, 812 P.2d 527 (1991)). Heinmiller argues that the purpose of the letters at issue was not to threaten and harass M.B., but rather to express "love and concern" for her. The facts do not support this contention.

It is undisputed that on July 20, 1990, Heinmiller discovered that M.B. had filed a complaint against her with the Department of Health. Less than 1 month later, on August 11, 1990, Heinmiller wrote M.B. a letter containing the following passage:

You can show this to your therapists (I hope you do) and your entire bloodthirsty, scapegoating network. They are free to continue to try to stone me in the streets (which is precisely the same as trying to destroy my career, my financial footing and ongoing relationship to you.) But that stoning will not alter reality or my integrity. It will ultimately shame and demean them. And it will ultimately sicken and devastate you....

Clerk's Papers, at 1400. On October 28, 1990, Heinmiller *608 wrote M.B. yet another letter. That letter contained the following passages:

(Did you know that [the lawyer] and his wife have questionable reputations in the legal community! One attorney—a managing partner of a lawfirm—told me [the lawyer] has a reputation for filing "non-

meritorious cases." And a full partner of another lawfirm told me that "everybody knows about [the lawyer] and his wife.")

Clerk's Papers, at 1421-22.

You are not going to collect money or destroy my reputation because you had a traumatic experience during orgasm-nearly two years after termination of great therapy. You are not going to be supported in reinforcing incompetent therapists, and opportunistic "experts" or lawyer. In case you haven't noticed, I have continued to be rather successful at preventing the withholding of defense. How? because I know what I am talking about and I know my rights as well as seeking **440 the assistance of broader resources than "a lawyer."

I want to tell you something more. I believe this whole thing has gotten so out of hand and is so self-serving on the part of your therapists, "experts" and lawyer that it amounts to CONSPIRACY TO OBSTRUCT JUSTICE AND TO COMMIT FRAUD. I have stated so and submitted that opinion to the State of Washington—two separate entities.

Clerk's Papers, at 1425. In her most damning and incriminating letter to M.B., dated Thanksgiving 1990, Heinmiller wrote:

And when I have been exonerated and your cohorts have been exposed for what they are, I am going to publish a book. I already have considerable content as well as the title—no joke—THERAPIST BASHING: FOR POWER, PROFIT AND CHATHARISIS [*sic*] by Joan K. Heinmiller MSW, ACSW; an autobiographical account. You want to bet that my effort at discretion regarding our evolving lesbian relationship was only my selfish effort at "swearing you to secrecy?" I wonder how it will feel to all of you to have your lesbianism and/or incestuous ulterior motives publicly scrutinized. I wonder how you will feel as a certified preschool teacher seeking employment after this whole mess is pressed through the legal sieve at your inauguration. I have virtually nothing to lose and everything to gain. I have made peace with myself, what about the rest of you?

*609 Finding of fact 1.98. These letters provide ample evidence to support the Department's factual finding. Two expert witnesses testified at the hearing that

Heinmiller wrote the letters from which these passages derive, out of concern and love for M.B. However, the Department exercised its prerogative as a fact finder not to afford credence to the opinion of these witnesses.

V

RCW 18.130.160 provides:

Upon a finding, after hearing, that a license holder or applicant has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority may issue an order providing for one or any combination of the following:

.....

(2) Suspension of the license for a fixed or indefinite term;

.....

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority[.]

[10] A court can reverse an agency order if “[t]he order is arbitrary or capricious.” RCW 34.05.570(3)(i). Heinmiller submits that the sanctions imposed upon her by the Department are rendered arbitrary and capricious by their harshness. Harshness, however, is not the test for arbitrary and capricious action.

Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wash.2d 690, 695, 658 P.2d 648 (1983) (quoting State v. Rowe, 93 Wash.2d 277, 284, 609 P.2d 1348 (1980)). Action taken after giving respondent ample opportunity to be *610 heard, exercised honestly and upon

due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.

State Med. Disciplinary Bd. v. Johnston, 99 Wash.2d 466, 483, 663 P.2d 457 (1983) (citing Washington State Employees Ass'n v. Cleary, 86 Wash.2d 124, 542 P.2d 1249 (1975)).

In a recent opinion, Keene v. Board of Accountancy, 77 Wash.App. 849, 894 P.2d 582 (1995), the Court of Appeals was presented with the harshness argument currently **441 before this court. In Keene, the State Board of Accountancy suspended an accountant's license to practice accounting for a period of 5 years, attaching certain conditions to its reinstatement at the end of that period. The Court of Appeals acknowledged the harshness of the sanctions, but declined to find them arbitrary and capricious because “the action was not taken without due consideration.” Keene, at 860, 894 P.2d 582.

[11] The review judge imposed the previously described sanctions after a fair hearing at which the facts were considered and Heinmiller had an opportunity to present her arguments. It therefore cannot be said that those sanctions resulted from willful and unreasoning action. Neither can it be said that they are not necessary to protect the public. “In determining what action is appropriate, the disciplining authority must ... consider what sanctions are necessary to protect ... the public.” RCW 18.130.160. It is not unreasonable to prohibit a therapist who engaged in a sexual relationship with a patient from treating patients until she has demonstrated that she will not in the future lead another patient into such a relationship. This holds true whether the patient is female or male.

Affirmed.

DURHAM, C.J., and SMITH, GUY, MADSEN and TALMADGE, JJ., concur. *611 PEKELIS, Justice (concurring).

I concur in the majority's decision to uphold the Department of Health's (Department) conclusion that Heinmiller violated subsection (22) of the Uniform Disciplinary Act (UDA), by sending threatening and harassing letters to her former client. Heinmiller sent the letters to M.B. at a time when her professional conduct was governed by the UDA. However, in my

opinion, it is extremely problematic to discipline Heinmiller for violating subsection (2) of the UDA for allegedly misrepresenting her past conduct on her licensing application.

The majority opinion suggests that Heinmiller was disciplined because her past conduct violated subsections (1) and (24) of the UDA. This is incorrect. Although the Department concluded that her past conduct violated the terms of the UDA, it specifically found that it could *not* discipline Heinmiller for that conduct because the UDA did not apply to counselors and social workers at the time the relevant acts were committed. Introduction to Department of Health Review Judge's Conclusion of Law (Dep't C of L), Clerk's Papers (CP) at 9; Dep't C of L 2.55, CP at 68; Introduction of Administrative Law Judge (ALJ) C of L at 2. Rather, the Department based its disciplinary action on Heinmiller's alleged misrepresentation or concealment of a material fact regarding this past conduct. Even the parties agree that the issue before this court is whether to uphold the Department's decision regarding Heinmiller's responses on her licensing application. Appellant Br. at 1, Resp't Br. at 1.

In my view, the Department's decision should not be upheld because it erroneously applied a constructive knowledge standard when determining that Heinmiller's failure to disclose her relationship with M.B. constituted a "[m]isrepresentation or concealment of a material fact in obtaining a license" RCW 18.130.180(2). When Heinmiller applied for a counselor license and certification as a social worker, she was asked the following question:

Within the past ten years, have you engaged in any of the conduct described in the Uniform Disciplinary Act, 18.130.180 RCW, excluding the conduct described in 18.130.180(6) and 18.130.180(23)?

*612 Department of Health Review Judge's Findings of Fact (Dep't F of F) 1.2, CP at 10. She responded in the negative. Dep't F of F 1.2, CP at 10. The Department decided that this response constituted a misrepresentation because it was enough that Heinmiller "should have known" that her past conduct constituted an act of "moral turpitude" and "sexual contact with a client" within the meaning of the UDA and thus required disclosure. Dep't C of L 2.42, CP at 64. In my opinion, however, both the plain language of the statute and the dictates of fair play require that

applicants such as Heinmiller have *actual* knowledge of the falsity of a response before they can be disciplined for misrepresentation.

**442 Absent some ambiguity, courts must give words in a statute their common meaning. *E.g.*, Department of Licensing v. Lax, 125 Wash.2d 818, 822, 888 P.2d 1190 (1995). The majority acknowledges that dictionary definitions of "misrepresentation" and "concealment" suggest that the declarant must have actual knowledge of the material fact in question. *See* Black's Law Dictionary 1001, 289 (6th ed. 1990). Majority at 437. They also recognize the utility of dictionaries in ascertaining the common meaning of statutory language. *See Garrison v. State Nursing Bd.*, 87 Wash.2d 195, 196, 550 P.2d 7 (1976). Majority at 437. Nevertheless, the majority concludes that, as applied to this statute, the common meaning of "misrepresentation" and "concealment" are unsatisfactory.

The majority struggles to circumvent the plain meaning of "misrepresentation" and "concealment" apparently out of fear that a constructive knowledge standard is necessary to ensure that the public is protected from professional incompetence and misconduct. This fear is misplaced.

There is no question that the Department can refuse to license a social worker whose prior track record demonstrates that she is not fit to practice her profession. RCW 18.19.050(1). However, when this is done not because of the person's past conduct, but based on answers to questions,*613 two basic requirements should be met. First, the questions should be directed to objective facts about which there can be little doubt. It is far better to ask, "Have you ever been arrested or charged with a crime?" than to ask, "Have you ever engaged in an act of moral turpitude?" Well crafted questions would focus an applicant's attention on the specific conduct requiring disclosure and would be more likely to elicit responses which will alert officials to the need for an in depth investigation before granting a license. This would do more to protect the public from unfit professionals than does requiring applicants to reflect on whether their own behavior constitutes an act of "moral turpitude."

Second, to discipline a person not because she knew, but because she *should* have known that her conduct would be deemed by others to constitute an act of

“moral turpitude” makes the Department's action almost Kafkaesque. What constitutes an act of “moral turpitude” is difficult to ascertain with any precision. Asking an applicant to evaluate her past conduct by such an amorphous concept merely sets a trap which can snare even applicants who attempt to be forthright and honest in their responses. It does nothing to protect the public from unfit applicants.

The inequities created by using a constructive knowledge definition for “misrepresentation” are even more sharply demonstrated by analyzing the Department's determination that Heinmiller “should have known” that M.B. was still her client when they first had sexual contact. There is some evidence to support the Department's finding that the social worker/client relationship continued, but at the same time there is evidence that the relationship had ended. Heinmiller and M.B. mutually agreed to end their professional relationship before they had sexual contact. At that point, all formal indicia of a professional relationship were terminated and never resumed. There were no further appointments or payment for services and Heinmiller and M.B. no longer held *614 themselves out as having a current professional relationship. It is, thus, understandable how, in total good faith, Heinmiller could answer in the negative when asked whether she had sexual contact with a client.^{FN1}

FN1. A well written question on the application such as, “Have you ever had sexual contact with a client or former client?”, would have focused Heinmiller's attention on the type of conduct which required disclosure.

If the Department wishes to discipline persons who have been issued a license but are later discovered to have engaged in unprofessional conduct, it can promulgate rules to that effect. RCW 18.19.050(1). Disciplining a person under subsection (2) of the UDA, however, should be reserved for those who have *knowingly* misrepresented information. This would ensure that subsection (2) is not used as a way for the Department to circumvent its own disciplinary rules, but is instead **443 used as a tool for weeding out dishonest applicants.

For the foregoing reasons, I would adhere to the plain meaning of “misrepresentation” or “concealment” and require that applicants have actual knowledge of

the falsity of a response before disciplining them under subsection (2) of the UDA.

JOHNSON and ALEXANDER, JJ., concur.
Wash., 1995.
Heinmiller v. Department of Health
127 Wash.2d 595, 903 P.2d 433

END OF DOCUMENT

▽

Supreme Court of Washington,
En Banc.
In the Matter of the DETENTION OF Sheldon
MARTIN, Petitioner.
No. 78963-1.

Argued Sept. 25, 2007.
Decided May 1, 2008.

Background: Attorney General petitioned for civil commitment, as sexually violent predator (SVP), of defendant who committed sexually violent offenses in Oregon and other criminal activity in Clark County, Washington. Defendant moved to dismiss for lack of jurisdiction. The Superior Court, Thurston County, Wm. Thomas McPhee, J., denied motion, and at bench trial, defendant stipulated to facts sufficient to commit him. Defendant appealed denial of motion to dismiss. The Court of Appeals, 133 Wash.App. 450, 136 P.3d 789, affirmed. Review was granted.

Holding: The Supreme Court, Sanders, J., held that with respect to a defendant serving a prison sentence for nonsexually violent offenses committed in Clark County, which sentence was being served after defendant had completed his prison sentence for sexually violent offenses in Oregon, a prosecutor in Thurston County, Washington, could not initiate proceedings for civil commitment of defendant, as sexually violent predator, based on the sexually violent offenses committed in another state.

Reversed and remanded with directions.

Chambers, J., filed a dissenting opinion, in which C. Johnson, Owens, JJ., and Bridge, J. Pro Tem., concurred.

West Headnotes

[1] Criminal Law 110 ↪ 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited

Cases

Statutory construction is a question of law reviewed de novo.

[2] Statutes 361 ↪ 181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature.

[3] Mental Health 257A ↪ 454

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak454 k. Persons and Offenses

Included. Most Cited Cases

With respect to a defendant serving a prison sentence for nonsexually violent offenses committed in Clark County, Washington, which sentence was being served after defendant had completed his prison sentence for sexually violent offenses in Oregon, a prosecutor in Thurston County, Washington, could not initiate proceedings for civil commitment of defendant, as sexually violent predator, based on the sexually violent offenses committed in another state; Thurston County was not the county in which defendant was convicted or charged. West's RCWA 71.09.020(15)(b), 71.09.025(1, 4), 71.09.030.

[4] Statutes 361 ↪ 188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

When interpreting a statute, the court first looks to its plain language, and if the plain language is subject to only one interpretation, the inquiry is at an end.

[5] Statutes 361  **190**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k187 Meaning of Language
 - 361k190 k. Existence of Ambiguity.

Most Cited Cases

If after analyzing the plain language, the statute remains subject to multiple interpretations, it is “ambiguous.”

[6] Statutes 361  **190**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k187 Meaning of Language
 - 361k190 k. Existence of Ambiguity.

Most Cited Cases

A statute is not “ambiguous” merely because multiple interpretations of it are conceivable; in such circumstances, the statute is possibly unclear in its application to a specific situation, but it is not ambiguous because its language conveys a single meaning.

[7] Statutes 361  **235**

361 Statutes

- 361VI Construction and Operation
 - 361VI(B) Particular Classes of Statutes
 - 361k235 k. Liberal or Strict Construction as Affected by Nature of Act in General. Most Cited

Cases

Statutes curtailing civil liberties are strictly construed to their terms.

[8] Statutes 361  **186**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k186 k. Cases and Matters Omitted.

Most Cited Cases

An omission that renders an entire statute absurd or meaningless is the only type of omission the court may correct.

[9] Statutes 361  **186**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k186 k. Cases and Matters Omitted.

Most Cited Cases

Statutes 361  **189**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k187 Meaning of Language
 - 361k189 k. Literal and Grammatical

Interpretation. Most Cited Cases

If an omission from a statute is understandable, that means the court is able to ascertain why the legislature intended a literal reading of the statute, and the court does not correct that type of perceived legislative error.

[10] Statutes 361  **186**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k180 Intention of Legislature
 - 361k186 k. Cases and Matters Omitted.

Most Cited Cases

Statutes 361  **200**

361 Statutes

- 361VI Construction and Operation
 - 361VI(A) General Rules of Construction
 - 361k187 Meaning of Language
 - 361k200 k. Mistakes in Writing; Grammar, Spelling, or Punctuation. Most Cited Cases

If a statute contains an inconsistency but remains rational as a whole, the court will not correct any supposed legislative omission in order to make the statute more perfect, more comprehensive, and more consistent.

****952** Joseph Orry-Leroy Baker, Van Siclen Stocks & Firkins, Auburn, WA, for Petitioner.

Melanie Tratnik, Attorney Generals Office/CJ Division, Malcolm Ross, Attorney General of Washington Seattle, WA, for Respondent.

SANDERS, J.

***504** ¶ 1 The State committed Sheldon Martin as a sexually violent predator based on two sexually violent offenses he committed in Oregon. Washington's sexually violent predator law (chapter 71.09 RCW) includes out-of-state convictions of sexually violent offenses as a basis for a commitment petition but authorizes only a specific prosecutor to file the petition: "the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney...."

^{FN1} The superior court denied Martin's motion to dismiss the petition for want of statutory authorization. ***505** The Court of Appeals, Division Two, affirmed the superior court, holding the language in the statute was venue language permitting a motion to change venue, not a motion to dismiss. We hold the language in the statute unambiguously authorizes a specific prosecutor to initiate commitment proceedings. Accordingly, we reverse the Court of Appeals and grant Martin's motion to dismiss the State's petition.

FN1.RCW 71.09.030.

FACTS AND PROCEDURAL HISTORY

¶ 2 The material facts are undisputed. On March 3, 1992, Martin was convicted in Vancouver, Washington of burglary in the second degree with sexual motivation and indecent exposure, which are not sexually violent offenses under Washington's sexually violent predator law. Pending sentencing Martin was released on bail and arrested on April 8, 1992 in Portland, Oregon. Martin pleaded guilty in Oregon to kidnapping in the second degree and attempted sexual abuse in the first degree, two sexually violent offenses. He was sentenced to 120 months. Martin ****953** was returned to Washington for sentencing; he was sentenced to 30 months to be served consecutively after his Oregon sentence.

¶ 3 When Martin neared the end of his sentence in

Washington, the End of Sentence Review Committee of the Community Protection Unit of the Washington Department of Corrections determined Martin met the statutory definition of a sexually violent predator and recommended referring Martin to the Clark County prosecutor for commitment proceedings. However, the community protection unit instead referred the matter to the Thurston County Prosecuting Attorney's Office. On March 4, 2003, the attorney general's office, at the request of the Thurston County prosecutor, filed the commitment petition in Thurston County Superior Court.

¶ 4 The trial court denied Martin's motion to dismiss the petition, ruling RCW 71.09.030 did not limit a prosecutor's ***506** authority to seek commitment to those counties where the sexually violent offense occurred. Accordingly, the trial court determined any prosecutor can file a commitment petition when the basis of the petition is an out-of-state conviction for a sexually violent offense. The Court of Appeals, Division Two, affirmed the trial court's order holding the language in RCW 71.09.030 referring to the "county where the person was convicted or charged" was "only venue language" requiring a motion to change venue, not a motion to dismiss. *In re Det. of Martin*, 133 Wash.App. 450, 454-55, 136 P.3d 789 (2006).

¶ 5 We granted review, *In re Det. of Martin*, 160 Wash.2d 1009, 160 P.3d 54 (2007), and now reverse the Court of Appeals, holding RCW 71.09.030 unambiguously authorizes only a specific county prosecutor to file, or request the attorney general to file, the commitment petition. The Thurston County prosecutor could not file this commitment petition, or request the attorney general's office to file it, because the Thurston County prosecutor never convicted or charged Martin with an offense. Which prosecutor could appropriately take such an action we do not decide.

STANDARD OF REVIEW

[1][2] ¶ 6 Statutory construction is a question of law reviewed de novo. *W. Telepage, Inc. v. City of Tacoma*, 140 Wash.2d 599, 607, 998 P.2d 884 (2000). The primary objective of any statutory construction inquiry is "to ascertain and carry out the intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991).

ANALYSIS

[3] ¶ 7 The question presented is whether RCW 71.09.030 authorizes the Thurston County prosecutor to commence a sexually violent predator commitment proceeding if the Thurston County prosecutor never convicted or charged the subject of the proceeding with an offense.

*507 ¶ 8 RCW 71.09.025 and RCW 71.09.030 establish the mandatory and exclusive procedure whereby a prosecuting attorney commences a sexually violent predator commitment proceeding.

¶ 9 First, the “agency with jurisdiction” ^{FN2} determines whether the person satisfies the statutory criteria of a sexually violent predator. ^{FN3} If so, the agency refers the matter to the “prosecuting attorney of the county where that person was charged,” providing the prosecutor with “all relevant information.” ^{FN4} If the agency fails to refer the matter, however, the prosecuting attorney of the county where that person was charged remains authorized to file the commitment petition. *In re Det. of Aquí*, 84 Wash.App. 88, 96, 929 P.2d 436 (1996).

FN2.RCW 71.09.025(4) defines “ ‘agency with jurisdiction’ ” as the “agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections....”

FN3.RCW 71.09.025(1)(a).

FN4.RCW 71.09.025(1)(a), (b); *see also* RCW 9.94A.840.

¶ 10 The statute then enumerates five classes of people subject to commitment as a sexually violent predator:

(1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total **954 confinement ...; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement ...; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand

trial is about to be released, or has been released ...; (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released ...; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator....

RCW 71.09.030.

¶ 11 Once a person falls within one of these five classes of people, “the prosecuting attorney of the county where the *508 person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a ‘sexually violent predator?....” *Id.* (emphasis added).

[4][5][6] ¶ 12 When interpreting a statute we first look to its plain language. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry is at an end. *Id.* If after analyzing the plain language, the statute remains subject to multiple interpretations, it is ambiguous. *Burton v. Lehman*, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005). However, a statute is not ambiguous if multiple interpretations of it are conceivable. *W. Telepage, Inc.*, 140 Wash.2d at 608, 998 P.2d 884. In such circumstances the statute is possibly unclear in its application to a specific situation, but it is not ambiguous because its language conveys a single meaning. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L.REV. 57, 62-63, 78-79 (1998-99).

¶ 13 Here, the phrase “the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney” ^{FN5} cannot be interpreted to mean anything but exactly what it says. It exclusively authorizes a specific county prosecutor to commence the proceedings. This language is not ambiguous, and we assume the legislature means exactly what it says. *W. Telepage, Inc.*, 140 Wash.2d at 609, 998 P.2d 884.

FN5.RCW 71.09.030.

[7] ¶ 14 Therefore, we must derive the statute's meaning from the words of the statute itself. *State v. Tili*,

139 Wash.2d 107, 115, 985 P.2d 365 (1999). We strictly construe statutes curtailing civil liberties to their terms. *In re Det. of Swanson*, 115 Wash.2d 21, 31, 804 P.2d 1 (1990); see also *In re Det. of Marshall*, 156 Wash.2d 150, 164, 125 P.3d 111 (2005) (Chambers, J., dissenting) (“It is our solemn duty to ensure that the State’s power to incarcerate is exercised only under the most stringent of standards.”). With this in mind we turn to the question of whether the statute permits the *509 Thurston County prosecutor to initiate this commitment proceeding.

a. RCW 71.09.030 does not permit the Thurston County prosecutor to commence this commitment proceeding

¶ 15 The sexually violent predator statute defines a “[s]exually violent offense” to include out-of-state convictions for certain offenses; ^{FN6} however, the statute authorizes only the prosecutor who convicted or charged the subject of the petition to commence the commitment proceeding. ^{FN7} “The authority of the prosecuting attorney to appear in a particular proceeding is ... found in the statute.” *Bates v. Sch. Dist. No. 10*, 45 Wash. 498, 501, 88 P. 944 (1907).

FN6.RCW 71.09.020(15)(b).

FN7.RCW 71.09.030.

¶ 16 The State and dissent agree the statute clearly refers to the prosecutor who convicted or charged the subject of the petition to commence the proceeding. However, the State and the dissent construct a legislative intent from the definition of a “sexually violent offense” regarding commitment proceedings based on out-of-state convictions of sexually violent offenses; the legislature must **955 have intended to authorize the Thurston County (or every county) prosecutor to commence the proceedings to avoid the result of identifying the problem without providing a remedy.

¶ 17 The legislature, however, wrote the statute in an unambiguous manner and we do not have the power to rewrite it “even if we believe the legislature intended something else but failed to express it adequately.” *Vita Food Prods., Inc. v. State*, 91 Wash.2d 132, 134, 587 P.2d 535 (1978). The plain language of the statute expresses the legislature’s intent: “the prosecuting attorney of the county where the person

was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a ‘sexually violent predator’....” RCW 71.09.030.

*510 ¶ 18 The dissent would render this plain language meaningless and superfluous, permitting any county prosecutor, or even the attorney general sans request by a county prosecutor, to file the petition. Dissent at 958. We may not render this plain language meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

¶ 19 A construction permitting the Thurston County (or every county) prosecutor to commence the commitment proceedings would frustrate the intended operation of RCW 71.09.030. ^{FN8} A prosecutor may commit five classes of people and Martin falls within the first class; he was previously convicted of two sexually violent offenses (in Oregon) and was about to be released. RCW 71.09.030, however, authorizes only the county prosecutor who convicted or charged the alleged sexually violent predator to commence the commitment proceeding, excluding other county prosecutors from commencing a commitment proceeding. Under the maxim *expressio unius est exclusio alterius*, ^{FN9} and our duty to strictly construe statutes curtailing civil liberties, we may infer the legislature intended a specific prosecutor to commence the civil commitment proceeding, to the exclusion of all other prosecutors. See *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969); see also *Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County*, 82 Wash.2d 138, 141, 508 P.2d 1361 (1973) (“To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.”). Thus, permitting the *511 Thurston County prosecutor to commence the proceeding frustrates this intended operation of the statute.

^{FN8}. Moreover, a construction permitting any county prosecutor to commence the commitment proceedings would undermine the operation of RCW 71.09.025(1)(a) as

well since the “agency with jurisdiction” refers the alleged sexually violent predator to the county prosecutor who charged the alleged sexually violent predator.

FN9. “[T]o express or include one thing implies the exclusion of the other.” BLACK’S LAW DICTIONARY 620-21 (8th ed.2004).

¶ 20 The dissent “technically” agrees with our interpretation of the statute, but construes the statute broadly, taking a results-oriented approach to statutory interpretation. Dissent at 958-59. Unlike the dissent we believe civil incarceration that is noncompliant with the process due under the statute which authorizes civil incarceration affects a person’s substantial rights, namely depriving basic liberty without the process due. See U.S. CONST. amend. XIV, § 1; Wash. Const. art. I, § 3. The dissent assumes no harm by presupposing the Clark County prosecutor would have requested the attorney general to file the petition. The dissent’s presupposition ignores the issue, and we reject such ad hoc approach to judicial decision making.

¶ 21 Under the dissent’s approach a statute may not limit a prosecutor’s authority. For example, under RCW 7.68.320(1), “[a]ny property subject to seizure and forfeiture under RCW 7.68.310 may be seized by the prosecuting attorney of the county in which the convicted person was convicted....” Yet according to the dissent if Martin’s property was subject to seizure by the Clark County **956 prosecutor, the Thurston County prosecutor could seize it with Martin merely suffering “procedural error,” an obviously impermissible conclusion. Dissent at 959. In sum, we must reject the dissent’s reasoning because it would lead to a principle being applied in one circumstance that would not be applied in a similar circumstance.

[8] ¶ 22 Moreover, the legislative omission of filing authority when the predicate offense occurs out-of-state, but no Washington prosecutor convicted or charged the alleged sexually violent predator, does not render the clear language of the statute subject to judicial construction because “an unambiguous statute is not subject to judicial construction.” *Kilian v. Atkinson*, 147 Wash.2d 16, 20, 50 P.3d 638 (2002). Nor does this omission render the entire statute absurd or meaningless, the only type of omission this court may correct. *512 *State v. Taylor*, 97 Wash.2d

724, 729, 649 P.2d 633 (1982); see also *State v. Delgado*, 148 Wash.2d 723, 63 P.3d 792 (2003).

[9] ¶ 23 As we explained in *Taylor* and applied in *Delgado*, there are three types of cases addressing legislative omissions: an understandable omission, an omission creating an inconsistency, and an omission rendering the statute meaningless. *Taylor*, 97 Wash.2d at 729-30, 649 P.2d 633; *Delgado*, 148 Wash.2d at 730-31, 63 P.3d 792. In the first type of case the court is able to ascertain why the legislature intended a literal reading of the statute. *Taylor*, 97 Wash.2d at 729, 649 P.2d 633. “The court does not correct this type of perceived legislative error.” *Delgado*, 148 Wash.2d at 730, 63 P.3d 792.

¶ 24 Here, authorizing only the county prosecutor who convicted or charged the alleged sexually violent predator reflects the legislature’s perceived limits of its personal jurisdiction over alleged sexually violent predators outside Washington. With limited exception inapplicable here, Washington’s criminal or civil authority does not extend beyond its borders. See *State v. Lane*, 112 Wash.2d 464, 771 P.2d 1150 (1989); *Grange Ins. Ass’n v. State*, 110 Wash.2d 752, 753-54, 757 P.2d 933 (1988). Commonsense dictates when an alleged sexually violent predator enters our State, he or she simultaneously enters a county of our State. When an alleged sexually violent predator is about to be released from confinement, he or she is about to be released after being convicted of some offense in a county of our State. Authorizing only those prosecutors who convicted or charged the alleged sexually violent predator is understandable; “prosecutors are elected by and answerable to their ... constituents.” *State v. Bryant*, 146 Wash.2d 90, 101, 42 P.3d 1278 (2002). Accordingly, since this omission of filing authority is understandable, we do not correct it. See *Taylor*, 97 Wash.2d at 729, 649 P.2d 633.

[10] ¶ 25 In the second type of omission case, the omission does not undermine the effectiveness of the entire statute but “simply kept the purposes [of the statute] from being effectuated comprehensively.” *Id.* If a statute contains an inconsistency but remains rational as a whole, this court *513 will not correct any supposed legislative omission in order to make the statute “more perfect, more comprehensive and more consistent.” *Id.* Under these circumstances the court does not “suppl[y] the omitted language be-

cause it [is] not ‘imperative’ to make the statute rational.” *Id.*

¶ 26 By contrast, in the third type of omission case, the omission makes the “statute entirely meaningless.” *Delgado*, 148 Wash.2d at 731, 63 P.3d 792. This court will compensate for this type of omission if “it is ‘imperatively required to make it a rational statute.’ ” *Taylor*, 97 Wash.2d at 729, 649 P.2d 633 (quoting *McKay v. Dep’t of Labor & Indus.*, 180 Wash. 191, 194, 39 P.2d 997 (1934)). For example, an omission simultaneously qualifying a person for confinement *and* release is meaningless. *Id.* at 730, 649 P.2d 633. Under this circumstance the statute is *completely* ineffectual unless corrected.

¶ 27 *Delgado* provides an example of where this court draws the line between these two types of omission cases. In *Delgado* this court refused to include a “comparability clause” in a two-strike statute^{FN10} to allow an **957 offense to count as a strike that is factually comparable to the ones listed in the statute. As we explained:

FN10.*Delgado*, 148 Wash.2d at 728, 63 P.3d 792 (citing former RCW 9.94A.030(27)(b)(i) (1998)).

Reading the two-strike statute to require only those prior offenses listed does not render the act meaningless. Despite potentially inconsistent sentences for those with prior convictions of rape of a child and the former offense of statutory rape, the act still functions to severely punish most recidivist sex offenders.

Id. at 731, 63 P.3d 792; see also *State v. S.M.H.*, 76 Wash.App. 550, 887 P.2d 903 (1995) (holding an omission did not require judicial correction because it did not undermine the effectiveness of the sex offender registration statute despite the result of an unregistered sex offender).

¶ 28 Here, the omission falls within the second type of omission case because the statute still functions to commit most sexually violent predators. Construing the statute to *514 permit the Thurston County prosecutor (or every county prosecutor) to commence commitment proceedings when the predicate offense occurs out-of-state, regardless of whether the Thurston County prosecutor convicted or charged the subject of the proceeding, is not imperative to make

the statute rational as a whole. The omission does not render the statute meaningless, nor does it make the sexually violent predator law completely ineffectual to achieving its purpose. The inconsistency renders the statute less effective, but “[b]y arguing we should make more perfect this statutory scheme, the State and the dissent ask us to impermissibly transgress on the province of the legislature.” *Delgado*, 148 Wash.2d at 731, 63 P.3d 792.

¶ 29 Moreover, a statutory construction permitting any prosecutor to file the commitment petition in light of its express provision of authority to a specific prosecutor is blind judicial intervention without the guidance of a clear legislative intent. The State asks us to sacrifice the legislature’s express provision of authority on the altar of the legislature’s “inept wording.” Resp’t’s Opening Br. at 7. This court may excuse “inept wording” if it creates an absurd or obviously unintended result. *State v. Burke*, 92 Wash.2d 474, 478, 598 P.2d 395 (1979). However, omitting authority to commence commitment proceedings based on an out-of-state conviction does not create an absurd or obviously unintended result.^{FN11} Without some declaration that the legislature intended the Thurston County (or every county) prosecutor to file the commitment petition when the predicate offense occurs out-of-state, we cannot sanction such an unfettered grant of authority considering the express grant of authority contained in RCW 71.09.030. Any request to amend the statute to avoid the result of applying the plain meaning of the statutory language must be addressed to the legislature. *Amalgamated Transit Union Legislative Council v. State*, 145 Wash.2d 544, 560, 40 P.3d 656 (2002).

FN11.*See supra* p. 12.

***515b. The issue is statutory authority, not subject matter jurisdiction**

¶ 30 The State argues RCW 71.09.030 creates subject matter jurisdiction over commitment petitions but does not specify a venue for when the sexually violent offense occurs out-of-state. The Court of Appeals agreed with the State, holding the language in RCW 71.09.030 providing the prosecuting attorney of the county where the respondent was convicted or charged was “only venue language” requiring a motion to change venue. *In re Det. of Martin*, 133 Wash.App. at 454-55, 136 P.3d 789.

¶ 31 This argument about subject matter jurisdiction and venue obfuscates the real question before us, which is to determine *whom* the statute authorizes to file the petition, not *where* the petition is filed. Certainly naming a specific prosecutor as the filing authority establishes venue; however, venue does not supersede the expression of authority. If the prosecutor who instituted the proceeding was not authorized to do so, “logically it follows that he cannot insist upon a [motion to change venue] any more than he can claim the right to institute the suit in the first instance.” *State ex rel. Attorney Gen. v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 513, 70 P. 114 (1902). The State’s reliance on ***958Dougherty v. Department of Labor & Industries*, 150 Wash.2d 310, 76 P.3d 1183 (2003) is misplaced because the question in *Dougherty* was exactly the opposite from the one presented here, i.e., where to file, not who files.

¶ 32 In *Dougherty* the issue was whether an express statutory designation of the county to file a workers’ compensation appeal limited jurisdiction or specified venue. Critical to our purpose here *Dougherty*’s authority to file the appeal was never questioned. *Id.* at 314-15, 76 P.3d 1183 (observing the statute’s first half provided authority, whereas the second half specified venue). The *Dougherty* court held the statute in question ^{FN12} was procedural not jurisdictional and **516* filing in the wrong county was cured by changing venue. *Id.* at 320, 76 P.3d 1183.

FN12.RCW 51.52.110.

¶ 33 In contrast to *Dougherty*, the question here is *who* files the petition not *where* the petition is filed. The *Dougherty* court was unconcerned with filing authority; therefore, the *Dougherty* court’s analysis of subject matter jurisdiction and venue is irrelevant to the question before us.

CONCLUSION

¶ 34 We hold RCW 71.09.030 unambiguously authorizes a specific prosecuting attorney to file, or request the filing of, a sexually violent predator petition, namely the prosecuting attorney who convicted or charged the alleged sexually violent predator. The Thurston County prosecutor lacked the authority to commence the commitment proceedings against Martin because the Thurston County prosecutor never

convicted or charged Martin. Before the State can commit a person for what may arguably be the remainder of his life, the State must be put through the inconvenience of fully complying with the statute.

¶ 35 We reverse the Court of Appeals decision and remand to Thurston County Superior Court with directions to grant Sheldon Martin’s motion to dismiss the State’s petition.

WE CONCUR: GERRY L. ALEXANDER, C.J.,
MARY E. FAIRHURST, BARBARA A. MADSEN,
JAMES M. JOHNSON, JJ.
CHAMBERS, J. (dissenting).

¶ 36 At most, this case presents a highly technical statutory error, the kind the legislature has instructed us to disregard unless it affects “the substantial rights of the adverse party.” RCW 4.36.240. Since Sheldon Martin has not met this burden, I respectfully disagree with my colleagues that he is entitled to the extreme remedy of dismissal.

¶ 37 Our legislature has created a system of civil confinement for sexually violent predators who are likely to **517* reoffend, chapter 71.09 RCW. Under chapter 71.09 RCW, the State could civilly commit Martin if it proved, beyond a reasonable doubt, that he is a sexually violent predator as defined by the act. RCW 71.09.060. See generally *In re Det. of Albrecht*, 147 Wash.2d 1, 7, 51 P.3d 73 (2002). Our legislature has designated “the prosecuting attorney of the county where the person was convicted or charged” of an offense as the proper entity to either bring a sexually violent predator petition or ask the attorney general to do so. RCW 71.09.030. Alas, the Thurston County prosecutor asked the attorney general to bring this case, even though Martin was never charged or convicted in Thurston County. I agree with my colleagues that the State failed to follow the letter of the law.

¶ 38 However, I disagree that Judge McPhee committed reversible error when he denied a motion to dismiss the State’s sexually violent predator petition against Martin because the Thurston County prosecutor asked the attorney general to represent the State in filing the petition. This case might be different had Martin asked for some other, more limited relief. But the Thurston County Superior Court had the constitutional power to hear this petition, and I see no cause to dismiss the petition merely because the “wrong”

prosecutor asked the attorney general to file it. See Const. art. IV, § 6. See generally Dougherty v. Dep't of Labor & Indus., 150 Wash.2d 310, 315-16, 76 P.3d 1183 (2003). Because this is a question of statutory interpretation, our role here is to **959 interpret the intent of the legislature within the constraints of the constitution, not to audit the State's technical performance. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002) (citing State v. J.M., 144 Wash.2d 472, 480, 28 P.3d 720 (2001)).

¶ 39 I agree with my colleagues that technically, the Thurston County prosecutor should not have asked the attorney general to file this petition. However, I cannot agree that this error deprived either the attorney general of the authority to file or the superior court of the authority to *518 hear the petition. Martin suffered a technical, procedural error. From the earliest days of statehood, this court has required some showing that such technical errors affected the substantial rights of the nonprevailing party before we would intervene. E.g., Eakin v. McCraith, 2 Wash. Terr. 112, 117, 3 P. 838 (1882); see also RCW 4.36.240 (harmless error shall be disregarded). Martin is only entitled to relief if he can show he suffered some harm from having the Thurston County prosecutor, as opposed to the Clark County prosecutor, ask the attorney general to initiate these proceedings. He has not met that burden.

¶ 40 I also disagree with the majority's assertion that the question presented in this case is exactly the opposite of the question presented in Dougherty. 150 Wash.2d 310, 76 P.3d 1183. In at least one important way, these cases are strikingly similar. In Dougherty, the relevant statute directed that certain administrative appeals "shall be" filed in a particular county court. Dougherty, 150 Wash.2d at 315, 76 P.3d 1183 (citing RCW 51.52.110). In the case before us, the relevant statute directs that certain prosecutors "may" initiate sexually violent predator petitions. See RCW 71.09.030. In both cases, someone made a mistake: in Dougherty, an appeal was filed in the wrong court; in this case, the wrong prosecutor asked the attorney general to file the case. And in each case, the offended party is only entitled to relief, in my view, if he or she can show harm.

¶ 41 There certainly are situations where we should dismiss an action filed by the wrong party. See gen-

erally Bouckaert v. State Bd. of Land Comm'rs, 84 Wash. 356, 359-60, 146 P. 848 (1915). But the wrong party did not file this case. The legislature vested the attorney general with the authority to file these cases, RCW 71.09.030, and the attorney general filed this one. Maybe the prosecutor in Clark County, where Martin was charged and convicted, had interests that the Thurston County prosecutor thwarted, but that would be for the Clark County prosecutor to tell us. *519 Martin has suffered no wrong for which the law gives a remedy.

¶ 42 I respectfully dissent.

WE CONCUR: SUSAN OWENS, CHARLES W. JOHNSON, JJ., BOBBE J. BRIDGE, J. Pro Tem.
Wash., 2008.

In re Detention of Martin
163 Wash.2d 501, 182 P.3d 951

END OF DOCUMENT

C

Court of Appeals of Washington, Division 2.
 In re MARRIAGE OF Sally A. BARBER, Appellant,
 and
 Brian Barber, Respondent.
 No. 25771-8-II.

May 25, 2001.

Former husband sought reimbursement, from former wife, for court-ordered child day care expenses not actually incurred by former wife. The Superior Court, Thurston County, Paula Casey, J., ordered reimbursement. Former wife appealed. The Court of Appeals, Quinn-Brintnall, J., held that: (1) statutory amendment regarding reimbursement of day care expenses created a substantive right, and not merely procedural rights, for overpayments received after the June 6, 1996, effective date of the amendment, and (2) trial court should have considered former wife's laches and equitable estoppel defenses.

Remanded.

West Headnotes

[1] Equity 150 ↪50150 Equity

150I Jurisdiction, Principles, and Maxims

150I(B) Remedy at Law and Multiplicity of Suits

150k50 k. Statutory Creation of Remedy.

Most Cited Cases

Generally, a court cannot grant equitable relief when a statute provides specific relief.

[2] Equity 150 ↪43150 Equity

150I Jurisdiction, Principles, and Maxims

150I(B) Remedy at Law and Multiplicity of Suits

150k43 k. Existence of Remedy at Law and Effect in General. Most Cited Cases
 Equity does not intervene when there is a complete

and adequate remedy at law.

[3] Statutes 361 ↪205361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k205 k. In General. Most Cited Cases

Statutes 361 ↪212.6361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited Cases

A legislative body is presumed not to have used superfluous words, and the court is bound to accord meaning, if possible, to every word in a statute.

[4] Child Support 76E ↪5576E Child Support

76EIII Factors Considered

76EIII(A) In General

76Ek55 k. Reimbursement to Person Providing Support. Most Cited Cases

Reimbursement provision of statutory amendment regarding child day care expenses, stating that an obligee must reimburse an obligor for certain court-ordered day care expenses not actually incurred by obligee, created a substantive and mandatory right as to overpayments received after the June 6, 1996, effective date of the amendment; the amendment did not merely create procedural rights. West's RCWA 26.19.080(3).

[5] Child Support 76E ↪676E Child Support

76EI In General

76Ek2 Constitutional and Statutory Provisions

76Ek6 k. Retroactive Effect. Most Cited Cases

Child Support 76E ↪55

76E Child Support

76EIII Factors Considered

76EIII(A) In General

76Ek55 k. Reimbursement to Person Providing Support. Most Cited Cases

A limited right to reimbursement from the obligee, for overpayments for court-ordered child day care expenses not actually incurred by the obligee, and received by obligee before the June 6, 1996, effective date of the statutory amendment authorizing reimbursement claims, may exist under equitable common-law principles in certain circumstances. West's RCWA 26.19.080(3).

[6] Child Support 76E ↪55

76E Child Support

76EIII Factors Considered

76EIII(A) In General

76Ek55 k. Reimbursement to Person Providing Support. Most Cited Cases

A court may apply equitable principles to bar an obligor's claim for reimbursement of overpayments for court-ordered child day care expenses not actually incurred by the obligee, and received by obligee before the June 6, 1996, effective date of the statutory amendment authorizing reimbursement claims. West's RCWA 26.19.080(3).

[7] Child Support 76E ↪55

76E Child Support

76EIII Factors Considered

76EIII(A) In General

76Ek55 k. Reimbursement to Person Providing Support. Most Cited Cases

Equitable principles such as laches and equitable estoppel may bar, in the appropriate circumstances, an obligor's statutory action for reimbursement of overpayments for court-ordered child day care expenses not actually incurred by the obligee, and received by obligee after the June 6, 1996, effective date of the statutory amendment authorizing reimbursement claims. West's RCWA 26.19.080(3).

[8] Estoppel 156 ↪52(1)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52 Nature and Application of Estoppel in Pais

156k52(1) k. In General. Most Cited Cases

Cases

The doctrine of equitable estoppel rests on the principle that where a person, by his acts or representations, causes another to change his position or to refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage.

[9] Estoppel 156 ↪52(6)

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52 Nature and Application of Estoppel in Pais

156k52(6) k. Doctrine Not Favored.

Most Cited Cases

Estoppel 156 ↪118

156 Estoppel

156III Equitable Estoppel

156III(F) Evidence

156k118 k. Weight and Sufficiency of Evidence. Most Cited Cases

Courts do not favor equitable estoppel, and the party asserting it must prove every element with clear, cogent, and convincing evidence.

[10] Equity 150 ↪72(1)

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k72 Prejudice from Delay in General

150k72(1) k. In General. Most Cited Cases

"Laches," in legal significance, is not mere delay, but delay that works a disadvantage to another.

[11] Equity 150 

150 Equity

150II Laches and Stale Demands

150k67 k. Nature and Elements in General.

Most Cited Cases

Laches is an extraordinary remedy to prevent injustice and hardship, and should not be employed as a mere artificial excuse for denying to a litigant that which he is fairly entitled to receive.

[12] Equity 150 

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k70 k. Knowledge of Facts. Most Cited

Cases

Equity 150 

150 Equity

150II Laches and Stale Demands

150k68 Grounds and Essentials of Bar

150k72 Prejudice from Delay in General

150k72(1) k. In General. Most Cited

Cases

A defendant alleging laches must establish that: (1) plaintiff had knowledge of the facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action; and (3) the delay damaged defendant.

****1108*391** Margaret H. Brost, Olympia, for Appellant.

Stephen A. Foster, Foster Foster & Schaller, Olympia, for Respondent.

QUINN-BRINTNALL, J.

Sally Barber appeals an order *392 requiring her to reimburse her ex-husband for day care expenses she did not incur. We hold that the reimbursement provisions of RCW 26.19.080(3) are mandatory for overpayments after June 6, 1996. But because we hold that the trial court erred by failing to consider whether or not the doctrines of equitable estoppel and laches prevent Brian Barber from bringing the reimbursement claim, we remand for further proceedings.

FACTS

Brian Barber paid his ex-wife, Sally Barber, child support and day care expenses under a February 25, 1994, decree of dissolution. The court ordered Brian ^{FN1} to pay \$541.94 in monthly child support for their two daughters, then aged 9 and 7. This amount included \$453.76 in basic support and \$88.20 in day care expenses. The child support order provided that “[c]hild support shall be adjusted ... [e]very two years....” Clerk’s Papers at 8. But neither party sought a change in the decree until 1999.

^{FN1}. The first names of the parties are used for the ease and clarity of the reader. We mean no disrespect.

On October 6, 1999, Sally filed a Petition for Support Modification, based on special expenses due to their elder daughter’s involvement in the juvenile justice system. In response, Brian filed a Motion for Refund of Day Care pursuant to RCW 26.19.080(3). Brian requested that the court require Sally to disclose when she ceased incurring day care expenses, and he sought reimbursement for day care expenses that she did not incur after that date in the amount of \$88.20 per month.

In late 1994, Sally had moved the children from a day care facility to in-home childcare. At some point, the children no longer required day care. Sally claims that she and Brian agreed not to change Brian’s payments for day care expenses because any change would have been offset by an increase in his child support obligation due to his increased income. Brian denies that they discussed the issue and denies the agreement.

*393 In Findings of Fact dated December 7, 1999, a court commissioner granted Brian’s request for reimbursement and found that the reimbursement should be offset against an increased child support obligation retroactive to February 1996, two years following the initial decree.^{FN2} On Brian’s motion to revise, the superior court revised the commissioner’s ruling, vacated the offset of the retroactive child support obligation, and ordered Sally to reimburse Brian \$5,242.88 for day care costs not incurred, plus interest.^{FN3} Sally appeals, arguing that the superior court should have considered equitable relief and that equi-

table estoppel and laches bar Brian from seeking reimbursement for the day care expenses.

FN2. The commissioner's Order of Child Support, however, did not mention the reimbursement of day care expenses or the retroactive modification of child support.

FN3. The superior court's order for reimbursement of day care included an offset of \$757 for back child support owed. "Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor." RCW 26.19.080(3).

DISCUSSION

I. Mandatory Reimbursement Provision of RCW 26.19.080(3).

[1][2] Generally, a court cannot grant equitable relief when a statute provides specific relief. "Equity does not intervene when there is a complete and adequate remedy at law." Ballard v. Wooster, 182 Wash. 408, 413, 45 P.2d 511 (1935), cited with approval in Roon v. King County, 24 Wash.2d 519, 526, 166 P.2d 165 (1946); see also Tyler Pipe Industries, Inc. v. Dept. of Revenue, 96 Wash.2d 785, 789, 638 P.2d 1213 (1982). In **1109 1996, the Legislature amended RCW 26.19.080(3), adding the following italicized language:

Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same *394 proportion as the basic child support obligation. *If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court or file an application for an adjudicative hearing with the department of social and health services for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses. Any or-*

dered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period. Absent agreement of the obligee, nothing in this section entitles an obligor to pay more than his or her proportionate share of day care or other special child rearing expenses in advance and then deduct the overpayment from future support transfer payments.

RCW 26.19.080(3) (emphasis added).

[3][4] In In re Marriage of Hawthorne, 91 Wash.App. 965, 957 P.2d 1296 (1998), Division One of this court held that the 1996 amendment did "not create a new right of action but merely clarifie[d] the procedures the obligor may use to recoup payments made for daycare expenses which are not incurred." Hawthorne, 91 Wash.App. at 969, 957 P.2d 1296. By focusing on the amendment's procedural remedy,^{FN4} however, the Hawthorne court treated as surplusage the portion of the amendment that created a substantive obligation for mandatory reimbursement. A legislative body is presumed not to have used superfluous words, and we are bound to accord meaning, if possible, to every word in a statute. *395 Applied Indus. Materials Corp. v. Melton, 74 Wash.App. 73, 79, 872 P.2d 87 (1994); State v. Lundquist, 60 Wash.2d 397, 403, 374 P.2d 246 (1962). We believe the Hawthorne interpretation fails to give full weight to that portion of the amendment mandating repayment; a new statutory right. Thus, if equitable principles do not prevent Brian from bringing a motion to reimburse under RCW 26.19.080(3), Sally must reimburse him for overpayments she received after June 6, 1996, the effective date of the amendment, if the overpayments amounted to at least 20 percent of Brian's annual day care or special child rearing expenses.

FN4. "The obligor may institute an action ..." RCW 26.19.080(3). See full text of amendment above.

[5] Reimbursement of overpayments made prior to

June 6, 1996, is not mandatory, although a limited right to reimbursement may exist under equitable common-law principles in certain circumstances. Hawthorne, 91 Wash.App. at 968, 957 P.2d 1296 (citing In re Marriage of Stern, 68 Wash.App. 922, 932, 846 P.2d 1387 (1993)). Sally's mandatory statutory obligation to reimburse Brian for the day care expenses she had not actually incurred did not exist prior to June 6, 1996. The superior court erred in refusing to consider equitable defenses as to that portion of the overpayment alleged to have occurred prior to the effective date of the amendment.

II. Equitable estoppel and laches as bar to request for reimbursement of day care expenses.

Sally asserts that the trial court erred "when it did not consider equitable relief" for her. Assignment of Error No. 1, Brief of Appellant at 2. Specifically, she alleges that **1110 equitable estoppel and laches bar Brian's claim for reimbursement. No findings were entered on the issue, and it is not clear whether the trial court decided not to apply equitable estoppel and laches because it concluded that they could not be applied to RCW 26.19.080(3) under any circumstances, or because it concluded that the elements of these doctrines were not met in this case.

[6][7][8] As we set forth above, the court may apply equitable principles to reimbursement claims for overpayments made before June 6, 1996. Overpayment reimbursement claims properly brought and proved under the statute arising after *396 the effective date of the statute, however, are mandatory, unless the claim itself is barred by equitable doctrines. We hold that equitable principles may bar an action for reimbursement under RCW 26.19.080(3) in the appropriate circumstances.

The doctrine of equitable estoppel rests on the principle that where a person, by his acts or representations, causes another to change his position or to refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage.

Hartman v. Smith, 100 Wash.2d 766, 769, 674 P.2d 176 (1984) (quoting Dickson v. United States Fid. & Guar. Co., 77 Wash.2d 785, 788, 466 P.2d 515

(1970)). On remand, the trial court must decide whether or not equitable estoppel or laches bars Brian from bringing an action for reimbursement under the statute.

[9][10] To prevail on her argument that equitable estoppel bars Brian's reimbursement claim, on remand Sally must establish "(1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury resulting from allowing the first party to contradict or repudiate [such admission, statement, or act]." In re Marriage of Hunter, 52 Wash.App. 265, 271, 758 P.2d 1019 (1988) (alteration in original) (quoting Roy v. Cunningham, 46 Wash.App. 409, 415, 731 P.2d 526 (1986)). Courts do not favor equitable estoppel, and the party asserting it must prove every element with clear, cogent, and convincing evidence. In re Marriage of Sanborn, 55 Wash.App. 124, 129, 777 P.2d 4 (1989).

"[L]aches in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so *397 changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. When a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief."

Crodle v. Dodge, 99 Wash. 121, 131, 168 P. 986 (1917) (quoting 10 R.C.L. 396) (cited with approval in Brost v. L.A.N.D., Inc., 37 Wash.App. 372, 375-76, 680 P.2d 453 (1984)).

[11][12] "Laches is an extraordinary remedy to prevent injustice and hardship and should not be employed as 'a mere artificial excuse for denying to a litigant that which ... he is fairly entitled to receive....'" Brost, 37 Wash.App. at 376, 680 P.2d 453 (quoting Crodle, 99 Wash. at 131, 168 P. 986). To prevail on her argument that the doctrine of laches prevents Brian from seeking reimbursement of overpayment of day care expenses, on remand Sally must establish that (1) Brian had knowledge of the facts constituting

a cause of action or a reasonable opportunity to discover such facts; ^{FN5} (2) there **1111 was an unreasonable delay in commencing the action; and (3) the delay damaged her. See Hunter, 52 Wash.App. at 270, 758 P.2d 1019.

^{FN5}. We note that at the time of the February 1994 child support calculations both children were in the "A" age group. The child support worksheets indicate a total combined monthly income of \$3,932.15. Under the economic table of RCW 26.19.020, the basic child support obligation for each age "A" child in a two-child family was \$463. On April 19, 1996 the Barber's elder daughter turned 12. Under the economic table of RCW 26.19.020, she would then be classified as a "B" child. Assuming the same income and proportion, Brian's support obligation would have increased by \$53.40. On August 12, 1998, assuming the same income and proportion, Brian's support would have increased another \$53.40 under the standard statutory child support guidelines when his second child became a "B" child. At the time Brian moved for reimbursement, his elder daughter was 15 and his younger daughter was 13 years old.

III. Retroactive adjustment of support.

Sally also asserts that the trial court "erred when it held that the [commissioner's] adjustment of support provision was a 'modification' of support and could not have retroactive effect." Brief of Appellant at 2. This claim misstates the court's ruling. In its order of March 3, 2000, the superior court found that "[t]he Commissioner committed an error of law when he ordered consideration of the adjustment *398 provision of the 1994 child support order ... because an adjustment in support may not be given retroactive effect." Clerk's Papers at 104-05.

The provisions of any child support decree may be modified only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment. RCW 26.09.170(1)(a). Sally filed her petition for support modification on October 6, 1999. The

court had authority to modify only those installments accruing after that date.^{FN6} Additionally, RCW 26.19.080(3) expressly allocates reimbursement terms ^{FN7} but does not allow reimbursements to be offset against anticipatory child support increases. The superior court did not err in revising the commissioner's ruling to eliminate the offset.

^{FN6}. The court granted Sally's request for a prospective modification effective November 1999. Neither party has appealed that modification.

^{FN7}. Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period.

RCW 26.19.080(3) (part).

In summary, we hold that reimbursement of overpaid day care or special child rearing expenses pursuant to RCW 26.19.080(3) is generally mandatory for payments made after June 6, 1996. But nothing in RCW 26.19.080(3) prevents the party receiving the alleged overpayment from raising equitable defenses, including laches and equitable estoppel, as a bar to a request for mandatory reimbursement for overpaid day care costs under this statute. We remand this matter to the trial court to consider 1) whether or not equitable estoppel or laches bars Brian's entire request for reimbursement under RCW 26.19.080(3) *399 and, if not, 2) whether equity warrants reimbursement to Brian of day care costs paid from February 1994 through June 6, 1996, in addition to the mandatory reimbursement of the amounts paid after June 6, 1996.

We concur: HUNT, A.C.J., and MORGAN, J.
Wash.App. Div. 2,2001.
In re Marriage of Barber
106 Wash.App. 390, 23 P.3d 1106

END OF DOCUMENT

23 P.3d 1106
106 Wash.App. 390, 23 P.3d 1106
(Cite as: 106 Wash.App. 390, 23 P.3d 1106)

640 F.2d 1051
(Cite as: 640 F.2d 1051)

▷

United States Court of Appeals,
Ninth Circuit.
IRWIN MEMORIAL BLOOD BANK OF THE SAN
FRANCISCO MEDICAL SOCIETY, Appellant,
v.
AMERICAN NATIONAL RED CROSS, Appellee.
No. 79-4180.

Argued and Submitted June 9, 1980.
Decided March 26, 1981.

Medical society blood bank brought Freedom of Information Act suit seeking order requiring disclosure by American National Red Cross of certain financial information. The United States District Court for the Northern District of California, Robert H. Schnacke, J., found that Red Cross was not an agency as defined by Act and granted summary judgment in favor of Red Cross, and blood bank appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, held that American National Red Cross was not an "agency" for purposes of Freedom of Information Act.

Affirmed.

West Headnotes

[1] Records 326 ↪51

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k51 k. Agencies or Custodians Affected. Most Cited Cases

American National Red Cross, while undoubtedly a close ally of the United States Government, is not an "agency" for purposes of the Freedom of Information Act, as operations of Red Cross are not subject to substantial federal control or supervision. 5 U.S.C.A. §§ 551(1), 552, 552(e).

[2] Records 326 ↪51

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k51 k. Agencies or Custodians Affected. Most Cited Cases

Extent of Freedom of Information Act's expanded coverage under 1974 amendment defining "agency" is a matter to be developed by the courts on a case-by-case basis; each arrangement must be examined in its own context, in view of myriad organizational arrangements adopted for getting the business of the government done. 5 U.S.C.A. § 552(e).

[3] Records 326 ↪51

326 Records

326II Public Access

326II(B) General Statutory Disclosure Requirements

326k51 k. Agencies or Custodians Affected. Most Cited Cases

Under Freedom of Information Act, threshold showing of substantial federal control or supervision is required before an entity can be characterized as "federal" for some purpose, and it is the existence of this element of substantial federal control that distinguishes those entities that can be fairly denominated as "federal" agencies under Freedom of Information Act from organization whose activities may be described as merely quasi-public or quasi-governmental. 5 U.S.C.A. § 552(e).

*1052 David E. Willett, Hassard, Bonnington, Rogers & Huber, San Francisco, Cal., for appellant.

James Skelly Wright, Jr., Washington, D. C., argued for appellee; Howard T. Weir, Morgan, Lewis & Bockius, Washington, D. C., on brief.

Appeal from the United States District Court for the Northern District of California.

Before ANDERSON and TANG, Circuit Judges, and MURRAY, [FN*] District Judge.

FN* The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

640 F.2d 1051
(Cite as: 640 F.2d 1051)

J. BLAINE ANDERSON, Circuit Judge:

Appellant Irwin initiated this action in the lower court pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. s 552. It sought an order requiring disclosure by appellee Red Cross of certain financial information. Red Cross defended by asserting that it was not an “agency” of the Federal Government within the meaning of the FOIA. The controlling facts were not disputed, and cross-motions for summary judgment were made. Finding that Red Cross was not an “agency” as defined by 5 U.S.C. s 552(e), summary judgment was granted in favor of Red Cross, from which Irwin appeals. We affirm the lower court's decision.

Irwin strongly contends that this court should hold Red Cross subject to the requirements of the FOIA because it has generally been regarded as a federal agency and characterized as such by various state and federal government entities and officials, and by the Red Cross itself. Specifically, Irwin argues that Red Cross' ability to avoid the requirements of various state regulatory statutes because of its relationship with the federal government is entirely inconsistent with its assertion of non-agency status. In addition, Irwin directs us to the Supreme Court's decision in which the Red Cross was held to be “an instrumentality of the United States for purposes of immunity from state taxation....” Department of Employment v. United States, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966).

[1] Even though this argument is intuitively appealing, we think it misses the mark. It is significant that none of the above characterizations were made within the context of the FOIA. Because Congress has expressly defined those agencies to which the statute applies, the relevance of characterizations of an entity in different contexts is substantially diminished. The only issue before this court is whether the Red Cross is an “agency” for purposes of the Freedom of Information Act, 5 U.S.C. s 552.

Prior to November, 1974, the requirements of the FOIA were applicable only to “agencies” as defined in section 2(a) of the Administrative Procedure Act, 5 U.S.C. s 551(1). With certain specific exceptions not relevant to this discussion, ***1053**section 551(1) defines “agency” to mean “each authority of the Gov-

ernment of the United States, whether or not it is within or subject to review by another agency.” Although this definition was viewed as unsatisfactory by most courts, a broad standard was eventually developed. In Lombardo v. Handler, 397 F.Supp. 792 (D.D.C.1975), aff'd, 546 F.2d 1043 (D.C.Cir.1976), cert. denied, 431 U.S. 932, 97 S.Ct. 2639, 53 L.Ed.2d 248 (1977), the court's reference to the legislative history of s 551(1) led to the following observation:

“The theme that runs through the legislative history of section 2 is that an administrative agency is a part of government which is ‘generally independent in the exercise of (its) functions’ and which ‘by law has authority to take final and binding action’ affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication.”

Id. 397 F.Supp. at 795, quoting Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U.Pa.L.Rev. 1, 9 (1970); see also, Washington Research Project, Inc. v. Dept. of Health, Education and Welfare, 504 F.2d 238, 248, 248 n. 15 (D.C.Cir.1974), cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975). This concept of “substantial independent authority,” therefore, was the focal point of analysis under s 551(1). See Lombardo, supra, 397 F.Supp. at 795 (and the cases cited therein).

On November 21, 1974, the Freedom of Information Act, 5 U.S.C. s 552, was amended to include s 552(e), which provides as follows:

“For purposes of this section, the term ‘agency’ as defined in section 551(1) of this title includes any executive department, military department, Government Corporation, Government controlled corporation; or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”

Irwin does not contend, nor do we think it could, that the Red Cross is an agency under s 551(1) as that section was interpreted by the courts. Rather, it argues that Red Cross' relationship with the federal government is sufficient to include it within the language of s 552(e) as either a government-controlled corporation, or other establishment in the executive

640 F.2d 1051
(Cite as: 640 F.2d 1051)

branch of the Government.

It is true, as Irwin argues, that section 552(e) was intended to expand the definition of “agency” to include entities that may not have been considered agencies under the act prior to the amendment. On March 5, 1974, the Committee on Government Operations released its report on the proposed amendment. In pertinent part, it reads:

“DEFINITION OF ‘AGENCY’

“For the purposes of this section, the definition of ‘agency’ has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S.Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of ‘agency’ for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

“The term ‘establishment in the Executive Office of the President,’ as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

“The term ‘Government corporation,’ as used in this subsection, would include a corporation that is a wholly Government-owned enterprise, established by Congress*1054 through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation.

“The term ‘Government controlled corporation,’ as used in this subsection, would include a corporation which is not owned by the Federal Government, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB).” (emphasis in original)

H.R.Rep.No.93-876, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 6267, 6274.[FN1] In its report dated October 1, 1974, the Committee of Conference modified this definition of “government controlled corporation” to exclude “corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting.” Joint Explanatory Statement of the Committee of Conference, Conference Report No. 93-1200, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 6285, 6293.

FN1. In this report the Committee noted that the Departments of Defense and Justice uniformly opposed virtually every proposal to strengthen and clarify the Act. H.R.Rep.No.93-876, supra, at 6275. It included in an appendix to its report the views of those departments. In pertinent part, the Justice Department's letter reads:

“(The proposed amendment) redefines an agency for purposes of this Act to include executive and military departments, Government owned or controlled corporations, any independent regulatory agency, or other establishment in the Executive Branch including the Executive Office of the President. We cannot determine from this language whether or not the Act would be extended to include groups such as: The American National Red Cross, the Girl Scouts of America, National Academy of Sciences, the Veterans of Foreign Wars, or the Daughters of the American Revolution. Some clarification would seem appropriate.”

(1974) U.S.Code Cong. & Ad.News 6276, 6281. All of these groups referred to in the Justice Department's letter are included in the list of organizations found in Title 36 of the U.S.Code, which is entitled “Patriotic Societies and Observances.” 36 U.S.C. s 1 et seq. The complete absence of these organizations in the Committee's examples of entities subject to the FOIA suggests, albeit by way of negative impli-

640 F.2d 1051
(Cite as: 640 F.2d 1051)

cation, that these organizations were not intended to fall within the Act's coverage. We have chosen to footnote this information because its support of the decision we reach is not needed.

[2] We think these examples furnish a helpful starting point and aid in the difficult task of discerning the limits of the Act's intended coverage. Nonetheless, the true extent of the Act's expanded coverage under section 552(e) is a matter to be developed by the courts on a case-by-case basis. This decision-making process is an unavoidable consequence resulting from "the 'myriad organizational arrangements' adopted 'for getting the business of the government done.'" Public Citizen Health Research Group v. Dept. of Health, Education and Welfare, 449 F.Supp. 937, 940 (D.D.C.1978). Therefore, each arrangement must be examined in its own context. Washington Research Project, *supra*, 504 F.2d at 246.

Moreover, this vast diversity of organizational arrangements undermines the precedential value of prior decisions. The characteristics of separate entities may differ so drastically, both quantitatively and qualitatively, that no meaningful comparison between the two can be made. We recognize the shortcomings of this developmental process, and the fact that in some cases it is wholly inadequate in terms of the certainty and predictability of the Act's applicability, but this is the inherent and inevitable course we must follow.

[3] Turning to the case at hand, Irwin argues that Red Cross is an agency within § 552(e) because it is either a Government controlled corporation, or other establishment in the executive branch of the Government. In the context within which the Red Cross operates, we think it is unnecessary to distinguish between the two because regardless of its label, be it a department, corporation, office, etc., a threshold showing of substantial federal control or supervision is required before an entity can *1055 be characterized as "federal" for some purpose. Forsham v. Harris, 445 U.S. 169, 180-81, 100 S.Ct. 978, 984-85, 63 L.Ed.2d 293, 304 (1980); Rocap v. Indiek, 539 F.2d 174, 177 (D.C.Cir.1976); Public Citizens, *supra*, 449 F.Supp. at 941; Lombardo, *supra*, 397 F.Supp. at 802. It is the existence of this element of substantial federal control that distinguishes those entities that can be fairly denominated as federal agencies under the FOIA

from the organizations whose activities may be described as merely quasi-public or quasi-governmental. It must be recognized that the requisite degree of federal control, however, is manifested in various forms and usually consists of a confluence of several "federal" characteristics. The cases just cited are illustrative.

In Forsham v. Harris, *supra*, one issue addressed by the Court was whether the information generated by the University Group Diabetes Program (UGDP) was subject to disclosure under the FOIA. The UGDP was funded solely by grants awarded by the National Institute of Arthritis, Metabolism and Digestive Diseases (NIAMDD), a federal agency statutorily authorized to award the grants. As a consequence of the awards, the NIAMDD exercised a certain amount of supervision over the funded activity. The Court decided that the UGDP was not an "agency," holding that a private recipient of a federal grant is not an agency under the FOIA "absent extensive, detailed, and virtually day-to-day supervision." 445 U.S. at 180, 100 S.Ct. at 984, 63 L.Ed.2d at 304.

In Rocap v. Indiek, *supra*, the court concluded that the Federal Home Loan Mortgage Corporation (FHLMC) is an agency subject to the requirements of the FOIA. The court found that the "substantial federal control over its day-to-day operations" marked the dividing line between it and similar organizations that were not intended to be included within the 1974 expansion. 539 F.2d at 177. Several characteristics of the FHLMC were deemed significant to the court's determination. The FHLMC is federally chartered, its board of directors consists solely of federal officers appointed by the President, it is subject to virtual day-to-day governmental supervision and control over its business transactions, and to federal audit and reporting requirements. The Corporation is expressly designated an "agency" and its employees are officers and employees of the United States, for a number of purposes. Furthermore, it is entitled to make and enforce such bylaws, rules, and regulations as may be necessary or appropriate to carry out the purposes and provisions of its enabling act. *Id.* at 180.

The National Capital Medical Foundation, Inc. (NCMF) was the entity under consideration in Public Citizens Health Research Group v. Dept. of Health, Education and Welfare, *supra*. The NCMF owed certain statutory obligations to HEW, having been des-

640 F.2d 1051
(Cite as: 640 F.2d 1051)

ignated by HEW as a Professional Standards Review Organization pursuant to 42 U.S.C. s 1320c-1 (Supp. V 1975). As such, it was required to review health care provided to hospital patients covered by Medicaid and Medicare and to make final and binding determinations as to whether the care rendered was necessary and therefore qualified for federal reimbursement. 449 F.Supp. at 938. Even though the 1974 amendments had long since been in operation, the court chose to rely on the definition provided by s 551(1). Therefore, the court concluded that the important consideration was whether NCMF had any authority in law to make decisions. The NCMF had such authority and exercised it daily. While believing that that fact alone may have been decisive, the court proceeded to identify other factors that we think are relevant to a determination under s 552(e). Specifically, the NCMF was financed by the United States, was a creature of statute, performed an executive function, and operated under “direct, pervasive, continuous regulatory control affecting even minutia of the procedures and functions.” *Id.* at 941.

Finally, in *Lombardo v. Handler*, *supra*, the National Academy of Sciences was held not to be an agency under s 552(e). Many factors were offered to demonstrate the Academy's agency status. The Academy was established by Act of Congress and *1056 reports thereto. It is obligated to perform investigations, etc. for the departments of the federal government upon request. Congress can restrict its real estate holdings. The Academy had been mentioned in several Acts of Congress which gave some legal significance to the reports or recommendations of the Academy. Approximately 75% of its income, amounting to over \$40,000,000 in fiscal year 1974, was derived from contracts with the United States. The court rejected the contention that the Academy was an establishment in the executive branch, finding that “it neither functions under the President nor was it created by Congress or the President.” 397 F.Supp. at 802. The court held it was not a government controlled corporation “for no significant control by the federal government has been shown.” *Id.* Finally, it was “not an authority of the government nor (did) it perform government functions like an administrative agency.” *Id.*

It is against this backdrop that we consider the characteristics and the federal connections of the Red Cross.[FN2] The origins of the American National

Red Cross can be traced to a private organization incorporated as the American National Association of the Red Cross in 1881 under the laws of the District of Columbia. It was not until 1900, however, that this precursor organization acquired a government charter and its present name. The Red Cross' present charter dates from an Act of Congress in 1905. See, 36 U.S.C. s 1 et seq.

FN2. For the interested reader, a more detailed discussion of the Red Cross' origin, development, and operations can be found at Sturges, *The Legal Status of the Red Cross*, 56 *Mich.L.Rev.* 1 (1957). This reference is not intended to infer either the approval or disapproval by this court of the author's conclusions.

Membership in the American National Red Cross is open to all the people of the United States, its Territories, and dependencies, upon payment of the sums specified from time to time in the bylaws. 36 U.S.C. s 4a. The vast majority of its workers are volunteers. In fiscal year 1977, an estimated 1,441,364 persons engaged in Red Cross activities without compensation. The Supreme Court has noted that Red Cross employees are not employees of the United States. Dept. of Employment v. United States, *supra*, 385 U.S. at 360, 87 S.Ct. at 467. Those employees who receive compensation are covered by the organization's own pension plan and pay Social Security taxes.

The United States does not appropriate any funds to assist the Red Cross in implementing its charter powers and duties. Rather, the only federal money received by the Red Cross is in connection with various government contracts and specific purpose grants. For example, in fiscal year 1977, the Red Cross received approximately .39% of its total income from government contracts or grants. In fiscal years 1976 and 1975, the percentage was 1.56% and 1.36%, respectively. These contracts or grants involved such activities as the Indo-China Refugee Relief Program and Blood Research and Development Contracts and Grants. To meet its operating expenses, the Red Cross depends primarily upon private voluntary contributions and revenues generated by its blood services.

It is settled that government officials do not direct the

640 F.2d 1051
(Cite as: 640 F.2d 1051)

everyday affairs of the Red Cross. Dept. of Employment, supra, 385 U.S. at 360, 87 S.Ct. 467. This does not mean, however, that it is totally free from federal supervision. The federal government, pursuant to 36 U.S.C. ss 13, 15, has made buildings in the District of Columbia available to the Red Cross, but section 13 also provides that the buildings shall remain the property of the United States, and that the Red Cross is charged with the responsibility, the care, keeping, and maintenance of the buildings without expense to the United States. The Red Cross is required to make and transmit to the Secretary of Defense a report of receipts and expenditures of whatever kind, and the report is audited by the Department of Defense and forwarded to Congress. 36 U.S.C. s 6. The Department of Defense is reimbursed by the Red Cross for the costs of the audit. 36 U.S.C. s 7.

***1057** Moreover, some degree of federal control or supervision can be inferred from the power of appointment to the Red Cross' governing body which is vested in the President of the United States. The Board of Governors of the Red Cross consists of fifty members. Eight governors are appointed by the President, one of which shall act as the principal officer of the corporation. The remaining seven appointees "shall be officials of departments and agencies of the Federal Government, whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives." 36 U.S.C. s 5(a). Thirty governors are elected by the various local chapters at the national convention. 36 U.S.C. s 5(b). The remaining twelve positions are selected as members-at-large by the Board of Governors through an electoral process. 36 U.S.C. s 5(c).

The extent of federal control that derives from the use of public buildings, the financial reporting and auditing requirements, and the President's appointment power can not appropriately be assessed in a vacuum. The characteristics that indicate federal control must be viewed in connection with the factors that indicate the contrary. In addition to those factors previously mentioned, we must consider the specific purposes of the corporation as expressed in the enabling legislation, and the conditions it must comply with to retain its membership in the International Red Cross.

Broadly stated, the major purposes of the Red Cross

are (1) to furnish volunteer aid to the sick and wounded of Armed Forces in time of war, in accordance with the spirit and conditions of the Geneva Conference and other similar treaties or conventions to which the United States has given its adhesion or may hereafter give its adhesion, and (2) to carry on a system of national and international relief in time of peace so as to mitigate the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same. (emphasis added). 36 U.S.C. s 3.

Finally, it must be recognized that the American National Red Cross is a "national society" within the organizational framework of the International Red Cross. Sturges, *The Legal Status of the Red Cross*, 56 Mich.L.Rev. 1, 2 (1957). Among the conditions necessary for recognition by the International Committee of the Red Cross are: recognition by the organization's legal government as a Voluntary Aid Society; possession of autonomous status which allows it to operate in conformity with the fundamental principles of the Red Cross, as formulated by the International Red Cross Conference; availability of membership to any of its nationals regardless of race, sex, class, religion, or political opinions; and adherence to the fundamental principles of the Red Cross "impartiality; political, religious and economic independence; the universality of the Red Cross and the equality of all National Societies." Handbook, I.R.C. 319-320; see, Sturges, *supra*, at 2-3 n.4.

As reflected by these conditions, a dominant concern of the Red Cross is that it be viewed by the peoples of the world as an institution which owes its primary allegiance, not to any nation or group of nations, but to the alleviation of human suffering. As The Honorable Basil O'Connor, Chairman, explained in the Annual Report of the American National Red Cross Corporation for 1946, "... the International Red Cross Committee has always maintained that the national societies, while cooperating closely and cordially with their own governments and with other agencies, should at the same time remain independent." See, Sturges, *supra*, at 12 n.30.

Viewing the Red Cross in its own context, as we must, and giving careful consideration to the various relevant factors that may indicate the requisite magnitude of governmental control, we are convinced that

640 F.2d 1051
(Cite as: 640 F.2d 1051)

the Red Cross is an organization that was not intended to be included within the terms of the FOIA. The Red Cross is undoubtedly a close ally of the United States government, but its operations are not subject to substantial federal control or supervision.*1058 Therefore, the judgment of the district court is

AFFIRMED.

C.A.Cal., 1981.
Irwin Memorial Blood Bank of San Francisco Medical Soc. v. American Nat. Red Cross
640 F.2d 1051

END OF DOCUMENT

C

Supreme Court of Washington.
 McAVOY

v.

WEBER et ux. (HOME OWNERS' LOAN CORPORATION, Garnishee).
 No. 27290.

March 24, 1939.

Department 1.

Action by W. G. McAvoy against F. C. Weber and L. S. Weber, his wife, wherein plaintiff secured judgment and sued out a writ of garnishment directed to the Home Owners' Loan Corporation. From a judgment for the plaintiff on the pleadings, the garnishee defendant appeals.

Affirmed.

West Headnotes

[1] Garnishment 189 ↪ 1

189 Garnishment

189I Nature and Grounds

189k1 k. Nature and Purpose of Remedy.

Most Cited Cases

The right to garnishment exists only when clearly sanctioned by statutory law.

[2] Garnishment 189 ↪ 17

189 Garnishment

189II Persons and Property Subject to Garnishment

189k17 k. Municipal Corporations and Officers. Most Cited Cases

General statutory provisions authorizing garnishment do not, in absence of clearly expressed legislative intent, apply to municipal or quasi-municipal corporations, or other public bodies charged with performance of governmental functions.

[3] Garnishment 189 ↪ 17

189 Garnishment

189II Persons and Property Subject to Garnishment

189k17 k. Municipal Corporations and Officers. Most Cited Cases

Enactment of amendment to garnishment statute making counties, cities, towns, school districts, and other municipal corporations subject to garnishment impliedly recognized that statute prior to amendment did not apply to municipal or other public corporations, agencies, and officers, and, since amending statute does not specifically or inferentially provide that public corporations shall be subject to garnishment, such corporations would still be exempt. Rem.Rev.Stat. §§ 680, 680-1.

[4] United States 393 ↪ 53(4)

393 United States

393I Government in General

393k53 Corporations and Special Instrumentalities Controlled by United States

393k53(4) k. Organization, Existence and Status. Most Cited Cases

(Formerly 393k53)

The Home Owners' Loan Corporation is an "instrumentality of the United States." Home Owners' Loan Act 1933, 12 U.S.C.A. § 1461 et seq.

[5] Garnishment 189 ↪ 18

189 Garnishment

189II Persons and Property Subject to Garnishment

189k18 k. State or United States Government and Officers. Most Cited Cases

In view of garnishment statute permitting garnishment of state, counties, and municipalities, public policy in state does not prevent maintenance of garnishment action against Home Owners' Loan Corporation. Home Owners' Loan Act 1933, 12 U.S.C.A. § 1461 et seq.; Rem.Rev.Stat. §§ 680, 680-1.

[6] Garnishment 189 ↪ 18

189 Garnishment

189II Persons and Property Subject to Garnishment

189k18 k. State or United States Government and Officers. Most Cited Cases

Garnishment of Home Owners' Loan Corporation to collect unpaid judgment against employee of corporation in no way interferes with powers or acts of sovereign, so as to invoke doctrine that public policy forbids disturbance of federal government by private litigation. Home Owners' Loan Act 1933, 12 U.S.C.A. § 1461 et seq.; Rem.Rev.Stat. § 680.

[7] Evidence 157 ↪ 22(1)

157 Evidence

157I Judicial Notice

157k22 Corporations and Associations and Members Thereof

157k22(1) k. In General. Most Cited Cases

It is matter of common knowledge that Home Owners' Loan Corporation has many employees.

[8] Garnishment 189 ↪ 18

189 Garnishment

189II Persons and Property Subject to Garnishment

189k18 k. State or United States Government and Officers. Most Cited Cases

Assuming Home Owners' Loan Corporation is engaged in public function, Congress did not expressly provide immunity of corporation from garnishment, and from fact that Congress specifically exempted corporation from taxation there is strong inference that it did not intend to confer unexpressed exemption. Home Owners' Loan Act 1933, 12 U.S.C.A. § 1461 et seq.

[9] Garnishment 189 ↪ 18

189 Garnishment

189II Persons and Property Subject to Garnishment

189k18 k. State or United States Government and Officers. Most Cited Cases

Home Owners' Loan Corporation is a "private corporation" engaging in business of purely commercial character, and is subject to service of garnishment within the state, notwithstanding that it was designed, and is owned, controlled, and supported as an instru-

ment of the United States. Home Owners' Loan Act 1933, 12 U.S.C.A. § 1461 et seq.; Rem.Rev.Stat. § 680.

*371**449 Appeal from Superior Court, King County; Calvin S. Hall, judge. Tom S. Patterson, Russell F. Stark, and Pendleton Miller, all of Seattle, for appellant.

Koenigsberg & Sanford, of Seattle, for respondent.

STEINERT, Justice.

This appeal grows out of a garnishment proceeding. Plaintiff, having recovered judgment against F. C. Weber and wife, sued out a writ of garnishment directed to Home Owners' Loan Corporation which employed Weber as supervisor of its property management section. The garnishee defendant appeared specially and moved to quash the writ on the ground that the corporation was an instrumentality of the United States of America and not subject to garnishment. The motion was denied. Preserving its special appearance, the garnishee defendant then *372 answered admitting that it was indebted to Weber, its employe, for salary earned, in the sum of \$312.48, which it was ready, willing, and able to pay to Weber were it not for the writ of garnishment. The answer reiterated the grounds stated in the motion to quash, and further alleged that the garnishee defendant was incorporated pursuant to the Home Owners' Loan Act passed by Congress June 14, 1933; that its entire business and scope of operations were prescribed by the act of its creation; and that, therefore, the salary of its employe was not subject to garnishment by process from any state court. Plaintiff thereupon **450 moved for judgment on the pleadings. The court granted the motion, and entered judgment against the garnishee defendant in the sum of \$234, which was the amount owing to plaintiff upon his judgment against the principal defendants. The garnishee defendant has appealed.

The question presented for determination is whether or not the Home Owners' Loan Corporation is subject to garnishment. The superior court answered the question in the affirmative.

[1] Garnishment is a purely statutory proceeding. Morris & Co. v. Canadian Bank of Commerce, 95 Wash. 418, 163 P. 1139; Pacific Coast Paper Mills v.

Pacific Mercantile Agency, 165 Wash. 62, 4 P.2d 886; Van Moorhem v. Roche Harbor Lime & Cement Co., 169 Wash. 354, 13 P.2d 496. The right to garnish exists only when clearly sanctioned by the statutory law. 28 C.J. 25, § 13.

Rem.Rev.Stat. § 680, originally enacted in 1893, provides, among other things, that a writ of garnishment may issue in a case where the plaintiff has a judgment, wholly or partially unsatisfied, in the court from which he seeks the writ. On its face, this section of the statute is general in its *373 application, and comprehends any case wherein the plaintiff holds an unsatisfied judgment against any person, individual or corporate, although it contains no express provision either permitting or prohibiting garnishment of a public corporation.

[2] However, according to the weight of authority, although there are many cases to the contrary, general provisions authorizing garnishment do not, in the absence of clearly expressed legislative intent, apply to municipal or quasi municipal corporations, or other public bodies charged with the performance of governmental functions. 28 C.J. 56, § 67.

In recognition of that rule this court has held that Rem.Rev.Stat. § 680, does not apply to counties. State ex rel. Summerfield v. Tyler, 14 Wash. 495, 45 P. 31, 37 L.R.A. 207, 53 Am.St.Rep. 878; Flood v. Libby, 38 Wash. 366, 80 P. 533, 107 Am.St.Rep. 851. Those decisions were rested on grounds of public policy. Hanson v. Hodge, 92 Wash. 425, 159 P. 388.

[3] In 1915, the statute was amended (Rem.Rev.Stat. § 680-1), to make counties, cities, towns, school districts and *other municipal corporations* subject to garnishment after judgment. By thus expressly extending the scope of the original statute, as previously limited by the Summerfield and Flood cases, supra, the legislature impliedly recognized that the statute prior to its amendment did not apply to municipal or other public corporations, agencies, and officers. However, it will be noted that the amending statute, Rem.Rev.Stat. § 680-1, does not specifically or inferentially provide that public corporations performing governmental functions shall be subject to garnishment. Such corporations, under the generally accepted rule, would still be exempt.

The question then arises as to the legal status of the

Home Owners' Loan Corporation, that is, *374 whether, because of its peculiar nature and function, it is to be considered a public corporation immune from garnishment, or a private corporation subject to such process.

In form, the corporation is undoubtedly a private one. Whether it is such in essence depends upon the purposes for which it was created by the act and the nature of the activities which it exercises thereunder.

The corporation was created under the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U.S.C.A. § 1461 et seq.

The purposes of the act, according to its title, were to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who were unable to amortize their debts elsewhere, and to increase the market of the obligations of the United States. The act authorized the Federal Home Loan Board, then in existence, to create a corporation to be known as Home Owners' Loan Corporation 'which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section [§ 4(a), 12 U.S.C.A. § 1463(a)].'

The act provided that the capital stock of the corporation was to be not in excess of \$200,000,000, all of which was to be subscribed for by the secretary of the treasury on behalf of the United States. The corporation was authorized, for a period of three years, to issue bonds to the extent of \$4,750,000,000 with which to obtain**451 funds for carrying out the purposes of the act; to exchange those bonds for home mortgages and other obligations and liens secured by real estate; to *375 make cash loans to such home owners as were unable to obtain loans from ordinary lending agencies; and to redeem homes lost to the owners by foreclosure or forced sale. Payment of the bonds issued by the corporation was guaranteed, both as to principal and interest, by the United States. The corporation was authorized to select, employ and fix the compensation of such officers, employees, attorneys, etc., as it deemed necessary in the performance

of its duties, and to determine its necessary expenditures and the manner in which they should be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The bonds of the corporation were exempted from all taxation except surtaxes, state inheritance taxes, and gift taxes, and the corporation and all its property were exempted from all taxes except real property taxes. The corporation was given free use of the mails. Upon liquidation, all surplus or accumulated funds were to be paid into the United States treasury.

[4] It thus appears from the act itself that the corporation is an 'instrumentality of the United States.' We have ourselves heretofore so recognized it. Home Owners' Loan Corporation v. Rawson, Wash., 83 P.2d 765. It also appears that all of the capital stock of the corporation is owned and held by the United States. But it is equally apparent that the corporation was created for the purpose of engaging in business of a purely commercial character such as theretofore had been conducted by private individuals and corporations. Its operations consisted of loaning money and refinancing mortgages on homes. Although it was an enterprise which, by reason of its scope and magnitude, affected a considerable number of individuals,*376 it nevertheless simply exhibited a multiplication of private transactions. Its object was not to aid the government in the exercise of its sovereign powers, legislative, executive, or judicial, nor was it designed to facilitate some project or means by which the government as such was to be protected or benefited. The current of advantage ran in the opposite direction. The corporation was simply an instrument or means by which the government rendered temporary financial assistance to certain individuals. Its operations involved merely a series of ordinary business transactions wherein the corporation would lend to a certain class of borrowers, provided the security was ample, and wherein the borrower might elect, but was not compelled, to borrow. The government did not undertake to accomplish the purposes of the act through its own governmental agencies, but created a new and distinct entity in the form of a private corporation. If there be any ultimate profit or loss in the final liquidation of the corporation, the government takes the consequences just as private individuals or corporations would do under a similar experience. If there be a profit, no governmental need will have been subserved; if there be a loss, no governmental function will have been impaired. Although the cor-

poration was designed, and is owned, controlled, and supported as an instrumentality of the United States, it, nevertheless, has the character and all the attributes of a private domestic corporation.

It is urged, however, that even if the corporation is not engaged in accomplishing the ends for which the federal government was established, the peculiar character of the corporation and its functions are such that public policy allowing an immunity from garnishment*377 ought to be extended to encompass such an agency.

[5] So far as the state is concerned, we see nothing in its public policy inimical to the maintenance of a garnishment action against appellant. Under our present garnishment statute the state, counties, and municipalities may be garnished. There can be no reason for exempting an agency which, even though it be an instrumentality of the United States, is nevertheless a distinct entity with no sovereign powers, and having all the attributes of a private corporation engaged in commercial transactions. If the corporation be, in law, a private one, it would be against the express public policy of this state to exempt it from garnishment.

[6] Appellant cannot here rely upon the doctrine that public policy forbids a disturbance of the federal government by private litigation, because the process of garnishment in such cases as this will in no way interfere with the powers or acts of the sovereign. The Home Owners' Loan act authorized the corporation to sue and be sued in any court of competent jurisdiction,**452 federal or state. If it can sue upon its contracts, it surely can garnish. If it is engaging in a commercial business, under the protection and privileges afforded by the law of a state, it should be amenable to all the lawful process, including garnishment, afforded by such state against other corporations doing a similar business.

[7][8] But even if the corporation were considered to be engaged in a public function, it does not appear to us that it was the intent of Congress to create an agency immune from garnishment. It is a matter of common knowledge that the corporation has many employees. The government certainly has no desire that they shall escape the payment of their honest debts. If, in passing*378 the act, the Congress of the United States felt that the business of loaning money

through its instrumentality had no relation to the personal honesty of its employes in their private transactions, and that such business might in some way be jeopardized by allowing the corporation to be garnished, it could easily have written into the act a clause providing immunity from such process. Congress did not do that expressly, and we think it a fair inference that it did not intend the same result by implication. From the fact that Congress specifically exempted the corporation from taxation there is a strong inference that it did not intend to confer an unexpressed exemption, particularly one that affected a process ordinarily incident to suit, to which appellant was, by the terms of the act, made liable.

In the consideration of this case, many authorities have come to our attention, both by citation on the part of counsel, and by independent search. For the most part, however, those cases involve questions that are fundamentally different from the one now before us, and, while, as authorities, they are instructive in a general way, they do not afford any satisfactory guidance to the solution of our present problem. For this reason we do not discuss them. However, there are four cases which bear directly upon the question presented here, and to these we will briefly advert.

In the case of Gill v. Reese, 53 Ohio App. 134, 4 N.E.2d 273, 274, plaintiff recovered judgment against defendant, and thereafter procured a writ of garnishment against Home Owners' Loan Corporation. The garnishee defendant filed a motion to quash the writ. The motion was granted, and the plaintiff appealed. In reversing the order of the trial court, the appellate court said: *379 'Great confusion has arisen in the submission of this case to this court on the proposition whether or not the corporation itself is a public one. There can be no question but that the corporation is an instrumentality of the government, engaged in a great undertaking affecting the public. The distinction failed to be recognized is that, while the undertaking itself has the characteristics of a public enterprise, yet the acts have been authorized by Congress itself to be performed by and through the arm of a private corporation, rather than by means of the exercise of power by a government officer, or by the legislative body itself. The authorities are uniform in establishing the law to be that such a corporation is a private corporation.' The broad principle of law applied by the court in that case was that it was in

general highly desirable that when governmental agencies are used in industrial and commercial ventures, they should be subject to the same liabilities and to the same tribunals as other persons or corporations similarly involved. Concerning the question of public policy, the court held that the rule of immunity was not applicable, for the reason that in answering such process the corporation would not be interrupting its functions, but rather would be furthering its general purpose in seeing that its funds were placed in the hands of those to whom they were due.

In Central Market, Inc., v. King, 132 Neb. 380, 272 N.W. 244, wherein the trial court refused to quash a writ of garnishment directed to Home Owners' Loan Corporation, the facts were almost identical with those in the case at bar. In affirming the order of the lower court, the supreme court of Nebraska held that the Home Owners' Loan Corporation must be regarded as a separate entity even though all its capital stock was held by the United States, and approved the doctrine that when the United States enters into commercial*380 business it abandons its sovereign capacity, and is to be treated like any other corporation. Upon the subject of public policy, the court expressed itself in much the same language as that used by the Ohio court in the Gill case, supra.

In H. & P. Paint Supply Co., Inc., v. Ortloff, 159 Misc. 886, 289 N.Y.S. 367, wherein the facts were similar to those in the two preceding cases, the Home Owners' **453 Loan Corporation, as garnishee, made the contention that as an instrumentality of the federal government it could not be subjected to third party proceedings supplemental to judgment. In its opinion, the court pointed out the various characteristics wherein the corporation resembled a private corporation, and held that as a federal instrumentality it was not exempt from such process. The reason given by the court was that any inconvenience caused by garnishment would not interfere with the performance of the purposes for which the corporation was created, and that allowance of the process was not violative of public policy, or in derogation of the act. The court further held that, under all of the attendant circumstances, exemption from process should not be implied.

The three cases to which reference has just been made were cited with approval in the following: Biedermann v. Home Owners' Loan Corporation,

D.C., 20 F.Supp. 23;Pennell v. Home Owners' Loan Corporation, D.C., 21 F.Supp. 497;Casper v. Regional Agr. Credit Corporation, 202 Minn. 433, 278 N.W. 896. Cf. Keifer & Keifer v. Reconstruction Finance Corp., 59 S.Ct. 516, 83 L.Ed. 784, decided by the United States Supreme Court February 27, 1939.

On the other hand, the case of Home Owners' Loan Corporation v. Hardie & Caudle, 171 Tenn. 43, 100 S.W.2d 238, 108 A.L.R. 702, supports the view that the corporation is not subject to garnishment because it is a governmental agency with its funds in the treasury of the United States, and because the act creating the *381 corporation discloses neither express nor implied intention that the corporation shall be subject to garnishment.

[9] We are in accord with the views expressed by the Ohio, Nebraska, and New York courts, and, as a conclusion to what we have already stated, we hold that appellant is a private corporation subject to garnishment in actions of this kind.

Since a private corporation is shown to have in its possession funds owing to its employe against whom there exists an unsatisfied judgment, the case comes within Rem.Rev.Stat. § 680, and a writ of garnishment is effective to reach such funds.

The judgment is affirmed.

BLAKE, C. J., and MAIN, ROBINSON, and JEFFERS, JJ., concur.

Wash. 1939

McAvoy v. Weber

198 Wash. 370, 88 P.2d 448

END OF DOCUMENT

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

▷

Supreme Court of the United States
M'CULLOCH

v.

STATE OF MARYLAND *et al.*
February Term, 1819

****1** *United States Bank.-Implied power.-Taxing power.*

Congress has power to incorporate a bank.

The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the constitution, form the supreme law of the land.

There is nothing in the constitution of the United States, similar to the articles of confederation, which excludes incidental or implied powers.

If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted that end, and which are not prohibited, may constitutionally be employed to carry it into effect. ^{FN1}

^{FN1} See Hepburn v. Griswold, 8 Wall. 603; Knox v. Lee, 12 Id. 533.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not

prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognisance.

The act of the 10th April 1816, c. 44, to 'incorporate the subscribers to the Bank of the United States,' is a law made in pursuance of the constitution.

The bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The state, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. ^{FN2}

West Headnotes

Banks and Banking 52 ↪ 233

52 Banks and Banking

52IV National Banks

52k233 k. Power to Control and Regulate.

Most Cited Cases

Congress has power to incorporate a bank.

Corporations 101 ↪ 4

101 Corporations

101I Incorporation and Organization

101k4 k. Power to Incorporate. Most Cited

Cases

Though the power of establishing a corporation is not among the enumerated powers granted by the constitution to the general government, yet such power may be exercised by it whenever it becomes an appropriate means of exercising any of the powers expressly granted.

Taxation 371 ↪ 2064

371 Taxation

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

371III Property Taxes

371III(A) In General

371k2062 Power of State

371k2064 k. United States Entities, Property, and Securities. Most Cited Cases (Formerly 371k9)

This doctrine does not apply to a tax on the real property of the bank, in common with other real property in a state, nor to a tax on the interest of the citizen of a state in the bank, in common with other similar property throughout the state.

Taxation 371  2006

371 Taxation

371I In General

371k2004 Power of State

371k2006 k. United States Entities, Property, and Securities. Most Cited Cases (Formerly 371k9)

The state within which a branch of the United States Bank may be established cannot constitutionally tax it, nor pass any law to control or impede its operations, or the operations of the parent bank.

FN2 But it is competent for congress to confer on the state governments the power to tax the shares of the national banks, within certain limitations; the power of taxation under the constitution, is a concurrent one. Van Allen v. The Assessors, 3 Wall. 585. NELSON, J. But, says the learned judge, congress may, by reason of its paramount authority, exclude the states from the exercise of such power. Ibid. It is difficult, however, to perceive in what part of the constitution, the power is conferred on congress to erect a multitude of moneyed corporations, in the several states, absorbing \$400,000,000 of the capital of the country, and to exempt it from state taxation.

ERROR to the Court of Appeals of the State of Maryland. This was an action of debt, brought by the defendant in error, John James, who sued as well for himself as for the state of Maryland, in the county court of Baltimore county, in the said state, against the plaintiff in error, McCulloch, to recover certain penalties, under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following

statement of facts, agreed and submitted to the court by the parties, was affirmed by the court of appeals of the state of Maryland, the highest court of law of said state, and the cause was brought, by writ of error, to this court.

It is admitted by the parties in this cause, by their counsel, that there was passed, on the 10th day of April 1816, by the congress of the United States, an act, entitled, 'an act to incorporate the subscribers to the Bank of the United States;' and that there was passed on the 11th day of February 1818, by the general assembly of Maryland, an act, entitled, 'an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature,' *318 which said acts are made part of this statement, and it is agreed, may be read from the statute books in which they are respectively printed. It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of congress aforesaid, did organize themselves, and go into full operation, in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did on the ___ day of ____ 1817, establish a branch of the said bank, or an office of discount and deposit, in the city of Baltimore, in the state of Maryland, which has, from that time, until the first day of May 1818, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank-notes and discounting promissory notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said president, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch, or office of discount and deposit, at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union. It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and *319 deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank-notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

respective bank-notes were not, nor was either of them, so issued, on stamped paper, in the manner prescribed by the act of assembly aforesaid. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch, or office of discount and deposit, have not, nor has either of them, paid in advance, or otherwise, the sum of \$15,000, to the treasurer of the Western Shore, for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the governor and council of the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

****2** The question submitted to the court for their decision in this case, is, as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in ***320** which are hereby agreed to be mutually released), if the court should be of opinion, that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for \$2500, and costs of suit. But if the court should be of opinion, that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs to the defendant.

It is agreed, that either party may appeal from the decision of the county court, to the court of appeals, and from the decision of the court of appeals to the supreme court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had, if a jury had been sworn and impannelled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon.

Copy of the act of the Legislature of the State of Maryland, referred to in the preceding statement.

An act to impose a tax on all banks or branches

thereof, in the state of Maryland, not chartered by the legislature.

Be it enacted by the general assembly of Maryland, that if any bank has established, or shall, without authority from the state first had and obtained, establish any branch, office of discount and ***321** deposit, or office of pay and receipt in any part of this state, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes, in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued, except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note, upon a stamp of twenty cents; every twenty dollar note, upon a stamp of thirty cents; every fifty dollar note, upon a stamp of fifty cents; every one hundred dollar note, upon a stamp of one dollar; every five hundred dollar note, upon a stamp of ten dollars; and every thousand dollar note, upon a stamp of twenty dollars; which paper shall be furnished by the treasurer of the Western Shore, under the direction of the governor and council, to be paid for upon delivery; provided always, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the treasurer of the Western Shore, for the use of state, the sum of \$15,000.

****3** And be it enacted, that the president, cashier, each of the directors and officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of \$500 for each and every offence, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding \$100 ***322** every penalty aforesaid, to be recovered by indictment, or action of debt, in the county court of the county where the offence shall be committed, one-half to the informer, and the other half to the use of the state.

And be it enacted, that this act shall be in full force and effect from and after the first day of May next.

***317** The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

vested in the national government.

This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state may hold in this institution, in common with other property of the same description throughout the state.

February 22d-27th, and March 1st-3d.

Webster, for the plaintiff in error,^{FN3} stated: 1. That the question whether congress constitutionally possesses the power to incorporate a bank, might be raised upon this record; and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped, that it was not now to be considered as an open question. It is a question of the utmost magnitude, deeply interesting to the government itself, as well as to individuals. The mere discussion of such a question may most essentially affect the value of a vast amount of private property. We are bound to suppose, that the defendant in error is well aware of these consequences, and would not have intimated an intention to agitate such a question, but with a real design to make it a topic of serious discussion, and with a view of demanding upon it the solemn judgment of this court. This *323 question arose early after the adoption of the constitution, and was discussed and settled, so far as legislative decision could settle it, in the first congress. The arguments drawn from the constitution, in favor of this power, were stated and exhausted in that discussion. They were exhibited, with characteristic perspicuity and force, by the first secretary of the treasury, in his report to the president of the United States. The first congress created and incorporated a bank. Act of 5th February 1791, ch. 84. Nearly each succeeding congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government. Individuals, it is true, have doubted, or thought otherwise; but it cannot be shown, that either branch of the legislature has, at any time, expressed an opinion against the existence of the power. The executive government has acted upon it; and the courts of law have acted upon it. Many of those who doubted or denied the existence of the powers, when first attempted to be exercised, have yielded to the first decision, and acquiesced in it, as a settled question. When all branches of the government have thus

been acting on the existence of this power, nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. Congress, by the constitution, is invested with certain powers; and as to the objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the constitution, *324 empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So, it has power to raise a revenue, and to apply it in the support of the government, and defence of the country; it may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war, or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam-frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was not in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it. These words, 'necessary and proper,' in such an instrument, are probably to be considered as synonymous. Necessarily, powers must here intend such powers as are suitable and *325 fitted to the object; such as are best and most useful in relation to the end proposed. If this be not so, and if congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the states. It is not for this court to decide, whether a bank, or such a bank as this, be the

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

best possible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them, in the two houses of congress. Here, the only question is, whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government, as to be fairly within the discretion of congress, when selecting means and instruments to execute its powers and perform its duties. A bank is not less the proper subject for the choice of congress, nor the less constitutional, because it requires to be executed by granting a charter of incorporation. It is not, of itself, unconstitutional in congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; *326 and, as means, take their character generally from their end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. The state governments create corporations to execute powers confided to their trust, without any specific authority in the state constitutions for that purpose. There is the same reason that congress should exercise its discretion as to the means by which it must execute the powers conferred upon it. Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed. Among other means, it has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown, that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.

FN3 This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland; and the government of the United States having directed their attorney general to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party.

**4 2. The second question is, whether, if the bank be constitutionally created, the state governments have

power to tax it? The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the *327 constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. The only inquiry, therefore, in this case is, whether the law of the state of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it? If it be not, then it is void; if it be, then it may be valid. Upon the supposition, that the bank is constitutionally created, this is the only question; and this question seems answered, as soon as it is stated. If the states may tax the bank, to what extent shall they tax it, and where shall they stop? An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the states may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state governments for its existence. This consequence is inevitable. The object in laying this tax, may have been revenue to the state. In the next case, the object may be to expel the bank from the state; but *328 how is this object to be ascertained, or who is to judge of the motives of legislative acts? The government of the United States has itself a great pecuniary interest in this corporation. Can the states tax this property? Under the confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that 'no impositions, duties or restrictions should be laid by any state on the property of the United States.' Is it supposed, that property of the United States is now subject to

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

the power of the state governments, in a greater degree than under the confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and must have, property locally existing in all the states; and may the states impose on this property, whether real or personal, such taxes as they please? Can they tax proceedings in the federal courts? If so, they can expel those judicatures from the states. As Maryland has undertaken to impose a stamp-tax on the notes of this bank, what hinders her from imposing a stamp-tax also on permits, clearances, registers and all other documents connected with imposts and navigation? If, by one, she can suspend the operations of the bank, by the other, she can equally well shut up the custom-house. The law of Maryland, in question, makes a requisition. The sum called for is not assessed on property, nor deducted from profits or income. It is a direct imposition on the power, privilege or franchise of the corporation. The act purports, also, to restrain *329 the circulation of the paper of the bank to bills of certain descriptions. It narrows and abridges the powers of the bank in a manner which, it would seem, even congress could not do. This law of Maryland cannot be sustained, but upon principles and reasoning which would subject every important measure of the national government to the revision and control of the state legislatures. By the charter the bank is authorized to issue bills of any denomination above five dollars. The act of Maryland purports to restrain and limit their powers in this respect. The charter, as well as the laws of the United States, makes it the duty of all collectors and receivers to receive the notes of the bank in payment of all debts due the government. The act of Maryland makes it penal, both on the person paying and the person receiving such bills, until stamped by the authority of Maryland. This is a direct interference with the revenue. The legislature of Maryland might, with as much propriety, tax treasury notes. This is either an attempt to expel the bank from the state; or it is an attempt to raise a revenue for state purposes, by an imposition on property and franchises holden under the national government, and created by that government, for purposes connected with its own administration. In either view, there cannot be a clearer case of interference. The bank cannot exist, nor can any bank established by congress exist, if this right to tax it exists in the state governments. One or the other must be surrendered; and a surrender on the part of the government of the United States would be a giving *330 up of those fundamental and essential powers without which the

government cannot be maintained. A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government, that congress should be able to exercise its constitutional powers, at its own discretion, without being subject to the control of state legislation. The question is not, whether a bank be necessary or useful, but whether congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the state governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of congress, establishing the bank, be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare, that congress can only exercise its constitutional powers, subject to the controlling discretion, and under the sufferance, of the state governments.

***5Hopkinson*, for the defendants in error, proposed three questions for the consideration of the court. 1. Had congress a constitutional power to incorporate the bank of the United States? 2. Granting this power to congress, has the bank, of its own authority, a right to establish its branches in the several states? 3. Can the bank, and its branches thus established, claim to be exempt from the ordinary *331 and equal taxation of property, as assessed in the states in which they are placed?

1. The first question has, for many years, divided the opinions of the first men of our country. He did not mean to controvert the arguments by which the bank was maintained, on its original establishment. The power may now be denied, in perfect consistency with those arguments. It is agreed, that no such power is expressly granted by the constitution. It has been obtained by implication; by reasoning from the 8th section of the 1st article of the constitution; and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution. If the bank be not 'necessary and proper' for this purpose, it has no foundation in our constitution, and can have no support in this court. But it strikes us, at once, that a power, growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circum-

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

stances which change; in a state of things which may exist at one period, and not at another. The argument might have been perfectly good, to show the necessity of a bank, for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then. That some of the powers of the constitution are of this fluctuating character, existing, or not, according to extraneous circumstances, has been fully recognised by this court at the present term, in the case of *Sturges v. Crowninshield* (*ante*, p. 122). Necessity was the plea and justification *332 of the first Bank of the United States. If the same necessity existed, when the second was established, it will afford the same justification; otherwise, it will stand without justification, as no other is pretended. We cannot, in making this inquiry, take a more fair and liberal test, than the report of General Hamilton, the father and defender of this power. The uses and advantages he states, as making up the necessity required by the constitution, are three. 1st. The augmentation of the active and productive capital of the country, by making gold and silver the basis of a paper circulation. 2d. Affording greater facility to the government, in procuring pecuniary aids; especially, in sudden emergencies; this, he says, is an indisputable advantage of public banks. 3d. The facility of the payment of taxes, in two ways; by loaning to the citizen, and enabling him to be punctual; and by increasing the quantity of circulating medium, and quickening circulation by bank-bills, easily transmitted from place to place. If we admit, that these advantages or conveniences amount to the necessity required by the constitution, for the creation and exercise of powers not expressly given; yet it is obvious, they may be derived from any public banks, and do not call for a Bank of the United States, unless there should be no other public banks, or not a sufficiency of them for these operations. In 1791, when this argument was held to be valid and effectual, there were but three banks in the United States, with limited capitals, and contracted spheres of operation. Very different is the case now, when we have a banking capital to a vast amount, vested in *333 banks of good credit, and so spread over the country, as to be convenient and competent for all the purposes enumerated in the argument. General Hamilton, conscious that his reasoning must fail, if the state banks were adequate for his objects, proceeds to show they were not. Mr. *Hopkinson* particularly examined all the objections urged by General Hamilton, to the agency of the state banks, then in existence, in the operations required for the

revenue; and endeavored to show, that they had no application to the present number, extent and situation of the state banks; relying only on those of a sound and unquestioned credit and permanency. He also contended, that the experience of five years, since the expiration of the old charter of the Bank of the United States, has fully shown the competency of the state banks, to all the purposes and uses alleged as reasons for erecting that bank, in 1791. The loans to the government by the state banks, in the emergencies spoken of; the accommodation to individuals, to enable them to pay their duties and taxes; the creation of a circulating currency; and the facility of transmitting money from place to place, have all been effected, as largely and beneficially, by the state banks, as they could have been done by a bank incorporated by congress. The change in the country, in relation to banks, and an experience that was depended upon, concur in proving, that whatever might have been the truth and force of the bank argument in 1791, they were wholly wanting in 1816.

****6*334** 2. If this Bank of the United States has been lawfully created and incorporated, we next inquire, whether it may, of its own authority, establish its branches in the several states, without the direction of congress, or the assent of the states? It is true, that the charter contains this power, but this avails nothing, if not warranted by the constitution. This power to establish branches, by the directors of the bank, must be maintained and justified, by the same necessity which supports the bank itself, or it cannot exist. The power derived from a given necessity, must be coextensive with it, and no more. We will inquire, 1st. Does this necessity exist in favor of the branches? 2d. Who should be the judge of the necessity, and direct the manner and extent of the remedy to be applied? Branches are not necessary for any of the enumerated advantages. Not for pecuniary aids to the government; since the ability to afford them must be regulated by the strength of the capital of the parent bank, and cannot be increased by scattering and spreading that capital in the branches. Nor are they necessary to create a circulating medium; for they create nothing; but issue paper on the faith and responsibility of the parent bank, who could issue the same quantity, on the same foundation; the distribution of the notes of the parent bank can as well be done, and in fact, is done, by the state banks. Where, then, is that necessity to be found for the branches, whatever may be allowed to the bank itself? It is undoubtedly true, that these branches are established with a single view to

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

trading, and the profit of the stockholders, and not for the convenience *335 or use of the government; and therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. If this is the case, can it be contended, that the state rights of territory and taxation are to yield for the gains of a money-trading corporation; to be prostrated at the will of a set of men who have no concern, and no duty but to increase their profits? Is this the necessity required by the constitution for the creation of undefined powers? It is true, that, by the charter, the government may require a branch in any place it may designate, but if this power is given only for the uses or necessities of the government, then the government only should have the power to order it. In truth, the directors have exercised the power, and they hold it, without any control from the government of the United States; and, as is now contended, without any control of the state governments. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage! A state will not suffer its own citizens to erect a bank, without its authority, but the citizens of another state may do so; for it may happen that the state thus used by the bank for one of its branches, does not hold a single share of the stock. 2d. But if these branches are to be supported, on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power *336 shall be exercised, which the necessity requires? Assuredly, the same tribunal which judges of the original necessity on which the bank is created, should also judge of any subsequent necessity requiring the extension of the remedy. Congress is that tribunal; the only one in which it may be safely trusted; the only one in which the states to be affected by the measure, are all fairly represented. If this power belongs to congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens: if this doctrine of necessity is without any known limits, but such as those who defend themselves by it, may choose, for the time, to give it; and if the powers derived from it, are assignable by the congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of govern-

ment in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers. The establishment of a bank in a state, without its assent; without regard to its interests, its policy or institutions, is a higher exercise of authority, than the creation of the parent bank; which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states, than those wide-spreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of *337 sovereign power, should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

**7 3. If, however, the states of this Union have surrendered themselves in this manner, by implication, to the congress of the United States, and to such corporations as the congress, from time to time, may find it 'necessary and proper' to create; if a state may no longer decide, whether a trading association, with independent powers and immunities, shall plant itself in its territory, carry on its business, make a currency and trade on its credit, raising capitals for individuals as fictitious as its own; if all this must be granted, the third and great question in this cause presents itself for consideration; that is, shall this association come there with rights of sovereignty, paramount to the sovereignty of the state, and with privileges possessed by no other persons, corporations or property in the state? in other words, can the bank and its branches, thus established, claim to be exempt from the ordinary and equal taxation of property, as assessed in the states in which they are placed? As this overwhelming invasion of state sovereignty is not warranted by any express clause or grant in the constitution, and never was *338 imagined by any state that adopted and ratified that constitution, it will be conceded, that it must be found to be necessarily and indissolubly connected with the power to establish the bank, or it must be repelled. The court has always shown a just anxiety to prevent any conflict between the federal and state powers; to construe both so as to avoid an interference, if possible, and to preserve that

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

harmony of action in both, on which the prosperity and happiness of all depend. If, therefore, the right to incorporate a national bank may exist, and be exercised consistently with the right of the state, to tax the property of such bank within its territory, the court will maintain both rights; although some inconvenience or diminution of advantage may be the consequence. It is not for the directors of the bank to say, you will lessen our profits by permitting us to be taxed; if such taxation will not deprive the government of the uses it derives from the agency and operations of the bank. The necessity of the government is the foundation of the charter; and beyond that necessity, it can claim nothing in derogation of state authority. If the power to erect this corporation were expressly given in the constitution, still, it would not be construed to be an exclusion of any state right, not absolutely incompatible and repugnant. The states need no reservation or acknowledgment of their right; all remain that are not expressly prohibited, or necessarily excluded; and this gives our opponents the broadest ground they can ask. The right now assailed by the bank, is the right of taxing property within the territory of *339 This is the highest attribute of sovereignty, the right to raise revenue; in fact, the right to exist; without which no other right can be held or enjoyed. The general power to tax is not denied to the states, but the bank claims to be exempted from the operation of this power. If this claim is valid, and to be supported by the court, it must be, either, 1. From the nature of the property: 2. Because it is a bank of the United States: 3. From some express provision of the constitution: or 4. Because the exemption is indispensably necessary to the exercise of some power granted by the constitution.

**8 1st. There is nothing in the nature of the property of bank-stock that exonerates it from taxation. It has been taxed, in some form, by every state in which a bank has been incorporated; either annually and directly, or by a gross sum paid for the charter. The United States have not only taxed the capital or stock of the state banks, but their business also, by imposing a duty on all notes discounted by them. The bank paid a tax for its capital; and every man who deals with the bank, by borrowing, paid another tax for the portion of the same capital he borrowed. This species of property, then, so far from having enjoyed any exemption from the calls of the revenue, has been particularly burdened; and been thought a fair subject of taxation both by the federal and state governments.

2d. Is it then exempt, as being a bank of the United States? How is it such? In name only. Just as the Bank of Pennsylvania, or the Bank of Maryland, *340 are banks of those states. The property of the bank, real or personal, does not belong to the United States only, as a stockholder, and as any other stockholders. The United States might have the same interest in any other bank, turnpike or canal company. So far as they hold stock, they have a property in the institution, and no further; so long, and no longer. Nor is the direction and management of the bank under the control of the United States. They are represented in the board by the directors appointed by them, as the other stockholders are represented by the directors they elect. A director of the government has no more power or right than any other director. As to the control the government may have over the conduct of the bank, by its patronage and deposits, it is precisely the same it might have over any other bank, to which that patronage would be equally important. Strip it of its name, and we find it to be a mere association of individuals, putting their money into a common stock, to be loaned for profit, and to divide the gains. The government is a partner in the firm, for gain also; for, except a participation of the profits of the business, the government could have every other use of the bank, without owning a dollar in it. It is not, then, a bank of the United States, if by that we mean, an institution belonging to the government, directed by it, or in which it has a permanent, indissoluble interest. The convenience it affords in the collection and distribution of the revenue, is collateral, secondary, and may be transferred at pleasure to any other bank. It forms no part of the construction *341 or character of this bank; which, as to all its rights and powers, would be exactly what it now is, if the government was to seek and obtain all this convenience from some other source; if the government were to withdraw its patronage, and sell out its stock. How, then, can such an institution claim the immunities of sovereignty; nay, that sovereignty does not possess? for a sovereign who places his property in the territory of another sovereign, submits it to the demands of the revenue, which are but justly paid, in return for the protection afforded to the property. General Hamilton, in his report on this subject, so far from considering the bank a public institution, connected with, or controlled by, the government, holds it to be indispensable that it should not be so. It must be, says he, under private, not public, direction; under the guidance of individual interest, not public policy.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

Still, he adds, the state may be holder of part of its stock; and consequently (what? it becomes a public property? no!), a sharer of the profits. He traces no other consequence to that circumstance. No rights are founded on it; no part of its utility or necessity arises from it. Can an institution, then, purely private, and which disclaims any public character, be clothed with the power and rights of the government, and demand subordination from the state government, in virtue of the federal authority, which it undertakes to wield at its own will and pleasure? Shall it be private, in its direction and interests; public, in its rights and privileges: a trading money-lender, in its business; an uncontrolled sovereign, in its powers? If the whole bank, with all its property and business, *342 belonged to the United States, it would not, therefore, be exempted from the taxation of the states. To this purpose, the United States and the several states must be considered as sovereign and independent; and the principle is clear, that a sovereign putting his property within the territory and jurisdiction of another sovereign, and of course, under his protection, submits it to the ordinary taxation of the state, and must contribute fairly to the wants of the revenue. In other words, the jurisdiction of the state extends over all its territory, and everything within or upon it, with a few known exceptions. With a view to this principle, the constitution has provided for those cases in which it was deemed necessary and proper to give the United States jurisdiction within a state, in exclusion of the state authority; and even in these cases, it will be seen, it cannot be done, without the assent of the state. For a seat of government, for forts, arsenals, dock-yards, &c., the assent of the state to surrender its jurisdiction is required; but the bank asks no consent, and is paramount to all state authority, to all the rights of territory, and demands of the public revenue. We have not been told, whether the banking-houses of this corporation, and any other real estate it may acquire, for the accommodation of its affairs, are also of this privileged order of property. In principle, it must be the same; for the privilege, if it exists, belongs to the corporation, and must cover equally all its property. It is understood, that a case was lately decided by the supreme court of Pennsylvania, and from which no appeal has been taken, on the part of the United *343 States, to this court, to show that United States property, as such, has no exemption from state taxation. A fort, belonging to the federal government, near Pittsburgh, was sold by public auction; the usual auction duty was claimed, and the payment resisted, on the ground, that none could be

exacted from the United States. The court decided otherwise. In admitting Louisiana into the Union, and so, it is believed, with all the new states, it is expressly stipulated, 'that no taxes shall be imposed on lands, the property of the United States.' There can, then, be no pretence, that bank property, even belonging to the United States, is, on that account, exonerated from state taxation.^{FN4}

FN4 See *Roach v. Philadelphia County*, 2 Am. L.J. 444; *United v. Weise*, 3 Wall. Jr. C. C. 72, 79.

**9 3d. If, then, neither the nature of the property, nor the interest the United States may have in the bank, will warrant the exemption claimed, is there anything expressed in the constitution, to limit and control the state right of taxation, as now contended for? We find but one limitation to this essential right, of which the states were naturally and justly most jealous. In the 10th section of the 1st article, it is declared, that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;' and there is a like prohibition to laying any duty of tonnage. Here, then, is the whole restriction or limitation, attempted to be imposed by the constitution, on the power of the states to raise revenue, precisely in the same manner, from the same subjects, and to the same extent, that any sovereign and independent *344 state may do; and it never was understood by those who made, or those who received, the constitution, that any further restriction ever would, or could, be imposed. This subject did not escape either the assailants or the defenders of our form of government; and their arguments and commentaries upon the instrument ought not to be disregarded, in fixing its construction. It was foreseen, and objected by its opponents, that under the general sweeping power given to congress, 'to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers,' &c., the states might be exposed to great dangers, and the most humiliating and oppressive encroachments, particularly in this very matter of taxation. By referring to the *Federalist*, the great champion of the constitution, the objections will be found stated, together with the answers to them. It is again and again replied, and most solemnly asserted, to the people of these United States, that the right of taxation in the states is sacred and inviolable, with

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

'the sole exception of duties on imports and exports;' that 'they retain the authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution.' With the exception mentioned, the federal and state powers of taxation are declared to be concurrent; and if the United States are justified in taxing state banks, the same equal and concurrent authority will justify the state in taxing the Bank of the United States, or any *345 other bank.^{FN5} The author begins No. 34, by saying, 'I flatter myself it has been clearly shown, in my last number, that the particular states, under the proposed constitution, would have *co-equal* authority with the Union, in the article of revenue, except as to duties on imports.' Under such assurances from those who made, who recommended, and carried, the constitution, and who were supposed best to understand it, was it received and adopted by the people of these United States; and now, after a lapse of nearly thirty years, they are to be informed, that all this is a mistake, all these assurances are unwarranted, and that the federal government does possess most productive and important powers of taxation, neither on imports, exports or tonnage, but strictly internal, which are prohibited to the states. The question then was, whether the United States should have any command of the internal revenue; the pretension now is, that they shall enjoy exclusively the best portion of it. The question was then quieted, by the acknowledgment of a co-equal right; it is now to be put at rest, by the prostration of the state power. The federal government is to hold a power by implication, and ingenious inference from general words in the constitution, which it can hardly be believed would have been suffered in an express grant. If, then, the people were not deceived, when they were told that, with the exceptions mentioned, the state right of taxation is sacred and inviolable; and it be also true, *346 that the Bank of the United States cannot exist under the exercise of that right, the consequence ought to be, that the bank must not exist; for if it can live only by the destruction of such a right-if it can live only by the exercise of a power, which this court solemnly declared to be a 'violent assumption of power, unwarranted by any clause in the constitution'-we cannot hesitate to say, let it not live.

^{FN5} Letters of Publius, or The Federalist, Nos. 31-36.

****10** But, in truth, this is not the state of the controversy. No such extremes are presented for our choice. We only require, that the bank shall not violate state rights, in establishing itself, or its branches; that it shall be submitted to the jurisdiction and laws of the state, in the same manner with other corporations and other property; and all this may be done, without ruining the institution, or destroying its national uses. Its profits will be diminished, by contributing to the revenue of the state; and this is the whole effect that ought, in a fair and liberal spirit of reasoning, to be anticipated. But, at all events, we show, on the part of the state, a clear, general, absolute and unqualified right of taxation (with the exception stated); and protest against such a right being made to yield to implications and obscure constructions of indefinite clauses in the constitution. Such a right must not be defeated, by doubtful pretensions of power, or arguments of convenience or policy to the government; much less to a private corporation. It is not a little alarming, to trace the progress of this argument. 1. The power to raise the bank is founded on no provision of the constitution that has the most distant allusion to such an *347 institution; there is not a word in that instrument that would suggest the idea of a bank, to the most fertile imagination; but the bank is created by implication and construction, made out by a very subtle course of reasoning; then, by another implication, raised on the former, the bank, this creature of construction, claims the right to enter the territory of a state, without its assent; to carry on its business, when it pleases, and where it pleases, against the will, and perhaps, in contravention of the policy, of the sovereign owner of the soil. Having such great success in the acquirement of implied rights, the experiment is now pushed further; and not contented with having obtained two rights in this extraordinary way, the fortunate adventurer assails the sovereignty of the state, and would strip from it its most vital and essential power. It is thus with the famous fig tree of India, whose branches shoot from the trunk to a considerable distance; then drop upon the earth, where they take root and become trees, from which also other branches shoot, and plant and propagate and extend themselves in the same way, until gradually a vast surface is covered, and everything perishes in the spreading shade.

What have we opposed to these doctrines, so just and reasonable? Distressing inconveniences, ingeniously

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

contrived; supposed dangers; fearful distrusts; anticipated violence and injustice from the states, and consequent ruin to the bank. A right to tax, is a right to destroy, is the whole amount of the argument, however varied by ingenuity, or embellished by eloquence. It is said, the states will abuse the power; and its exercise will *348 produce infinite inconvenience and embarrassment to the bank. Now, if this were true, it cannot help our opponents; because, if the states have the power contended for, this court cannot take it from them, under the fear that they may abuse it; nor, indeed, for its actual abuse; and if they have it not, they may not use it, however moderately and discreetly. Nor is there any more force in the argument, that the bank property will be subjected to double or treble taxation. Each state will tax only the capital really employed in it; and it is always in the power of the bank, to show how its capital is distributed. But it is feared, the capital in a state may be taxed in gross; and the individual stockholders also taxed for the same stock. Is this common case of a double taxation of the same article, to be a cause of alarm now? Our revenue laws abound with similar cases; they arise out of the very nature of our double government. So says the Federalist; and it is the first time it has been the ground of complaint. Poll taxes are paid to the federal and state governments; licenses to retail spirits; land taxes; and the whole round of internal duties, over which both governments have a concurrent, and, until now, it was supposed, a co-equal right. Were not the state banks taxed by the federal, and also by the state governments; in some, by a *bonus* for the charter; in others, directly and annually? The circumstance, that the taxes go to different governments, in these cases, is wholly immaterial to those who pay; unless it is, that it increases the danger of excess and oppression. It is justly remarked, on this subject, by *349 the Federalist, that our security from excessive burdens on any source of revenue, must be found in mutual forbearance and discretion in the use of the power; this is the only security, and the authority of this court can add nothing to it. When that fails, there is an end to the confederation, which is founded on a reasonable and honorable confidence in each other.

**11 It has been most impressively advanced, that the states, under pretence of taxing, may prohibit and expel the banks; ships, about to sail, and armies on power, they may tax munitions of war; to; who, in their 31st number, treat it very properly. Surely, their march; nay, the spirit of the court is to be aroused by

the fear that judicial proceedings will also come under this all-destroying power. Loans may be delayed for stamps, and the country ruined for the want of the money. But whenever the states shall be in a disposition to uproot the general government, they will take more direct and speedy means; and until they have this disposition, they will not use these. What power may not be abused; and whom or what shall we trust, if we guard, ourselves with this extreme caution? The common and daily intercourse between man and man; all our relations in society, depend upon a reasonable confidence in each other. It is peculiarly the basis of our confederation, which lives not a moment, after we shall cease to trust each other. If the two governments are to regard each other as enemies, seeking opportunities of injury and distress, they will not long continue friends. This sort of timid reasoning about the powers of the government, has not escaped the authors so often alluded *350 to; who, in their 31st number, treat it very properly. Surely, the argument is as strong against giving to the United States the power to incorporate a bank with branches. What may be more easily, or more extensively abused; and what more powerful engine can we imagine to be brought into operation against the revenues and rights of the states? If the federal government must have a bank for the purposes of its revenue, all collision will be avoided, by establishing the parent bank in its own district, where it holds an exclusive jurisdiction; and planting its branches in such states as shall assent to it; and using state banks, where such assent cannot be obtained. Speaking practically, and by our experience, it may be safely asserted, that all the uses of the bank to the government might be thus obtained. Nothing would be wanting but profits and large dividends to the stockholders, which are the real object in this contest. Whatever may be the right of the United States to establish a bank, it cannot be better than that of the states. Their lawful power to incorporate such institutions has never yet been questioned; whatever may be in reserve for them, when it may be found 'necessary and proper' for the interests of the national bank to crush the state institutions, and curtail the state authority. Granting, that these rights are equal in the two governments; and that the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States; and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been *351 expressly and exclusively transferred to the United States: the sovereign power of taxation (except on

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

foreign commerce) being, in the language of the Federalist, co-equal to the two governments; it follows, as a direct and necessary consequence, that having equal powers to erect banks, and equal powers of taxation on property of that description, being neither imports, exports or tonnage, whatever jurisdiction the federal government may exercise in this respect, over a bank created by a state, any state may exercise over a bank created by the United States. Now, the federal government has assumed the right of taxing the state banks, precisely in the manner in which the state of Maryland has proceeded against the Bank of the United States; and as this right has never been resisted or questioned, it may be taken to be admitted by both parties; and must be equal and common to both parties, or the fundamental principles of our confederation have been strangely mistaken, or are to be violently overthrown. It has also been suggested, that the bank may claim a protection from this tax, under that clause of the constitution, which prohibits the states from passing laws, which shall impair the obligation of contracts. The charter is said to be the contract between the government and the stockholders; and the interests of the latter will be injured by the tax which reduces their profits. Many answers offer themselves to this agreement. In the first place, the United States cannot, either by a direct law, or by a contract with a third party, take away any right from the states, not granted by the constitution; they *352 cannot do, collaterally and by implication, what cannot be done directly. Their contracts must conform to the constitution, and not the constitution to their contracts. If, therefore, the states have, in some other way, parted with this right of taxation, they cannot be deprived of it, by a contract between other parties. Under this doctrine, the United States might contract away every right of every state; and any attempt to resist it, would be called a violation of the obligations of a contract. Again, the United States have no more right to violate contracts than the states, and surely, they never imagined they were doing so, when they taxed so liberally the stock of the state banks. Again, it might as well be said, that a tax on real estate, imposed after a sale of it, and not then perhaps contemplated, or new duties imposed on merchandise, after it is ordered, violate the contract between the vendor and the purchaser, and diminishes the value of the property. In fact, all contracts in relation to property, subject to taxation, are presumed to have in view the probability or possibility that they will be taxed; and the happening of the event never was imagined to interfere with the contract, or its

lawful obligations.

**12 The *Attorney-General*, for the plaintiff in error, argued: 1. That the power of congress to create a bank ought not now to be questioned, after its exercise ever since the establishment of the constitution, sanctioned by every department of the government: by the legislature, in the charter of the bank, and other laws connected with the incorporation; by the *353 executive, in its assent to those laws; and by the judiciary, in carrying them into effect. After a lapse of time, and so many concurrent acts of the public authorities, this exercise of power must be considered as ratified by the voice of the people, and sanctioned by precedent. In the exercise of criminal judicature, the question of constitutionality could not have been overlooked by the courts, who have so often inflicted punishment for acts which would be no crimes, if these laws were repugnant to the fundamental law.

2. The power to establish such a corporation is implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect. A power without the means to use it, is a nullity. But we are not driven to seek for this power in implication: because the constitution, after enumerating certain specific powers, expressly gives to congress the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.' If, therefore, the act of congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to congress by the constitution. We contend, that it was necessary and proper to carry into execution several of the enumerated powers, such as the powers of levying and collecting taxes throughout this widely-extended empire; of paying *354 the public debts, both in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several states; of raising and supporting armies and a navy; and of carrying on war. That banks, dispersed throughout the country, are appropriate means of carrying into execution all these powers, cannot be denied. Our history furnishes abundant experience of the utility of a national bank as an instrument of finance. It will be found in the aid derived to the public

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

cause from the Bank of North America, established by congress, during the war of the revolution; in the great utility of the former Bank of the United States; and in the necessity of resorting to the instrumentality of the banks incorporated by the states, during the interval between the expiration of the former charter of the United States Bank, in 1811, and the establishment of the present bank in 1816; a period of war, the calamities of which were greatly aggravated by the want of this convenient instrument of finance. Nor is it required, that the power of establishing such a moneyed corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution, so strict and literal, would render every law which could be passed by congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted, tending to the same object, though *355 not equally well adapted to attain it. As the inevitable consequence of giving this very restricted sense to the word 'necessary,' would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected.

**13 Another not less inadmissible consequence of this construction is, that it is fatal to the permanency of the constitutional powers; it makes them dependent for their being, on extrinsic circumstances, which, as these are perpetually shifting and changing, must produce correspondent changes in the essence of the powers on which they depend. But surely, the constitutionality of any act of congress cannot depend upon such circumstances. They are the subject of legislative discretion, not of judicial cognisance. Nor does this position conflict with the doctrine of the court in *Sturges v. Crown-inshield* (*ante*, p. 122). The court has not said, in that case, that the powers of congress are shifting powers, which may or may not be constitutionally exercised, according to extrinsic or temporary circumstances; but it has merely determined, that the power of the state legislatures over the subject of bankruptcies is subordinate to that of congress on the same subject, and cannot be exercised so as to conflict with the uniform laws of bankruptcy throughout the Union which congress may establish. The power, in this instance, resides permanently in congress, whether it chooses to exercise it or not; but its exercise on the part of the states *356 is precarious, and

dependent, in certain respects, upon its actual exercise by congress. The convention well knew that it was utterly vain and nugatory, to give to congress certain specific powers, without the means of enforcing those powers. The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end. 'Necessary and proper' are, then, equivalent to needful and adapted; such is the popular sense in which the word necessary is sometimes used. That use of it is confirmed by the best authorities among lexicographers; among other definitions of the word 'necessary,' Johnson gives 'needful;' and he defines 'need,' the root of the latter, by the words, 'want, occasion.' Is a law, then, wanted, is there occasion for it, in order to carry into execution any of the enumerated powers of the national government; congress has the power of passing it. To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to congress. This is the only interpretation which can give effect to this vital clause of the constitution; and being consistent with the rules of the language, is not to be rejected, because there is another interpretation, equally consistent with the same rules, but wholly inadequate to convey what must have been the intention of the convention. Among the multitude of means to carry into execution the powers expressly given to the national government, congress is to select, from time to time, such as are most fit for the purpose. It would have been impossible *357 to enumerate them all in the constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end. It cannot be denied, that this is the character of the Bank of the United States. But it is said, that the government might use private bankers, or the banks incorporated by the states, to carry on their fiscal operations. This, however, presents a mere question of political expediency, which, it is repeated, is exclusively for legislative consideration; which has been determined by the legislative wisdom; and cannot be reviewed by the court.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

****14** It is objected, that this act creates a corporation; which, being an exercise of a fundamental power of sovereignty, can only be claimed by congress, under their grant of specific powers. But to have enumerated the power of establishing corporations, among the specific powers of congress, would have been to change the whole plan of the constitution; to destroy its simplicity, and load it with all the complex details of a code of private jurisprudence. The power of establishing corporations is not one of the ends of government; it is only a class of means for accomplishing its ends. An enumeration ***358** of this particular class of means, omitting all others, would have been a useless anomaly in the constitution. It is admitted, that this is an act to sovereignty, and so is any other law; if the authority of establishing corporations be a sovereign power, the United States are sovereign, as to all the powers specifically given to their government, and as to all others necessary and proper to carry into effect those specified. If the power of chartering a corporation be necessary and proper for this purpose, congress has it to an extent as ample as any other sovereign legislature. Any government of limited sovereignty can create corporations only with reference to the limited powers that government possesses. The inquiry then reverts, whether the power of incorporating a banking company, be a necessary and proper means of executing the specific powers of the national government. The immense powers incontestably given, show that there was a disposition, on the part of the people, to give ample means to carry those powers into effect. A state can create a corporation, in virtue of its sovereignty, without any specific authority for that purpose, conferred in the state constitutions. The United States are sovereign as to certain specific objects, and may, therefore, erect a corporation for the purpose of effecting those objects. If the incorporating power had been expressly granted as an end, it would have conferred a power not intended; if granted as a means, it would have conferred nothing more than was before given by necessary implication.

Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the ***359** implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that

this is nothing more than arguing from the abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government; and that, whatever may be the magnitude of the danger from this quarter, it is not equal to that of annihilating the powers of the government, to which the opposite doctrine would inevitably tend.

****15** 3. If, then, the establishment of the parent bank itself be constitutional, the right to establish the branches of that bank in the different states of the Union follows, as an incident of the principal power. The expediency of this ramification, congress is alone to determine. To confine the operation of the bank to the district of Columbia, where congress has the exclusive power of legislation, would be as absurd as to confine the courts of the United States to this district. Both institutions are wanted, wherever the administration of justice, or of the revenue, is wanted. The right, then, to establish these branches, is a necessary part of the means. This right is not delegated by congress to the parent bank. The act of congress for the establishment of offices of discount ***360** and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. When established, they rest, not on the authority of the parent bank, but on the authority of congress.

4. The only remaining question is, whether the act of the state of Maryland, for taxing the bank thus incorporated, be repugnant to the constitution of the United States? We insist, that any such tax, by authority of a state, would be unconstitutional, and that this act is so, from its peculiar provisions. But it is objected, that, by the 10th amendment of the constitution, all powers not expressly delegated to the United States, nor prohibited to the states, are reserved to the latter. It is said, that this being neither delegated to the one, nor prohibited to the other, must be reserved: and it is also said, that the only prohibition on the power of state taxation, which does exist, excludes this case, and thereby leaves it to the original power of the states. The only prohibition is, as to laying any imposts, or duties on imports and exports, or tonnage duty, and this, not being a tax of

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

that character, is said not to be within the terms of the prohibition; and consequently, it remains under the authority of the states. But we answer, that this does not contain the whole sum of constitutional restrictions on the authority of the states. There is another clause in the constitution, which has the effect of a prohibition on the exercise of their authority, in numerous cases. The 6th article of the constitution of the United States declares, that the laws made in pursuance of it, 'shall be the supreme law of the land, anything in the constitution, or laws of *361 any state to the contrary notwithstanding.' By this declaration, the states are prohibited from passing any acts which shall be repugnant to a law of the United States. The court has already instructed us in the doctrine, that there are certain powers, which, from their nature, are exclusively vested in congress.^{FN6} So, we contend here, that the only ground on which the constitutionality of the bank is maintainable, excludes all interference with the exercise of the power by the states. This ground is, that the bank, as ordained by congress, is an instrument to carry into execution its specified powers; and in order to enable this instrument to operate effectually, it must be under the direction of a single head. It cannot be interfered with, or controlled in any manner, by the states, without putting at hazard the accomplishment of the end, of which it is but a means. But the asserted power to tax any of the institutions of the United States, presents directly the question of the supremacy of their laws over the state laws. If this power really exists in the states, its natural and direct tendency is to annihilate any power which belongs to congress, whether express or implied. All the powers of the national government are to be executed in the states, and throughout the states; and if the state legislatures can tax the instruments by which those powers are executed, they may entirely defeat the execution of the powers. If they may tax an institution of finance, they may tax the proceedings in the courts of the United States. If they may *362 tax to one degree, they may tax to any degree; and nothing but their own discretion can impose a limit upon this exercise of their authority. They may tax both the bank and the courts, so as to expel them from the states. But, surely, the framers of the constitution did not intend, that the exercise of all the powers of the national government should depend upon the discretion of the state governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. It is a direct collision of powers between the two governments. Congress says, there shall be a branch of

the bank in the state of Maryland; that state says, there shall not. Which power is supreme? Besides, the charter, which is a contract between the United States and the corporation, is violated by this act of Maryland. A new condition is annexed by a sovereignty which was no party to the contract. The franchise, or corporate capacity, is taxed by a legislature, between whom and the object of taxation there is no political connection.

^{FN6} See *Sturges v. Crowninshield*, *ante*, p. 122.

**16 *Jones*, for the defendants in error, contended: 1. That this was to be considered as an open question, inasmuch as it had never before been submitted to judicial determination. The practice of the government, however inveterate, could never be considered as sanctioning a manifest usurpation; still less, could the practice, under a constitution of a date so recent, be put in competition with the contemporaneous exposition of its illustrious authors, as recorded for our instruction, in the 'Letters of Publius,' *363 or the *Federalist*. The interpretation of the constitution, which was contended for by the state of Maryland, would be justified from that text-book, containing a commentary, such as no other age or nation furnishes, upon its public law.

It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states. To suppose, that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it, are reserved to the states. We admit, that the 10th amendment to the constitution is merely declaratory; that it was adopted *ex abundanti cautela*; and that with it, nothing more is reserved, than would have been reserved without it. But it is contended, on the other side, that not only the direct powers, but all incidental powers, partake of the supreme power, which is sovereign. This is an inherent sophism in the opposite argument, which depends on the conversion and ambiguity of terms. What is meant by sovereign power? It is modified by the terms of the grant under which it was given. They do not import sovereign power, generally, but sovereign power, limited to particular cases; and the ques-

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

tion again recurs, whether sovereign power was given in this particular case. Is it true, that by conferring sovereign powers on a limited, delegated government, sovereign means are also granted? Is there no restriction *364 as to the means of exercising a general power? Sovereignty was vested in the former confederation, as fully as in the present national government. There was nothing which forbade the old confederation from taxing the people, except that three modes of raising revenue were pointed out, and they could resort to no other. All the powers given to congress, under that system, except taxation, operated as directly on the people, as the powers given to the present government. The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished. 'To levy and collect taxes,' 'to borrow money,' 'to pay the public debts,' 'to raise and support armies,' 'to provide and maintain a navy,' are not the ends for which this or any other just government is established. If a banking corporation can be said to be involved in either of these means, it must be as an instrument to collect taxes, to borrow money, and to pay the public debts. Is it such an instrument? It may, indeed, facilitate the operation of other financial institutions; but in its proper and natural character, it is a commercial institution, a partnership, incorporated for the purpose of carrying on the trade of banking. But we contend, that the government of the United States must confine themselves, in the collection and expenditure of revenue, to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means. But what natural connection is there between *365 the collection of taxes, and the incorporation of a company of bankers? Can it possibly be said, that because congress is invested with the power of raising and supporting armies, that it may give a charter of monopoly to a trading corporation, as a bounty for enlisting men? Or that, under its more analogous power of regulating commerce, it may establish an East or a West India company, with the exclusive privilege of trading with those parts of the world? Can it establish a corporation of farmers of the revenue, or burden the internal industry of the states with vexatious monopolies of their staple productions? There is an obvious distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped

under the pretext of necessity.

**17 For example, the power of coining money implies the power of establishing a mint. The power of laying and collecting taxes implies the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation, branching out into every district of the country, and inundating it with a flood of paper-money. To derive such a tremendous authority from implication, would be to change the subordinate into fundamental powers; to make the implied powers greater than those which are expressly granted; and to change the whole scheme and theory of the government. It is well known, that many of the powers which are expressly *366 granted to the national government in the constitution, were most reluctantly conceded by the people, who were lulled into confidence, by the assurances of its advocates, that it contained no latent ambiguity, but was to be limited to the literal terms of the grant: and in order to quiet all alarm, the 10th article of amendments was added, declaring 'that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' It would seem, that human language could not furnish words less liable to misconstruction! But it is contended, that the powers expressly granted to the national government in the constitution, are enlarged to an indefinite extent, by the sweeping clause, authorizing congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers. Now, we insist, that this clause shows that the intention of the convention was, to define the powers of the government with the utmost precision and accuracy. The creation of a sovereign legislature, implies an authority to pass laws to execute its given powers. This clause is nothing more than a declaration of the authority of congress to make laws, to execute the powers expressly granted to it, and the other departments of the government. But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language, more absolutely excluding a general and unlimited discretion than *367 these. It is not 'necessary or proper,' but 'necessary and proper.' The means used must have both these qualities. It must be, not merely convenient-fit-adapted-proper, to the accomplishment of the end in view; it must likewise

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

be necessary for the accomplishment of that end. Many means may be proper, which are not necessary; because the end may be attained without them. The word 'necessary,' is said to be a synonyme of 'needful.' But both these words are defined 'indispensably requisite;' and, most certainly, this is the sense in which the word 'necessary' is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision. The only question, then, on this branch of the argument, will be, whether the establishment of a banking corporation be indispensably requisite to execute any of the express powers of the government? So far as the interest of the United States is concerned, as partners of this company of bankers, or so far as the corporation may be regarded as an executive officer of the government, acquiring real and personal property in trust for the use of the government, it may be asked, what right the United States have to acquire property of any kind, except that purchased by the consent of the legislature of the state in which such property may be, for the erection of forts, magazines, &c.; and ships or munitions *368 of war, constructed or purchased by the United States, and the public treasure? Their right of acquiring property is absolutely limited to the subjects specified, which were the only means, of the nature of wealth or property, with which the people thought it necessary to invest them. The people never intended they should become bankers or traders of any description. They meant to leave to the states the power of regulating the trade of banking, and every other species of internal industry; subject merely to the power of congress to regulate foreign commerce, and the commerce between the different states, with which it is not pretended, that this asserted power is connected. The trade of banking, within the particular states, would then either be left to regulate itself, and carried on as a branch of private trade, as it is in many countries; or banking companies would be incorporated by the state legislatures to carry it on, as has been the usage of this country. But in either case, congress would have nothing to do with the subject. The power of creating corporations is a distinct sovereign power, applicable to a great variety of objects, and not being expressly granted to congress for this, or any other object, cannot be assumed by implication. If it might be assumed for this purpose, it might also be exer-

cised to create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by this dangerous doctrine of implied powers. Or it might be exercised to establish great trading monopolies, *369 or to lock up the property of the country in mortmain, by some strained connection between the exercise of such powers, and those expressly given to the government.

**18 3. Supposing the establishment of such a banking corporation, to be implied as one of the means necessary and proper to execute the powers expressly granted to the national government, it is contended by the counsel opposed to us, that its property is exempted from taxation by the state governments, because they cannot interfere with the exercise of any of the powers, express or implied, with which congress is invested. But the radical vice of this argument is, that the taxing power of the states, as it would exist, independent of the constitution, is in no respect limited or controlled by that supreme law, except in the single case of imposts and tonnage duties, which the states cannot lay, unless for the purpose of executing their inspection laws. But their power of taxation is absolutely unlimited in every other respect. Their power to tax the property of this corporation cannot be denied, without at the same time denying their right to tax any property of the United States. The property of the bank cannot be more highly privileged than that of the government. But they are not forbidden from taxing the property of the government, and therefore, cannot be constructively prohibited from taxing that of the bank. Being prohibited from taxing exports and imports, and tonnage, and left free from any other prohibition, in this respect; they may tax everything else but exports, imports and tonnage. The authority of *370 'the Federalist' is express, that the taxing power of congress does not exclude that of the states over any other objects except these. If, then, the exercise of the taxing power of congress does not exclude that of the states, why should the exercise of any other power by congress, exclude the power of taxation by the states? If an express power will not exclude it, shall an implied power have that effect? If a power of the same kind will not exclude it, shall a power of a different kind? The unlimited power of taxation results from state sovereignty. It is expressly taken away only in the particular instances mentioned. Shall others be added by implication? Will it be pretended, that there are

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

two species of sovereignty in our government? Sovereign power is absolute, as to the objects to which it may be applied. But the sovereign power of taxation in the states may be applied to all other objects, except imposts and tonnage: its exercise cannot, therefore, be limited and controlled by the exercise of another sovereign power in congress. The right of both sovereignties are co-equal and co-extensive. The trade of banking may be taxed by the state of Maryland; the United States may incorporate a company to carry on the trade of banking, which may establish a branch in Maryland; the exercise of the one sovereign power, cannot be controlled by the exercise of the other. It can no more be controlled in this case, than if it were the power of taxation in congress, which was interfered with by the power of taxation in the state, both being exerted concurrently on the same object. In both *371 cases, mutual confidence, discretion and forbearance can alone qualify the exercise of the conflicting powers, and prevent the destruction of either. This is an anomaly, and perhaps an imperfection, in our system of government. But neither congress, nor this court, can correct it. That system was established by reciprocal concessions and compromises between the state and federal governments; its harmony can only be maintained in the same spirit. Even admitting that the property of the United States (such as they have a right to hold), their forts and dock-yards, their ships and military stores, their archives and treasures, public institutions of war, or revenue or justice, are exempt, by necessary implication, from state taxation; does it, therefore, follow, that this corporation, which is a partnership of bankers, is also exempt? They are not collectors of the revenue, any more than any state bank or foreign bankers, whose agency the government may find it convenient to employ as depositaries of its funds. They may be employed to remit those funds from one place to another, or to procure loans, or to buy and sell stock; but it is in a commercial, and not an administrative character, that they are thus employed. The corporate character with which these persons are clothed, does not exempt them from state taxation. It is the nature of their employment, as agents or officers of the government, if anything, which must create the exemption. But the same employment of the state bank or private bankers, would equally entitle them to the same exemption. Nor can the exemption of the stock of this *372 corporation from state taxation, be claimed on the ground of the proprietary interest which the United States have in it as stockholders. Their interest is undistinguishably blended with

the general capital stock; if they will mix their funds with those of bankers, or engage as partners in any other branch of commerce, their sovereign character and dignity are lost in the mercantile character which they have assumed; and their property thus employed becomes subject to local taxation, like other capital employed in trade.

****19***Martin*, Attorney-General of Maryland.-1. Read several extracts from the Federalist, and the debates of the Virginia and New York conventions, to show that the contemporary exposition of the constitution, by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the counsel for the plaintiff in error. That it was then maintained, by the enemies of the constitution, that it contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence. This apprehension was treated as a dream of distempered jealousy. The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the 10th amendment was added to the constitution. This, however, could be considered as nothing more than declaratory of the sense of the people as to the extent of the powers *373 conferred on the new government. We are now called upon to apply that theory of interpretation, which was then rejected by the friends of the new constitution, and we are asked to engraft upon it powers of vast extent, which were disclaimed by them, and which if they had been fairly avowed at the time, would have prevented its adoption. Before we do this, they must, at least, be proved to exist, upon a candid examination of this instrument, as if it were now, for the first time, submitted to interpretation. Although we cannot, perhaps, be allowed to say, that the states have been 'deceived in their grant;' yet we may justly claim something like a rigorous demonstration of this power, which nowhere appears upon the face of the constitution, but which is supposed to be tacitly inculcated in its general object and spirit. That the scheme of the framers of the constitution, intended to leave nothing to implication, will be evident, from the consideration, that many of the powers expressly given are only means to accomplish other powers expressly given. For example, the power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

navy, to prosecute the war then declared. So also, as money is the sinew of war, the powers of laying and collecting taxes, and of borrowing money, are involved in that of declaring war. Yet all these powers are specifically enumerated. If, then, the convention has specified some powers, which being only means to accomplish the ends of government, might have been *374 taken by implication; by what just rule of construction, are other sovereign powers, equally vast and important, to be assumed by implication? We insist, that the only safe rule is, the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed in the 10th amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. The power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states, or to the people. It is not expressly delegated, either as an end, or a means, of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated. We still insist, that the authority of establishing corporations is one of the great sovereign powers of government. It may well exist in the state governments, without being expressly conferred in the state constitutions; because those governments have all the usual powers which belong to every political society, unless expressly forbidden, by the letter of the state constitutions, from exercising them. The power of establishing corporations has been constantly exercised by the state governments, and no portion of it has been ceded by them to the government of the United States.

**20 2. But admitting that congress has a right to incorporate a banking company, as one of the means *375 necessary and proper to execute the specific powers of the national government; we insist, that the respective states have the right to tax the property of that corporation, within their territory; that the United States cannot, by such an act of incorporation, withdraw any part of the property within the state from the grasp of taxation. It is not necessary for us to contend, that any part of the public property of the United States, its munitions of war, its ships and treasure, are subject to state taxation. But if the United States hold shares in the stock of a private banking company, or any other trading company,

their property is not exempt from taxation, in common with the other capital stock of the company; still less, can it communicate to the shares belonging to private stockholders, an immunity from local taxation. The right of taxation by the state, is co-extensive with all private property within the state. The interest of the United States in this bank is private property, though belonging to public persons. It is held by the government, as an undivided interest with private stockholders. It is employed in the same trade, subject to the same fluctuations of value, and liable to the same contingencies of profit and loss. The shares belonging to the United States, or of any other stockholders, are not subjected to direct taxation by the law of Maryland. The tax imposed, is a stamp tax upon the notes issued by a banking-house within the state of Maryland. Because the United States happen to be partially interested, either as dormant or active partners, in that house, is no reason why the state should refrain from laying a tax which they have, otherwise, *376 a constitutional right to impose, any more than if they were to become interested in any other house of trade, which should issue its notes, or bills of exchange, liable to a stamp duty, by a law of the state. But it is said, that a right to tax, in this case, implies a right to destroy; that it is impossible to draw the line of discrimination between a tax fairly laid for the purposes of revenue, and one imposed for the purpose of prohibition. We answer, that the same objection would equally apply to the right of congress to tax the state banks; since the same difficulty of discriminating occurs in the exercise of that right. The whole of this subject of taxation is full of difficulties, which the convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the state and the national government. This being found impracticable or inconvenient, the state governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to congress, but reserving to the states a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance. The debates in the state conventions show that the power of state taxation was understood to be absolutely unlimited, except as to imports and tonnage duties. The states would not have adopted the constitution, upon any other understanding. As to the judicial proceedings, and the custom-house papers of the United States, they are *377 not property,

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

by their very nature; they are not the subjects of taxation; they are the proper instruments of national sovereignty, essential to the exercise of its powers, and in legal contemplation altogether extra-territorial as to state authority.

****21***Pinkney*, for the plaintiff in error, in reply, stated: 1. That the cause must first be cleared of a question which ought not to have been forced into the argument—whether the act of congress establishing the bank was consistent with the constitution? This question depended both on authority and on principle. No topics to illustrate it could be drawn from the confederation, since the present constitution was as different from that, as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the states, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the constitution acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitution springs from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country is divided. The federal powers are just as sovereign as those of the states. The state sovereignties are not the authors ***378** of the constitution of the United States. They are preceding in point of time, to the national sovereignty, but they are postponed to it, in point of supremacy, by the will of the people. The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end; fitted to promote, and having a natural relation and connection with, the objects of that government. The constitution, by which these authorities, and the means of executing them, are given, and the laws made in pursuance of it, are declared to be the supreme law of the land; and they would have been such, without the insertion of this declaratory clause; they must be supreme, or they would be nothing. The constitutionality of the establishment of the bank, as one of the means necessary to carry into effect the authorities vested in the national government, is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive and judicial. A legislative construction, in a

doubtful case, persevered in for a course of years, ought to be binding upon the court. This, however, is not a question of construction merely, but of political necessity, on which congress must decide. It is conceded, that a manifest usurpation cannot be maintained in this mode; but, we contend, that this is such a doubtful case, that congress may expound the nature and extent of the authority under which it acts, and that this practical interpretation had become incorporated into the constitution. There are two distinguishing points which entitle it to great respect. The first is, that it was a ***379** contemporaneous construction; the second is, that it was made by the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first congress, by which the new government was organized; they must have understood their own work. They determined that the constitution gave to congress the power of incorporating a banking company. It was not required, that this power should be expressed in the text of the constitution; it might safely be left to implication. An express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted; we do not claim an authority in this respect, beyond the sphere of the specific powers. The grant of an authority to erect certain corporations, might have been equally dangerous, by omitting to provide for others, which time and experience might show to be equally, and even more necessary. It is a historical fact, of great importance in this discussion, that amendments to the constitution were actually proposed, in order to guard against the establishment of commercial monopolies. But if the general power of incorporating did not exist, why seek to qualify it, or to guard against its abuse? The legislative precedent, established in 1791, has been followed up by a series of acts of congress, all confirming the authority. Political considerations alone might have produced the refusal to renew the charter in 1811; at any rate, we know that they mingled themselves in the debate, and the determination.

****22*380** In 1815, a bill was passed by the two houses of congress, incorporating a national bank; to which the president refused his assent, upon political considerations only, waiving the question of constitutionality, as being settled by contemporaneous exposition, and repeated subsequent recognitions. In 1816, all branches of the legislature concurred in establishing the corporation, whose chartered rights are now

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

in judgment before the court. None of these measures ever passed *sub silentio*; the proposed incorporation was always discussed, and opposed, and supported, on constitutional grounds, as well as on considerations of political expediency. Congress is *primâ facie* a competent judge of its own constitutional powers. It is not, as in questions of privilege, the exclusive judge; but it must first decide, and that in a proper judicial character, whether a law is constitutional, before it is passed. It had an opportunity of exercising its judgment in this respect, upon the present subject, not only in the principal acts incorporating the former, and the present bank, but in the various incidental statutes subsequently enacted on the same subject; in all of which, the question of constitutionality was equally open to debate, but in none of which was it agitated.

There are, then, in the present case, the repeated determinations of the three branches of the national legislature, confirmed by the constant acquiescence of the state sovereignties, and of the people, for a considerable length of time. Their strength is fortified by judicial authority. The decisions in the courts, affirming the constitutionality of these *381 laws, passed, indeed, *sub silentio*; but it was the duty of the judges, especially in criminal cases, to have raised the question; and we are to conclude, from this circumstance, that no doubt was entertained respecting it. And if the question be examined on principle, it will be found not to admit of doubt. Has congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power, than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the constitution, and have no limits but the constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defence provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude. Congress has power to lay and collect taxes and duties, imposts and excises; to pay the debts, and provide for the common defence and general welfare of the United States; to borrow money on the credit of the nation; to regulate commerce; to establish uniform naturalization and bankrupt laws; to coin money, and regulate the circulating medium, and

the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science and the useful arts, by granting patents and copyrights; to constitute tribunals inferior to the supreme court, and to define *382 and punish offences against the law of nations; to declare and carry on war; to raise and support armies, and to provide and maintain a navy; to discipline and govern the land and naval forces; to call forth the militia to execute the laws, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia; to exercise exclusive legislation, in all cases, over the district where the seat of government is established, and over such other portions of territory as may be ceded to the Union for the erection of forts, magazines, & c.; to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and to make all laws which shall be necessary and proper for carrying into execution these powers, and all other powers vested in the national government, or any of its departments or officers. The laws thus made are declared to be the supreme law of the land; and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Yet it is doubted, whether a government invested with such immense powers has authority to erect a corporation within the sphere of its general objects, and in order to accomplish some of those objects! The state powers are much less in point of magnitude, though greater in number; yet it is supposed, the states possess the authority of establishing corporations, whilst it is denied to the general government. It is conceded to the state legislatures, though not specifically granted, because it is said to be an incident of state sovereignty; but it *383 is refused to congress, because it is not specifically granted, though it may be necessary and proper to execute the powers which are specifically granted. But the authority of legislation in the state government is not unlimited; there are several limitations to their legislative authority. First, from the nature of all government, especially, of republican government, in which the residuary powers of sovereignty, not granted specifically, by inevitable implication, are reserved to the people. Secondly, from the express limitations contained in the state constitutions. And thirdly, from the express prohibitions to the states contained in the United States constitution. The power of erecting corporations is nowhere expressly granted to the legislatures of the states in their constitutions; it is taken by necessary implication: but it

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

cannot be exercised to accomplish any of the ends which are beyond the sphere of their constitutional authority. The power of erecting corporations is not an end of any government; it is a necessary means of accomplishing the ends of all governments. It is an authority inherent in, and incident to, all sovereignty.

****23** The history of corporations will illustrate this position. They were transplanted from the Roman law into the common law of England, and all the municipal codes of modern Europe. From England, they were derived to this country. But in the civil law, a corporation could be created by a mere voluntary association of individuals. 1 Bl. Com. 471. And in England, the authority of parliament ***384** is not necessary to create a corporate body. The king may do it, and may communicate his power to a subject (1 Bl. Com. 474), so little is this regarded as a transcendent power of sovereignty, in the British constitution. So also, in our constitution, it ought to be regarded as but a subordinate power to carry into effect the great objects of government. The state governments cannot establish corporations to carry into effect the national powers given to congress, nor can congress create corporations to execute the peculiar duties of the state governments. But so much of the power or faculty of incorporation as concerns national objects has passed away from the state legislatures, and is vested in the national government. An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government—the felicity of the people. All powers are given to the national government, as the people will. The reservation in the 10th amendment to the constitution, of ‘powers not delegated to the United States,’ is not confined to powers not expressly delegated. Such an amendment was indeed proposed; but it was perceived, that it would strip the government of some of its most essential powers, and it was rejected. Unless a specific means be expressly prohibited to the general government, it has it, within the sphere of its specified powers. Many particular means are, of course, involved in the general means necessary to carry into effect the powers expressly granted, and in that case, the general means become ***385** the end, and the smaller objects the means.

It was impossible for the framers of the constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circum-

stances, in such an unexampled state of political society as ours, for ever changing and for ever improving. How unwise would it have been, to legislate immutably for exigencies which had not then occurred, and which must have been foreseen but dimly and imperfectly! The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure. The statute book of the United States is filled with powers derived from implication. The power to lay and collect taxes will not execute itself. Congress must designate in detail all the means of collection. So also, the power of establishing post-offices and post-roads, involves that of punishing the offence of robbing the mail. But there is no more necessary connection between the punishment of mail-robbers, and the power to establish post-roads, than there is between the institution of a bank, and the collection of the revenue and payment of the public debts and expenses. So, light-houses, beacons, buoys and public piers, have all been established, under the general power to regulate commerce. But they are not indispensably necessary to commerce. It might linger on, without these aids, though exposed to more perils and losses. So, congress has authority to coin money, and to guard the purity of the circulating medium, by providing for the punishment ***386** of counterfeiting the current coin; but laws are also made for punishing the offence of uttering and passing the coin thus counterfeited. It is the duty of the court to construe the constitutional powers of the national government liberally, and to mould them so as to effectuate its great objects. Whence is derived the power to punish smuggling? It does not collect the impost, but it is a means more effectually to prevent the collection from being diminished in amount, by frauds upon the revenue laws. Powers, as means, may then be implied in many cases. And if so, why not in this case as well as any other?

****24** The power of making all needful rules and regulations respecting the territory of the United States, is one of the specified powers of congress. Under this power, it has never been doubted, that congress had authority to establish corporations in the territorial governments. But this power is derived entirely from implication. It is assumed, as an incident to the principal power. If it may be assumed, in that case, upon the ground, that it is a necessary means of carrying into effect the power expressly granted, why may it not be assumed, in the present case, upon a similar ground? It is readily admitted,

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

there must be a relation, in the nature and fitness of things between the means used and the end to be accomplished. But the question is, whether the necessity which will justify a resort to a certain means, must be an absolute, indispensable, inevitable necessity? The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a political power; it *387 is a matter of legislative discretion, and those who exercise it, have a wide range of choice in selecting means. In its exercise, the mind must compare means with each other. But absolute necessity excludes all choice; and therefore, it cannot be this species of necessity which is required. Congress alone has the fit means of inquiry and decision. The more or less of necessity never can enter as an ingredient into judicial decision. Even absolute necessity cannot be judged of here; still less, can practical necessity be determined in a judicial *forum*. The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people. For this purpose, it must inquire, whether the means assumed have a connection, in the nature and fitness of things, with the end to be accomplished. The vast variety of possible means, excludes the practicability of judicial determination as to the fitness of a particular means. It is sufficient, that it does not appear to be violently and unnaturally forced into the service, or fraudulently assumed, in order to usurp a new substantive power of sovereignty. A philological analysis of the terms 'necessary and proper' will illustrate the argument. Compare these terms as they are used in that part of the constitution now in question, with the qualified manner in which they are used in the 10th section of the same article. In the latter, it is provided that 'no state shall, without the consent of congress, lay any imposts or duties on imports *388 or exports, except what may be absolutely necessary for executing its inspection laws.' In the clause in question, congress is invested with the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,' &c. There is here then, no qualification of the necessity; it need not be absolute; it may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject. This, like many other words, has a primitive sense, and another figurative and more relaxed; it may be qualified by the addition of adverbs of dimi-

nution or enlargement, such as very, indispensably, more, less, or absolutely necessary; which last is the sense in which it is used in the 10th section of this article of the constitution. But that it is not always used in this strict and rigorous sense, may be proved, by tracing its definition, and etymology in every human language.

**25 If, then, all the powers of the national government are sovereign and supreme; if the power of incorporation is incidental, and involved in the others; if the degree of political necessity which will justify a resort to a particular means, to carry into execution the other powers of the government, can never be a criterion of judicial determination, but must be left to legislative discretion, it only remains to inquire, whether a bank has a natural and obvious connection with other express or implied powers, so as to become a necessary and proper means of carrying them into execution. A bank *389 might be established as a branch of the public administration, without incorporation. The government might issue paper, upon the credit of the public faith, pledged for its redemption, or upon the credit of its property and funds. Let the office where this paper is issued be made a place of deposit for the money of individuals, and authorize its officers to discount, and a bank is created. It only wants the forms of incorporation. But, surely, it will not be pretended, that clothing it with these forms would make such an establishment unconstitutional. In the bank which is actually established and incorporated, the United States are joint stockholders, and appoint joint directors; the secretary of the treasury has a supervising authority over its affairs; it is bound, upon his requisition, to transfer the funds of the government wherever they may be wanted; it performs all the duties of commissioners of the loan-office; it is bound to loan the government a certain amount of money, on demand; its notes are receivable in payment for public debts and duties; it is intimately connected, according to the usage of the whole world, with the power of borrowing money, and with all the financial operations of the government. It has, also, a close connection with the power of regulating foreign commerce, and that between the different states. It provides a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated. It is true, there are state banks by which a circulating medium to a certain extent is provided. But that only diminishes the *quantum* of necessity, *390 which is no criterion by which to test the constitutionality of a

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

measure. It is also connected with the power of making all needful regulations for the government of the territory, 'and other property of the United States.' If they may establish a corporation to regulate their territory, they may establish one to regulate their property. Their treasure is their property, and may be invested in this mode. It is put in partnership; but not for the purpose of carrying on the trade of banking as one of the ends for which the government was established; but only as an instrument or means for executing its sovereign powers. This instrument could not be rendered effectual for this purpose, but by mixing the property of individuals with that of the public. The bank could not otherwise acquire a credit for its notes. Universal experience shows, that, if, altogether a government bank, it could not acquire, or would soon lose, the confidence of the community.

****26** 2. As to the branches, they are identical with the parent bank. The power to establish them is that species of subordinate power, wrapped up in the principal power, which congress may place at its discretion.

3. The last and greatest, and only difficult question in the cause, is that which respects the assumed right of the states to tax this bank, and its branches, thus established by congress? This is a question, comparatively of no importance to the individual states, but of vital importance to the Union. Deny this exemption to the bank as an instrument of government, and what is the consequence? There is no express provision ***391** in the constitution, which exempts any of the national institutions or property erty from state taxation. It is only by implication that the army and navy, and treasure, and judicature of the Union are exempt from state taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the states, as that contended for on the other side, is manifestly repugnant to the power of congress; since a power to establish, implies a power to continue and preserve.

There is a manifest repugnancy between the power of Maryland to tax, and the power of congress to pre-

serve, this institution. A power to build up, what another may pull down at pleasure, is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operations of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion cannot be controlled by the national councils. Whenever the local councils of Maryland will it, the bank must be expelled from that state. A right to tax, without limit or control, is essentially a power to destroy. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. If this power to tax the national property and institutions ***392** exists in the state of Maryland, it is unbounded in extent. There can be no check upon it, either by congress, or the people of the other states. Is there then any intelligible, fixed, defined boundary of this taxing power? If any, it must be found in this court. If it does not exist here, it is a nonentity. But the court cannot say what is an abuse, and what is a legitimate use of the power. The legislative intention may be so masked, as to defy the scrutinizing eye of the court. How will the court ascertain, *à priori*, that the given amount of tax will crush the bank? It is essentially a question of political economy, and there are always a vast variety of facts bearing upon it. The facts may be mistaken. Some important considerations belonging to the subject may be kept out of sight; they must all vary with times and circumstances. The result, then, must determine, whether the tax is destructive. But the bank may linger on for some time, and that result cannot be known, until the work of destruction is consummated. A criterion which has been proposed, is to see whether the tax has been laid, impartially, upon the state banks, as well as the Bank of the United States. Even this is an unsafe test; for the state governments may wish, and intend, to destroy their own banks. The existence of any national institution ought not to depend upon so frail a security. But this tax is levelled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other. It is a fundamental article of the state ***393** constitution of Maryland, that taxes shall operate on all the citizens impartially and uniformly, in proportion to their property, with the exception, however, of taxes laid for political purposes. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the state constitu-

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

tion, as not being laid uniformly on all the citizens, in proportion to their property. So that the legislature cannot disavow this to be its object, without, at the same time, confessing a manifest violation of the state constitution. Compare this act of Maryland with that of Kentucky, which is yet to come before the court, and the absolute necessity of repressing such attempts in their infancy, will be evident. Admit the constitutionality of the Maryland tax, and that of Kentucky follows inevitably. How can it be said, that the office of discount and deposit in Kentucky cannot bear a tax of \$60,000 *per annum*, payable monthly? Probably, it could not; but judicial certainty is essential; and the court has no means of arriving at that certainty. There is, then, here, an absolute repugnancy of power to power; we are not bound to show, that the particular exercise of the power in the present case is absolutely repugnant. It is sufficient, that the same power may be thus exercised.

****27** There certainly may be some exceptions out of the taxing power of the states, other than those created by the taxing power of congress; because, if there were no implied exceptions, then, the navy, and other ***394** exclusive property of the United States, would be liable to state taxation. If some of the powers of congress, other than its taxing power, necessarily involve incompatibility with the taxing power of the states, this may be incompatible. This is incompatible; for a power to impose a tax *ad libitum* upon the notes of the bank, is a power to repeal the law, by which the bank was created. The bank cannot be useful, it cannot act at all, unless it issues notes. If the present tax does not disable the bank from issuing its notes, another may; and it is the authority itself which is questioned, as being entirely repugnant to the power which established and preserves the bank. Two powers thus hostile and incompatible cannot co-exist. There must be, in this case, an implied exception to the general taxing power of the states, because it is a tax upon the legislative faculty of congress, upon the national property, upon the national institutions. Because the taxing powers of the two governments are concurrent in some respects, it does not follow, that there may not be limitations on the taxing power of the states, other than those which are imposed by the taxing power of congress. Judicial proceedings are practically a subject of taxation in many countries, and in some of the states of this Union. The states are not expressly prohibited in the constitution, from taxing the judicial proceedings of the United States. Yet such a prohibition must be im-

plied, or the administration of justice in the national courts might be obstructed by a prohibitory tax. But such a tax is no more a tax on the legislative faculty of congress than this. The branch ***395** bank in Maryland is as much an institution of the sovereign power of the Union, as the circuit court of Maryland. One is established in virtue of an express power; the other by an implied authority; but both are equal, and equally supreme. All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual states, in every respect, and for every purpose, including that of taxation. This immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction. The immunity of foreign public vessels from the local jurisdiction, whether state or national, was established in the case of *The Exchange*, 7 Cranch 116, not upon positive municipal law, nor upon conventional law; but it was implied, from the usage of nations, and the necessity of the case. If, in favor of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations, for the security of our own national government? So also, the jurisdiction of a foreign power, holding a temporary possession of a portion of national territory, is nowhere provided for in the constitution; but is derived from inevitable implication. *United States v. Rice* (*ante*, p. 246). These analogies show, that there may be exemptions from state jurisdiction, not detailed in the constitution, but arising out of general considerations. If congress has power to do a particular act, ***396** no state can impede, retard or burden it. Can there be a stronger ground, to infer a cessation of state jurisdiction?

****28** The Bank of the United States is as much an instrument of the government for fiscal purposes, as the courts are its instruments for judicial purposes. They both proceed from the supreme power, and equally claim its protection. Though every state in the Union may impose a stamp tax, yet no state can lay a stamp tax upon the judicial proceedings or custom-house papers of the United States. But there is no such express exception to the general taxing power of the states contained in the constitution. It arises from the general nature of the government, and from the principle of the supremacy of the national powers, and the laws made to execute them, over the state authorities and state laws.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

It is objected, however, that the act of congress, incorporating the bank, withdraws property from taxation by the state, which would be otherwise liable to state taxation. We answer, that it is immaterial, if it does thus withdraw certain property from the grasp of state taxation, if congress had authority to establish the bank, since the power of congress is supreme. But, in fact, it withdraws nothing from the mass of taxable property in Maryland, which that state could tax. The whole capital of the bank, belonging to private stockholders, is drawn from every state in the Union, and the stock belonging to the United States, previously constituted a part of the public treasure. Neither the stock belonging to citizens of other states, nor the privileged treasure *397 of the United States, mixed up with this private property, were previously liable to taxation in Maryland; and as to the stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all the other private property in the state. The establishment of the bank, so far from withdrawing anything from taxation by the state, brings something into Maryland which that state may tax. It produces revenue to the citizens of Maryland, which may be taxed equally and uniformly, with all their other private property. The materials of which the ships of war, belonging to the United States, are constructed, were previously liable to state taxation. But the instant they are converted into public property, for the public defence, they cease to be subject to state taxation. So, here, the treasure of the United States, and that of individuals, citizens of Maryland, and of other states, are undistinguishably confounded in the capital stock of this great national institution, which, it has been before shown, could be made useful as an instrument of finance, in no other mode than by thus blending together the property of the government and of private merchants. This partnership is, therefore, one of necessity, on the part of the United States. Either this tax operates upon the franchise of the bank, or upon its property. If upon the former, then it comes directly in conflict with the exercise of a great sovereign authority of congress; if upon the latter, then it is a tax upon the property of the United States; since the law does not, and *398 cannot, in imposing a stamp tax, distinguish their interest from that of private stockholders.

**29 But it is said, that congress possesses and exercises the unlimited authority of taking the state

banks; and therefore, the states ought to have an equal right to tax the Bank of the United States. The answer to this objection is, that, in taxing the state banks, the states in congress exercise their power of taxation. Congress exercises the power of the people; the whole acts on the whole. But the state tax is a part acting on the whole. Even if the two cases were the same, it would rather exempt the state banks from federal taxation, than subject the Bank of the United States to taxation by a particular state. But the state banks are not machines essential to execute the powers of the state sovereignties, and therefore, this is out of the question. The people of the United States, and the sovereignties of the several states, have no control over the taxing power of a particular state. But they have a control over the taxing power of the United States, in the responsibility of the members of the house of representatives to the people of the state which sends them, and of the senators, to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other states of the Union. The people of other states are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to the people of that state. The national *399 government can withdraw nothing from the taxing power of the states, which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the states are in perpetual conflict with the interests of the Union; which shows the danger of adding power to the partial views and local prejudices of the states. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property; and it must, consequently, be a tax on the faculty or franchise. It is, then, a tax on the legislative faculty of the Union, on the charter of the bank. It imposes a stamp duty upon the notes of the bank, and thus stops the very source of its circulation and life. It is as much a direct interference with the legislative faculty of congress, as would be a tax on patents, or copyrights, or custom-house papers or judicial proceedings.

Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

must be taken by implication; since the sovereign powers of the Union are supreme, and, wherever they come in direct conflict and repugnancy with those of the state governments, the latter must give way; since it has been proved, that this is the case as to the institution of the bank, and the general power of taxation by the states; since this power unlimited and unchecked, as it necessarily must be, by the *400 very nature of the subject, is absolutely inconsistent with, and repugnant to, the right of the United States to establish a national bank; if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.

March 7th, 1819.

MARSHALL, Ch. J., delivered the opinion of the court.

****30** In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of *401 hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is—has congress power to incorporate a bank? It has been truly said,

that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. *402 The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

****31** In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. *403 It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states-and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure *404 the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is, *405 emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

****32** This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this-that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, *406 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles *407 of confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in

some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

**33 Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, *408 that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, *409 if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed *410 to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

**34 The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the

power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning *411 which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity, for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making 'all *412 laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' The counsel for the state of Maryland have urged various arguments, to prove that this clause, though, in terms, a grant of power, is not so, in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it,

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

doubts might be entertained, whether congress could exercise its powers in the form of legislation.

****35** But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe ***413** its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be '*necessary and proper*' for carrying them into execution. The word '*necessary*' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word '*necessary*' is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally under-

stood as employing any means calculated to ***414** produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in a their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense-in that sense which common usage justifies. The word '*necessary*' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying '*imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,*' with that which authorizes congress '*to make all laws which shall be necessary and proper for carrying into execution*' the powers of the general government, without feeling a conviction, that the convention understood itself to change materially ***415** the meaning of the word '*necessary,*' by prefixing the word '*absolutely.*' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

****36** Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

***416** If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases.

Congress is empowered ‘to provide for the punishment ***417** of counterfeiting the securities and current coin of the United States,’ and ‘to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.’ The several

powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

****37** Take, for example, the power ‘to establish post-offices and post-roads.’ This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute ***418** impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word ‘necessary’ must be abandoned, in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution, by means not vindictive in their nature? If the word ‘necessary’ means ‘needful,’ ‘requisite,’ ‘essential,’ ‘conducive to,’ in order to let in the power of punishment for the infraction of law; why is it not

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

equally comprehensive, when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?

In ascertaining the sense in which the word 'necessary' is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power 'to make all laws which shall be necessary and proper to carry into execution' the powers of the government. If the word 'necessary' was used in that strict and rigorous sense for which the counsel for the state of *419 Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.

****38** But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. *420 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for

thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' &c., 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting *421 the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

****39** We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.^{FN7}

^{FN7} See *Montague v. Richardson*, 24 Conn. 348.

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power, as one which should be distinct and independent, to be exercised in any case whatever, it *422 would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged, by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' is not more comprehensive, than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions *423 against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure

by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

****40** But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

***424** After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself *425 may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire--

****41** 2. Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments--are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded--if it may restrain a state from the exercise of its taxing power on imports and exports--the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely *426 repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle

which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

*427 The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of suprem-

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

acy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

****42** The argument on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their ***428** acknowledged powers upon it, and that the constitution leaves them this right, in the confidence that they will not abuse it. Before we proceed to examine this argument, and to subject it to test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, ***429** for the benefit of all-and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are

objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

****43** If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable ***430** to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised *431 by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.

**44*432 If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they

may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle, is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend, that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and *433 other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is, 'that an indefinite power of taxation in the latter (the government *434 of the Union) might, and probably would, in time, deprive the former (the government of the states) of the

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might, at any time, abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus, all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments.'

****45** The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, 'to the exclusion and destruction of the state governments.' The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they ***435** mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this

power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a ***436** part, and the action of a part on the whole-between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the rights of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

****46** This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government ***437** of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT.-This cause came on to be heard, on the transcript of the record of the court of appeals of the state of Maryland, and was argued by counsel: on

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

(Cite as: 17 U.S. 316, 1819 WL 2135 (U.S.Md.))

consideration whereof, it is the opinion of this court, that the act of the legislature of Maryland is contrary to the constitution of the United States, and void; and therefore, that the said court of appeals of the state of Maryland erred, in affirming the judgment of the Baltimore county court, in which judgment was rendered against James W. McCulloch; but that the said court of appeals of Maryland ought to have reversed the said judgment of the said Baltimore county court, and ought to have given judgment for the said appellant, McCulloch: It is, therefore, adjudged and ordered, that the said judgment of the said court of appeals of the state of Maryland in this case, be, and the same hereby is, reversed and annulled. And this court, proceeding to render such judgment as the said court of appeals should have rendered; it is further adjudged and ordered, that the judgment of the said Baltimore county court be reversed and annulled, and that judgment be entered in the said Baltimore county court for the said James W. McCulloch.

U.S.,1819

M'Culloch v. State

17 U.S. 316, 1819 WL 2135 (U.S.Md.), 4 L.Ed. 579, 4 Wheat. 316, 4 A.F.T.R. 4491, 42 Cont.Cas.Fed. (CCH) P 77,296

END OF DOCUMENT

▷

Supreme Court of Washington,
En Banc.

STATE of Washington ex rel. EVERGREEN
FREEDOM FOUNDATION, A Washington Non-
profit Corporation and Teachers for a Responsible
Union, An Unincorporated Association, Petitioners,
v.

WASHINGTON EDUCATION ASSOCIATION;
National Education Association; Kristeen Hansel-
man; Bellevue Uniserv Council; Cascade Uniserv
Council; Chinook Uniserv Council; Eastern Wash-
ington Uniserv Council; Fourth Corner Uniserv
Council; Kent Uniserv Council; Lower Columbia
Uniserv Council; Mid-State Uniserv Council; North
Central Uniserv Council; Olympic Uniserv Council;
Pilchuck Uniserv Council; Puget Sound Uniserv
Council; Rainier Uniserv Council; Riverside Uniserv
Council; Samammish Uniserv Council; Seattle Unis-
erv Council; Soundview Uniserv Council; Southeast
Washington Uniserv Council; Spokane Uniserv
Council; Vancouver Uniserv Council; Tacoma Unis-
erv Council; Seattle Education Association; Seattle
School District No. 001; Bellevue School District No.
405; Central Kitsap School District No. 401; Everett
School District No. 002; Federal Way School District
No. 210; Highline School District No. 401; Kent
School District No. 415; Lynden School District No.
504; Olympia School District No. 111; Pasco School
District No. 001; Sedrowooley School District No.
101; Spokane School District No. 081; Tacoma
School District No. 010; Vancouver School District
No. 037; and Yakima School District No. 007, Re-
spondents.

No. 67126-5.

Argued Nov. 18, 1999.
Decided May 18, 2000.
As Amended June 8, 2000.

Nonprofit corporation and unincorporated association
of public school employees filed a complaint alleging
that education associations and school districts had
violated the Fair Campaign Practices Act by with-
holding funds from wages or salaries to be used for
political committees or for use as political contribu-
tions without obtaining annual written authorizations.
The Superior Court, Thurston County, Wm. Thomas

McPhee, J., granted school districts' motion to dis-
miss and granted summary judgment for education
associations. Direct review was granted. The Su-
preme Court, Smith, J., held that: (1) education asso-
ciations, in their capacity as labor organizations, were
not employers or other persons or entities "responsi-
ble for the disbursement of funds in payment of
wages or salaries," within meaning of Fair Campaign
Practices Act provision requiring annual written au-
thorization from employees for payroll deductions for
political contributions, and (2) rule promulgated by
Public Disclosure Commission (PDC) properly re-
quired an employer to obtain annual written authori-
zation from employees only when payment from the
deductions is made to a political committee required
to report under the Act or a candidate for state or lo-
cal office.

Affirmed.

Alexander, J., filed an opinion concurring in the re-
sult.

Talmadge, J., filed a specially concurring opinion.

Madsen, J., filed an opinion concurring in part and
dissenting in part, in which Agid, J. pro tem., joined.

Sanders, J., filed an opinion concurring in part and
dissenting in part.

West Headnotes

[1] Appeal and Error 30  893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

Dismissal for failure to state a claim is reviewed de
novo. CR 12(b)(6).

[2] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

Supreme Court reviews an order of summary judgment de novo and engages in the same inquiry as the trial court.

[3] Statutes 361 ↪325

361 Statutes

361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. Most Cited Cases

The basic rules of statutory construction applicable to legislative enactments also apply to initiatives.

[4] Statutes 361 ↪181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

The objective of statutory interpretation is to execute the intent of the Legislature, which must be primarily determined from the language of the statute itself.

[5] Statutes 361 ↪190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statutes 361 ↪212.7

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.7 k. Other Matters. Most Cited

Cases

When words in a statute are plain and unambiguous, the court is required to assume the Legislature meant what it said and apply the statute as written.

[6] Labor and Employment 231H ↪988

231H Labor and Employment

231HXII Labor Relations

231HXII(B) Labor Organizations

231Hk988 k. Nature and Status in General.

Most Cited Cases

(Formerly 232Ak81 Labor Relations)

A labor organization is not an “employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries,” within meaning of Fair Campaign Practices Act provision requiring annual written authorization from employees for payroll deductions for political contributions. West's RCWA 42.17.680(3).

[7] Elections 144 ↪317.3

144 Elections

144XI Violations of Election Laws

144k317.1 Contributions and Expenditures

144k317.3 k. Labor Organizations. Most

Cited Cases

(Formerly 232Ak81 Labor Relations)

Washington Education Association (WEA), in its capacity as a labor organization, was not an employer or other person or entity “responsible for the disbursement of funds in payment of wages or salaries,” within meaning of Fair Campaign Practices Act provision requiring annual written authorization from employees for payroll deductions by employers for political contributions. West's RCWA 42.17.680(3).

[8] Statutes 361 ↪190

140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M. (BNA) 2992, 144 Ed. Law Rep. 396
(Cite as: 140 Wash.2d 615, 999 P.2d 602)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Where there is no ambiguity, the meaning of a statute is derived from its language alone.

[9] Statutes 361 ⚡ **217.4**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k217.4 k. Legislative History in

General. Most Cited Cases

Where a statute is not ambiguous, it is not necessary to resort to legislative history to interpret it.

[10] Statutes 361 ⚡ **181(2)**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and Conse-

quences. Most Cited Cases

General rules of statutory construction require avoidance of unlikely, absurd, or strained results.

[11] Statutes 361 ⚡ **190**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

The court does not ignore clear statutory language and will not strain to find an ambiguity where the language of the statute is clear.

[12] Administrative Law and Procedure 15A ⚡ **305**

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administra-

tive Agencies, Officers and Agents

15AIV(A) In General

15Ak303 Powers in General

15Ak305 k. Statutory Basis and Limitation. Most Cited Cases

Administrative Law and Procedure 15A ⚡ **325**

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak325 k. Implied Powers. Most Cited Cases

The powers of an administrative agency are derived from statutory authority expressly granted or necessarily implied.

[13] Administrative Law and Procedure 15A ⚡ **387**

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(C) Rules and Regulations

15Ak385 Power to Make

15Ak387 k. Statutory Limitation. Most Cited Cases

Although an agency does not have the power to promulgate rules which amend or change legislative enactments, the agency may adopt rules which "fill in the gaps" if those rules are necessary for effectuation of a general statutory scheme.

[14] Labor and Employment 231H ⚡ **63**

231H Labor and Employment

231HII Government Regulation in General

231Hk63 k. Regulations in General. Most Cited Cases

(Formerly 232Ak28 Labor Relations)

Implementation and enforcement of Fair Campaign Practices Act provision requiring annual written authorization from employees for payroll deductions by employers for political contributions required that the Public Disclosure Commission (PDC) promulgate rules for guidance to employers concerning the circumstances under which an employer must require such written annual authorization. West's RCWA 42.17.370, 42.17.680(3).

[15] Labor and Employment 231H 2187231H Labor and Employment231HXIII Wages and Hours231HXIII(A) In General231Hk2186 Deduction and Forfeiture231Hk2187 k. In General. Most CitedCases

(Formerly 255k73(1) Master and Servant)

Rule promulgated by Public Disclosure Commission (PDC) to implement Fair Campaign Practices Act provision regarding payroll deductions for political contributions properly requires an employer to obtain annual written authorization from employees for such deductions only when payment from the deductions is made to a political committee required to report under the Act or a candidate for state or local office. West's RCWA 42.17.680(3); Wash. Admin. Code § 390-17-100.

[16] Labor and Employment 231H 1037(2)231H Labor and Employment231HXII Labor Relations231HXII(B) Labor Organizations231Hk1031 Dues, Fees, and Assessments231Hk1037 Payment231Hk1037(2) k. Check-Off. MostCited Cases

(Formerly 232Ak104 Labor Relations)

When the employer makes deductions under the Education Employment Relations Act and the Public Employees Collective Bargaining Act, and the employer is not made aware of the specific intended use of the funds, the employer has no legal obligation or authority under the Fair Campaign Practices Act to seek annual written authorization for payroll deductions for political contributions. West's RCWA 41.56.110, 41.59.100, 42.17.680(3).

[17] Statutes 361 325361 Statutes361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. Most Cited Cases

The intent of the electorate in initiatives must be ascertained from the language of the initiative itself, as well as from statements contained in the official Voters Pamphlet.

ers Pamphlet.

[18] Statutes 361 325361 Statutes361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. Most Cited Cases

Initiatives are not construed like other legislation because, in interpreting them, reviewing courts focus on the language of the initiative as the average informed lay voter would read it.

[19] Elections 144 311144 Elections144XI Violations of Election Laws

144k311 k. Constitutional and Statutory Provisions. Most Cited Cases

Although the Fair Campaign Practices Act is to be construed liberally, the court need not do so if such a construction would result in an unlikely, absurd, or strained interpretation of the statutory language. West's RCWA 42.17.920.

[20] Statutes 361 325361 Statutes361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. Most Cited Cases

In determining the purpose or intent of the statute based upon the initiative, the court may consider arguments made for and against the initiative in the Voters Pamphlet.

[21] Statutes 361 206361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

It is a basic rule of statutory construction that, whenever possible, statutes should be construed so that no part of the statutory scheme is rendered superfluous, and to accomplish this purpose, all provisions should be harmonized.

[22] Labor and Employment 231H ↪1034(2)231H Labor and Employment231HXII Labor Relations231HXII(B) Labor Organizations231Hk1031 Dues, Fees, and Assessments231Hk1034 Use of Funds231Hk1034(2) k. Political Activities.Most Cited Cases

(Formerly 232Ak104 Labor Relations)

Fair Campaign Practices Act does not prohibit a labor organization from using general treasury funds obtained from members' dues for the purpose of operating a political committee, influencing an election, or to otherwise make contributions to a political committee or candidate. West's RCWA 42.17.680(3).

****604*617** Song, Oswald & Mondress, James D. Oswald, Seattle, for Amicus Curiae on behalf of Washington State Labor Council.

Davis, Wright, Tremaine, Daniel Benjamin Ritter, Seattle, for Amicus Curiae on behalf of Foundation for Campaign Finance Comm.

Shawn Newman, Olympia, for Amicus Curiae on behalf of Initiative and Referendum Institute.

James Martin Johnson, Jeanne A. Brown, Evergreen Freedom Foundation, Olympia, Ellis, Li & McKinstry, Steven T. O'Ban, Nathaniel Lee Taylor, Seattle, for Appellants.

Judith A. Lonquist, Clifford Donald Foster, Jr., Seattle, Harriet Kay Strasberg, Olympia, Joni Roberta Kerr, Vancouver, Catherine O'Toole, Federal Way, for Respondents.

***618SMITH, J.**

Appellants Evergreen Freedom Foundation ^{FN1} and Teachers For A Responsible Union ^{FN2} seek direct review of orders of summary judgment and dismissal by the Thurston County Superior Court in favor of Respondent School Districts ^{FN3} and Washington Education Associations ^{FN4} in a lawsuit by Appellants claiming violation by Respondents of RCW 42.17.680(3) in withholding funds from wages or salaries for political contributions without obtaining annual written authorizations. The Superior Court

concluded that ****605** the WEA, in its capacity as a labor organization, did not violate RCW 42.17.680(3) because the statute applies only to an "employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries." Additionally, the court concluded that Respondent School Districts did not violate section 680(3) because WAC 390-17-100, the rule promulgated by the Public Disclosure Commission to implement the statute, is entitled ***619** to great weight and the School Districts have complied with it. We affirm.

FN1. Evergreen Freedom Foundation is a Washington nonprofit corporation. Clerk's Papers at 14.

FN2. Teachers For A Responsible Union is an unincorporated association of public school employees. Clerk's Papers at 14.

FN3. The fifteen school districts named as Respondents in this case are referred to collectively as "Respondent School Districts." Clerk's Papers at 15-16 and 35.

FN4. The Washington Education Association (WEA) (a labor organization incorporated in Washington and affiliated with the National Education Association) (NEA). Kristeen Hanselman (an employee of NEA), the twenty-one individually named Uniserv Councils (regional affiliates of WEA and NEA), and the Seattle Education Association (a local education association affiliated with WEA) are referred to collectively as "Respondent Education Association." Clerk's Papers at 14-16, 26-29 and 154.

QUESTIONS PRESENTED

The questions presented in this case are:

(1) Whether the Washington Education Association, in its capacity as a labor organization, is an "other person or entity responsible for the disbursement of funds in payment of wages or salaries" under RCW 42.17.680(3), which requires annual written authorization from members for payroll deductions by employers from wages or salaries for political contributions.

(2) Whether WAC 390-17-100, promulgated by the Public Disclosure Commission (PDC) to implement RCW 42.17.680(3), properly requires an employer to obtain annual written authorization from employees for payroll deductions for political contributions only when payment from the deductions is made to a political committee required to report under chapter 42.17 RCW or a candidate for state or local office.

STATEMENT OF FACTS

The facts in this case are not disputed. RCW 42.17.680(3) was enacted as a consequence of passage of Initiative 134 as section 8 of the Fair Campaign Practices Act on November 3, 1992.^{FN5}

FN5. See RCW 42.17.680(3).

In the 1991 legislative session, Engrossed Substitute Senate Bill 5864 was introduced to regulate political contributions, campaign expenditures and advertising.^{FN6} The bill, the original version of which later became Initiative 134, passed the Senate on March 15, 1991.^{FN7} The House referred the bill *620 back to the Senate where it remained without further action through expiration of the 1991 legislative session.^{FN8}

FN6. S.B. Rep. ESSB 5864, at 1 (Mar. 15, 1991).

FN7. *Id.*

FN8. 1 *Legislative Digest and History of the Senate and House of Representatives*, 52d Leg. 356 (Final No. 6, Wash. 1991-92).

In 1992, senators from one political party sponsored Initiative 134.^{FN9} The required signatures were obtained on the petition to the Legislature for the initiative to be placed on the November 1992 ballot.^{FN10} Initiative 134 was passed by popular vote on November 3, 1992 by a margin of seventy-two percent.

FN9. Edward D. Seeberger, *Sine Die: A Guide to the Washington State Legislative Process* 164-65 (1997); see also, S.B. Rep. ESSB 5864, at 1 (Mar. 15, 1991).

FN10. *Senate Journal*, 52d Leg., Reg. Sess.

17 (Wash. 1992); see Washington State Constitution, article II § 1(a).

Before Initiative 134 was passed in 1992, the Washington Education Association (WEA) made political contributions through a registered political committee, Political Unity of Leaders in State Education (PULSE).^{FN11} At that time, PULSE was funded by automatic payroll deductions from the salaries or wages of WEA members who were state employees.^{FN12} There was no requirement for annual reauthorization of PULSE deductions. After passage of Initiative 134, the WEA determined it was then required to obtain annual written authorization**606 from its members before making further automatic payroll deductions for PULSE.^{FN13}

FN11. Clerk's Papers at 310.

FN12. WEA represents approximately 65,000 educational employees who work in the State's K-12 and post-secondary schools. An annual deduction of \$13 per member was paid to PULSE with a portion distributed to Uniserv PACs. Clerk's Papers at 154 and 310. This concept, also referred to as "reverse dues check-off," occurred after an initial authorization to deduct dues from members' salaries was received by the WEA, and all subsequent payroll deductions to fund PULSE were automatic and would be discontinued only at the employee's request. See Br. of Appellant at 14.

FN13. The WEA also noted a decline in the number of contributors to PULSE from a high of 44,785 to a low of 9,756 as of September 1995. Clerk's Papers at 348. Contributions to PULSE after the passage of Initiative 134 fell by \$455,364. Br. of Appellant at 15.

*621 The WEA dissolved PULSE in 1994^{FN14} and established two new entities: the Washington Education Association-Political Action Committee (WEA-PAC)^{FN15} and the Political Education Fund, later renamed the Community Outreach Program (COP).^{FN16} WEA-PAC is funded by a separate payroll deduction for which the WEA obtains annual written authorizations from employee-members.^{FN17} COP is funded by "a special assessment on mem-

bers” and not from a mandatory general membership dues deduction.^{FN18} Employees within the WEA bargaining units who choose not to become WEA members are assessed a separate “agency shop fee,”^{FN19}*622 which does not include a COP assessment,^{FN20} as provided in collective bargaining agreements with employee-members and under RCW 41.59.100.

FN14. The WEA's “Life After Initiative 134 Task Force” stated the PULSE structure was outmoded. In April 1994, based on the recommendations of the Task Force, the WEA Representative Assembly disbanded PULSE and the Uniserv PACs. The dissolution of PULSE reduced each WEA member's payroll deduction by \$13, while the deduction for general dues increased by \$12. Clerk's Papers at 151-57 and 310-11; *see also* Br. of Appellant at 17-19.

FN15. WEA-PAC is a centralized “political committee” as defined by RCW 42.17.020(33) and replaces the Uniserv PACs. WEA-PAC continues many of the political activities formerly conducted by PULSE, such as contributing to candidate campaigns, school levies and ballot propositions. Clerk's Papers at 155-56 and 311.

FN16. An April 1994 amendment to WEA bylaws, Article II, Section 2, initially referred to the entity as “Political Education.” Since November 1996, COP has not been recognized by the Public Disclosure Committee as a “political committee” under RCW 42.17.020(33). Clerk's Papers at 156-60 and 563.

FN17. Each WEA-PAC member is assessed a \$12 annual payment (\$1 per month). Clerk's Papers at 156-57. Appellants do not claim funding of WEA-PAC violates RCW 42.17.680(3). *See* Br. of Appellant at 8; Br. of Resp't School Districts at 2.

FN18. Resp't Education Association's Resp. to Amicus Curiae Br. of Foundation For Campaign Finance Compliance at 2; *see* Br. of Resp't School Districts at 4; Clerk's Papers at 151-57. (Respondent Education As-

sociation acknowledges that the WEA receives general dues from its members and uses general treasury funds for contributions defined by RCW 42.17.020(14)). Br. of Resp't Education Association at 8.

FN19. Under United States Supreme Court precedent, the First Amendment rights of agency shop fee payers are preserved if they are not compelled to contribute to political or ideological causes they oppose. Specifically in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court did not hold that a labor organization cannot use its general treasury fund for participation in the political process, but stated that the United States Constitution requires only that expenditures be financed “by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.” *Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782; *see also* *Railway Employees' Dep't, v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

FN20. There is no dispute that “agency shop fees” collected by WEA for representing non-union members in its collective bargaining units are not used for political purposes. “Agency shop fee” payers, in addition to Community College, Technical College and four-year University members, are not assessed for WEA-PAC and NEA-PAC. “Agency Shop” fee payers are not assessed for COP. Clerk's Papers at 148-49 and 151-57; Br. of Appellant at 18; and Resp't Education Association's Resp. to Amicus Curiae Br. of Foundation For Campaign Finance Compliance at 2.

In this case, the WEA has negotiated collective bargaining agreements on behalf of the recognized bargaining units of Respondent School Districts' certificated employees affiliated with it.^{FN21} Under the col-

lective bargaining agreements, Respondent School Districts, through payroll deductions, withhold WEA general membership dues and agency shop fees of non-WEA members in the amounts determined by the WEA.^{FN22} The **607 WEA facilitates the payroll deduction process^{FN23} and supplies the Respondent School Districts with membership manuals, rosters, various enrollment information, dues distribution information and written authorization forms. The school districts' payroll officers transmit withheld funds to the WEA or its designees under terms of *623 the collective bargaining agreements.^{FN24} The WEA, COP, Uniserv Councils, and local education associations which receive funds withheld by Respondent School Districts have never registered as "political committees" under chapter 42.17 RCW nor have they been candidates for state or local political offices.^{FN25}

FN21. Br. of Resp't School Districts at 4; Clerk's Papers at 460-509.

FN22. Before withholding general membership dues, payroll officers do not obtain annual written authorization from WEA member-employees prior to transmittal of funds to the WEA. Br. of Resp't School Districts at 4. The payroll officers separately deduct dues from WEA members for the following: NEA, WEA, COP, NEA-PAC, WEA-PAC, Uniserv and Local. Br. of Resp't School Districts at 4; Clerk's Papers at 151, 156-58, 183-218, 519 and 815.

FN23. The WEA's local education associations obtain member signatures on forms and provide copies to the school districts' payroll officers. The school districts do not independently verify compliance with RCW 42.17.680(3). Clerk's Papers at 148-49 and 519; *see* Br. of Appellant at 18; and Br. of Resp't Education Association at 8. A total deduction amount is provided by WEA to the school districts which in turn forward a single check reflecting the total deductions from the WEA member-employees' salaries or wages. The funds collected by WEA are then disbursed to the various recipients. Clerk's Papers at 460-509 and 518-19.

FN24. School district payroll officers trans-

mit the withheld funds to Blue Cross of Washington and Alaska or the local affiliates of the WEA which then forward the funds to the NEA, WEA, Uniserv Councils and Local Education Associations. Br. of Resp't School Districts at 4-5; Clerk's Papers at 183-218 and 815.

FN25. Br. of Resp't School Districts at 4-5; Clerk's Papers at 153-66.

Since August 30, 1993, an administrative rule promulgated by the Public Disclosure Commission, WAC 390-17-100, has required employers to obtain annual written authorizations from employees for payroll deductions for political purposes only when a recipient is a registered political committee under chapter 42.17 RCW or a candidate for state or local office.^{FN26} Respondent School Districts acknowledge they are "employers" under RCW 42.17.680(3) and Chapter 41.59 RCW, the Educational Employment Relations Act.^{FN27}

FN26. WAC 390-17-100; *see also* Clerk's Papers at 100-03.

FN27. Br. of Resp't School Districts at 3; Clerk's Papers at 15-16 and 36.

On June 24, 1997, Appellants Evergreen Freedom Foundation and Teachers For A Responsible Union^{FN28} filed in the Thurston County Superior Court a complaint against Respondents School Districts and Education Association for campaign finance, reporting and contribution violations of chapter 42.17 RCW.^{FN29} Their amended complaint filed on December 17, 1997 claimed several violations, including violation of RCW 42.17.680(3) by the WEA and Respondent School Districts for withholding funds from wages or salaries to be used for political committees or for use as political contributions without obtaining annual written authorizations. [FN30]*624 Respondent Education Association filed its answer **608 to the original complaint on August 12, 1997.^{FN31} The answer of Respondent School Districts^{FN32} to that complaint was filed on November 13, 1997.^{FN33} Both Respondents denied each of the claimed violations of chapter 42.17 RCW.

FN28. Appellants Evergreen Freedom Foundation and Teachers For A Responsible

Union are referred to collectively as “Appellants Evergreen Freedom Foundation.”

FN29. Clerk's Papers at 12-25.

FN30. Appellants claimed the following violations of chapter 42.17 RCW: (Count I) Violation of RCW 42.17.040, .050, .080 and .090-WEA failed to register and report as a political committee; (Count II) Violation of RCW 42.17.040, .050, .080 and .090-Uniserv Councils failed to register and report as political committees; (Count III) Violation of RCW 42.17.680(3)-WEA directs school districts to withhold or divert funds in payment of wages or salaries for political committees or for use as political contributions without obtaining annual written authorizations; (Count IV) Violation of RCW 42.17.680(3)-School districts are “employers” and withhold or divert funds in payment of wages or salaries for political committees or for use as political contributions without obtaining annual written authorizations; (Count V) Violation of RCW 42.17.150, .155, .170 and .180 by the NEA and Kristeen Hanselman for filing incomplete reports under-reporting NEA and NEA-PAC contributions; (Count VI) Violation of RCW 42.17.100 and .180 by WEA for not reporting expenditures supporting local elections; and (Count VII) Violation of RCW 42.17.180 by Seattle Education Association for not reporting contributions in 1996. Clerk's Papers at 42-54.

FN31. Clerk's papers at 26-34.

FN32. Respondent School District's answer was filed on behalf of all fifteen school districts, including Vancouver School District 037. Clerk's Papers at 35.

FN33. Clerk's Papers at 35-41.

On January 9, 1998, the Thurston County Superior Court, the Honorable Wm. Thomas McPhee, granted the motion of the Public Disclosure Commission (PDC) to intervene for the limited purpose of opposing Appellants' motion to add additional causes of action to its amended complaint.^{FN34} The court denied

Appellants' motion.^{FN35}

FN34. Clerk's Papers at 86-88.

FN35. Clerk's Papers at 89-90.

On April 3, 1998, Respondent Education Association, Appellants Evergreen Freedom Foundation, Respondent School Districts and Vancouver School District filed separate motions.^{FN36} Respondent Education Association moved to dismiss the claims in Counts III and IV of Appellants' amended complaint because the Association is not a *625 “political committee.”^{FN37} In their motion for partial summary judgment, Appellants claimed the WEA and Respondent School Districts have violated RCW 42.17.680(3) and that the WEA is a “political committee” under RCW 42.17.020(33).^{FN38}

FN36. Clerk's Papers at 91, 228-55, 271, 723-53.

FN37. Clerk's Papers at 91 and 684-711A.

FN38. Clerk's Papers at 228-55.

The trial court granted Respondent Education Association's motion to dismiss and denied Appellants' motion for partial summary judgment on July 2, 1998.^{FN39} The court concluded the WEA is not an “employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries,” and is therefore not governed by RCW 42.17.680(3).^{FN40} Relying on the “last antecedent rule” of statutory construction and the use of the phrase “employer or labor organizations” in subsections (1) and (2) of the statute, and its omission in subsection (3), the court concluded the drafters of the law intended to regulate labor organizations in some respects but did not intend for subsection (3) to apply to them.^{FN41}

FN39. Clerk's Papers at 648-51.

FN40. Clerk's Papers at 648.

FN41. The trial court also concluded there are “clear issues of fact” concerning the Appellants' contention that “Section 680(3) applies to WEA as the principal of the school

districts, who act as its agents in withholding dues ... deductions from the districts' teachers." The court concluded the school districts have not violated section 680(3), and therefore no liability can be imputed to Respondent Education Association. Clerk's Papers at 649-51.

In the motions for summary judgment by Respondent School Districts and the Vancouver School District, they asserted there was no violation of RCW 42.17.680(3) and that they have complied with the PDC's rule (WAC 390-17-100).^{FN42} The court granted summary judgment in favor of Respondent School Districts and the Vancouver School District.^{FN43} The court stated that although RCW 42.17.680(3) *626 contains both "patent"^{FN44} and "latent"^{FN45} ambiguities, the rule promulgated by the PDC as the enforcing agency is entitled to "great weight when construing Section .680(3); but the court still must make an independent determination about the [school] districts' compliance with the statute."^{FN46} The court reasoned that, although the school districts are "employers," **609 the funds they deduct without prior annual authorization are not withheld as "political contributions" as that term is used in RCW 42.17.680(3) and, accordingly, Respondent School Districts did not violate the statute by withholding funds for the WEA. The court concluded "the [school] districts have complied with Section .680(3) as well as [WAC 390-17-100] ... [and WAC 390-17-100 which] constru[es] the statute is consistent with the purposes of the Act."^{FN47}

FN42. Clerk's Papers at 271-93 and 712-53.

FN43. Clerk's Papers at 643-47.

FN44. The court stated the "patent" ambiguities of RCW 42.17.680(3) involve the phrase "for use as a political contribution" being juxtaposed with the phrase "contributions to political committees." Clerk's Papers at 645.

FN45. The court stated the "latent" ambiguities of RCW 42.17.680(3) involve the "political committees to whom payments are regulated [but] are not identified[,] nor is the responsibility for identifying them assigned." Clerk's Papers at 645.

FN46. Clerk's Papers at 647.

FN47. The court issued a third order on July 2, 1998 on the issue of whether the WEA is a "political committee" as defined by RCW 42.17.020(33). The court denied the motions of both Appellants and Respondent Education Association and stated that additional discovery is required before assessing the impact of the "primary purpose test" under State v. Dan J. Evans Campaign Committee, 86 Wash.2d 503, 546 P.2d 75 (1976), on the WEA. Clerk's Papers at 647 and 652-56.

On July 28, 1998, Appellants moved for final judgment on the RCW 42.17.680(3) claims.^{FN48} The court granted final judgment on August 24, 1998 dismissing counts III and IV of Appellants' amended complaint; dismissing Respondent School Districts as defendants; and dismissing the claims against Respondent Education Association for violation of RCW 42.17.680(3).^{FN49}

FN48. Clerk's papers at 657-59.

FN49. Clerk's Papers at 663-67.

On September 21, 1998, Appellants sought direct review *627 by this Court.^{FN50} On October 23, 1998, in response to Appellants' request for discovery, the Superior Court issued a revised order dismissing all claims concerning COP because they were resolved in the settlement agreement of a separate lawsuit, WEA v. PDC, Thurston County Cause Number 96-2-04395-5 (Oct. 23, 1998).^{FN51}

FN50. Clerk's Papers at 668-70.

FN51. The settlement agreement in WEA v. PDC contained conclusions involving the active roles WEA, its affiliates and NEA played in the effort to defeat Initiatives 173 (establishment of vouchers to attend public or private schools) and 177 (creation of independent/charter schools and renewed school districts). Clerk's Papers at 69-88 and 348-67. The agreement included the following conclusions: COP dues will not be used for payment of administrative expenses of

WEA-PAC or for contributions to any other political committee, candidate or political party and any funds so expended will be returned to WEA members; at least since November 1966 COP has not been a "political committee" as defined by RCW 42.17.020(33); WEA-PAC violated the reporting requirements of RCW 42.17.080 and .090; WEA violated RCW 42.17.170 and .180 regarding its contributions to WEA-PAC and to the "No on 173/177 Committee;" WEA and NEA violated RCW 42.17.120 by submitting \$410,00.00 to the "No on 173/177 Committee" without disclosing NEA as the source of those funds; NEA violated RCW 42.17.180 by failing to file employer lobbyist reports; WEA-PAC exceeded the contribution limits of RCW 42.17.640; and penalized WEA and its affiliates in the amount of \$80,000.00 in addition to costs and attorneys' fees in the amount of \$20,000.00 both payable to the State. Clerk's Papers at 153-66.

This Court granted direct appeal in this case on August 31, 1999. ^{FN52}

FN52. Order dated Aug. 31, 1999.

DISCUSSION

Laws of 1993, ch. 2, § 8, based upon Initiative 134 passed by the voters on November 3, 1992, now codified in identical language as RCW 42.17.680, reads:

42.17.680 Limitations on employers or labor organizations. ^{FN53} (1) No employer or labor organization may increase the salary of an officer or employee, or give an emolument to an officer, employee, or other person or entity, with the intention that the increase in salary, or the emolument, or a part of it, be contributed or spent to support or oppose a candidate, state official against whom recall charges have been filed, political party, or political committee.

FN53. Laws of 1993, ch. 2, § 8.

(2) No employer or labor organization may discriminate *628 against an officer or employee in

the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

(3) *No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an **610 employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee.* The request must be made on a form prescribed by the commission informing the employee of the prohibition against employer and labor organization discrimination described in subsection (2) of this section. The request is valid for no more than twelve months from the date it is made by the employee.

(4) Each person or entity who withholds contributions under subsection (3) of this section shall maintain open for public inspection for a period of no less than three years, during normal business hours, documents and books of accounts that shall include a copy of each employee's request, the amounts and dates funds were actually withheld, and the amounts and dates funds were transferred to a political committee. Copies of such information shall be delivered to the commission upon request.

(Emphasis added.)

Appellants Evergreen Freedom Foundation make two main contentions. First, they contend that Respondent Education Association, specifically the WEA, is an "employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries" and is therefore required to comply with RCW 42.17.680(3). Second, they claim the WEA and Respondent School Districts, with which it has collective bargaining agreements, have violated the statute because the school districts deducted WEA general membership dues from the salaries or wages of its employee-members without prior annual written authorization, and transmitted those dues to the WEA, which in turn utilized them for political contributions.

*629 The trial court found no violation of Section

680(3) by either Respondent Education Association or Respondent School Districts.^{FN54}

FN54. Briefs *amicus curiae* were filed in support of the WEA by the Washington State Labor Council and in support of Appellants by the Foundation For Campaign Finance Compliance and the Initiative And Referendum Institute.

APPLICATION OF RCW 42.17.680(3) TO LABOR ORGANIZATIONS

[1][2] In this case, certain claims of Appellants against Respondent Education Association were dismissed under Court Rule (CR) 12(b)(6) and summary judgment was granted in favor of Respondent School Districts. Dismissal of a claim under CR 12(b)(6) is reviewed de novo and is appropriate only if “it appears beyond a reasonable doubt that no facts exist that would justify recovery.”^{FN55} This Court reviews an order of summary judgment de novo and engages in the same inquiry as the trial court.^{FN56} In doing this, the Court will affirm a summary judgment order “only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”^{FN57}

FN55. *Reid v. Pierce County*, 136 Wash.2d 195, 201, 961 P.2d 333 (1998) quoting, *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994).

FN56. *Reid*, 136 Wash.2d at 201, 961 P.2d 333.

FN57. *Id.*

Appellants claim the WEA, in its capacity as a labor organization, is an “other person or entity responsible for the disbursement of funds in payment of wages or salaries” under RCW 42.17.680(3). They claim the terms “person”^{FN58} and “entity”^{FN59} are broadly defined and should be interpreted *630 to include labor organizations.^{FN60} The WEA concedes it **611 is a “person or entity” but argues it is not “responsible for the disbursement of funds in payment of wages or salaries” to its members.^{FN61} Appellants respond that the statute should be broadly construed to effectuate

its purposes, which they claim were to limit the taking of salaries or wages for political purposes opposed by an employee-member and to prevent the consolidation of political power in large organizations such as labor organizations.^{FN62} The WEA counters that the statute is not ambiguous, and thus an inquiry into legislative intent is not necessary.

FN58. “Person” as defined by RCW 42.17.020(30) “includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.”

FN59. “Entity” is not defined by chapter 42.17 RCW. BLACK'S LAW DICTIONARY 532 (6th ed.1990) defines it as “[a] real being; existence.... An organization or being that possesses separate existence.”

FN60. Appellants also claim the WEA is “responsible for the disbursement of funds” by relying upon the collectively bargained contract right of the WEA to inform the school districts of the amount of the general membership dues to withhold and “may withhold or divert a portion of an employee's wages or salaries.” Clerk's Papers at 238-41.

FN61. According to Respondent Education Association it “may direct school district payroll officers as to the amount of union dues to be deducted from the salary of an employee, ... [h]owever, this fact does not make the union an ‘entity responsible for [the] disbursement of funds in payment of wages or salaries.’ ” Respondent reiterates that school districts are “employers” and operate unilaterally in the area of disbursement of wages. Br. of Resp't Education Association at 14-15.

FN62. Br. of Appellant at 31-40.

[3][4][5] But this case does require interpretation of RCW 42.17.680(3) as a matter of law.^{FN63} It has not

previously been interpreted by this Court.^{FN64} The basic rules of statutory construction applicable to legislative enactments also apply to initiatives.^{FN65} The objective of statutory interpretation is to execute the intent of the Legislature, which must be primarily determined from the language of the statute itself.^{FN66} *631 When words in a statute are plain and unambiguous, this Court is required to assume the Legislature meant what it said and apply the statute as written.^{FN67}

FN63.State v. Martin, 137 Wash.2d 774, 788, 975 P.2d 1020 (1999).

FN64. However, this Court interpreted another section of the statute, RCW 42.17.680(2) in Nelson v. McClatchy Newspapers, Inc., 131 Wash.2d 523, 531, 936 P.2d 1123 (1997). (Fair Campaign Practices Act prohibits employers from discriminating against employees because of employees' refusal to abstain from political involvement.).

FN65.State ex rel. Heavey v. Murphy, 138 Wash.2d 800, 808, 982 P.2d 611 (1999); Seeber v. Public Disclosure Commission, 96 Wash.2d 135, 139, 634 P.2d 303 (1981).

FN66.Roberts v. Johnson, 137 Wash.2d 84, 91, 969 P.2d 446 (1999). In re Custody of Smith, 137 Wash.2d 1, 8, 969 P.2d 21 (1998).

FN67.In re Custody of Smith, 137 Wash.2d at 8, 969 P.2d 21.

[6][7] Section 8 of Initiative 134 was adopted by popular vote and later codified in identical language as RCW 42.17.680(3). Subsection (3) prohibits those responsible for disbursement of funds in payment of employee wages from withholding or diverting a portion of those funds for political contributions. The prohibition of subsection (3) is directed to an "employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries." The language of subsection (3) does include the words "labor organization," but does not characterize the organization as an "employer or other person or entity" paying the wages or salaries of employees.

A review of the entire statute indicates several specific references to "labor organizations". In particular, the phrase "employer or labor organizations" appears in both subsections (1) and (2), but the same words "employer or labor organizations" do not appear in subsection (3), although subsection (3) does refer to "employer or labor organizations discrimination."^{FN68}

FN68.Accord Seeber, 96 Wash.2d at 139, 634 P.2d 303. ("It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.").

In this State general membership dues of a labor organization may be used as a source for political contributions.^{FN69} The Federal Election Campaign Act of 1974,^{FN70} 2 U.S.C. § 441b, to the contrary, prohibits use of corporate funds and labor organization funds for direct political contributions to federal election campaigns. The federal statute is clear and unequivocal in its language. Appellants' argument that subsection (3) of the Washington statute, RCW 42.17.680, was intended to achieve a similar result is not supported by citation to any authority.

FN69. Chapter 42.17 RCW.

FN70.2 U.S.C. § 431-55.

**612[8][9]*632 Appellants have not identified any ambiguity in RCW 42.17.680 as it relates to labor organizations. Where there is no ambiguity, the meaning of a statute is derived from its language alone.^{FN71} Where a statute is not ambiguous, it is not necessary to resort to legislative history to interpret it.^{FN72}

FN71.Geschwind v. Flanagan, 121 Wash.2d 833, 840, 854 P.2d 1061 (1993).

FN72.Geschwind, 121 Wash.2d at 841, 854 P.2d 1061.

[10][11] General rules of statutory construction require avoidance of unlikely, absurd, or strained results.^{FN73} This Court does not ignore clear statutory language and will not strain to find an ambiguity where the language of the statute is clear.^{FN74} The

140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M. (BNA) 2992, 144 Ed. Law Rep. 396
(Cite as: 140 Wash.2d 615, 999 P.2d 602)

plain words in RCW 42.17.680(3), an “employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries,” does not include labor organizations. Nor are they included in the identical wording of Initiative 134, section 8(3).

FN73. Double D Hop Ranch v. Sanchez, 133 Wash.2d 793, 799, 947 P.2d 727, 952 P.2d 590 (1997), citing, State v. Stannard, 109 Wash.2d 29, 36, 742 P.2d 1244 (1987).

FN74. Geschwind, 121 Wash.2d at 841, 854 P.2d 1061.

INTERPRETATION OF RCW 42.17.680(3) UNDER WAC 390-17-100

The Public Disclosure Commission promulgated WAC 390-17-100 on authorizations for withholding political contributions under RCW 42.17.680(3). It reads:

WAC 390-17-100 Contribution withholding authorizations. (1) For purposes of RCW 42.17.680(3), all political contribution withholding authorizations existing on or before January 1, 1993, will expire no later than December 31, 1993. Beginning January 1, 1994, each employer or other person who withholds or otherwise diverts a portion of wages or salary of a Washington resident or a nonresident whose primary place of work is in the state of Washington

(a) For the purpose of making one or more contributions to any political committee required to report pursuant to RCW 42.17.040, [42.17].050, [42.17]. 060 or [42.17].090(1)(k), or

*633 b) For use, specifically designated by the contributing employee, for political contributions to candidates for state or local office is required to have on file the written authorization of the individual subject to the payroll withholding or diversion of wages.

(Emphasis added.)

Appellants contend that Respondent School Districts violated RCW 42.17.680(3) by withholding dues and

COP assessment deductions from the salaries or wages of WEA member-employees without their prior annual written authorization for contributions to “political committees” or for use as “political contributions” to candidates for state or local office. Respondent School Districts counter that transmitting the withheld funds to the WEA is not a “political contribution” under subsection (3). Appellants respond that, since the WEA makes political contributions from the withheld funds, the payments to it are necessarily also “political contributions.” This is not necessarily so.

Respondent School Districts agree with the trial court's conclusion that RCW 42.17.680(3) contains both “patent” ^{FN75} and “latent” ^{FN76} ambiguities which are resolved by the administrative rule promulgated by the PDC. ^{FN77} The School Districts' main argument *613 is that their transmitting WEA general membership dues and COP assessments complies with the statute because they have fully complied with *634 WAC 390-17-100. The Districts maintain that WAC 390-17-100 resolves the ambiguities of subsection (3) by requiring employers to obtain annual authorizations for withholding salaries or wages only if (1) the payee is registered as a “political committee” with the PDC at the time the payment is made or (2) the payment is made as a designated contribution to a person who is a candidate for state or local political office. The Districts argue the contrary interpretation suggested by Appellants would require an employer to follow the money deducted from the employee-member's paycheck, determine its intended use and then require authorization, regardless whether the recipient of the deduction uses the funds as intended. They assert they have no control over expenditure by the WEA of withheld funds they forward to it or its affiliates.

FN75. The “patent” ambiguity relates to the phrase “for use as political contributions.” School Districts assert that although “contributions” are defined in RCW 42.17.020(14), chapter 42.17 RCW, neither defines the term “political” nor the phrase “political contribution” to guide employers on when a withheld payment is “for use as a political contribution” under section 680(3). Br. of Resp't School Districts at 7.

FN76. Similarly, the Districts identify a “la-

140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M. (BNA) 2992, 144 Ed. Law Rep. 396
(Cite as: 140 Wash.2d 615, 999 P.2d 602)

tent” ambiguity: “No language guides employers on whether they must determine for themselves whether a payee of a withheld salar[y] or wag[e] is a political committee under RCW 42.17.020(33) or whether the duty to obtain annual requests applies only when the payee is registered as a political committee with the PDC.” Br. of Resp’t School Districts at 7.

FN77. Respondent School Districts indicate that although a “political committee” is defined under RCW 42.17.020(33) and such organizations must register with the PDC and file reports under RCW 42.17.040-.090 and .105, section 680(3) is ambiguous. Br. of Resp’t School Districts at 7.

[12][13][14] The powers of an administrative agency are derived from statutory authority expressly granted or necessarily implied.^{FN78} The PDC has an express grant of authority to adopt rules to implement the policies and statutes contained in chapter 42.17 RCW.^{FN79} Although an agency does not have the power to promulgate rules which amend or change legislative enactments, the agency may adopt rules which “fill in the gaps” if those rules are necessary for effectuation of a general statutory scheme.^{FN80} Implementation and enforcement of RCW 42.17.680(3) required that the PDC promulgate rules for guidance to employers concerning the circumstances under which an employer must require written annual authorization prior to withholding or diverting a portion of an employee's wages or salaries for political purposes.

FN78.State v. Ford, 110 Wash.2d 827, 831, 755 P.2d 806 (1988), (citing Green River Community College v. Higher Education Personnel Bd., 95 Wash.2d 108, 622 P.2d 826 (1980) modified, 95 Wash.2d 962, 633 P.2d 1324 (1981)).

FN79.RCW 42.17.370.

FN80.Green River Community College, 95 Wash.2d at 112, 622 P.2d 826, (citing Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash.2d 441, 448, 536 P.2d 157 (1975)).

“[A]dministrative rules adopted pursuant to a legisla-

tive grant of authority are presumed to be valid and *635 should be upheld on judicial review if they are reasonably consistent with the statute being implemented.”^{FN81} “[A] party attacking the validity of an administrative rule has the burden of showing compelling reasons that the rule is in conflict with the intent and purpose of the legislation.”^{FN82} Appellants have not satisfied this burden.

FN81.Green River Community College, 95 Wash.2d at 112, 622 P.2d 826.

FN82.Id.

[15][16]WAC 390-17-100 requires an annual authorization only for funds withheld or diverted from an employee's wages for contributions to a political committee or for political contributions to candidates for state or local offices specifically designated by the contributing employee. When an employer has notice that the funds deducted are for the use of a political committee or candidate, the employer may not then make that deduction without specific annual authorization. However, when the employer makes deductions under the Education Employment Relations Act, RCW 41.59.100, and the Public Employees Collective Bargaining Act, RCW 41.56.110, and the employer is not made aware of the specific intended use of the funds, the employer has no legal obligation or authority to seek annual written authorization.^{FN83}

FN83. In this case, chapters 41.56 and 41.59 RCW are the collective bargaining laws governing school district employees. These statutes require the employer under a collective bargaining agreement to deduct dues from salaries of employees and to transmit those dues to the other party to the agreement, the labor organization. The interpretation by the PDC of RCW 42.17.680(3) does not conflict with the collective bargaining statutes because that interpretation does not restrict the employer in making dues deductions intended for the general treasury of labor organizations.

**614 In analyzing an administrative rule adopted by an agency charged with enforcing a statute, this Court has stated that:

The validity of an administrative rule may also be

140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M. (BNA) 2992, 144 Ed. Law Rep. 396
(Cite as: 140 Wash.2d 615, 999 P.2d 602)

tested by the construction placed on the authorizing statute by the administrative agency. [citations omitted.] Moreover, an administrative construction nearly contemporaneous with the passage of the statute, *636 especially when the legislature fails to repudiate the contemporaneous construction, is entitled to great weight.^{FN84}

FN84. *Green River Community College*, 95 Wash.2d at 117-18, 622 P.2d 826; see *In re Sehome Park Care Ctr., Inc.*, 127 Wash.2d 774, 903 P.2d 443 (1995).

Initiative 134 was passed by popular vote on November 3, 1992 and codified in exact language as RCW 42.17.680(3). WAC 390-17-100 was promulgated by the PDC to implement the statute and became effective on August 30, 1993.

In November 1996, the Executive Director of the PDC concluded that RCW 42.17.680(3) did not apply to the WEA nor labor organizations generally.^{FN85} The Legislature has neither repudiated that interpretation by the PDC nor amended the statute. In 1997 and 1998, the Legislature considered proposed legislation which would have amended RCW 42.17.680(3) by restricting expenditures by entities receiving funds through payroll deductions. No such legislation was passed.^{FN86} The Legislature has apparently acquiesced in the PDC's interpretation of RCW 42.17.680(3) since 1996.

FN85. Clerk's Papers at 705-09.

FN86. Clerk's Papers at 710-11A.

Appellants claim the intent of the drafters of Initiative 134, Section 8, was to protect the "constitutional rights" of labor organization members. They advocate a liberal interpretation of RCW 42.17.680(3).^{FN87} Respondents Education Association and School Districts both assert Appellants' constitutional argument is without merit because neither the text of the initiative nor the Voter's Pamphlet refer to the constitution.

FN87. Br. of Appellant at 31. Also, Appellants provide no authority for their claim that precedent established by United States Supreme Court and United States Court of Appeals for the Ninth Circuit interpreting

the constitutionality of labor organizations' security provisions is the foundation for Initiative 134 and enactment of RCW 42.17.680(3). Br. of Appellant at 40-50.

[17][18][19] The intent of the electorate in initiatives must be ascertained from the language of the initiative itself, as well as from statements contained in the official Voters *637 Pamphlet.^{FN88} Initiatives are not construed like other legislation because, in interpreting them, reviewing courts "focus on the language of the initiative" "as the average informed lay voter would read it." ' ' ^{FN89} Although chapter 42.17 RCW is to be construed liberally, this Court need not do so if such a construction would result in an unlikely, absurd, or strained interpretation of the statutory language.^{FN90}

FN88. *State v. Thorne*, 129 Wash.2d 736, 763, 921 P.2d 514 (1996).

FN89. *Senate Republican Campaign Comm. v. PDC*, 133 Wash.2d 229, 243, 943 P.2d 1358 (1997); see *City of Spokane v. Taxpayers of City of Spokane*, 111 Wash.2d 91, 98, 758 P.2d 480 (1988), quoting *Estate of Turner v. Department of Revenue*, 106 Wash.2d 649, 654, 724 P.2d 1013 (1986).

FN90. *Senate Republican Campaign Comm. v. PDC*, 133 Wash.2d at 243, 943 P.2d 1358.

[20] Appellants base their arguments on what they perceive to be the intent of subsection (3), while ignoring the language of Initiative 134 and the language of the voters pamphlet. In determining the purpose or intent of the statute based upon the initiative, the Court may consider arguments made for and against the initiative in the Voters Pamphlet.^{FN91} The Voters Pamphlet makes no reference to court decisions or agency practice.^{FN92}

FN91. *State v. Thorne*, 129 Wash.2d at 763, 921 P.2d 514.

FN92. Only a single sentence in the Voter's Pamphlet relating to agency fees refers to sections 26 and 16 (codified as RCW 42.17.760). There is no reference to section 8(3). In the section entitled "The Effect of

Initiative Measure 134, if approved as law” it states “[v]oluntary state payroll deductions for political committees would no longer be permitted and agency shop fees could not be used for political purposes without individual authorization.” Clerk’s Papers at 743-44.

****615** The intent of the people of this State in enacting Initiative 134 can be determined from the declarations in RCW 42.17.610 and .620.^{FN93} Appellants contend that RCW 42.17.610(1) and RCW 42.17.620(2) support their position on the purpose ***638** of RCW 42.17.680(3). They claim subsection (3) was adopted to stop unions from “amassing large funds ... for politics without authorization.”^{FN94} However, RCW 42.17.610(1) and RCW 42.17.620(2) relate only to campaign contributions to political candidates, as codified in RCW 42.17.640. The remaining findings in RCW 42.17.610 similarly limit their application to “candidates” and “elected officials.”

FN93. **“42.17.610 Findings.** The people of the state of Washington find and declare that:

“(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

“(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

“(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

“42.17.620 Intent. By limiting campaign contributions, the people intend to:

“(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

“(2) Reduce the influence of large organizational contributors; and

“(3) Restore public trust in governmental institutions and the electoral process.”

FN94. Br. of Appellant at 33.

RCW 42.17.620(2) may be construed as applying only to contribution limits for political campaigns. It does not identify “large organizational contributors.” No distinction is made between labor organizations and corporations with respect to limits on campaign contributions unless specifically noted as in RCW 42.17.760.

RCW 42.17.640 relates to contribution limits for all persons. Its language does not distinguish between labor organizations and corporations and treats all donors equally. Under RCW 42.17.640, the intent to reduce the “influence of large organizational contributors” is achieved by imposition of a maximum contribution limit on all donors. Contrary to Appellants’ assertions, the stated intent to “reduce the influence of large organizational contributors” does not mean that labor organizations are prohibited from using their general treasury funds for contributions and expenditures defined under RCW 42.17.020(14), (19).

The full context of Initiative 134 suggests the reference to limiting the influence of labor organizations and all “large organizational contributors” is associated with the ***639** provisions limiting contributions to candidates. This language does not justify creation of unstated prohibitions on a wide variety of campaign activity by labor organizations.

Prior to passage of Initiative 134, there were no restrictions on the type of funds a labor organization could use for contributions defined by RCW 42.17.020(14). RCW 42.17.760 restricts the expenditures a labor organization may make in only one way: by preventing labor organizations from using agency

shop fees paid by non-members to operate a political committee or influence an election. In prohibiting only the use of agency shop fees paid by nonmembers, RCW 42.17.760 inferentially allows labor organizations to use dues paid by members for contributions to political committees and candidates. The drafters of Initiative 134 prohibited use of agency shop fees collected from nonmembers. This leads to the logical conclusion that the Initiative did not alter the ability of labor organizations to use members' dues for contributions under Chapter 42.17 RCW. Contrary to Appellant's assertions, RCW 42.17.680(3) does not prohibit the use of a labor organization's general treasury funds for political contributions.

The trial court was correct in its adoption of the PDC's interpretation in WAC 390-17-100 which clarifies both RCW 42.17.680(3) and RCW 42.17.760. RCW 42.17.680(3) permits a labor organization to use for political purposes general treasury funds obtained **616 from dues of members, while RCW 42.17.760 prohibits the labor organization from using for political purposes agency shop fees paid by non-members.

[21][22] It is a basic rule of statutory construction that, whenever possible, statutes should be construed so that no part of the statutory scheme is rendered superfluous.^{FN95} To accomplish this purpose, all provisions should be harmonized. [FN96]*640 This we have done. There is no statutory prohibition against a labor organization using general treasury funds obtained from members' dues for the purpose of operating a political committee, influencing an election or to otherwise make contributions to a political committee or candidate.

FN95.State ex rel. Heavey, 138 Wash.2d at 807 fn. 2, 982 P.2d 611, (citing Sim v. State Parks & Recreation Comm., 90 Wash.2d 378, 383, 583 P.2d 1193 (1978)).

FN96.State v. Thomas, 121 Wash.2d 504, 511, 851 P.2d 673 (1993); see Puyallup v. Pacific Northwest Bell Telephone Co., 98 Wash.2d 443, 448, 656 P.2d 1035 (1982).

SUMMARY AND CONCLUSION

In determining whether the WEA as a labor organiza-

tion is an "other person or entity responsible for the disbursement of funds in payment of wages or salaries" under RCW 42.17.680(3), the Court looks first to the statute. Under the clear and unambiguous language of the statute, it is evident that labor organizations are not subject to its provisions. Labor organizations are not required to obtain annual written authorization for use of funds for political contributions prior to receiving general membership dues by payroll deduction from its members.

The interpretation of RCW 42.17.680(3) by the Public Disclosure Commission in WAC 390-17-100 clarifies any ambiguity and helps to implement the statute without amending it or frustrating its intent.

We affirm the decision of the Thurston County Superior Court which dismissed the claims by Evergreen Freedom Foundation and Teachers For A Responsible Union for violations of RCW 42.17.680(3) against Respondent School Districts and granted summary judgment in favor of Respondent Education Association.

GUY, C.J., JOHNSON, TALMADGE, and IRELAND, JJ., concur.ALEXANDER, J. (concurring in the result).

I agree with the majority opinion as far as it goes. I find it unsatisfactory only in that it fails to define the "notice" that triggers a school district employer's responsibility to follow the *641 dictates of RCW 42.17.680(3). I quickly add that I disagree with the view Justice Sanders expresses in his concurrence/dissent to the effect that a district should be deemed to have notice if it learns or should learn, from public records or sources outside the Washington Education Association (WEA), about the destination of withheld funds. A more difficult question, though, is presented if a district receives information from one of its employees, who claims he or she is a member of the WEA and privy to the internal workings of the association, that withheld money is being used for the benefit of political candidates or committees. Under that scenario, a much stronger argument can be mounted that the district has actual notice, or that, at the very least, it must assume a burden to make further inquiries. One could argue that if we were to conclude otherwise, we would be rendering the statute, which was passed by the people, a nullity and would be placing too great a premium on the district's right to turn a blind eye to information it

receives from an employee who claims he or she is affected by the deduction.

Despite the concerns I express above, I nevertheless concur in the result here because there was no showing that the district received actual notice from any WEA member prior to the withholding of funds.

TALMADGE, J. (concurring).

While I agree with the thorough and well-reasoned opinion of the majority in this case, I write separately to emphasize my growing dismay with the cavalier attitude taken by many lawyers and parties toward the mandate of RAP 10.3(e). RAP 10.3(e) requires a **617 brief of an amicus curiae to conform to all of the provisions of our rules regarding the contents of a brief; additionally, the brief must “set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus.” In the present case, we received a brief from an organization styling itself the Foundation for Campaign Finance Compliance. The brief of this high-sounding organization fails to comply with RAP 10.3(e)*642 because it contains no information identifying the organization or its interests in the present litigation. This violation of RAP 10.3(e) should have resulted in rejection of the brief. RAP 10.7.

On the larger question in this case, I approach the issues here with the certain sense of irony. An organization calling itself the Evergreen Freedom Foundation purports to utilize Washington's public disclosure laws regarding the activities of the Washington Education Association and its affiliates. There is little mystery regarding the nature of the Washington Education Association or its affiliates: they are educational employee unions. On the other hand, we know nothing about the Evergreen Freedom Foundation. It chooses to utilize the courts for what may be a political agenda, and yet we know nothing regarding the individuals or organizations who make up the Evergreen Freedom Foundation or provide financial support to it. Just as we know nothing regarding the organization or funding of the “Foundation for Campaign Finance Compliance,” we know nothing of the organization or funding of the Evergreen Freedom Foundation. Perhaps a healthy dose of “public disclosure” so vigorously sought by these organizations would be usefully applied to their own activities as well, so the public will know who supports and funds them when they purport to be acting in the public interest.

I have previously expressed an extreme reluctance to see Washington's judiciary dragged into the mire of political questions. See Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems, 22 SEATTLE U.L.REV. 695 (1999). In many respects, being dragged into political battles such as may be present here ultimately diminishes the authority and dignity of the courts. But on a more practical level, presuming that we are in the midst of a political battle that must, in fact, be decided, it is anomalous that we should be asked to decide a question regarding public disclosure fraught with political implications by organizations who neither comply with our rules regarding the disclosure of their *643 identity and interest as amicus curiae, or who have never provided the public with any clues regarding their organization or funding sources. Even my capacity for irony, tested over many years in the partisan political system, cannot withstand such an overwhelming onslaught as in this case.

MADSEN, J. (concurring/dissenting).

I agree with the majority that RCW 42.17.680(3) does not apply to labor organizations. I also agree that the Public Disclosure Commission's interpretation of the statute in WAC 390-17-100 should be given deference. I cannot agree, however, that either the statute or the rule contains the “notice standard” advanced by the majority. Having correctly identified the scope of the statute and the employer's obligation by reference to the rule, the majority then inexplicably imports a notice standard which is unnecessary in light of and inconsistent with the agency rule, places the employer in an untenable position with regard to this and other statutory obligations, and is not necessary to meet the purposes of Initiative 134.

RCW 42.17.680(3) provides in relevant part that “[n]o employer ... may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee....” This provision is part of the Fair Campaign Practices Act of 1992, enacted by the voters as Initiative 134. The trial court ruled this language was ambiguous, both because the statute does not provide guidance as to whether an employer must determine whether an entity is a political committee or whether only registered political committees fall within its scope, and because it is not clear what is meant by

140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M. (BNA) 2992, 144 Ed. Law Rep. 396
(Cite as: 140 Wash.2d 615, 999 P.2d 602)

“for use as political contributions.” RCW 42.17.680(3).

****618** I do not agree that the term “political committees” is ambiguous. Where a statute defines key terms and uses plain language, it is not ambiguous. ***644**United States Tobacco Sales & Marketing Co. v. Department of Revenue, 96 Wash.App. 932, 938, 982 P.2d 652 (1999). The Fair Campaign Practices Act (Act) provides that the definitions in RCW 42.17.020 apply to RCW 42.17.680 except as modified by the Act. Laws of 1993, ch. 2, § 3 (definitions apply to sections 4 through 19 of the Act); see § 8 (codified as RCW 42.17.680). “Political committee” is defined in RCW 42.17.020(33) as “any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17.040(1) requires “[e]very political committee” having the expectation of receiving contributions or expending funds in any election campaign to register. (Emphasis added.) See also RCW 42.17.065 (requiring continuing political committees to register in accordance with RCW 42.17.040). Since the definition in RCW 42.17.020(33) applies to RCW 42.17.680, since every political committee expecting contributions must register, and since RCW 42.17.680(3) concerns contributions, the term “political committees” in the context of RCW 42.17.680(3) is plainly co-extensive with registered political committees.^{FN1}

^{FN1}. It is possible a political committee may fail to register as required. That possibility does not, however, alter the analysis. It is not up to employers to assure that political committees comply with the registration requirements. What employers must do themselves is comply with RCW 42.17.680(3) which, in accord with RCW 42.17.020(33) and RCW 42.17.040, concerns contributions to political committees, i.e., registered political committees.

Accordingly, if an employer withholds a portion of an employee's wages or salary for contributions to a registered political committee, the annual employee written consent required by RCW 42.17.680 must be obtained.

It is a closer question whether there is ambiguity in the phrase “for use as political contributions.” The provision as a whole is aimed at obtaining annual consent where an employer withholds a portion of wages or salaries for disbursement as political contributions, and not where disbursement is to a labor organization in the form of union dues or other union assessments which are not readily ***645** identifiable as political contributions. Assuming the phrase is ambiguous, however, the majority is correct in resolving the ambiguity by reference to the agency interpretation of the statute.

Two rules of statutory construction are particularly applicable here. First, an agency's interpretation of an ambiguous statute is entitled to great weight where the statute is one which the agency is charged with implementing and concerns matters within the agency's expertise. City of Seattle v. Department of Labor & Indus., 136 Wash.2d 693, 704, 965 P.2d 619 (1998); Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council, 129 Wash.2d 787, 799, 920 P.2d 581 (1996); City of Pasco v. Public Employment Relations Comm'n, 119 Wash.2d 504, 509, 833 P.2d 381 (1992). Second, the contemporaneous construction placed upon a statute by the agency charged with enforcement is accorded great weight. In re Sehome Park Care Ctr., Inc., 127 Wash.2d 774, 780, 903 P.2d 443 (1995); Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd., 95 Wash.2d 108, 118, 622 P.2d 826 (1980); Morin v. Johnson, 49 Wash.2d 275, 279, 300 P.2d 569 (1956). An administrative construction which is nearly contemporaneous with passage of legislation is particularly entitled to great weight where the Legislature fails to repudiate the contemporaneous construction. Green River, 95 Wash.2d at 118, 622 P.2d 826. Finally, an additional principle for construing statutes is important here. Where an agency charged with administering a statute promulgates a particular definition of a statutory term (in the absence of a statutory definition), that definition should be accorded weight. See Phillips v. City of Seattle, 111 Wash.2d 903, 908, 766 P.2d 1099 (1989).

Here, WAC 390-17-100 is a contemporaneous interpretation of RCW 42.17.680(3), it defines the phrase “for use as political contributions,” and it has not been repudiated by ****619** the Legislature.^{FN2} The rule provides that employers must obtain annual consent

where the employer withholds or *646 diverts wages or salaries “[f]or use, specifically designated by the contributing employee, for political contributions to candidates for state or local office....” WAC 390-17-100(1)(b).

FN2. Although the people enacted the statute through the initiative process, the Legislature has had time in which to lawfully amend the statute, as it has done with other provisions enacted by passage of Initiative 134. *See, e.g.*, Laws of 1995, ch. 397, § 20, amending RCW 42.17.640.

As construed by the Public Disclosure Commission, the rule gives meaning to both phrases in the statute. “Contributions to political committees” means contributions to registered political committees, which, pursuant to RCW 42.17.020, may involve contributions to committees supporting or opposing candidates *or* to committees supporting or opposing ballot measures. “For use as political contributions” pertains to contributions to candidates for office. (While an employee could not designate a direct contribution supporting a ballot measure, because no entity exists to utilize the contribution, an employee can designate contributions to political committees and candidates.)

The majority agrees that WAC 390-17-100 properly clarifies RCW 42.17.680(3). Majority at 615. However, the majority adopts a notice standard found neither in the statute nor in the rule. The majority says that where the employer has notice that the deducted funds are for the use of a political committee or candidate, the employer must have the employee's written annual consent. Majority at 613.

This standard is completely unnecessary where the rule is a correct interpretation of the statute. The employer will be able to determine whether the funds withheld from wages or salaries will be disbursed to a registered political committee, and will know from a specific designation by the employee whether the funds are to go to a candidate for office. There is no uncertainty about whether the annual authorization is required; the employer has clear guidelines for compliance with the statute.

The majority's judicially created condition causes needless confusion. Does “notice” mean actual notice, and if so, from whom? Does it mean construc-

tive notice, i.e., a reasonable employer should have known? Relevant to the circumstances *647 in this case, does the employer ever have an affirmative duty to inquire of a labor organization what the funds it receives are to be used for, i.e., if there is some question about what funds are to be used for, with use as a political contribution a possibility, must the employer inquire further?

The majority's notice standard is also confusing because it means that although the agency rule correctly states the law, it does not *always* correctly state the law. WAC 390-17-100 dictates that amounts deducted as dues to a labor organization do not require an annual authorization since they are not contributions to registered political committees nor are they amounts specifically designated by the employee as contributions to candidates for office. However, under the majority's notice rule, if the employer has notice that some of the dues will ultimately be put to these uses, then an annual authorization is required. Thus, the notice standard is inconsistent with the agency's interpretation of RCW 42.17.680(3) in WAC 390-17-100.

The majority's notice standard also raises disturbing questions about how an employer is to comply with RCW 42.17.680(3) and other statutory mandates. The employer is put in an untenable position. The employer will be under considerable pressure to assure its own compliance with RCW 42.17 because RCW 42.17.390 provides that an employer who violates RCW 42.17.680(3) may be subject to a civil penalty of up to \$10,000 for each violation. At the same time, however, several other statutes impose restraints on employers. For example, RCW 41.59.100, part of the Educational Employment Relations Act, provides that as a result of collective bargaining, an employer may be required to deduct from the employee's pay monthly dues to a labor organization. There is no requirement of an annual authorization, however. Under RCW 41.59.140(1)(b), it is an unfair labor practice for an employer to **620 interfere with the administration of any employee organization.

Thus, if an employer school district has some reason to *648 believe that a portion of union dues or other assessments withheld will be used as political contributions, and requires an annual consent form from the employee in an effort to comply with the majority's notice rule, the employer could well run afoul of

RCW 41.59.100 if mistaken. However, if the same employer inquires into a labor organization's use of funds in an effort to verify whether dues are used for political contributions, the employer may well run afoul of RCW 41.59.140(1)(b). Looming all the time is the potential for penalties under RCW 42.17.390. This uncertainty does not arise under the agency's interpretation of the statute to which the majority purports to give deference.

A public employer is also restrained by RCW 41.56.110. That statute provides that as a result of a collective bargaining agreement involving public employees, an employer may be required to deduct from the employee's pay monthly dues to a labor organization upon written authorization of the employee. The statute does not require an annual authorization. Therefore, a public employer who has reason to believe that some portion of an employee's union dues will be used for political purposes and attempts to obtain annual consent for withholding that portion under RCW 42.17.680(3) runs the risk of violating RCW 41.56.110 if wrong.

This conflict between the statutory obligations does not arise under WAC 390-17-100. Moreover, any conflict between the statutes arising from the majority's added notice standard would have to be resolved in favor of the collective bargaining provision. With the exception of port district employees, RCW 41.56.905 mandates that the provisions of RCW 41.56 prevail in the case of conflict with any other statute. Where an annual consent form involving union dues sought pursuant to RCW 42.17.680(3) conflicts with RCW 41.56.110, RCW 41.56.110 must prevail. Of course, under the Public Disclosure Commission's interpretation of RCW 42.17.680(3), there is no risk of violating RCW 41.56.110 and no potential conflict between the statutes.

*649 The majority concedes that the Commission's interpretation avoids conflict with the collective bargaining laws found in RCW 41.56 and RCW 41.59, and says that the Commission's interpretation "does not restrict the employer in making dues deductions intended for the general treasury of labor organizations." Majority at 613 n. 83. The majority negates the Commission's interpretation, though, because it states: "[W]hen the employer makes deductions under ... RCW 41.59.100, and ... RCW 41.56.110, and the employer is not made aware of the specific in-

tended use of the funds, the employer has no legal obligation or authority to seek annual written authorization." Majority at 613 (emphasis added). In other words, under the notice standard an employer is at risk of violating the collective bargaining laws. Moreover, the majority's explanation of how RCW 42.17.680(3) is to operate in conjunction with the collective bargaining laws highlights the inconsistency of the majority's notice standard and WAC 390-17-100.

The majority's importation of a notice standard is also at odds with this court's decision in *Washington Fed'n of State Employees v. State*, 127 Wash.2d 544, 901 P.2d 1028 (1995). There, the court held unconstitutional as applied a provision of Initiative 134 which repealed a statute authorizing state employees to have voluntary payroll deductions contributed to registered political committees. The provision unconstitutionally impaired contracts when applied to collective bargaining agreements in existence when the initiative was adopted. Where a collective bargaining agreement compels an employer to withhold dues for labor organizations from members' wages without an annual authorization, requiring annual consent under RCW 42.17.680(3) for some part of that withheld amount because it may ultimately be used for political purposes raises similar concerns to those addressed in *Washington Federation*.

The majority's notice standard is not necessary to meet the purposes of the Fair Campaign Practices Act, either. The Act **621 clearly is designed to prevent use of agency fees paid by nonunion members as political contributions, not *650 to prevent use of members' dues to labor organizations for political purposes. That goal is achieved by RCW 42.17.760.

The stated purposes of the Act do not suggest the majority's notice standard is required. RCW 42.17.610 and RCW 42.17.620 list goals of the Act as preventing special interest groups from having improper influence over decisions of elected officials, providing that individuals and interest groups have fair and equal opportunity to influence elections and government processes, reducing the influence of large organizational contributors, and restoring the public trust in governmental institutions and the electoral process. The majority's notice standard is not necessary in order to satisfy any of these purposes. Further, nothing in the Act or its history indicates that

the Public Disclosure Commission's interpretation of RCW 42.17.680(3) is inconsistent with the purposes of the Act. As explained, a notice standard is unnecessary under the agency's rule.

Because the majority's notice standard is unnecessary, inconsistent with the agency rule which the majority agrees correctly states the law, will cause confusion, and will place employers in untenable positions when trying to comply with applicable laws, I dissent from that part of the majority adopting the notice standard. This court should defer to the agency interpretation of RCW 42.17.680(3), an interpretation which resolves all of the problems which the majority's notice standard raises.

For the reasons stated, I dissent in part.

AGID, J.P.T., concurs. SANDERS, J. (concurring in part, dissenting in part).

At issue is the meaning and application of a single sentence in the Fair Campaign Practices Act:

No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee.

RCW 42.17.680(3).

*651 The problem is certain school districts withheld union dues from teachers' salaries, turned those dues over to the Washington Education Association (WEA), which, in turn, made contributions to political candidates and committees of its choice absent prior written approval of the employee. The WEA claims this provision of the act is inapplicable to it because it is not "responsible for the disbursement of funds in payment of wages." RCW 42.17.680(3). The majority agrees with the claim that the WEA is outside the act, and so do I. Therefore I agree the trial court's dismissal of the WEA should be affirmed. All concede, however, school district *employers* fall within the scope of the act.

Dismissal of the WEA does not relieve school district employers of their responsibility to comply with this law. Rather the districts contend they have complied, asserting their responsibility is limited by the statute

to assure the immediate direct payee of the deduction (here, the WEA) is not itself a candidate or political committee. It is out of their department what that payee actually does with the money, they argue. The trial court agreed with this "snapshot" approach, dismissing the districts from this suit on that basis.

Although I commend the districts' argument for its simplicity, and recognize any requirement that an employer be held responsible to "follow the money" Watergate-style ^{FN1} may impose an unwanted burden on the employer, this is after all a policy argument for the electorate, not this court. Our job, absent constitutional objection, is to read the statute and apply its plain language, letting the chips fall where they may. And if the language is ambiguous, it is our duty to resolve the ambiguity in accordance with our previously established rules of statutory **622 construction, and then apply the law impartially.

FN1. One recalls Deep Throat's advice to Woodward and Bernstein to "follow the money." *All the President's Men* (Warner Bros.1976).

*652 Plain language of initiative

We begin (and I would prefer to end) our analysis with the plain language of the enactment: "In interpreting [an initiative] we must look to the voters' intent and the language of the [i]nitiative as the average informed lay voter would read it." *In re Estate of Hitchman*, 100 Wash.2d 464, 467, 670 P.2d 655 (1983).

Subsection 680(3) of this statute plainly prohibits withholding, absent consent, of any portion of wages or salary "for contributions" or "for use as political contributions." The employers' argument is the strongest when it comes to the "for contributions" language as that could be construed to connote a directness or immediacy associated with the payee, i.e., the deduction is not made "for contributions" but for union dues.

However the "for use as" language would pertain to how the money is used once it goes wherever it is going. As the statute does not define "use" in this context, we look to the plain and ordinary meaning of the word as found in a dictionary. *State v. Bolar*, 129 Wash.2d 361, 366, 917 P.2d 125 (1996). As even

small school children know, to “use” something is to put it to “a particular service or end.” *Webster's Third New International Dictionary* 2523 (1981). The dictionary tells us further “use” involves “a sense of a useful or valuable end, result, or purpose.” *Id.* Therefore to determine how the withheld money is “used” in this context we must be mindful of its end, result, or purpose, which means we must follow it to its destination.

Further support for this proposition is found in our recent decision in *State v. Batten*, 140 Wash.2d 362, 997 P.2d 350 (2000). There we considered what it means to have “used” a motor vehicle in the commission of a felony, and decided the plain and ordinary meaning of “used” gleaned from *Webster's Third New International Dictionary* (3d ed.1966) is “ ‘employed in accomplishing something.’ ” *State v. Batten*, 140 Wash.2d at 365, 997 P.2d at 352*653 (quoting *State v. Batten*, 95 Wash.App. 127, 129, 974 P.2d 879 (1999)). Defining “used” in this way we held the defendant *used* his car in the commission of a felony (possession of narcotics and a firearm) when he employed his vehicle not to drive, but to store and conceal his felonious accoutrements. Employing this definition, that “use” means employed to accomplish something, we can safely say that to determine how withheld dues are “used” we must look to the “something” in furtherance of which they are “employed,” i.e., political contributions. Moreover, since criminal statutes are strictly and narrowly construed, the same term when used in this civil statute must mean at least as much as it means in the criminal context.

Although there is some claim in this record that the WEA did not actually *use* the *particular* money obtained from mandatory dues, but rather preexisting reserves, for political purposes, there is also evidence in this record which would support the opposite view. However under the summary judgment rule, CR 56, all facts must be construed most favorably to the nonmoving party. Such approach should therefore control our disposition here in favor of the appellants.

Notably the trial court did not base its dismissal on a contrary view of the facts. Rather the trial court endorsed the districts' “snapshot” analysis which absolves the employer of *any* responsibility for what his payee does with the money as a matter of law. But based on the plain language of this statute, I disagree.

What is truly inexplicable about the majority opinion is that it *also* disagrees with this “out-of-my-department” approach. Indeed the majority cautions that an employer is absolved from liability only if “the employer is not made aware of the specific intended use of the funds....” Majority at 613. The majority thus rejects the core of the employers' argument that how these funds are ultimately used is irrelevant, and thus equally rejects the basis of the trial court's summary dismissal. But it affirms that dismissal nonetheless!

*654 I submit the majority cannot sustain its affirmation, even under its own theory, unless it finds neither fact nor inference in this record that the employer knew or reasonably should have known that at least a portion of these mandatory deductions would end up in **623 political campaign coffers. ^{FN2} But I think it is fairly obvious they would, for the following reasons.

^{FN2}. Justice Alexander's concurrence faults the majority for failure to define “notice” and would put a school district on notice of the political destination of funds only if the source of the information regarding the political use comes from its own employee rather than any other source, including official Public Disclosure Commission filings. I, on the other hand, find no problem with respect to the definition of “notice” (nor do I puzzle at the lack thereof) since any notice requirement is an invention of the majority, as the term is conspicuous in its absence from either the statute or regulation. Moreover if we are to judicially impose a knowledge predicate without statutory basis I can conceive of no reason that knowledge can only be obtained from an employee rather than some other (potentially more reliable) source. There is no rational basis to believe official public records filed by the WEA with, say, the Public Disclosure Commission, indicating the political destination of its funds, is less reliable than the scuttlebutt of a district employee “who claims he or she is a member of the WEA and privy to the internal workings of the association....” Concurrence at 616.

First, these employers do not even deny knowledge

about the ultimate political destination of these funds. Rather they have litigated this case on the theory that they have no responsibility beyond the immediate payee. Br. of Resp't School Districts at 10-11. That is the same position taken by the WEA. Br. of Resp't Educational Ass'n at 24-25.

Second, the WEA makes no bones about its continued and historical involvement in political campaigns. The WEA tells us such involvement is necessary and appropriate to facilitate the interest of its members. No apologies made.

Third, public records demonstrate that the WEA in fact donates to political candidates and campaigns. For example, a simple glance at the Public Disclosure Commission's list of "Major Contributors to Ballot Issues" (dated Jan. 13, 1997), which is a public record available to any school district, discloses substantial general budget amounts devoted to political purposes. Said document alone shows a total of \$713,841 was contributed in 1996 by the WEA to defeat Initiatives 173 and 177 allowing for school vouchers and charter schools. Clerk's Papers (CP) at 168.

*655 Fourth, by law, mandatory payroll deductions for agency shop fees (for employed nonunion members) payable to the union may not include money to be contributed by the union for political purposes; whereas there is no such per se restriction on dues from union members. RCW 42.17.760.^{FN3} (The WEA even argues in its brief that teachers who do not approve of WEA political expenditures could avoid their proportional contribution by resigning from the union and thereby subjecting themselves to reduced withholding of agency fees which could not be used for political purposes. Response Br. of Resp't Educational Ass'n at 6.) Therefore, by logical inference, the employer is on notice that the difference between agency fees and union dues is probably attributable to political use.

^{FN3}. A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Fifth, employers may have received actual notice of how these mandatory deductions would be used for political purposes from affected employees and others. (To comply with the majority opinion this is all a potential future plaintiff need do.) For example, the school districts' payroll officers received a memorandum from the WEA in the summer of 1994 alerting them that to compensate for the loss of mandatory WEA-PAC dues the new deduction would be called "Political Education." CP at 151. This none-too-subtle new moniker put school districts on notice as to what use such funds were destined.

It is a reasonable inference from the combination of these facts that the school districts had actual, or at least constructive, knowledge of the political use of the payroll deductions. Granted, knowledge may be a question of fact; however, it is a material one that would preclude summary judgment and require reversal.

Notwithstanding, I can find no requirement for actual knowledge in the plain language of this statute and would not invent **624 one from the bench. Under the plain language *656 of this statute the buck stops with the employer who must take responsibility for the ultimate misappropriation of any portion of wage deductions contrary to law. Perhaps the employers would be well advised to make some reasonable inquiry, or take some reasonable precautions by contract or other device with its payees; however, that is up to them, not this court.

Liberal construction if ambiguity is found

Although I find no ambiguity in this statute, even if there were one the result would be no different.

First, this chapter of the revised code is "intended to be remedial and shall be liberally construed...." RCW 42.17.945; see also RCW 42.17.010(11).

This liberal construction mandate means the coverage of the Act's provisions must be liberally construed and its exceptions narrowly confined. Vogt v. Seattle-First Nat'l Bank, 117 Wash.2d 541, 552, 817 P.2d 1364 (1991).

The intent of the people in enacting Initiative 134, which we must effectuate, is found in the statute it-

self.

Senate Republican Campaign Comm. v. Public Disclosure Comm'n, 133 Wash.2d 229, 247-48, 943 P.2d 1358 (Johnson, J., dissenting).

I think a liberal construction of the statute is inconsistent with the employers' position because in effect the employers' view would allow an employee's money to be put to a political use without his consent and against his wishes so long as the contribution to a political campaign is washed through a middleman. Based on the text at issue I think the electorate was attempting to achieve that noble principle well stated by no less than Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical...."^{FN4} But this principle is defeated by a money laundering scheme such as we have here.

FN4. Everson v. Board of Educ., 330 U.S. 1, 28 & n. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392 (1947) (Rutledge, J., dissenting), *quoted in* "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786. *See* 1 Randall, *The Life of Thomas Jefferson* (1858) 219-220; XII Hening's Statutes of Virginia (1823) 84.

*657 The majority puts weight on the administrative regulation adopted by the Public Disclosure Commission to support its view. However read literally the regulation requires a written authorization prior to a wage deduction "[f]or use, specifically designated by the contributing employee, for political contributions to candidates for state or local office...." WAC 390-17-100(1)(b).^{FN5} Therefore if money from a mandatory wage deduction is applied "for use" as a political contribution without the employee's consent, then we are back where we started in our analysis.

FN5. WAC 390-17-100. Contribution withholding authorizations. (1) For purposes of RCW 42.17.680(3), all political contribution withholding authorizations existing on or before January 1, 1993, will expire no later than December 31, 1993. Beginning January 1, 1994, each employer or other person who withholds or otherwise diverts a portion of wages or salary of a Wash-

ington resident or a nonresident whose primary place of work is in the state of Washington.

(a) For the purpose of making one or more contributions to any political committee required to report pursuant to RCW 42.17.040, [42.17].050, [42.17].060 or [42.17].090(1)(k), or

(b) For use, specifically designated by the contributing employee, for political contributions to candidates for state or local office is required to have on file the written authorization of the individual subject to the payroll withholding or diversion of wages.

On the other hand, if we construe the regulation to mean unauthorized deductions may be "used" for political contributions without any legal liability (even with employer knowledge of the ultimate intended political recipient), then the regulation narrows the scope of the statute even as construed by the majority. In such a situation the statute must control because it is axiomatic that administrative rules or regulations cannot amend or change legislative enactments. *See, e.g. Department of Ecology v. Theodoratus*, 135 Wash.2d 582, 600, 957 P.2d 1241 (1998).

****625 Injunctive relief**

Amicus Foundation for Campaign Compliance argues that even if a prior violation of the act has not been made *658 out, RCW 42.17.390(6) vests authority in the court to enjoin "any person to prevent the doing of any act herein prohibited...."

Only a snapshot, "its-out-of-my-department," approach urged by the employers which absolves them of *any* responsibility—even upon actual knowledge that mandatory deduction money will be used for political purposes—would save the school districts from *ongoing*, or future, violations of subsection 680(3). Now, if not then, it is patently obvious to anyone of educable age that the WEA will continue to use dues money for political purposes in the future just as it has in the past. Therefore future unauthorized deductions from employee salaries for political use cannot be justified under the pretense that the employer did not know what was going on, at least

short of some overt change in WEA policy. Thus if we are to do anything to maintain the efficacy of the initiative process in lieu of outright judicial repeal of this section of the initiative, a remand to at least consider the propriety of injunctive relief is amply justified.

After all, this case started after the WEA contributed \$713,841 to the political committees opposed to the school voucher and charter schools initiatives in 1996 (I-173 and I-177) (CP at 168), and it seems very likely the WEA will be active on behalf of candidates and ballot measures in the coming election year as well. The WEA may certainly continue these activities insofar as they are otherwise lawful; however, to fulfill the purposes of this initiative, mandatory deductions from member salaries must be accompanied by signed authorizations from the affected employees if *employers* are to comply with the law, even as the majority sees it. Our duty is to protect the rights of these employees under this initiative enactment until or unless the legislature sees fit to amend or repeal it.

It is not our prerogative to substitute our will for that of the electorate, short of constitutional violation-nor do I think it is appropriate for our majority to defeat the *659 language and purpose of this initiative which our fellow citizens have adopted.

For these reasons I concur in part and dissent in part.

Wash.,2000.

State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n
140 Wash.2d 615, 999 P.2d 602, 164 L.R.R.M.
(BNA) 2992, 144 Ed. Law Rep. 396

END OF DOCUMENT

▷

Supreme Court of Washington.
 STATE ex rel. MACRI
 v.
 CITY OF BREMERTON et al.
 No. 28218.

March 21, 1941.

Department 2.

Action in mandamus by the State of Washington, on the relation of Sam Macri, as sole trader doing business under the firm name of Macri and Company, against the City of Bremerton and others. From that portion of the judgment which awarded to relator only the statutory attorney's fee of \$10, relator appeals.

Affirmed.

West Headnotes

[1] Damages 115 ↪71

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(D) Expenses of Litigation

115k70 Attorney Fees, Costs, and Expenses of Litigation

115k71 k. Elements of Damages in General. Most Cited Cases

Generally, apart from the sums allowable and taxed as costs, there can be no recovery as damages of the costs and expenses of litigation.

[2] Damages 115 ↪1

115 Damages

115I Nature and Grounds in General

115k1 k. Nature and Theory of Pecuniary Reparation. Most Cited Cases

Damages 115 ↪71

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(D) Expenses of Litigation

115k70 Attorney Fees, Costs, and Expenses of Litigation

115k71 k. Elements of Damages in General. Most Cited Cases

The term "damages" in its legal sense means the compensation which the law will award for an injury done, and though in its early signification the term included "costs", the terms are now regarded as distinct, and "costs" are awarded as damages only where the circumstances of the particular case withdraw it from the general rule that there can be no recovery as damages of costs and expenses of litigation apart from sums allowable and taxed as costs.

[3] Costs 102 ↪2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In General. Most Cited Cases

Costs 102 ↪194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

(Formerly 102k172)

"Costs" are allowances to a party for the "expense" incurred in prosecuting or defending a suit, and in absence of statute or agreement the word "costs" does not include counsel fees.

[4] Costs 102 ↪194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

(Formerly 102k172)

Costs 102 ↪ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours;

Rate. Most Cited Cases

(Formerly 102k173(1))

The amount and items recoverable as counsel fees must depend on statutes or stipulations of the parties authorizing their allowance.

[5] Mandamus 250 ↪ 1

250 Mandamus

250I Nature and Grounds in General

250k1 k. Nature and Scope of Remedy in General. Most Cited Cases

Mandamus 250 ↪ 190

250 Mandamus

250III Jurisdiction, Proceedings, and Relief

250k190 k. Costs. Most Cited Cases

A proceeding for a writ of mandate is but another form of "civil action" and is governed by the rule that the successful litigant may recover only such counsel fees as the statute or agreement of the parties provides shall be taxed as costs in the action. RCW 4.84.080.

[6] Mandamus 250 ↪ 177

250 Mandamus

250III Jurisdiction, Proceedings, and Relief

250k177 k. Award and Assessment of Damages. Most Cited Cases

Mandamus 250 ↪ 190

250 Mandamus

250III Jurisdiction, Proceedings, and Relief

250k190 k. Costs. Most Cited Cases

Where a city was adjudged to have wrongfully paid from and withheld balance of a contractor's retained percentage earned under a public works contract, and contractor brought a mandamus action against city to collect retained percentage, contractor was not entitled to recover against city, as costs or damages, an

attorney's fee in excess of amount fixed by statute under rule that equity may allow counsel fees to a complainant who has maintained a successful suit for preservation, protection, or creation of common fund or has created or brought into court such fund. RCW 4.84.080.

[7] Costs 102 ↪ 3

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k3 k. Dependent on Statute. Most Cited Cases

A party who contends that he is entitled to a judgment for costs against his adversary must bring himself within the operation of some statute.

[8] Costs 102 ↪ 3

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k3 k. Dependent on Statute. Most Cited Cases

Costs 102 ↪ 12

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k11 Discretion of Court

102k12 k. In General. Most Cited Cases

Costs 102 ↪ 32(1)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k32 Prevailing or Successful Party in General

102k32(1) k. In General. Most Cited Cases

In actions at law, costs are not recoverable except pursuant to statutory enactment, and the court may not award costs to the successful party, nor in a case which is within the purview of the statute according a right to costs has the court any discretionary power with respect to the award or allowance of costs.

[9] Costs 102 ↪ 32(1)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k32 Prevailing or Successful Party in General

102k32(1) k. In General. Most Cited Cases
Under statutes according a right to costs in an action at law, the right to recover costs is established by and dependent on the judgment rendered.

[10] Costs 102 ↪ 13

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k11 Discretion of Court

102k13 k. In Equity. Most Cited Cases

In equity proceedings the allowance and imposition of costs, unless otherwise governed by statute or rules of court, do not follow the outcome of the suit but rest in the sound discretion of the court according to the justice of the cause or the facts and circumstances of the particular case.

[11] Costs 102 ↪ 194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
(Formerly 102k172)

The right to recover counsel fees from one's adversary as a part of the costs does not exist at common law, and such an item of expense is not allowable in the absence of a statute or of some agreement expressly authorizing the taxing of such fees in addition to the ordinary statutory costs, and that rule is not changed by the fact that fraudulent or malicious acts are disclosed, although in certain circumstances fraud or malice may furnish a basis for the recovery of the expenses of litigation including counsel fees as an element of damages.

[12] Costs 102 ↪ 194.10

102 Costs

102VIII Attorney Fees

102k194.10 k. In General. Most Cited Cases
(Formerly 102k172)

The term "costs" or "expenses" as used in a statute is not understood ordinarily to include counsel fees.

[13] Costs 102 ↪ 194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
(Formerly 102k172)

In absence of contract, statute, or recognized ground of equity a court has no power to award an attorney's fee as part of the costs of litigation.

[14] Costs 102 ↪ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
(Formerly 102k173(1))

Damages 115 ↪ 71.5

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(D) Expenses of Litigation

115k70 Attorney Fees, Costs, and Expenses of Litigation

115k71.5 k. Under Special Statutory Provisions. Most Cited Cases
(Formerly 115k711/2)

Where a city was adjudged to have wrongfully paid from and withheld balance of contractor's retained percentage earned under a public works contract, contractor was not entitled to recover against city, as costs or damages, an attorney's fee in excess of amount fixed by statute in an action against city to collect retained percentage. Rem.Rev.Stat. § 481.

*93**613 Appeal from Superior Court, Kitsap County; Roger J. Meakim, judge. Tom W. Holman and Harold A. Pebbles, both of Seattle, for appellant.

Marion Garland and James W. Bryan, Jr., both of

Bremerton, for respondents.

*94 MILLARD, Justice.

In August 1937, Sam Macri and the city of Bremerton entered into a written contract for the construction, by Macri, of a city sewer system. Under one of the provisions of that contract Macri was obligated to indemnify and hold harmless the city of Bremerton from any and all claims for damages arising from or through the operation of contractor Macri, which provision included all claims for injuries or damages to the property or right of any person. The city was authorized, in the event of the failure of contractor Macri to obtain a valid release of any and all such claims prior to the final acceptance of the work, to settle or compromise such claims and charge the cost thereof to the contractor as so paid on the contract.

About four months prior to the completion of the work under the contract, Walter R. Warren filed with the city of Bremerton a claim in December, 1937, for damages in the amount of \$4,500 for alleged removal of lateral support to his land through the contractor's operations. Without notification to the contractor of the claim the city rejected the claim. Two months later Walter R. Warren instituted an action upon the claim naming as defendants the city of Bremerton, contractor Macri and the contractor's surety. Although regularly served with process the city did not appear; however, as disclosed by the statement of the trial court as dictated into the record 'the city attorney knew the suit was brought and wilfully refrained from defending.' Macri and his surety duly appeared by motion and demurrer. Without joining final issue with the contractor and his surety, Warren obtained the entry of default against the city. Thereafter the court made findings as to the extent of damage to Warren's land and entered judgment against *95 the city, solely, in the amount of twelve hundred dollars, which judgment was taken without knowledge of Macri and his surety. Warren satisfied the judgment of record pursuant to the procedure prescribed by Rem.Rev.Stat. § 953 and demanded a warrant from the city in payment of that judgment. The then city attorney of Bremerton, who is responsible for the city's wilful default, allowed entry and satisfaction of record of the default judgment, rejected certified copy of such judgment satisfaction as a claim and appeared in, but did not resist, entry of decree in mandamus proceedings instituted June 22, 1938, by

Warren to compel the city of Bremerton to issue to him a warrant in payment of his judgment. Macri and his surety had no notice of that proceeding. The city then notified Macri and **614 his surety of the mandate judgment and demanded that they pay same. Macri and his surety, after serving notice upon Warren, procured two orders in the action instituted by Warren upon his claim dismissing the action against them. The city was notified through its then city attorney that Macri and his surety would not pay the mandate judgment and that they would hold the city responsible for any payment thereof from Macri's retained percentage of the contract price for the sewer construction. Despite that notice the city paid Warren out of that retained percentage the amount of the mandate judgment.

August 29, 1938, Macri instituted an action in mandamus to compel the city and its officers to accept full performance of the work under the contract, to certify such acceptance, and to issue to contractor Macri a city warrant in the amount of \$6,064.67 in full payment of the work. The city pleaded as a partial defense its payment of the judgment in the Warren damage action. Trial to the court resulted in entry *96 of a decree awarding Macri the total amount of the retained percentage in the amount of \$6,058.10 'less any claims filed as provided for by law.' The city did not appeal from that decree nor did it formally accept Macri's work or pay to him the amount of the retained percentage as fixed by the decree. It submitted, instead, to Macri, and insisted upon his acceptance of, two claims designated 'purchase requisitions' the effect of which was to deduct from the retained percentage amounts representing the Warren judgment and also two other damage claims which were subsequently disallowed.

Macri thereupon instituted contempt proceeding to compel obedience by the city and its officers to the decree and peremptory writ of mandate. The defense pleaded in the contempt proceeding was payment by the city of the judgment in the Warren action. The trial court held that the Warren judgment was a proper deductible item, on the theory that it had been concluded by the Warren litigation. Macri appealed from that judgment.

We held (State ex rel. Macri v. Bremerton, 2 Wash.2d 243, 97 P.2d 1066) that the basic controversy between the parties throughout the various

stages of the action had always been whether the claim originally asserted by Warren was one for which Macri was legally liable and, if so, to what extent; that Macri's covenant to hold harmless the city against claims for damages had reference to damages arising from legal liability, and in so far as the city acted as a mere volunteer in paying Warren, the city could not look to Macri for indemnity. We concluded that the principal question that should have been presented and decided in the trial court was whether, or to what extent, there were any valid claims which should be deducted from the amount of the retained percentage. The judgment *97 was reversed and the cause remanded with direction to the trial court to proceed in accordance with the foregoing views.

Pursuant to the foregoing, a further hearing was had which resulted in findings that Macri was entitled to judgment against the city of Bremerton in the amount of \$6,058.10, with costs which included the statutory attorney's fee of ten dollars. The trial court specifically found that Macri had been compelled to secure, and there had been furnished him, very considerable legal services in this litigation, and that such services were to an unusual extent required by the conduct of the city officers; and that the reasonable value of such legal services as sustained by the uncontroverted evidence is fifteen per cent of the total amount to be recovered by Macri in this litigation. However the trial court was convinced that an attorney's fee in excess of the amount fixed by statute was not recoverable. Judgment was entered in consonance with the foregoing. The city's tender of cash payment of the judgment including the statutory attorney's fee of ten dollars was accepted with the exception of the item of ten dollars. The appeal is prosecuted by Macri from that portion of the judgment which awards to him only the statutory attorney's fee of ten dollars.

The sole question presented by this appeal is whether, by reason of the fact that the city was adjudged to have wrongfully paid from and withheld the balance of appellant contractor's retained percentage earned under the public works contract in question, the contractor was entitled to recovery against the city, as costs or damages, an attorney's fee in excess of the amount fixed by statute, Rem.Rev.Stat. § 481, in action against the city to collect the retained percentage.

*98 Counsel for appellant contend that retained percentage funds, held by virtue of the public improvements contract statute, Rem.Rev.Stat. § 10320, are trust funds and cites, as sustaining authority for the position**615 that the trial court should have allowed a reasonable attorney's fee to appellant contractor against respondent city, Longview School District No. 112 v. Stubbs Electric Co., 160 Wash. 465, 295 P. 186, although counsel are mindful that that case involved an indemnitor's rights under subrogation of the surety's claim to protection because of the school district's premature payment to its contractor Hammond from the retained percentage fund.'

In Longview School Dist. No. 112 v. Stubbs Electric Company, 160 Wash. 465, 295 P. 186, the school district appealed from a judgment in favor of Stubbs Electric Company. The judgment was entered upon the pleadings of the parties and an agreed statement of facts. The retained percentage of the contract price amounted to \$495 for a period of thirty days after the completion of the contract and acceptance by the architect. The school district breached the contract and bond by paying to Hammond the full contract price before the expiration of the thirty-day period. Within the thirty-day period the time recording company presented to the surety an unpaid claim in the amount of \$967 for materials furnished Hammond in the work. The surety, in turn, referred the claim to the Stubbs Electric Company, the indemnitor. The surety then demanded of the school district payment of \$495 to apply on the claim of the time recording company. The school district refused to pay. The time recording company recovered judgment against the surety for \$967 and interest, including attorneys' *99 fees of \$120 and costs in the amount of \$33.20. In accordance with the indemnity agreement Stubbs Electric Company satisfied that judgment in addition to which the electric company paid attorneys' fees and costs of \$153 incurred by the surety in defending the action brought against it by the time recording company. The trial court held that the electric company was entitled to be subrogated to the rights of the surety company, as against the school district, and awarded judgment against the school district for \$801.20 from which judgment the school district appealed. Two questions were presented to this court; first, did the doctrine of subrogation apply? We answered that question in the affirmative. The second question was whether the school district was liable for the attorneys' fees and costs amounting to \$306.20. It will be remembered that the attorneys' fees were \$120

awarded the plaintiff in its judgment against the surety and 'attorneys' fees and costs of \$153' incurred by the surety in defending the action brought against it by the time recording company. The school district insisted on appeal that Stubbs Electric Company was not entitled to recover in excess of \$495, the amount which the school district was required to retain for a thirty-day period after acceptance of the work by the architect and which the school district paid to Hammond before the expiration of the thirty-day period; that the electric company was not entitled to recovery of attorneys' fees and costs amounting to \$306.20. No point was made that attorneys' fees recoverable by a successful litigant were limited by the statute. Counsel for respondent argued that the electric company, as an indemnitor of the surety, who paid a judgment against *100 the surety, was subrogated to all of the rights of the surety and that as the natural and proximate consequence of appellant's wrongful act involved the electric company in litigation with others, the electric company was entitled to a recovery in damages against the school district, the author of the act, of the reasonable expenses incurred in such litigation together with compensation for attorneys' fees and such costs as may have been awarded the plaintiff, the Stubbs Electric Company in that case. 17 C.J. 809, and Curtley v. Security Savings Soc., 46 Wash. 50, 89 P. 180, were cited as sustaining authority.

The doctrine of subrogation was involved in Longview School Dist. No. 112 v. Stubbs Electric Company, supra, and the basis of our decision, that the respondent was entitled to an allowance of attorneys' fees and other expenses as damages incurred in collateral proceedings as the natural and proximate consequence of the admittedly wrongful act of the school district, distinguishes that case on the facts from the case at bar. As stated above, no argument was made, nor was the question discussed in brief or opinion, whether attorneys' fees, apart from the amount allowed, and taxed as costs pursuant to statutory authority therefor, could be recovered as damages or as costs. In the case at bar the action is between the two litigants and there has not been at any time an action against a third party for which appellant could successfully claim an attorney's fee as part of his damage.

**616 In Curtley v. Security Savings Society, 46 Wash. 50, 89 P. 180, in which a vendee brought an

action to recover damages for failure of title, we held that fees paid by the vendee to counsel for defending an action brought against him for a breach of the building contract, which was involved in that case, were recoverable by the vendee as a part of the damages he *101 sustained by reason of failure of title to the property he was purchasing under his contract. This is in harmony with some authorities to the effect that attorneys' fees incurred in good faith in an endeavor to save one's self from loss occasioned by the wrongful act of another may be recovered in an action against the wrongdoer. 17 C.J. 809-811, § 135.

The rule governing the allowance of costs in civil actions has been settled so long that an extensive discussion at this time of the subject would not be warranted if it were not for the reliance of counsel for appellant on Longview School Dist. No. 112 v. Stubbs Electric Co., 160 Wash. 465, 295 P. 186 (which is distinguishable from the case at bar), and the confidence with which counsel for appellant press the point that in the absence of contract the court may allow counsel fees in excess of the fees fixed by statute to a successful litigant in a civil action.

This proceeding, the case at bar, for a writ of mandate is but another form of civil action. State ex rel. LaFollette v. Hinkle, 131 Wash. 86, 90, 229 P. 317. Under the statute, Rem.Rev.Stat. § 481, 'costs to be called the attorney fee' which may be allowed to a successful litigant in a civil action are limited to ten dollars in all actions where judgment is rendered without a jury.

[1][2] Apart from the sums allowable and taxed as costs there can, as a general rule, be no recovery as damages of the costs and expenses of litigation. If recovery is sought by appellant of attorneys' fees in excess of the statutory allowance thereof as 'damages,' it should be borne in mind that the term 'damages' is in its legal sense defined as meaning the compensation which the law will award for an injury done. 17 C.J. 807. In its early signification the term was held to include costs but the terms are now regarded as *102 distinct and costs are awarded as damages only where the circumstances of the particular case withdraw it from the general rule. 17 C.J. 710.

[3] The term 'costs' may be considered as synonymous with the term 'expense.' Costs are allowances

to a party for the expense incurred in prosecuting or defending a suit. 15 C.J. 20. The word 'costs' in the absence of statute or agreement does not include counsel fees; in other words, the general rule is that counsel fees are not costs either in suits in equity or actions at law.

[4] 'The amount and items recoverable as attorney's fees must of course depend on the statutes or stipulations of the parties authorizing their allowance. Although there is some authority to the contrary, if a specific amount is prescribed by statute, the court cannot allow a greater sum; * * *' 15 C.J. 117.

[5] This action is governed by the rule which applies in all ordinary civil actions; that is, the successful litigant may recover only such attorney fees as the statute or agreement of the parties provides shall be taxed as costs in the action. Easterbrooks v. Abrahams, 200 Wash. 636, 94 P.2d 486.

In Enbody v. Hartford Accident & Indem. Co., 147 Wash. 237, 265 P. 734, 735, we said: 'The statute (Rem.Comp.Stat. § 481) [P.C. § 7462] allows, in all cases, to the prevailing party certain specified sums called attorney's fees to be taxed as costs, and in certain other instances it provides specially for the recovery of attorney's fees expended in a former action to be recovered in another (see Rem.Comp.Stat. § 654) [P.C. § 7386]. But the general rule, in the absence of statute, is not to allow such a recovery. Lovell v. House of the Good Shepherd, 14 Wash. 211, 44 P. 253; State ex rel. Maltbie v. Will, 54 Wash. 453, 103 P. 479, 104 P. 797; Gabrielson v. Gorin, 92 Wash. 408, 159 P. 387. An exception is made in the instance where the damages sought are for the wrongful issuance*103 of an injunction, but this is so hedged about with limitations as to make the rule inapplicable to other situations. More than this, the rule is one that the court does not desire to extend.'

In State ex rel. Maltbie v. Will, 54 Wash. 453, 103 P. 479, 482, 104 P. 797, we held that in a mandamus proceeding by a county officer to secure a salary warrant, an attorney's fee incurred in prosecuting the action can not be allowed as damages nor except as statutory taxable costs. We said: 'The appellant insists **617 that he is entitled to recover \$200 attorney's fees from Douglas county, as his damages incurred by reason of the refusal of the county officers to allow and pay his claim. This contention cannot be

sustained. The statute of this state fixes the attorney fees that may be allowed to a successful litigant as costs in civil actions, and no additional fees for their prosecution should be allowed without statutory authority.'

[6] Equity may allow counsel fees to complainant who has maintained a successful suit for preservation, protection or creation of common fund or who has created or brought into court such fund. The rule, however, allowing complainant counsel fees for creating or preserving common fund is not applicable to the facts in the case at bar.

Sprague v. Ticonic Bank, 307 U.S. 161, 59 S.Ct. 777, 779, 83 L.Ed. 1184, is an equity case in which the United States Supreme Court held that when a litigant in a federal district court, through the prosecution of a suit on his own behalf and at his own expense, has affixed a lien on earmarked funds in an insolvent bank for the repayment in full, with ordinary costs and interest, of a sum theretofore deposited by him in trust, and, by so doing, has incidentally, through the principle of stare decisis, established like rights for other depositors, not parties to the suit, but in like situation, *104 it lies within the power of the court as a court of equity to make the successful litigant an allowance of costs 'as between solicitor and client,' for counsel fees and litigation expenses, to be paid out of the earmarked funds. Sprague v. Ticonic Bank, supra, is clearly distinguishable from the case at bar.

In Houston Oil Terminal Co. v. City of Shreveport et al., 172 La. 994, 136 So. 29, the supreme court of Louisiana held, following the general rule, that in absence of contract, statute or recognized ground of equity, attorney fees are not recoverable by a successful litigant as 'costs'; that a materialman is not entitled to recover counsel fees for instituting suit against city for payment from balance due paving contractor.

In Jenkins v. Commercial National Bank of St. Anthony, 19 Idaho 290, 113 P. 463, it was held, in an action for damages for the wrongful foreclosure of a chattel mortgage, that the successful plaintiff could not recover attorneys' fees in view of the absence of statutory authority or express agreement of the parties therefor. Cline v. Stratton, 233 Ky. 568, 26 S.W.2d 487, in which counsel fees were allowed in an action for settlement of an estate falls within the rule that

equity may allow counsel fees to a litigant who has successfully maintained suit for preservation, protection or creation of a common fund.

In Guay v. Brotherhood Bldg. Association, 87 N.H. 216, 177 A. 409, 97 A.L.R. 1053, it was held that attorneys' fees incurred by mortgagor in maintaining its rights against a premature foreclosure by the holder of the mortgage were not recoverable as an element of damages from the wrongdoer. The court said:

'The second exception is to the refusal of the master to allow as damages the counsel fees incurred by the defendants in maintaining their rights against the premature foreclosure by the plaintiff's testatrix. It *105 is not enough to say that the foreclosure was wrongful, illegal, or tortious. Ordinarily, one suffering from such a wrong cannot recover the counsel fees incurred in resistance of it, but will be limited to the attorney fee allowed by statute to be taxed as costs. The case of Chartier v. Marshall, 56 N.H. 478, obscure in its facts and with no definite discussion of the principles involved, cannot be regarded as authority to govern the situation here presented, even if it has not in fact been overruled by the later cases.

'Counsel fees other than statutory costs have been allowed under certain classifications. They include: (1) Cases of enforcement of judicial authority, as where misconduct of a party amounting to contempt of court has caused the opposing party to incur counsel fees (Barber v. George R. Jones Shoe Co., 80 N.H. 507, 511, 512, 120 A. 80), or where a person retains possession of property after a judicial determination of the wrongful character of his possession, thus forcing the party wronged to the expense of further proceedings to recover possession or otherwise enforce his rights (Fowler v. Owen, 68 N.H. 270, 39 A. 329, 73 Am.St.Rep. 588; Manchester v. Hodge, 75 N.H. 502, 77 A. 76; Jacques v. Manchester Coal & Ice Co., 78 N.H. 248, 100 A. 47). Even in the second proceeding to enforce rights judicially declared in a prior action, the wronged party is not allowed anything for counsel fees in the first litigation. His only right as to counsel fees in the earlier proceeding is to **618 have the statutory costs taxed therein. Hersey v. Hutchins, 71 N.H. 458, 52 A. 862.

'(2) Counsel fees other than those permitted by statute may be allowed by the court as the price of

terms. Thus they may be taxed against the applicant for a new trial in some cases as terms for the granting of the motion. Watkins v. Railroad, 80 N.H. 468, 119 A. 206. And a party guilty of misconduct in consequence of which a mistrial is ordered may properly be required to pay counsel fees to the opposing party as the price of another trial. Moses v. Craig, 77 N.H. 586, 95 A. 148.

'(3) Counsel fees may be allowed as damages in cases where there is contractual liability. Such liability may exist where the contract is to be interpreted as expressly providing for their payment, as in injunction bonds (Derry Bank v. Heath, 45 N.H. 524; *106 Solomon v. Chesley, 59 N.H. 24), and in sheriffs' bonds (Hoitt v. Holcomb, 32 N.H. 185, 211); or it may be implied in some cases of indemnity, as where the party indemnified calls in the indemnitor to defend a suit upon the obligation the latter has agreed to pay (Fairfield v. Day, 71 N.H. 63, 51 A. 263). It may also be implied in cases where expenses by one of several interested parties have tended to the common benefit of all and the one may have contribution from the others. (Rollins v. Rice, 59 N.H. 493, 498).

'(4) Counsel fees other than statutory costs may also be allowed to a stakeholder out of the res, as (a) in the case of a trustee's petition for instructions (Rollins v. Rice, supra), (b) in petitions for partition, and (c) in bills of interpleader, where the stakeholder may have costs attendant upon his bringing the fund and the question of the rights of adverse claimants into the court for adjudication (Farley v. Blood, 30 N.H. 354, 374); counsel fees sometimes being allowed as a charge against the fund.

'(5) In domestic relations cases the court has some discretionary powers relative to allowing substantial counsel fees. In divorce proceedings the power is limited. The court (a) may allow a wife who is libelee a reasonable sum to prosecute her defense when she appears to have a good defense and is without property, (b) denies such fees to a wife who is libelant pending the proceedings, but (c) may take the expenses of her defense into account, if she is given a divorce, in the award of alimony. Wallace v. Wallace, 75 N.H. 217, 72 A. 1033. The principal possibly extends to proceedings involving the custody of children.

'The case here falls into none of these classes, and if the foregoing analysis is not exhaustive, the counsel fees to which these defendants are entitled seem clearly subject to the statutory regulation and not distinct therefrom upon any principle heretofore recognized. The master's ruling was correct.' 87 N.H. 216, 177 A. 412, 97 A.L.R. 1058.

In State ex rel. Risch v. Trustees, 121 Wis. 44, 98 N.W. 954, it was held, under a statute similar to ours, Rem.Rev.Stat. § 481, that a mandamus proceeding*107 is a civil action and is governed by the statute relating to costs; and that the right to reasonable costs in an action or other judicial proceeding is a creature of the statute.

In a concurring opinion in State v. Pearl, 163 Wash. 268, 1 P.2d 315, it was observed that, while the courts did not at the common law have authority to award costs in criminal proceedings, and, in the absence of statutory authorization therefor, a judgment for costs can not be rendered against a state in a criminal case (United States ex rel. Phillips v. Gaines, 131 U.S. clxix Appendix), immediately prior to our Revolution, costs were awarded pursuant to statutes to the victorious litigant in those cases in which the king was not a party; and that those statutes are a part of the common law of this country. Attention was directed to Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909, 929, in which one of the questions discussed was whether the legislature was empowered to require security for costs as a condition of invoking the jurisdiction of the supreme court of that state. The appellants referred to the constitutional provision conferring appellate jurisdiction upon the Wisconsin supreme court, and also referred to that portion of the Bill of Rights adopted from Magna Carta providing that 'Every person ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay.' The court stated that statutes such as those which required security for costs as a condition of invoking the jurisdiction of the appellate court had existed in the face of similar constitutional provisions for more than one hundred years; that courts exercised authority of a like nature theretofore, though 'fenced about by Magna Charta.' The provisions of the bill of rights in the Wisconsin**619 constitution, the *108 court held, granted no new right but guaranteed one existing at common law. The court said:

'* * * The burdens which the Magna Charta provision was designed to lift and secure immunity from, bear no resemblance whatever to those legitimate expenses of litigation which we call costs, or security for the payment thereof to the prevailing party. They were those exactions, common once, when standards of official conduct, as regards judicial administration, were so incomparably lower than in modern times that we can hardly appreciate how they could ever have been deemed justifiable, as they doubtless were. They were bribes, so to speak, demanded and received by officers exercising judicial power in the king's courts, in the nature of consideration for the use of judicial machinery. In effect, justice was to some extent a matter of bargain and sale. The exactions were not to pay for any legitimate expense, but went to enrich the judicial head, or some one acting thereunder and by his authority. Strange as it may seem, that practice was not deemed to involve any moral turpitude. It was supposed to be to such a degree attributable to sovereign prerogative that the uprooting thereof was accomplished only by a formal relinquishment by the sovereign and a grant to the people, the form thereof being this: 'We will not sell the right and justice to any one, nor will we refuse it, or put it off.' Sir Edward Coke's explanation of the scope of that pledge would seem to have given rise to the phrasing of the idea as we now find it in our own and other Constitutions:

"The king, in the judgment of the law, is ever present and repeating in all his courts, 'Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam' (We neither sell nor deny, nor delay, to any person, equity or justice), and therefore every subject, for injury done him 'in bonis, in terris, vel persona' (in person, goods, or body) by any other subject, be he ecclesiastical or temporal, without any exceptions, may take his remedy by the course of the law and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.'

*109 'In construing any provision of the Bill of Rights taken from the English Charter, it must not be forgotten that no new restriction was intended thereby, but that the sole purpose thereof was to preserve those valuable safeguards against excessive use of sovereign authority that had become a distinguishing characteristic of English liberty. That idea cannot be found better stated than by Cooley, J., in Weimer

v. Bunbury, 30 Mich. 201, 214:

“The truth is, the Bills of Rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.’

‘It is suggested, as conclusive evidence that the right to use judicial remedies under the common-law system was free and that the provision of our Bill of Rights referred to was designed to prevent conditions thereof being created here, that appeals in England were always allowed, even to the House of Lords, without any burdens being imposed on the appellant. A more careful examination of the subject would have shown that the right to impose reasonable conditions as to costs and security for costs was never questioned in the English courts. Special favors, it is true, were granted to persons in need thereof, to sue in forma pauperis, upon proof being made that otherwise justice would be denied (1 Dan.Ch.Pr. [6th Am.Ed.] 38, 155); but otherwise, costs and security for costs, in some form, in personal actions, were the general rule after the days of Magna Charta. At first the system was somewhat after the course of the old mischievous custom, though shorn of the real wickedness thereof, since exactions were required as amercements in the nature of revenue for the sovereign. The imposition went against the losing party as a penalty; in the case of the plaintiff for unjustly bringing the defendant into court; and in the case of the defendant for unreasonably resisting the plaintiff’s demand. 3 Bla.Com. 399. Later *110 by legislation costs were given the plaintiff, when a prevailing party, but not to the defendant under the same circumstances. 6 Edw. I, c. 1. Subsequently the same privilege was extended to defendants. 23 Hen. VIII, c. 15. Soon amercements for the enrichment of the sovereign treasury were abolished. 24 Hen. VIII, c. 8. Laws providing for security for costs naturally followed. By **620 the statutes of 3 Jac. I, c. 8, and 3 Car. I, c. 4 § 4, it was provided that in personal actions, with few exceptions to fit particular cases: ‘No writ of error should be allowed, unless the party bringing the same, with two sufficient sureties, shall first be bound unto the party for whom the judgment

is given, by recognizance to be acknowledged in the same court, in double the sum, to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment be affirmed, or the writ of error non proessed, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution.’ 3 Bla.Com. 411, note. Long before the separation of this country from England Blackstone said, in giving the state of the law as it then existed:

“If a writ of error be brought * * * after verdict, he that bring the writ or that is plaintiff in error, must find substantial pledges of prosecution, or bail: to prevent delays by frivolous pretences to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all, except in a few particular instances, by virtue of the several statutes.’

‘Thus it will be seen that substantially every element in our statutes as to costs and security for the payment thereof, is found in the laws of England as they existed before the Revolution, and that it was never supposed there was anything in Magna Charta inconsistent therewith. By gradual approaches, so to speak, the doctrine of the civil law in its entirety was reached and engrafted upon the English system: ‘Victus, victori in expensis condemnandus est,’-the vanquished is to be condemned in costs to the conqueror.*111 We inherited the principle thereof as part of the common law. In some form it has found a place in the code of every state of the Union that has followed common-law ideas, notwithstanding the adoption at the same time, in the Constitutions of such states, of the essential principles of Magna Charta.

‘We often see it stated that costs are a creature of the statute; that costs were not given at common law. Wisconsin C. R. Co. v. Kneale, 79 Wis. 89, 95, 48 N.W. 248; Parsons, Costs, § 1. That is liable to be misunderstood by not considering that the common law of England is not synonymous with the common law of this country. The former does not include the English statutes. As the only way costs were imposed before such statutes was by amercements for the benefit of the king, or possibly an addition to the verdict or the judgment of the jury (5 Ency.Pl. & Pr.

108), it is right to say costs were not allowed by the common law of England. But the principles of the English statutes amending the common law and existing at the time of our Revolution, suitable to our condition and in harmony with our constitution and statutes, are a part of the common law of this country. Coburn v. Harvey, 18 Wis. 147; Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223, 7 Am.Rep. 69. As only the principle of the English statutes as to costs and security for costs has been regarded as thus made a part of the common law of this country, the idea that costs are regulated wholly by statute is of course true. Nash v. Meggett, 89 Wis. 486, 494, 61 N.W. 283. 121 Wis. 127, 99 N.W. 909, 929.

In 3 Blackstone's Commentaries 399 (2 Cooley's, fourth edition, page 1153) Justice Blackstone says: 'Thus much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that *'victus victori in expensis condemnandus est'* (he who loses the suit pays costs to his adversary): (p) though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, *eo nomine* (by that name), to the defendant in a real action was the *112 statute of Gloucester, 6 Edw. I, c. 1, as did the statute of Marlbridge, 52 Hen. III, c. 6, to the defendant in one particular case, relative to wardship in chivalry: though in reality costs were considered and included in the quantum of damages, in such actions where damages are given; and, even now, costs for the plaintiff are always entered on the roll as increase of damages by the court. (q) But, because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and farther directs, that the same rule shall hold place in all cases where the party is to recover damages. And, therefore, in such actions where no damages were then recoverable (as in *quare implet*, in which damages were not given till the statute of **621 Westm. 2, 13 Edw. I), no costs are now allowed; (r) unless they have been expressly given by some subsequent statute. The statute 3 Hen. VII, c. 10, was the first which allowed any costs on a writ of error. But no costs were allowed the defendant in any shape, till the statutes 23 Hen. VIII, c. 15, 4 Jac. 1, c. 3, 8 and 9 Wm. III, c. 11, 4 and 5 Ann. c. 16, which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had, in case he had recovered. These costs on both sides are taxed and moderated by the prothonotary, or other proper

officer of the court.'

[7] An examination of the authorities discloses that the idea, as observed in Harrigan v. Gilchrist, *supra*, that costs are regulated wholly by statute is true and that a party who claims to be entitled to a judgment for costs against his adversary must bring himself within the operation of some statutory provision.

[8][9] 'In actions at law costs are not recoverable, except pursuant to statutory enactment. The court may not award costs to the successful party; nor, in a case which is within the purview of the statute according a right to costs, has the court any discretionary power as to the award or allowance. Under the statutes the rule is universal, apparently, that in an action at law the right to recover costs is established by, and dependent*113 on, the judgment rendered, or, as it is expressed, 'costs follow the result as of course.'

'The statutes in some instances have declared that the prevailing party shall recover his costs in all civil actions or proceedings of any kind. Other statutes allow costs to the successful party as a matter of right or 'of course' in actions or proceedings which involve controversies as to certain subjects of litigation, such as the title to, or possession of, real property and demands for money or damages.

[10] 'In equity proceedings the allowance and imposition of costs, unless otherwise governed by statute or rules of court, do not always follow the outcome of the suit, but rest in the sound discretion of the court according to the justice of the cause or the facts and circumstances of the particular case.' 14 Am.Jur. pp. 15, 16.

[11] 'The right to recover attorneys' fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. Such an item of expense is not allowable in the absence of a statute or of some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory costs. This rule is not changed by the fact that fraudulent or malicious acts are disclosed, although in certain circumstances fraud or malice may furnish a basis for the recovery of the expenses of litigation, including counsel fees, as an element of damages. * *

[12] 'The term 'costs' or 'expenses' as used in a statute is not understood ordinarily to include attorneys' fees.' 14 Am.Jur. p. 38.

'A court has no power to award costs unless such power is derived from statute. It has been held that the exercise of this power by the United States Supreme Court, sitting as a court of original jurisdiction in equity, is incidental to its authority as a court of equity, although such power has never been expressly conferred by any act of Congress.' 14 Am.Jur. 52

[13][14] In absence of contract, statute or recognized ground of equity, a court has no power to award an attorney's *114 fee as part of the costs of litigation. The statute, Rem.Rev.Stat. § 481, fixed the attorney fee which may be allowed to a successful litigant as costs in a civil action, like the case at bar, in the amount of ten dollars, therefore no allowance in excess of that amount may be awarded to appellant.

The judgment is affirmed.

ROBINSON, C. J., and BEALS, SIMPSON, and
JEFFERS, JJ., concur.
Wash. 1941
State ex rel. Macri v. City of Bremerton
8 Wash.2d 93, 111 P.2d 612

END OF DOCUMENT

H

Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Michael ROGGENKAMP, Petitioner.
State of Washington, Respondent,
v.
Jason Ray Clark, Petitioner.
Nos. 73839-4, 74231-6.

Argued Jan. 15, 2004.
Decided Feb. 10, 2005.

Background: First defendant was convicted in the Juvenile Court, King County, James D. Cayce, J., of vehicular assault and vehicular homicide, and second defendant was convicted in the Superior Court, Clark County, Barbara Johnson, J., of three counts of vehicular assault. Defendants appealed and the Court of Appeals affirmed in both cases, 115 Wash.App. 927, 64 P.3d 92 and 117 Wash.App. 281, 71 P.3d 224. Review was granted, and cases consolidated.

Holdings: The Supreme Court, Alexander, C.J., held that:

(1) under vehicular assault and vehicular homicide statutes, driving in “a reckless manner” means driving in a rash or heedless manner, indifferent to the consequences, abrogating State v. Hursh, 77 Wash.App. 242, 890 P.2d 1066, State v. Miller, 60 Wash.App. 767, 807 P.2d 893, and State v. McAllister, 60 Wash.App. 654, 806 P.2d 772, and (2) first defendant's actions were proximate cause of accident giving rise to charges.

Affirmed.

Sanders, J., filed dissenting opinion.

Chambers, J., filed separate opinion, concurring in dissent.

West Headnotes

[1] Criminal Law 110 ↪ 1038.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.2 k. Failure to Instruct in General. Most Cited Cases
Failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude which may be raised for the first time on appeal. RAP 2.5(a).

[2] Automobiles 48A ↪ 342.1

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak342 Homicide
48Ak342.1 k. In General. Most Cited Cases
Under vehicular assault statute, driving in a “reckless manner” means driving in a rash or heedless manner, indifferent to the consequences, and language in reckless driving statute defining reckless driving as driving with willful or wanton disregard for the safety of persons or property does not govern “reckless manner” language in vehicular assault statute, abrogating State v. Hursh, 77 Wash.App. 242, 890 P.2d 1066, State v. Miller, 60 Wash.App. 767, 807 P.2d 893, and State v. McAllister, 60 Wash.App. 654, 806 P.2d 772. West's RCWA 46.61.500(1), 46.61.522(1).

[3] Automobiles 48A ↪ 342.1

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak342 Homicide
48Ak342.1 k. In General. Most Cited Cases
Under vehicular homicide statute, driving in a “reckless manner” means driving in a rash or heedless manner, indifferent to the consequences, and language in reckless driving statute defining reckless

driving as driving with willful or wanton disregard for the safety of persons or property does not govern “reckless manner” language in vehicular homicide statute. West's RCWA 46.61.500(1), 46.61.520(1).

[4] Criminal Law 110 ↪ 1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited

Cases

The Supreme Court reviews a question of statutory construction de novo.

[5] Statutes 361 ↪ 188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

Statutes 361 ↪ 190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statutory construction begins by reading the text of the statute or statutes involved; if the language is unambiguous, a court is to rely solely on the statutory language when construing the statute.

[6] Statutes 361 ↪ 190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statutes 361 ↪ 217.4

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k217.4 k. Legislative History in

General. Most Cited Cases

Statutes 361 ↪ 218

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k218 k. Contemporaneous Construction in General. Most Cited Cases

Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous, and legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of the statute.

[7] Statutes 361 ↪ 193

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k193 k. Associated Words. Most Cited Cases

The principle of “noscitur a sociis” provides that a single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated.

[8] Statutes 361 ↪ 208

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k208 k. Context and Related Clauses. Most Cited Cases

In interpreting statutory terms, a court should take into consideration the meaning naturally attaching to them from the context, and adopt the sense of the words which best harmonizes with the context.

[9] Statutes 361 ↪ 206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes 361 ⚡212.6

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited

Cases

The drafters of legislation are presumed to have used no superfluous words and courts must accord meaning, if possible, to every word in a statute.

[10] Statutes 361 ⚡190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statutes 361 ⚡206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Courts may not delete language from an unambiguous statute; statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

[11] Statutes 361 ⚡212.7

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.7 k. Other Matters. Most Cited

Cases

When interpreting a statute, a court is required to assume the Legislature meant exactly what it said and apply the statute as written.

[12] Statutes 361 ⚡212.6

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited

Cases

The legislature is deemed to intend a different meaning when it uses different terms in a statute or statutes.

[13] Statutes 361 ⚡212.6

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited

Cases

When the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.

[14] Statutes 361 ⚡230

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k230 k. Amendatory and Amended Acts. Most Cited Cases

When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute.

[15] Courts 106 ⚡91(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k91 Decisions of Higher Court or Court of Last Resort

106k91(1) k. Highest Appellate Court. Most Cited Cases

It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.

[16] Automobiles 48A ↪ 342.1

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak342 Homicide

48Ak342.1 k. In General. Most Cited

Cases

Automobiles 48A ↪ 347

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak347 k. Assault and Battery. Most

Cited Cases

Defendant's actions were proximate cause of accident giving rise to charges of vehicular assault and vehicular homicide, and other driver's 1.3 blood alcohol concentration, her alleged running of stop sign immediately prior to collision, and fact that defendant locked his car's brakes just prior to collision and went into uncontrolled skid did not render other's driver's actions superseding cause of such accident, where defendant was traveling in the wrong lane of traffic at more than twice the speed limit attempting to pass another vehicle when the collision occurred. West's RCWA 46.61.520(1), 46.61.522(1).

[17] Automobiles 48A ↪ 342.1

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak342 Homicide

48Ak342.1 k. In General. Most Cited

Cases

A concurring cause does not shield a defendant from a vehicular homicide conviction. West's RCWA 46.61.520(1).

****198** Allen Hansen & Maybrown PS, Richard Hansen, Cassandra L. Stamm, Horwitz & Stamm, Seattle, David Schultz, Camas, for Petitioner.

James Morrissey Whisman, Stephen Hobbs, Deputy, King County Prosecutor's Office, Seattle, Richard Alan Melnick, Vancouver, for Respondent.

ALEXANDER, C.J.

***618** The primary question presented to us in this consolidated review is whether the term "[i]n a reckless manner," which appears in the vehicular homicide and vehicular assault statutes, is defined by the "willful or wanton disregard for the safety of persons or property" language of the reckless driving statute. We answer "no" to that question, holding to the well-established definition of the term as "driving in a rash or heedless manner, indifferent to the consequences." We, therefore, affirm the decision of the Court of Appeals in each of the cases before us.

I

State v. Roggenkamp

Michael Roggenkamp was charged in King County Juvenile Court with one count of vehicular homicide and two counts of vehicular assault. The charges stemmed from an incident that occurred in May 2000 at a road intersection near Enumclaw. Then and there a vehicle driven by 16-year-old Roggenkamp struck a vehicle driven by JoAnn Carpenter. When the collision occurred, Roggenkamp was traveling in the wrong lane of traffic at more than twice the speed limit in an attempt to pass another vehicle. Carpenter and a passenger in her car, Andrew Strand, were both severely injured. Another passenger, Carpenter's son, Michael, died from injuries he received in the accident.

***619** The charges against Roggenkamp were premised on the "in a reckless manner" alternative of the vehicular homicide and vehicular assault statutes. ^{FN1} In finding Roggenkamp guilty, the trial court determined that driving or operating a vehicle "in a reckless manner" means to "operat[e] a motor vehicle in a rash and heedless manner, indifferent to the consequences." *State v. Roggenkamp*, 115 Wash.App. 927, 935, 64 P.3d 92 (2003).

^{FN1}RCW 46.61.522(1), the vehicular assault statute, reads:

“(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

“(a) *In a reckless manner* and causes substantial bodily harm to another; or

“(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

“(c) With disregard for the safety of others and causes substantial bodily harm to another.” (Emphasis added).

RCW 46.61.520(1), the vehicular homicide statute, reads:

“(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

“(a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or

“(b) *In a reckless manner*; or

“(c) With disregard for the safety of others.” (Emphasis added.)

Roggenkamp appealed his conviction to the Court of Appeals, Division One, which affirmed. Roggenkamp then sought review by this court, arguing that the trial court erred when it applied the “rash and heedless manner, indifferent to the consequences” language, and did not apply the “willful or wanton disregard for the safety of persons or property” language that appears in the reckless driving statute, RCW 46.61.500(1).^{FN2} He contended, alternatively, that a superseding event caused the incident that led to the charges against him and that, therefore, his convictions should be reversed and the **199 charges dismissed. We granted Roggenkamp’s petition for review.

FN2.RCW 46.61.500(1), the reckless driving statute, in pertinent part, reads: “Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.”

**620 State v. Clark*

Jason Ray Clark was charged in Clark County Superior Court with three counts of vehicular assault. The charges arose out of a June 2001 car crash in Vancouver, Washington in which Clark’s speeding vehicle struck a vehicle driven by Deborah Pratt. Pratt and two of Clark’s passengers were seriously injured in the incident.

Like the charges against Roggenkamp, the charges against Clark were premised on the “in a reckless manner” alternative of the vehicular assault statute. In jury instruction 10, the trial court indicated that “to operate a vehicle in a reckless manner” means driving in a “rash or heedless manner, indifferent to the consequences.” Clerk’s Papers at 17. The jury found Clark guilty as charged. Clark appealed his convictions to the Court of Appeals, Division Two, asserting for the first time that the trial court erred in instructing the jury that one operates a vehicle “in a reckless manner” if he or she drives in a “rash or heedless manner, indifferent to the consequences.” The Court of Appeals affirmed the conviction. State v. Clark, 117 Wash.App. 281, 71 P.3d 224 (2003). Clark subsequently sought review by this court, again raising the question of whether the jury was properly instructed on the definition of “in a reckless manner.” We granted Clark’s petition for review and consolidated the review with Roggenkamp’s.

II

[1] The State contends here, as it did at the Court of Appeals, that Clark waived his right to challenge the adequacy of jury instruction 10 by failing to object to the instruction at trial. We reject this argument. Failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude which may be raised for the first time on appeal. State v. Stein, 144 Wash.2d 236, 241, 27 P.3d 184 (2001); RAP 2.5(a).

**621 III*

A. The appropriate definition of “in a reckless manner”

[2][3] Roggenkamp and Clark each assert that the trial court applied an erroneous definition of “in a reckless manner” as that term is used in the vehicular homicide and vehicular assault statutes. They would have us hold that the term is defined by the “willful or wanton disregard for the safety of persons or property” language that appears in the reckless driving statute, RCW 46.61.500(1).

[4][5][6] We review a question of statutory construction de novo. State v. Votava, 149 Wash.2d 178, 183, 66 P.3d 1050 (2003). Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language. State v. Avery, 103 Wash.App. 527, 532, 13 P.3d 226 (2000). Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. State v. Keller, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001). Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute. Fraternal Order of Eagles, Teno Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wash.2d 224, 243, 59 P.3d 655 (2002).

1. The definition of “in a reckless manner” as used in the vehicular homicide and vehicular assault statutes is well settled in our case law.

The term “in a reckless manner” is not defined in either the vehicular homicide statute, RCW 46.61.520, or the vehicular assault statute, RCW 46.61.522. Nor is the term defined elsewhere in the Motor Vehicle Code. However, through a series of decisions by this court, a definition of the term “in a reckless manner” for purposes of the vehicular homicide and vehicular assault statutes has evolved and is now well settled. This evolution culminated *622 in our decision in State v. Bowman, 57 Wash.2d 266, 270, 271, 356 P.2d 999 (1960), in which we indicated that driving “in a reckless manner” means **200 “driving in a rash or heedless manner, indifferent to the consequences.” (Emphasis omitted.)

Roggenkamp and Clark each assert that the Court of

Appeals has wavered in its application of the definition of “in a reckless manner.” In support of this assertion, they call to our attention three cases in which divisions of that court have applied the “willful or wanton disregard for the safety of persons or property” language of the reckless driving statute to vehicular assault or vehicular homicide cases. See State v. Hursh, 77 Wash.App. 242, 248, 890 P.2d 1066 (1995) (Division One) (vehicular assault); State v. Miller, 60 Wash.App. 767, 773, 807 P.2d 893 (1991) (Division Three) (vehicular homicide); and State v. McAllister, 60 Wash.App. 654, 658-59, 806 P.2d 772 (1991) (Division Three) (vehicular homicide).

We view the McAllister, Miller, and Hursh decisions as aberrations in the long string of cases, stretching back to 1938, that have rejected defining the term “in a reckless manner” in vehicular homicide and vehicular assault cases as “willful or wanton disregard for the safety of persons or property.” This position finds support in the fact that Division Three of the Court of Appeals implicitly declined to follow its holdings in Miller and McAllister in a later case in which it explicitly rejected a defendant's contention that “the ‘reckless manner’ element of vehicular assault is the same as the ‘willful or wanton disregard’ element of reckless driving.” State v. Thompson, 90 Wash.App. 41, 47-48, 950 P.2d 977 (1998). In that case, the court held that driving in a “ ‘reckless manner’ ... means to drive in a rash or heedless manner, with indifference to the consequences.” Id. at 48, 950 P.2d 977.

*623 2. Principles of statutory interpretation dictate that we not adopt petitioners' proposed definition of driving “in a reckless manner.”

The interpretation of driving “in a reckless manner” that petitioners advocate would require us to dismember both the term “in a reckless manner,” as used in the vehicular homicide and vehicular assault statutes, and the term “reckless driving,” as used in the reckless driving statute. We say that because in order to hold that “reckless” in the term “in a reckless manner” has the same meaning as “reckless” in the term “reckless driving,” we would have to sever the word “reckless” in each of these statutes from the surrounding context and read the word as if it stood alone. We are not inclined to do that because in doing so we would violate fundamental principles of statutory construction.

[7][8] A principle consistent with this view is that of *noscitur a sociis*, which provides that a single word in a statute should not be read in isolation, and that “the meaning of words may be indicated or controlled by those with which they are associated.” *State v. Jackson*, 137 Wash.2d 712, 729, 976 P.2d 1229 (1999) (quoting *Ball v. Stokely Foods, Inc.*, 37 Wash.2d 79, 87-88, 221 P.2d 832 (1950)). In *Jackson*, we applied this principle and held that the word “shelter” in the phrase “food, water, shelter, clothing, and medically necessary health care,” as used in RCW 9A.42.010(1), should not be isolated and analyzed apart from the words surrounding it. *Id.* In interpreting statutory terms, a court should “take into consideration the meaning naturally attaching to them from the context, and [] adopt the sense of the words which best harmonizes with the context.” *Id.* (quoting *McDermott v. Kaczmarek*, 2 Wash.App. 643, 648, 469 P.2d 191 (1970) (quoting 50 AM.JUR. Statutes § 247 (1944))).

In the vehicular homicide and vehicular assault statutes, the word “reckless” is plainly part of the term “in a reckless manner.” By the same token, the word *624 “reckless” as it appears in the reckless driving statute is part of the term “reckless driving.” The terms “reckless manner” and “reckless driving” both function as single units of meaning in their respective statutes. In each, “reckless” functions as an adjective. In the vehicular homicide and vehicular assault statutes, “reckless” modifies “manner.” In the reckless driving statute, on the other hand, “reckless” modifies “driving.” Furthermore, “reckless manner” and “reckless driving” are each terms of art unique to the state’s motor vehicle laws that have long been employed by the legislature to describe driving offenses. See, e.g., LAWS of 1923, ch. 122, § 2. To carve **201 up the phrases “reckless manner” and “reckless driving” by severing “reckless” from each phrase in order to read it in isolation would clearly violate the dictates of the aforementioned doctrine of *noscitur a sociis*.^{FN3}

^{FN3} The dissent suggests that a provision in Washington’s criminal code, RCW 9A.08.010(1)(c), which provides a default definition of “recklessness,” should apply here. Because we do not read the word “reckless” in isolation, RCW 9A.08.010(1)(c) is not applicable.

[9][10] Another well-settled principle of statutory construction is that “each word of a statute is to be accorded meaning.” *State ex rel. Schillberg v. Barnett*, 79 Wash.2d 578, 584, 488 P.2d 255 (1971). “[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.” *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep’t of Motor Vehicles*, 13 Wash.App. 624, 628, 536 P.2d 644 (1975)). “[W]e may not delete language from an unambiguous statute: ‘Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’ ” *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996))).

[11] Petitioners’ reading of “in a reckless manner” runs afoul of the aforementioned principle because it would *625 render some words in the statute to be without meaning or purpose. Isolating “reckless” from the phrase “in a reckless manner,” as petitioners advocate, would render the word “manner” meaningless and superfluous. Petitioners, in short, would rewrite the vehicular homicide and vehicular assault statutes by stripping out the word “manner” so that an element of vehicular homicide or vehicular assault is “driving recklessly.” We should resist doing that because when interpreting a statute, “this court is required to assume the Legislature meant exactly what it said and apply the statute as written.” *Pearsall-Stipek*, 141 Wash.2d at 767, 10 P.3d 1034 (quoting *In re Custody of Smith*, 137 Wash.2d 1, 8, 969 P.2d 21 (1998)). In the vehicular homicide and vehicular assault statutes, the legislature said that operating or driving “a vehicle in a *reckless manner*,” not “driving recklessly,” was an element of the crime. We must assume that the legislature meant precisely what it said and apply the statute as written.

[12][13] Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms. *State v. Beaver*, 148 Wash.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v. Dep’t of Reve-*

nue, 141 Wash.2d 139, 160, 3 P.3d 741 (2000) (it is “well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’ ” (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wash.2d 626, 634, 555 P.2d 1368 (1976))).^{FN4} Here, the legislature chose to use the term “in a reckless manner” in the vehicular homicide and vehicular assault statutes and to *626 use the term “reckless driving” in another.^{FN5} Because the **202 legislature chose different terms, we must recognize that a different meaning was intended by each term.^{FN6}

^{FN4}. The dissent points out that we also recognize the inverse rule. Dissent at 205. “When the *same* word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.” *Medcalf v. Dep't of Licensing*, 133 Wash.2d 290, 300-01, 944 P.2d 1014 (1997) (emphasis added); see *DeGrief v. City of Seattle*, 50 Wash.2d 1, 11, 297 P.2d 940 (1956). However, here the legislature did not use “the same word or words” but, rather, used different terms, i.e., “in a reckless manner” and “reckless driving.”

^{FN5}. The dissent claims that we make our distinction between the vehicular homicide and vehicular assault statutes and the reckless driving statute based on use of the terms “operates” or “operating” in the vehicular homicide and vehicular assault statutes and the term “drives” in the reckless driving statute. Dissent at 206-207 In fact the distinction we draw is based on use of the term “reckless manner” in the vehicular homicide and vehicular assault statutes and “reckless driving” in the reckless driving statute. That distinction is not, as the dissent suggests “mere semantics.” *Id.* at 206 (emphasis added).

^{FN6}. As the dissent points out, RCW 46.98.020 states that provisions of Title 46 RCW “shall be construed in *pari materia*.” Because we deal here with different terms, RCW 46.98.020 does not require us to give these terms the same definition.

The structure of the vehicular homicide and vehicular assault statutes further dictates that “in a reckless manner” not be defined as “willful or wanton disregard for the safety of persons or property.” As the Court of Appeals correctly observed, “[t]here are three alternative means of committing both vehicular homicide and vehicular assault.” *Roggenkamp*, 115 Wash.App. at 935, 64 P.3d 92 (footnote omitted). These offenses can be committed in three alternative ways: by operating a motor vehicle either while “under the influence of intoxicating liquor or any drug,” “[i]n a reckless manner,” or “[w]ith disregard for the safety of others.” RCW 46.61.520, .522. If “in a reckless manner” is defined as driving “with willful or wanton disregard for the safety of others,” the “in a reckless manner” alternative of committing vehicular homicide or vehicular assault would be completely swallowed up and thus rendered meaningless and superfluous. Both the driving “in a reckless manner” alternative and the driving “with disregard for the safety of others” alternative would apply to the same act, but the “in a reckless manner” alternative would require proof that the defendant acted with willfulness or wantonness. The “in a reckless manner” alternative would be effectively written out of the statute as prosecutors, seeking to avoid having to prove the higher mental state, stopped charging defendants under the “in a reckless manner” alternative. We must assume that when the legislature created three alternative *627 ways of committing vehicular homicide and vehicular assault, it meant for each alternative to be distinct.

3. The legislative histories of the vehicular homicide, vehicular assault, and reckless driving statutes make clear that “in a reckless manner” was intended to have a meaning distinct from “reckless driving.”

The present reckless driving statute, RCW 46.61.500, was enacted in 1965. See LAWS of 1965, Ex.Sess., ch. 155, § 59. However, a statute similar to the current statute was enacted in 1937. LAWS of 1937, ch. 189, § 118. The earlier statute made it unlawful to “operate a motor vehicle in a *reckless manner*” and directed that “[f] or the purpose of this section to ‘operate in a *reckless manner*’ shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property.” *Id.* (Emphasis added.) The ve-

hicular homicide statute (then known as negligent homicide by means of a motor vehicle) was also enacted in 1937. LAWS of 1937, ch. 189, § 120. It provided that “[w]hen the death of any person shall ensue within one year as a proximate result of injury received by the operation of any vehicle ... in a *reckless manner* or with disregard for the safety of others, the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle.” *Id.* (Emphasis added.) In 1961, all laws relating to motor vehicles, including the 1937 reckless driving and vehicular homicide statutes, were repealed and reenacted as part of the Motor Vehicle Code, Title 46 RCW. LAWS of 1961, ch. 12. The 1937 reckless driving statute became RCW 46.56.020, but the language of the statute was unchanged. *Id.* at 380. The vehicular homicide statute became RCW 46.56.040, but the language of that statute, too, was unchanged. *Id.* at 381.

It was in 1965 that the legislature undertook a major revision of the State’s motor vehicle laws that affected*628 nearly the entire Motor Vehicle Code.^{FN7} LAWS of 1965, Ex.Sess., **203 ch. 155. As noted above, this effort included a repeal of the 1937 reckless driving statute, LAWS of 1965, Ex.Sess., ch. 155, § 91, and the enactment of an entirely new reckless driving statute, LAWS of 1965, Ex.Sess., ch. 155, § 59. The 1965 reckless driving statute, codified at RCW 46.61.500, differs from the reckless driving law it replaced in that it no longer employed the term “in a reckless manner.” Because the new statute did not refer to operating a motor vehicle “in a reckless manner,” the language of the 1937 reckless driving statute dictating a unique construction of “in a reckless manner” for purposes of that section was necessarily omitted. The only construction of “in a reckless manner” that remained is the one articulated by this court in *Bowman*: driving in a “rash or heedless manner, indifferent to the consequences.” *Bowman*, 57 Wash.2d at 271, 356 P.2d 999 (emphasis omitted).

^{FN7}. The 1965 revision of the Motor Vehicle Code was contained in House Bill 234. Contrary to the dissent’s suggestion House Bill 234 was not enacted “to remove the phrase ‘[f]or the purpose of this section.’ ” Dissent at 208. House Bill 234 was a major revision of the State’s motor vehicle laws and constituted over 90 sections.

This history demonstrates that the legislature has always intended that “reckless manner” as used in the vehicular homicide and vehicular assault statutes *not* be defined as “willful or wanton disregard for the safety of persons or property.” Between 1937 and 1965 both the reckless driving statute and the vehicular homicide statute employed the term “in a reckless manner,” but the reckless driving statute expressly provided that the phrase “operate in a reckless manner” was to be given an exceptional construction unique to that section. As used elsewhere in the motor vehicle laws, “in a reckless manner” was to be defined differently.^{FN8} By expressly limiting the “willful or *629 wanton disregard for the safety of persons or property” construction of “in a reckless manner” to the reckless driving statute only, the 1937 legislature clearly demonstrated its intent that “in a reckless manner” as used in the vehicular homicide statute was *not* to mean “willful or wanton disregard for the safety of persons or property.”

^{FN8}. Consistent with the express language of the 1937 reckless driving statute, this court recognized the distinction between construction of the term “in a reckless manner” as used in the reckless driving statute and that term as used in the vehicular homicide statute. *State v. Dickert*, 194 Wash. 629, 632, 79 P.2d 328 (1938). This distinction was not, as the dissent claims, made between the terms “reckless driving” and “reckless manner.” Dissent at 207. The distinction recognized in *Dickert* was between *two different constructions of the same term*: “reckless manner.” See *Dickert*, 194 Wash. at 631-32, 79 P.2d 328. The exceptional construction dictated in the 1937 reckless driving statute applied to the term “in a reckless manner” *not* the term “reckless driving.”

In the 1965 revisions to the Motor Vehicle Code, the legislature used different terminology to describe the offense of reckless driving. This choice of language achieved the legislature’s purpose of criminalizing driving a vehicle in willful or wanton disregard for the safety of persons or property and eliminating the confusion over the meaning of “reckless manner,” as discussed in *State v. Dickert*, 194 Wash. 629, 632, 79 P.2d 328 (1938). That the 1965 reckless driving statute was enacted in order to differentiate between

“reckless driving” and driving “in a reckless manner” reinforces the conclusion that the legislature intended “reckless driving” to have a meaning distinct from “in a reckless manner.”

[14][15] When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute. *In re Pers. Restraint of Quackenbush*, 142 Wash.2d 928, 936, 16 P.3d 638 (2001). Furthermore, “[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.” *Johnson v. Morris*, 87 Wash.2d 922, 927, 557 P.2d 1299 (1976). Thus, our definition of “reckless manner” as used in the vehicular homicide statute, articulated in *Bowman*, 57 Wash.2d at 271, 356 P.2d 999, operates as if it was originally written into the vehicular homicide statute and we must presume that the legislature was aware of this construction.

The vehicular homicide and vehicular assault statutes have been recodified or amended numerous times *630 since they were enacted. See LAWS of 2001, ch. 300, § 1; LAWS of 1998, ch. 211, § 2; LAWS of 1996, ch. 199, § 8; LAWS of 1996, ch. 199, § 7; LAWS of 1991, ch. 348, § 1; LAWS of 1983, ch. 164, § 2; LAWS of 1983, ch. 164, § 1; LAWS of 1975, 1st Ex.Sess., ch. 287, § 3; LAWS of 1973, 2d Ex.Sess., **204 ch. 38, § 2; LAWS of 1970, Ex.Sess., ch. 49, § 5; LAWS of 1965, Ex.Sess., ch. 155, § 63; LAWS of 1961, ch. 12, § 46.56.040. Despite these many statutory changes, the legislature has never availed itself of the opportunity to redefine the term “in a reckless manner” as used in the vehicular assault or vehicular homicide statutes. Because the legislature has acquiesced in this court’s definition of “in a reckless manner,” we will not alter our interpretation of that term until the legislature provides a different definition.

In sum, we find no basis upon which to export the “willful or wanton disregard for the safety of persons or property” language used in the reckless driving statute and import it to define the term “in a reckless manner” in the two pertinent felony statutes. We conclude, therefore, that the courts below applied the correct definition of the term “in a reckless manner.”

B. Did the Court of Appeals err when it held the evidence was sufficient for the trial court to find that

Roggenkamp's actions were the sole proximate cause of the accident?

[16] Roggenkamp makes the additional argument that JoAnn Carpenter's actions prior to the fatal incident were a superseding event that renders his conviction improper ^{FN9} and that the Court of Appeals erred in not so concluding. We have reviewed the Court of Appeals decision resolving this issue in favor of the State and find ourselves entirely in *631 agreement with the decision and the reasoning that led to it.

FN9. Roggenkamp points to Carpenter's “absolute minimum” 1.3 blood alcohol concentration, her alleged running of a stop sign immediately prior to the collision, and the fact he locked his car's brakes immediately prior the wreck and went into an uncontrolled skid as support for his argument that the evidence was insufficient to establish that his actions were the proximate cause of JoAnn Carpenter's and Andrew Strand's injuries and Michael Carpenter's death. Clerk's Papers at 124.

[17] As the Court of Appeals pointed out, JoAnn Carpenter's actions were, at most, a concurring cause, not a superseding cause of the accident. A concurring cause does not shield a defendant from a vehicular homicide conviction. *State v. Souther*, 100 Wash.App. 701, 710-11, 998 P.2d 350, review denied, 142 Wash.2d 1006, 34 P.3d 1232 (2000). We, therefore, affirm the Court of Appeals on this issue.

IV

For more than four decades we have defined the term “reckless manner,” as used in the vehicular assault and vehicular homicides statutes, as meaning to operate a vehicle in a “rash or heedless manner, indifferent to the consequences.” The express language of the aforementioned statutes as well as legislative history and recent case law does not provide any basis for departing from this traditional definition. Therefore, we reaffirm that the “rash or heedless manner, indifferent to the consequences” definition is the proper definition of the term “reckless manner” as it appears in RCW 46.61.520(1)(b) and RCW 46.61.522(1)(a). We hold additionally that JoAnn Carpenter's actions were, at the very most, a concurring cause of the accident and not a superseding

cause as a matter of law. Therefore, we affirm the Court of Appeals in both of these cases.

We concur: C. JOHNSON, MADSEN, BRIDGE, OWENS, FAIRHURST, JJ., and IRELAND, J.P.T. SANDERS, J. (dissenting).

Under the guise of judicial restraint the majority disregards unambiguous statutory language by adhering to inapposite precedent, holding “driving ‘in a reckless manner’ under RCW 46.61.520(1)(b) and RCW 46.61.522(1)(a) [means] operating a vehicle in a ‘rash or heedless manner, indifferent to the consequences.’” Because the plain language of the current Motor *632 Vehicle Code mandates otherwise, and also because the doctrinal basis for the majority’s holding has been legislatively repealed, I dissent.

I. Reckless Means Reckless

The critical question presented is the definition of “operating a motor vehicle ... [i]n a reckless manner” as used in the vehicular **205 homicide statute, RCW 46.61.520(1)(b), and vehicular assault statute, RCW 46.61.522(1)(a). Construction of one compels an identical construction of the other. State v. Neher, 112 Wash.2d 347, 351, 771 P.2d 330 (1989).^{FN1} I conclude both the *Roggenkamp* and *Clark* trial courts erred by defining this phrase as “rash or heedless manner, indifferent to the consequences.” Clark Clerk’s Papers (CCP) at 17 (Instruction 10); see also *Roggenkamp* Clerk’s Papers (RCP) at 126-27 (Conclusion of Law 1).^{FN2} The correct definition of “operating a motor vehicle ... [i]n a reckless manner,” RCW 46.61.520(1)(b), is governed by the reckless driving provision, RCW 46.61.500(1). My reasons follow.

^{FN1}. This is so despite the vehicular homicide statute’s use of the past progressive tense “was operating” in contrast to the vehicular assault statute’s use of the present simple tense “operates.” Compare RCW 46.61.520(1) (“was operating”) with RCW 46.61.522(1) (“operates”). In the interest of simplicity I cite only to the vehicular homicide statute, RCW 46.61.520(1)(b), unless the context requires otherwise.

^{FN2}. The *Roggenkamp* court used a conjunctive “rash and heedless” definition, RCP at 126-27 (Conclusion of Law 1) (emphasis

added) whereas the *Clark* court instructed the jury with a disjunctive “rash or heedless” definition, CCP at 17 (Instruction 10) (emphasis added). Both standards are erroneous for the reasons which follow. However, because our pre-1965 cases recognized a disjunctive “rash or heedless” definition, see *infra* pp. 201-202, I cite that phrase throughout.

This statutory construction inquiry must consider our primary aim is to ascertain the legislature’s intent, remembering such intent is derived solely from the plain language of the statute if it is unambiguous, accepting the legislature means precisely what it says. State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003); State v. Sullivan, 143 Wash.2d 162, 175, 19 P.3d 1012 (2001). Courts may not rewrite or add statutory language. J.P., 149 Wash.2d at 450, 69 P.3d 318; *633 see also Millay v. Cam, 135 Wash.2d 193, 203, 955 P.2d 791 (1998). However it is equally important that a court may “not delete language from an unambiguous statute.” J.P., 149 Wash.2d at 450, 69 P.3d 318. “ ‘Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’ ” Davis v. Dep’t of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999) (quoting Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)). And this principle mandates a statute’s plain language is to be discerned not simply from a tunnel-vision approach considering no more than the section at issue, but rather “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 11, 43 P.3d 4 (2002) (emphasis added).

These principles require “every ‘provision [to] be viewed in relation to other provisions and harmonized if at all possible to [e]nsure proper construction of every provision.’ ” State v. S.P., 110 Wash.2d 886, 890, 756 P.2d 1315 (1988) (quoting Addleman v. Bd. of Prison Terms & Paroles, 107 Wash.2d 503, 509, 730 P.2d 1327 (1986)). Harmonization is especially necessary when “ ‘statutes relate to the same thing or class,’ ” in which case they are in *pari materia*. Monroe v. Soliz, 132 Wash.2d 414, 425, 939 P.2d 205 (1997) (quoting King County v. Taxpayers of King County, 104 Wash.2d 1, 9, 700 P.2d 1143

(1985)). Only when harmonization is not possible does the court separately construe statutes dealing with the same subject matter. *Id.*; see also State v. Fairbanks, 25 Wash.2d 686, 690, 171 P.2d 845 (1946). We have long held:

“Whenever a legislature had used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.”

*634 Champion v. Shoreline Sch. Dist. No. 412, 81 Wash.2d 672, 676, 504 P.2d 304 (1972) (quoting State ex rel. Am. Piano Co. v. Superior Court, 105 Wash. 676, 178 P. 827 (1919)). And it is to this end that “when similar words are used in different parts of a statute, ‘*the meaning is presumed to be the same throughout.*’ ” **206 Welch v. Southland Corp., 134 Wash.2d 629, 636, 952 P.2d 162 (1998) (emphasis added) (quoting Cowles Publ'g Co. v. State Patrol, 109 Wash.2d 712, 722, 748 P.2d 597 (1988) (quoting Booma v. Bigelow-Sanford Carpet Co., 330 Mass. 79, 82, 111 N.E.2d 742, 743 (1953)); see also De Grief v. City of Seattle, 50 Wash.2d 1, 11, 297 P.2d 940 (1956).

RCW 46.61.500(1) defines “reckless driving” as “driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property.” Similarly, vehicular assault and vehicular homicide occur when injury or death results from “operating a motor vehicle ... [i]n a reckless manner.” RCW 46.61.520(1)(b); see also RCW 46.61.522(1)(a). Thus, all three sections of the Motor Vehicle Code cited above require “reckless” driving before a defendant is convicted of reckless driving, vehicular homicide, or vehicular assault. Not only does this invoke the common statutory construction principle of construing provisions in *pari materia*, but we are also legislatively commanded to do as much: “The provisions of this title [Title 46 RCW] shall be construed in *pari materia* even though as a matter of prior legislative history they were not originally enacted in the same statute.” RCW 46.98.020. Such a declaration evinces clear legislative intent to preclude isolationist judicial interpretation of any one provision in the Motor Vehicle Code. To the contrary, in *pari materia* provisions must and should be construed alike. Champion, 81

Wash.2d at 676, 504 P.2d 304.

Champion is instructive. Analogous to this case, the court there construed the meaning of the term “certificated employee” in former RCW 28A.67.070 (LAWS OF 1970, Ex.Sess., ch. 15, § 16), *recodified as amended at* RCW 28A.405.210. Champion, 81 Wash.2d at 673, 504 P.2d 304. Noting Title 28A RCW's mandate to construe its provisions in *pari materia*, *635 see former RCW 28A.98.040 (LAWS OF 1969, Ex.Sess., ch. 223, § 28A.98.040), *recodified at* RCW 28A.900.040, and the statutory construction canon to construe identical words alike, we held the term included only those with teaching certificates because all references to “certificated” within the code applied only to those persons holding teaching certificates. Champion, 81 Wash.2d at 676-77, 504 P.2d 304. Accordingly, we held nurses were not included within the class of “other certificated employee[s],” even though they were required by state law to hold personnel certificates. *Id.* at 679-80, 504 P.2d 304.^{FN3} Thus, just as Champion held an identical construction of “certificated employee” was required in Title 28A RCW, the plain language of Title 46 RCW requires identical construction of the term “reckless” as used in RCW 46.61.500(1), 46.61.520(1)(b), and 46.61.522(1)(a), unless there is express language in the statute directing the court to construe it otherwise.

FN3. Notably, Title 28A RCW's in *pari materia* construction section is identical in all relevant parts to Title 46 RCW's sister provision. Compare RCW 28A.900.040 (“The provisions of this title, Title 28A RCW, shall be construed in *pari materia* even though as a matter of prior legislative history they were not originally enacted in the same statute.”) with RCW 46.98.020 (“The provisions of this title shall be construed in *pari materia* even though as a matter of prior legislative history they were not originally enacted in the same statute.”).

The only section defining “reckless” is RCW 46.61.500(1). Nothing in the current version of RCW 46.61.500 indicates this definition does not or should not apply elsewhere in Title 46 RCW. As such, we are required by plain language and also as a matter of basic statutory construction to give identical definitions throughout Title 46 RCW. RCW 46.98.020;

Champion, 81 Wash.2d at 676-77, 504 P.2d 304; cf. *infra* at 201-204 (discussing prior version of reckless driving statute which, unlike current version, contained express language preventing its application to other provisions in Motor Vehicle Code).

Yet the majority avoids this legislative command and construction canon requiring us to construe these provisions together, holding “operating a motor vehicle ... [i]n a reckless manner,” RCW 46.61.520(1)(b), is *636 different from “reckless driving,” RCW 46.61.500(1), and therefore requires separate definitions. For support the majority claims “reckless driving,” RCW 46.61.500(1), and “operating a motor vehicle ... [i]n a reckless manner,” RCW 46.61.520(1)(b), have different meanings because of the independent nomenclature employed. See majority at 200-202 **207 (distinguishing “reckless manner” from “reckless driving”). While it is true the courts presume the legislature “intend[s] a different meaning when it uses different words,” majority at 202, the cited difference must be more than mere semantics.^{FN4} The majority cites *State v. Beaver*, 148 Wash.2d 338, 60 P.3d 586 (2002) as support for its construction proposition. *Beaver* construed the terms “minimum term” and “release date” in the Juvenile Justice Act of 1977, chapter 13.40 RCW, holding the legislature intended different meanings to attach by its use of differing language. *Beaver*, 148 Wash.2d at 343-44, 60 P.3d 586. In stark contrast, the majority must assume “operating a motor vehicle,” RCW 46.61.520(1)(b), means something other than “driving,” RCW 46.61.500(1), to reach its conclusion that the legislature intended different meanings to attach. I am aware of no other way to “operate a vehicle” than “driving” it, though I suppose a long, drawn out, creative inquiry might yield an answer no matter how absurd. However we are not required to wait for that answer; courts cannot follow a route to absurdity when construing statutes. *J.P.*, 149 Wash.2d at 450, 69 P.3d 318 (courts must avoid absurd results when interpreting statutes).

^{FN4} The majority at 201 nn. 4-5 emphasizes that the terms modified by “reckless” differ in the relevant statutes. However, it is the term “reckless” over which there is a definitional dispute. As I note below, there is no way to “operate” a vehicle other than to “drive” it, and thus the terms “operate ... in a reckless manner” (RCW

46.61.520(1)(b)) and “reckless driving” (RCW 46.61.500(1)) are synonymous if the term “reckless” is identically defined.

II. Absence of Basis for Law Precludes Calling It Law

Despite RCW 46.98.020 and the statutory construction canon to construe similar language the same throughout a statute, the majority defines “reckless” differently *637 from RCW 46.61.500(1)'s express definition. The majority claims prior cases from this court compel adherence to the “rash or heedless manner, indifferent to the consequences” definition. However a careful review of the history behind the “rash or heedless manner, indifferent to the consequences” standard demonstrates the basis for its distinction from “reckless driving,” while correct at the time, no longer exists.

A. Distinction Rested on Plain Language

The legislature first criminalized vehicular homicide in 1937.^{FN5} One alternative for committing vehicular homicide was the “operation of any vehicle in a reckless manner.” LAWS OF 1937, ch. 189, § 120. Reckless driving, on the other hand, was criminalized by a different section, which provided:

^{FN5} Until 1983 the crime was called “negligent homicide by means of a motor vehicle.” LAWS OF 1937, ch. 189, § 120. When the legislature criminalized vehicular assault in 1983, it reclassified “negligent” homicide as “vehicular” homicide. LAWS OF 1983, ch. 164, § 1. The final bill report indicates this was done because “the term ‘vehicular homicide’ is more descriptive of the crime than ‘negligent homicide.’” S.B. REP. on S.B. 3106, at 1, 48th Leg., Reg. Sess. (Wash.1983).

It shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of this state. *For the purpose of this section* to “operate in a reckless manner” shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property. *Id.* § 118 (emphasis added). The phrase “[f]or the

purpose of this section” prompted this court to distinguish negligent homicide by means of a motor vehicle and reckless driving in State v. Dickert, 194 Wash. 629, 79 P.2d 328 (1938). There we held the definition of reckless driving in section 118 (i.e., “willful or wanton disregard for the safety of persons or property”) did not apply to vehicular homicide as defined in section 120. We declined to extend section 118’s definition because it

*638 expressly provided that, *for the purpose “of this section,”* to operate in a reckless manner means in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property. The willful or wanton disregard for the safety of persons or property is not one of **208 the elements of negligent homicide, *as that crime is defined in § 120.*

Id. at 632, 79 P.2d 328 (emphasis added).

The “rash or heedless” standard first found its way into Washington jurisprudence in State v. Stevick, 23 Wash.2d 420, 161 P.2d 181 (1945), *overruled on other grounds by State v. Partridge*, 47 Wash.2d 640, 646, 289 P.2d 702 (1955), where we held a jury instruction defining “ ‘to operate in a reckless manner’ ” as “ ‘in a heedless, careless or rash manner or in a manner indifferent to consequences’ ” was not improper. Stevick, 23 Wash.2d at 426, 427, 161 P.2d 181. Partridge, though overruling Stevick on other grounds,^{FN6} adopted the definition, but pronounced it “[did] not wish to limit the trial courts in their definition of the term.” Partridge, 47 Wash.2d at 645, 289 P.2d 702.

FN6. Stevick held that ordinary negligence was sufficient to support a conviction under the reckless manner prong of negligent homicide. Stevick, 23 Wash.2d at 427, 161 P.2d 181. Partridge overruled that holding, stating that “something more than” ordinary negligence is required to sustain a conviction. Partridge, 47 Wash.2d at 645, 289 P.2d 702.

Despite Partridge’s proclamation, State v. Bowman, 57 Wash.2d 266, 356 P.2d 999 (1960), addressed a jury instruction which defined “ ‘reckless manner’ ” as “ ‘heedless, careless or rash manner or in a manner indifferent to consequences.’ ” Bowman, 57 Wash.2d

at 270, 356 P.2d 999. We approved the instruction, holding it was “ ‘specifically approved’ ” in Partridge. *Id.* However we cautioned against referencing carelessness in the definition as it could possibly be confused with ordinary negligence. *Id.* at 271, 356 P.2d 999. We concluded “a more precise definition of the terms ‘to operate a motor vehicle in a reckless manner’ would simply be *driving in a rash or heedless manner, indifferent to the consequences.*” *Id.* The majority relies on this statement to reject application of the reckless driving definition of RCW 46.61.500(1). See majority at 200-201.

*639 While the definition of “reckless manner” wavered slightly over the years from Stevick to Bowman, the underlying distinction of the “reckless manner” definition from the statutory “reckless driving” definition remains grounded in Dickert’s reliance on the reckless driving statute’s plain language restricting the “willful or wanton” standard to that statute alone. Dickert, 194 Wash. at 632, 79 P.2d 328.^{FN7}

FN7. The majority at 203 n. 8 again misses the point. As noted above, repeatedly, if the “manner of operating” is the same as “driving” a vehicle, and the majority has not suggested the contrary, then the dispute here is over the definition of “reckless.” The distinction in Dickert could as easily be summarized as the plain language distinction between the definition of “reckless” in the “reckless driving” statute and the definition of “reckless” in what was the “negligent homicide by means of a motor vehicle” statute. (Until 1983, vehicular homicide was termed “negligent homicide by means of a motor vehicle.” Laws of 1937, ch. 189, § 120.)

B. Legislative Amendments Subsequent to “Rash and Heedless” Progeny Eliminated Plain Language on Which Definition Was Based

Shortly after Bowman was decided, the legislature in 1961 repealed and reenacted all motor vehicle laws with House Bill 2, codifying them in Title 46 RCW. LAWS OF 1961, ch. 12. Though the legislature did not alter the language criminalizing reckless driving and vehicular homicide, it did add what is now RCW 46.98.020, which directs the courts to construe the act’s provisions in *pari materia* and as if they were

enacted at the same time. LAWS OF 1961, ch. 12, at 435, *codified at* RCW 46.98.020. The section has remained unchanged ever since.

Three years later the legislature enacted House Bill 234 to remove the phrase “[f]or the purpose of this section” that had existed at the time *Dickert* and its progeny were decided. LAWS OF 1965, Ex.Sess., ch. 155, § 59 ^{FN8}; *cf.* LAWS OF 1937, ch. 189, § 118. That the legislature chose to repeal the fundamental basis for *Dickert* and its progeny **209 (including *640Bowman) cannot be ignored. Every action by the legislature must be given effect, for “[t]he [l]egislature ‘does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.’ ” *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 769, 10 P.3d 1034 (2000) (quoting *John H. Sellen Constr. Co. v. Dep’t of Revenue*, 87 Wash.2d 878, 883, 558 P.2d 1342 (1976)). Nor are we permitted to presume the omission of that language was unintentional and therefore inconsequential. *In re Custody of Smith*, 137 Wash.2d 1, 12, 969 P.2d 21 (1998) (“A ‘court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.’ ” (quoting *Auto. Drivers & Demonstrators Union Local 882 v. Dep’t of Ret. Sys.*, 92 Wash.2d 415, 421, 598 P.2d 379 (1979))), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Jepson v. Dep’t of Labor & Indus.*, 89 Wash.2d 394, 403, 573 P.2d 10 (1977) (“We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally. We must assume the legislature meant what it said.” (citations omitted)).

FN8. Though the statute has been subsequently amended to reflect its classification as a misdemeanor, LAWS OF 1979, 1st Ex.Sess., ch. 136, § 85, and then a gross misdemeanor, LAWS OF 1990, ch. 291, § 1, the “willful or wanton disregard for the safety of persons or property” has remained the same. Compare LAWS OF 1965, Ex.Sess., ch. 155, § 59 (employing quoted language) with RCW 46.61.500(1) (same).

To the contrary we must presume the legislature consciously intended to eliminate the language which served as the underpinning of *Dickert*, namely the

phrase “[f]or the purpose of this section” which prohibited the court from applying the reckless driving definition to the vehicular homicide statute. *See Dickert*, 194 Wash. at 632, 79 P.2d 328. As a result there is no longer any statutory basis to distinguish the reckless driving definition from the operating a motor vehicle in a reckless manner prong of the vehicular homicide and assault statutes. The majority however avers *Bowman’s* interpretation of the vehicular homicide and assault statutes operates as though the legislature had originally written it into the statute. Were we confronted with the same statute at issue in *Bowman*, I would be inclined to agree. But the legislative amendments subsequent*641 to *Bowman* unequivocally demonstrate we face a different legislative scheme.^{FN9}

FN9. The post-*Bowman* cases referencing the “a rash or heedless manner, indifferent to the consequences” standard are inapposite to the issue at hand. *See State v. Brooks*, 73 Wash.2d 653, 440 P.2d 199 (1968); *State v. Eike*, 72 Wash.2d 760, 435 P.2d 680 (1967). Not only was the definition of “operating a motor vehicle ... [i]n a reckless manner” at issue in *Brooks*, but the court never even mentioned the “rash or heedless, indifferent to the consequences” definition the majority here follows. *Eike* is equally inapposite. There we recognized the vehicular homicide statute sets forth not two, but three methods of committing the crime: “(1) Driving while under the influence of or affected by intoxicating liquor or narcotic drugs; (2) driving in a reckless manner; and (3) driving with disregard for the safety of others.” *Eike*, 72 Wash.2d at 764, 435 P.2d 680. We rejected the defendant’s contention that “driving with disregard for the safety of others,” *id.* at 766, 435 P.2d 680, was subsumed in the “driving in a reckless manner” alternative. The only mention of the “rash or heedless” standard followed by the majority appeared in the *Eike* dissent. *See id.* at 778 n. 5, 435 P.2d 680 (Donworth, J., dissenting). Thus, no decision from this court considered the propriety of the “rash or heedless, indifferent to the consequences” standard after the 1961 and 1965 legislative amendments.

Rather than follow a line of cases based on grounds

that no longer exist, I instead abide by the legal maxim *cessante ratione legis cessat et ipsa lex*: “When the reason of the law ceases, the law itself also ceases.” BLACK’S LAW DICTIONARY 1622 (7th ed.1999); see also *State ex rel. King County v. Superior Court*, 104 Wash. 268, 275, 176 P. 352 (1918) (following doctrine). “Reckless” as used in the vehicular homicide and vehicular assault statutes, RCW 46.61.520(1)(b), RCW 46.61.522(1)(a), has the same meaning as “reckless driving” as defined by RCW 46.61.500(1). Plain language requires as much. RCW 46.98.020.^{FN10}

FN10. The majority at 203 also declares the “only construction of ‘in a reckless manner’ that remained” after the 1965 reckless driving statute was the court’s prior construction of the vehicular homicide statute. This ignores the fact that the Legislature passed the “in pari materia” statute in 1961. The enactment of the “in pari materia” was the legislature’s directive that similar terms in the statute be construed the same, and by giving definitional content to “reckless” driving (i.e., operation of a motor vehicle) the legislature was clearly *rejecting* this court’s prior construction of the term as used in other sections in the same title.

Further it is clear that while the majority is possibly correct that the legislature’s purpose may have been to “eliminate confusion” over the meaning of “reckless manner” (although one would think that *Dickert* itself cleared up any such “confusion”), the resolution of that “confusion” was to define “reckless” driving (i.e., operation of a motor vehicle) in RCW 46.61.500(1) and to apply that definition through the “in pari materia” statute to RCW 46.61.520(1)(b).

****210*642III. Unconstitutional to Fail to Use or Instruct Jury on “Willful or Wanton” Standard**

Axiomatic in constitutional jurisprudence is the requirement for the “State [to] prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Byrd*, 125 Wash.2d 707, 713, 887 P.2d 396 (1995). This court has held, in the context of examining the reckless driving stat-

ute as a lesser included offense of felony flight from a police officer, that “reckless driving requires either a willful or wanton disregard for the safety of others.” *State v. Parker*, 102 Wash.2d 161, 164, 683 P.2d 189 (1984); see also *id.* at 168, 683 P.2d 189 (Utter, J., dissenting) (“The crime of reckless driving ... requires the jury to find a defendant conscious and capable of forming a purposeful mental state; he, too, must be found capable of driving with a ‘wilful [sic] or wanton’ disregard for the safety of others.” (quoting RCW 46.61.500 and WPIC 95.10)).

It follows then that an element of reckless driving is acting with either willful or wanton disregard for the safety of persons or property. RCW 46.61.500(1). And since this definition of reckless driving applies to crimes of vehicular homicide and vehicular assault, the failure to instruct the jury on that element deprives the defendant of the constitutional right to a jury determination on all elements of the alleged crime. *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997) (“It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.”).

IV. Errors Not Harmless

Finally, I dispose of any contention these errors might be so harmless the convictions should nonetheless be upheld. Though an erroneous jury instruction and/or conclusion of law that misstates an element of a charged crime unconstitutionally violates the right to a jury, the conviction will still be upheld if the error was harmless beyond a *643 reasonable doubt. *State v. Brown*, 147 Wash.2d 330, 344, 58 P.3d 889 (2002). The test for harmless error when the instructions misstate or omit an element is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), quoted in *Brown*, 147 Wash.2d at 341, 58 P.3d 889. Such an inquiry requires the appellate court to “ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” *Id.* at 19, 87 S.Ct. 824. “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless

if that element is supported by uncontroverted evidence.” Brown, 147 Wash.2d at 341, 58 P.3d 889 (citing Neder, 527 U.S. at 18, 119 S.Ct. 1827). These errors plainly cannot meet that standard.

State v. Roggenkamp

Recognizing Michael Roggenkamp's conviction or acquittal hinged on “the definition of reckless,” *V Roggenkamp* Verbatim Report of Proceedings (May 25, 2001) at 108, the trial judge opined the “rash or heedless manner, indifferent to the consequences” standard precluded him from considering Roggenkamp's mental state, instead focusing his concentration on the act itself:

1. Recklessness, as defined in WPIC 90.05, *focuses on the act itself rather than the mens rea*. Reckless driving as defined in the relevant statute [RCW 46.61.520(1)(b) and RCW 46.61.522(1)(a)] is shaded towards the negligent driving standard as opposed to the non-negligent or non-vehicular homicide or vehicular assault definition of recklessness, which requires proof of willfulness or wanton conduct. However, ordinary negligence in operating a motor vehicle does not render a person guilty of vehicular homicide. ****211** *Recklessness under these standards is easier to prove than the willful or wanton standard, which incorporates a greater focus on the mental state of the person.*

***644** RCP at 126 (Conclusions of Law 1) (emphasis added). The trial judge correctly recognized the “willful or wanton” standard examines the defendant's mental state, considering the inherently subjective components of those terms. *See Adkisson v. City of Seattle*, 42 Wash.2d 676, 682-83, 258 P.2d 461 (1953).

That the trial judge specifically admitted the prosecution's burden was “easier to prove” because of the “rash or heedless manner, indifferent to the consequences” standard demonstrates the reasonable possibility a different result would have been reached had the trial judge followed the “willful or wanton” standard. Therefore reasonable doubt exists as to whether the legal error was harmless.

State v. Clark

The same is true for Jason Clark. As Clark drove down Northeast Minnehaha Street in Vancouver, he pulled alongside a vehicle driven by Thomas Severson. There was conflicting testimony as to whether Clark intended to race Severson and how fast Clark was driving throughout the entire incident. Clark testified that when he pulled up alongside Severson that passenger Monica Caywood made an obscene gesture to Severson (she “flipped him off”), and that he sped away from Severson “so he didn't try anything” as Clark “didn't know the guy.” II Verbatim Report of Proceedings (*State v. Clark*) at 150. This evidence reasonably suggests Clark did not increase his speed “willful[ly] or wanton [ly].” RCW 46.61.500(1). Furthermore, there was controverted evidence over how fast Clark actually drove. More fundamentally though, the jury expressed confusion over the definitions of “rash,” “indifferent,” and “heedless,” as evidenced by its request for definitions of each term, CCP at 21,^{FN11} thus indicating a reasonable possibility the jury might have returned an acquittal had it been instructed ***645** differently on a more difficult standard for the State to meet.

^{FN11}. The trial court provided the jury with no additional guidance, instructing the jury it “should rely upon [its] common understanding of the ordinary meaning of these words.” CCP at 21.

As reasonable doubt exists in both *State v. Roggenkamp* and *State v. Clark* whether use of the erroneous “rash or heedless manner, indifferent to the consequences” standard was harmless, reversal is required in each case.

CONCLUSION

Read in its present state, “reckless” must have identical meaning throughout the Motor Vehicle Code. Necessarily then, a person is guilty of vehicular homicide or vehicular assault if charged due to death or injury resulting from “operating a motor vehicle ... [i]n a reckless manner,” RCW 46.61.520(1)(a), only if that person was “reckless[ly] driving” as defined in RCW 46.61.500(1). There is no current ground to bifurcate these definitions, and the majority's adherence to antiquated precedent, the basis of which was repealed by the legislature almost 40 years ago, ignores the current plain language of Title 46 RCW. In so doing, the majority effectively nullifies RCW

46.98.020's command to construe all provisions of the Motor Vehicle Code in pari materia. Our role as interpreters of the law leaks into the legislative realm when we ignore unequivocal statutory commands.

For these reasons I dissent.

CHAMBERS, J. (concurring in dissent).

I concur with the dissent that the statutory underpinning of the jury instruction has been statutorily eroded. *See* dissent at 205; RCW 46.61.500(1) (modern definition of reckless driving). I also agree with the dissent that the error in the instruction was not harmless beyond a reasonable doubt, as required by *State v. Brown*, 147 Wash.2d 330, 344, 58 P.3d 889 (2002). The erroneous instruction substantially relieved the prosecution of its burden to prove willful and wanton behavior, and I cannot say with confidence-let alone beyond a reasonable doubt-that a properly instructed jury would have found the defendants**212 guilty. To that extent, I concur in the dissent.

Wash.,2005.
State v. Roggenkamp
153 Wash.2d 614, 106 P.3d 196

END OF DOCUMENT

C

Supreme Court of Washington,
 En Banc.
 STATE of Washington, Petitioner,
 v.

Kelly Russell SULLIVAN, a/k/a Kelly Russell., Sul-
 livan, Respondent.
 No. 69334-0.

Argued Nov. 30, 2000.
 Decided March 8, 2001.

State brought criminal charge of barratry against mo-
 torist who had purportedly served “demand for par-
 ticulars” on four law enforcement officers who had
 cited him for traffic infractions. The District Court,
 Kitsap County, Stephen E. Alexander, J., dismissed
 with prejudice. State appealed. The Superior Court,
 Kitsap County, M. Karlynn Haberly, J., affirmed.
 Discretionary review was granted. The Supreme
 Court, Smith, J., held that: (1) the “demand for par-
 ticulars” was not “judicial process,” within the mean-
 ing of the barratry statute, and (2) the barratry statute
 was not unconstitutionally vague.

Affirmed.

Talmadge, Justice pro tempore, filed a concurring
 opinion.

West Headnotes

[1] Indictment and Information 210 ↪ 144.1(3)210 Indictment and Information210IX Motion to Dismiss210k144.1 Grounds

210k144.1(3) k. Incompetent or Insuffi-
 cient Evidence. Most Cited Cases

A trial court may dismiss a criminal charge before
 trial if the State has insufficient evidence to prove its
 case.

[2] Statutes 361 ↪ 176361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k176 k. Judicial Authority and Duty.Most Cited Cases

The Supreme Court has the ultimate authority to de-
 termine the meaning and purpose of a statute.

[3] Statutes 361 ↪ 181(1)361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k180 Intention of Legislature361k181 In General361k181(1) k. In General. MostCited Cases

In interpreting statutory provisions, the primary ob-
 jective is to carry out the intent of the Legislature.

[4] Statutes 361 ↪ 190361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k187 Meaning of Language361k190 k. Existence of Ambiguity.Most Cited Cases

When a statute is unambiguous, it is not subject to
 judicial construction and its meaning must be derived
 from the plain language of the statute alone.

[5] Statutes 361 ↪ 190361 Statutes361VI Construction and Operation361VI(A) General Rules of Construction361k187 Meaning of Language361k190 k. Existence of Ambiguity.Most Cited Cases

(Formerly 361k188)

The court does not add to or subtract from the clear
 language of a statute, unless that is imperatively re-
 quired to make the statute rational.

[6] Statutes 361 ↪ 179361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k177 Constitutional and Statutory Rules and Provisions

361k179 k. Interpretation Clauses and Definitions in Statutes Construed. Most Cited Cases
Legislative definitions provided by the statute are controlling as to the meaning of a term used in the statute.

[7] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

In the absence of a statutory definition, the court will give the term used in a statute its plain and ordinary meaning, ascertained from a standard dictionary.

[8] Statutes 361 ↪181(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and Consequences. Most Cited Cases

The court will avoid unlikely, absurd, or strained consequences when interpreting a statute.

[9] Champerty and Maintenance 74 ↪9

74 Champerty and Maintenance

74k8 Criminal Responsibility

74k9 k. Offenses. Most Cited Cases

“Judicial process,” within meaning of statute defining misdemeanor barratry, in part, as serving or sending any paper or document purporting to be or resembling a judicial process that is not in fact a judicial process, is all acts of a court from the beginning to the end of its proceedings in a given cause, including the writ, summons, mandate, or other process used to inform parties of institution of court proceedings, and notices to compel appearance and participation in civil or criminal cases under applicable statutes and rules of court. West's RCWA 9.12.010.

[10] Indictment and Information 210 ↪121.2(1)

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k121 Bill of Particulars

210k121.2 Cases in Which Allowed

210k121.2(1) k. In General. Most Cited

Cases

Motorist's attempt to conduct discovery on four law enforcement officers who had cited him for traffic infractions, by purportedly serving “demand for particulars” on them, was not permissible under the Infractio Rules for Courts of Limited Jurisdiction. IRLJ 3.1(b).

[11] Constitutional Law 92 ↪990

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction

as to Constitutionality

92k990 k. In General. Most Cited Cases

(Formerly 92k48(1))

Constitutional Law 92 ↪1022

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional

Questions

92VI(C)3 Presumptions and Construction

as to Constitutionality

92k1006 Particular Issues and Applica-

tions

92k1022 k. Due Process. Most Cited

Cases

(Formerly 92k48(1))

Constitutional Law 92 ↪3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness;

Vagueness. Most Cited Cases

(Formerly 92k251.4)

A statute is presumed constitutional, and the burden is on the party challenging it as unconstitutionally vague in violation of due process, to prove beyond a reasonable doubt that it fails to make plain the general area of conduct it prohibits. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ↪4503

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of
Crime
92k4502 Creation and Definition of
Offense
92k4503 k. In General. Most Cited
Cases
(Formerly 92k258(1))
The due process clause requires that citizens be afforded fair warning of proscribed conduct. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ↪4503

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of
Crime
92k4502 Creation and Definition of
Offense
92k4503 k. In General. Most Cited
Cases
(Formerly 92k258(1))
Fair warning of prohibited activity is required by due process, so citizens may plan their activity accordingly and freely enjoy those activities which are not expressly illegal. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ↪3905

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)
The purpose of the due process vagueness doctrine is

to ensure that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced. U.S.C.A. Const.Amend. 14.

[15] Constitutional Law 92 ↪4506

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of
Crime
92k4502 Creation and Definition of
Offense
92k4506 k. Vagueness. Most Cited
Cases
(Formerly 92k258(2))
Under the due process clause, a statute is unconstitutionally "vague" if: (1) it does not define the criminal offense with sufficient definiteness that ordinary persons can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. U.S.C.A. Const.Amend. 14.

[16] Constitutional Law 92 ↪3905

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)
A statute is not sufficiently definite, as element of vagueness under the due process clause, if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. U.S.C.A. Const.Amend. 14.

[17] Constitutional Law 92 ↪3905

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

Impossible standards of specificity, or absolute agreement, are not required for a statute to be sufficiently definite, so that the statute is not vague in violation of due process; some measure of vagueness is inherent in the use of language. U.S.C.A. Const.Amend. 14.

[18] Constitutional Law 92 ↻3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases

(Formerly 92k251.4)

A challenged statute is “facially vague,” in violation of due process, if its terms are so loose and obscure that they cannot be clearly applied in any context. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law 92 ↻3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases

(Formerly 92k251.4)

A statute that does not involve First Amendment rights must be evaluated for vagueness, in violation of due process, on an as-applied basis, in light of the particular facts of the case, requiring inspection of the actual conduct of the party challenging the statute. U.S.C.A. Const.Amend. 1, 14.

[20] Champerty and Maintenance 74 ↻3

74 Champerty and Maintenance

74k3 k. Statutory Provisions. Most Cited Cases

(Formerly 92k258(3.1))

Constitutional Law 92 ↻4509(1)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)2 Nature and Elements of Crime

92k4502 Creation and Definition of Offense

92k4509 Particular Offenses

92k4509(1) k. In General. Most

Cited Cases

(Formerly 92k258(3.1))

Mere fact that the “demand for particulars” motorist purportedly served on four law enforcement officers who had cited him for traffic infractions was a written document did not implicate free speech rights, and thus, review of the barratry statute for vagueness in violation of due process would be on an as-applied basis rather than for facial vagueness. U.S.C.A. Const.Amend. 1, 14; West's RCWA Const. Art. 1, § 5; West's RCWA 9.12.010.

[21] Champerty and Maintenance 74 ↻3

74 Champerty and Maintenance

74k3 k. Statutory Provisions. Most Cited Cases

Constitutional Law 92 ↻4509(1)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)2 Nature and Elements of Crime

92k4502 Creation and Definition of Offense

92k4509 Particular Offenses

92k4509(1) k. In General. Most

Cited Cases

(Formerly 92k258(3.1))

Misdemeanor barratry statute did not lack sufficient definiteness, as element of unconstitutional vagueness in violation of due process, as applied to motorist who purportedly served “demand for particulars” on four law enforcement officers who had cited him for traffic infractions; the term “judicial process” in the statute, which defined barratry, in part, as serving or sending any paper or document purporting to be or resembling a judicial process that was not in fact a judicial process, could be ascertained from its plain and ordinary meaning in a standard dictionary. U.S.C.A. Const.Amend. 14; West's RCWA 9.12.010.

[22] Constitutional Law 92 ↻3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

Statutes are not void for vagueness, in violation of due process, merely because all their possible applications cannot be specifically anticipated. U.S.C.A. Const.Amend. 14.

[23] Constitutional Law 92 ↪ 3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

A reviewing court will not invalidate a statute as being vague in violation of due process simply because it believes the statute could have been drafted with greater precision. U.S.C.A. Const.Amend. 14.

[24] Constitutional Law 92 ↪ 3905

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

A statute is not unconstitutionally vague, in violation of due process, merely because a person cannot predict with complete certainty the exact point at which that person's actions would be classified as prohibited conduct. U.S.C.A. Const.Amend. 14.

[25] Statutes 361 ↪ 188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

The language of a statute is afforded a sensible, meaningful, and practical interpretation.

[26] Champerty and Maintenance 74 ↪ 9

74 Champerty and Maintenance

74k8 Criminal Responsibility

74k9 k. Offenses. Most Cited Cases

The 'demand for particulars' that pro se motorist served on four law enforcement officers who had cited him for traffic infractions was not "judicial process," within meaning of statute defining misdemeanor barratry, in part, as serving or sending any paper or document purporting to be or resembling a judicial process that was not in fact a judicial process; the 'demand for particulars' consisted of almost incomprehensible language, contained many irrelevant and inartfully stated questions, referred to federal statutes and court rules of questionable relevance, used pseudo-legalistic terms, was signed by motorist and not by a judge, was not issued by a court, and requested a response directly to motorist. West's RCWA 9.12.010.

***1014** Schroeter, Goldmark, Bender, ***165** Amanda Elizabeth Lee, Seattle, amicus curiae on behalf of Washington Ass'n of Criminal Defense Lawyers.

Washington Ass'n of Prosecuting Attys., Pamela Bethloginsky, Olympia, Russesll Hauge, Kitsap County Prosecutor, Randall Avery Sutton, Deputy, Port Orchard, for Petitioner.

Law Offices of Ronald D. Ness & Assoc., Ramona Coral Brandes, Port Orchard, for Respondent.

***166** SMITH, J.

Petitioner State of Washington seeks direct review of a decision of the Kitsap County Superior Court which affirmed a Kitsap County District Court order dismissing with prejudice a criminal charge of barratry against Respondent Kelly Russell Sullivan, a/k/a Kelly Russell., Sullivan, in violation of RCW 9.12.010. Review was granted on May 18, 2000. We affirm.

QUESTION PRESENTED

The question presented in this case is whether documents designated as "Demand for Particulars" purportedly served by Respondent Sullivan upon law enforcement officers who cited him for traffic infrac-

tions “purported to be or resembled judicial process” in violation of the barratry statute, RCW 9.12.010.

STATEMENT OF FACTS

On September 9, 1997, Respondent Kelly Russell Sullivan, a/k/a Kelly Russell., Sullivan,^{FN1} was stopped by Bremerton Police Officers [FNU[FNU[FNU] Fuller of the Bremerton Police Department came to the scene.^{FN4} Respondent claimed the officers were extorting him into entering a contract in violation of U.C.C. 3-501 [commercial paper], with reference*167 to 42 U.S.C. § 1986, 1985, 1983 [relating to violation of individual rights by government action], and 18 U.S.C. **1015 § 141 and § 142 [repealed July 1, 1944].^{FN5} A traffic infraction citation was issued to Respondent.^{FN6}

FN1. Clerk's Papers at 79. (Respondent identifies himself as “Demandant ... Kelly Russell., Sullivan.”); Br. of Resp't at 3.

FN2. *Id.* at 80.

FN3. *Id.*

FN4. *Id.*

FN5. *Id.*

FN6. Br. of Pet'r at 4; Br. of Resp't at 4.

On October 2, 1997, Kitsap County Deputy Sheriff Karen Demerick stopped a pickup truck operated by Respondent because the vehicle license had expired in March 1997.^{FN7} In the vehicle with Respondent was a male person who identified himself as Tim (or Tom) Duffey.^{FN8} Respondent inquired whether Deputy Sheriff Demerick knew she was violating his constitutional rights under the 2nd, 4th, 5th and 6th Amendments.^{FN9} She issued him a traffic infraction citation for expired vehicle license and no proof of liability insurance.^{FN10}

FN7. Clerk's Papers at 102 and 111.

FN8. *Id.* at 101, 103, 107 and 108.

FN9. *Id.* at 102.

FN10. *Id.* at 101-04 and 111. Respondent's liability insurance had expired in February 1997.

On or about September 9, 1997, Respondent “served” upon Police Officers Johnson, Olsen and Sergeant Fuller documents which he characterized as “Demand for Particulars.”^{FN11} The three sets of 12-page computer word-processed documents were actually photocopies of the same document, identical in form and content, containing 73 questions somewhat akin to interrogatories.^{FN12}

FN11. *Id.* at 65-100. Respondent's documents designated as “Demand for Particulars” included a page labeled “Proof of Service” which states:

I hereby certify a true and correct copy of the original Demand for Bill of Particulars with Affidavit of verification has been served on this 9[th], Day of September, 1997, to the Prosecuting Attorney of the Bremerton Municipal Court, and to Sgt. Tom Wolfe and Officer Greg Steel at the Bremerton Police Station, 239 4th St. Bremerton, WA. 98310, by private service.

The signature of “Timothy Charles., Duffey” appears below the paragraph as “Server.” *Id.* at 74, 86 and 98.

FN12. *Id.* at 65-100. Each document has sections labeled “Definitions,” “Background,” “Demand for bill of Particulars” (which contain 73 questions), “Proof of Service,” and “Verification of Bill of Particulars.” The only difference between the three sets of documents was the handwritten surnames of Officers “Fuller” and “Olsen” on the first page of two sets of documents. *Id.* at 65 and 89.

*168 On October 10, 1997, Respondent “served” Deputy Sheriff Demerick with one five-page set of documents,^{FN13} followed a day later by an additional eight-page document designated as “Demand for a Bill of Particulars.”^{FN14} Each set of documents varied

slightly in form and content. The second document is similar to those Respondent “served” upon the Bremerton Police officers about a month earlier.^{FN15}

FN13. The five-page document “served” upon Deputy Demerick on October 10, 1997 has sections labeled “Notice of Refusal for Fraud Pursuant to F.R.C.P. 9(b),” “Affidavit Of Truth In Support With Exhibit (A) ‘Citation(s) I 20060.’ Attached,” and “Verification of Refusal for Fraud.” *Id.* at 121-24.

FN14.*Id.* at 113-20. The eight-page document “served” upon Deputy Demerick on October 11, 1997 refers to ten pages—“page 1 of 10,” and “page(s) 3 of 10” through “page 8 of 10.” Page 2 was missing. Both sets of documents were apparently left at the counter of the Kitsap County Sheriff’s Office in Silverdale by a male person later identified as Respondent Sullivan. *Id.* at 106.

FN15. The eight-page document has sections labeled “Background,” “Demand for bill of Particulars” and “Verification of Bill of Particulars.” *Id.* at 113-20.

The documents Respondent “served” upon all four law enforcement officers^{FN16} are substantially similar. They bore headings similar to captions on most documents submitted to a court. They contained “case” headings indicating (1) “Bremerton Muncipal Court in and for The County of Kitsap, State of Washington/City of Bremerton Plaintiff(s) v. Sullivan Kelly R. Defendant(s);”^{FN17} and (2) “Kitsap County District Court Silverdale In and for the County of Kitsap, State of Washington**1016 /County of Kitsap Plaintiff, v. Sullivan Kelly Russell Defendant.”^{FN18}

FN16. The document “served” upon the Bremerton Police Officers on or about September 9, 1997 and the second set of documents “served” upon Deputy Sheriff Demerick on October 11, 1997 are referred to as Respondent’s “Demand for Particulars.”

FN17. Clerk’s Papers at 65.

FN18. Clerk’s Papers at 113.

The documents identified the State of Washington and either the City of Bremerton or the County of Kitsap as Plaintiff and Respondent Sullivan Kelly R [ussell] as Defendant*169 and used the numbers of the traffic infraction citations he received as the case numbers.^{FN19} The documents are identified as originating from Respondent^{FN20} and are signed by him.^{FN21}

FN19. Clerk’s Papers at 65, 77, 89, 113 and 121.

FN20. Respondent’s name, “hereinafter (‘Demandant’, ‘I’, ‘ME’, ‘MINE’, or ‘MY’),” his address [and telephone number], appears on the first page above the caption. Also, the footer on nearly every page of Respondent’s “Demand for Particulars” states “Respond to: [Respondent’s name and address].”

FN21. Clerk’s Papers at 75, 76, 87, 88, 99, 100, 119 and 120.

The document Respondent characterized as a “Demand for Particulars” contains these words in all capitals: “THIS IS LEGAL PROCESS, YOU ARE COMPELLED TO RESPOND.”^{FN22} The “demand for particulars” then stated:

FN22.*Id.*

This Demand is to be previewed in the nature of, and in fact is, a demurrer to discover *nature and cause* of action, and is used to determine the course/right of action for relief/remedy. The following questions are necessary, imperative, and material for the preparation of any dilatory pleadings or pleadings in bar involving this matter.

Demandant will be deprived and prejudiced of Demandant’s unalienable rights under Nature’s law and Nature’s God as recognized under Due Process clause of the Fourth and Fifth Amendments to the Constitution of the (u) nited States of America, Amended 1791 (without the legislative venue/jurisdiction), 1835, Article 1, Section 10-Right of the Accused.

If this demand is not the proper procedure to determine the nature and cause of the Above Case, then Demandant hereby empowers YOU and invokes YOUR Authority under the common law principle of the Brother's Keeper rule to purview this demand into the proper procedure and process as the protection of the Demandant's rights so require.

Following the 73 questions in Respondent's "demand for particulars," these statements were made:

The foregoing demand for Bill of Particulars is not to be construed as discovery, a traverse into any issue(s), a general appearance, a waiver of any rights, or in any way a motion or *170 joinder to the above Case or the tribunal, nor discovery to the merits of the above Case.

Failure by you to timely respond to the Demand for Bill of particulars within ten (10) day's or as a seasonably requested extension will establish, will be construed as an attempt by the officers of the court to withhold full disclosure as to the nature and cause of the action(s) purportedly brought in the above Case, and will make it impossible for the Demandant to meaningfully respond to the process issued or caused to be issued by the officers of the Court and will be used as Prima Facie evidence of Fraud, Bad Faith and Criminal Intent to deprive Demandant of his right of redress, due process, and civil rights as defined in Title 42 Section(s) 1983, 1984, 1986. U.S.C.A.

....

Further, failure to provide a true sworn, accurate and complete Bill of Particulars forthwith shall be construed as an admission of Fraud, a declaration that the Above Case is Nocumentum injuriosum, and constructive intent by the City of Bremerton to enter a nolle prosequi by tacit procuration.^[FN23]

FN23. Clerk's Papers at 73, 75, 85, 87, 97, 99, 118 and 119.

On December 11, 1997, the Prosecuting Attorney of Kitsap County charged Respondent Sullivan in the Kitsap County District **1017 Court with one count

of barratry in violation of RCW 9.12.010 as follows:

On or about the 10 day of *October, 19 97*, in the County of Kitsap, State of Washington, the above-named Defendant did (1) bring on his or her own behalf, or instigate, incite, or encourage another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit; and/or (2) serve or send any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process; contrary to Revised Code of Washington 9.12.010.^[FN24]

FN24.*Id.* at 22. Although awkwardly and clumsily worded, the complaint was in the words of the statute.

The complaint was later amended to indicate violation dates of the "9th day of October, 1997 through the 11th day *171 of October 1997."^{FN25} Respondent was arraigned on December 19, 1997.^{FN26} Upon his refusal to enter a plea, the court entered a plea of "not guilty" for him.^{FN27}

FN25.*Id.* at 25.

FN26.*Id.* at 49.

FN27.*Id.*

On January 28, 1998, Respondent in open court orally requested a bill of particulars in the barratry case.^{FN28} On February 10, 1998, the court denied his request, indicating he had already been provided with the information requested.^{FN29} Respondent by motion sought to transfer the case to the United States District Court for the Western District of Washington in Tacoma and to the Kitsap County Superior Court. Both motions were denied.^{FN30} His several motions to dismiss the charges were denied.^{FN31}

FN28.*Id.* at 51.

FN29.*Id.* at 52.

FN30.*Id.* at 53-55.

FN31.*Id.* at 52-55. (Respondent moved to dismiss the charges against him for lack of

jurisdiction; violation of speedy trial; failure to make a prima facie case; and the “lack of jurisdiction in personalia personam sequuntur.”)

[1] On April 28, 1998, Respondent made a motion to dismiss under *State v. Knapstad*,^{FN32} claiming the State could not establish a prima facie case of barratry against him. It was initially denied by the Kitsap County District Court.^{FN33} However, Respondent renewed the motion after the Honorable Terry K. McCluskey, Kitsap County Superior Court, on July 14, 1998 granted a *Knapstad* motion to Timothy Charles Duffey a/k/a Timothy Charles., Duffey in a similar *172 case charging Mr. Duffey with violation of the barratry statute, RCW 9.12.010.^{FN34}

FN32. *State v. Knapstad*, 107 Wash.2d 346, 349-57, 729 P.2d 48 (1986). A trial court may dismiss a criminal charge before trial if the State has insufficient evidence to prove its case. The defendant initiates the procedure by submitting an affidavit stating “there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt.” If the State does not deny the facts claimed in the defendant’s affidavit or asserts other material facts, the court must determine if the undisputed facts, “as a matter of law, establish a prima facie case of guilt.” By amended complaint filed on June 16, 1998, Respondent Sullivan was charged with one count of bail jumping for failure to appear in court in connection with the barratry charge. *Id.* at 56. That charge was later dismissed.

FN33. Clerk’s Papers at 55.

FN34. *Id.* at 3, 17-20 and 56.

On July 22, 1998, the Kitsap County District Court, the Honorable Stephen E. Alexander, granted Respondent’s renewed motion to dismiss.^{FN35} The State filed a timely notice of RALJ appeal on July 27, 1998.^{FN36} The appeal was stayed pending resolution by the Court of Appeals, Division Two, of the State’s appeal of the order issued by Judge McCluskey in *State v. Duffey*.^{FN37} The Court of Appeals in that case on July 23, 1999 affirmed dismissal of the barratry charge against Defendant Duffey.^{FN38} Following that

decision, the stay was lifted in Respondent **1018 Sullivan’s case. An order affirming the District Court’s decision to dismiss the barratry charge against Respondent was entered by the Honorable M. Karlynn Haberly, Kitsap County Superior Court, on March 17, 2000.^{FN39} On that date, the State filed a notice of direct discretionary review.^{FN40} The Supreme Court Commissioner by ruling granted review on May 18, 2000.^{FN41}

FN35. *Id.* at 3.

FN36. *Id.* at 1-2.

FN37. *Id.* at 58.

FN38. *State v. Duffey*, 97 Wash.App. 33, 981 P.2d 1 (1999), review granted, 139 Wash.2d 1015, 994 P.2d 848 (2000).

FN39. Clerk’s Papers at 126-27. The State abandoned its appeal from dismissal of the bail jumping charge.

FN40. *Id.* at 128.

FN41. Ruling Granting Review, May 18, 2000.

DISCUSSION

Inasmuch as the District Court and Superior Court decisions in this case admittedly were directly affected by the July 23, 1999 decision of the Court of Appeals in *State v. Duffey*, both Petitioner State of Washington and Respondent Sullivan now ask this court to consider the merits of the *Duffey* decision in this case because of the claimed similarity of the charges. This would be improper because *173 a) this court on January 5, 2000 granted review in the *Duffey* case and that review is still pending; (b) regardless of any claim of similarity with *Duffey*, Respondent Sullivan is not a party to that case; and (c) review of the *Duffey* decision must be based upon established rules and procedures relating only to that case unless that case and this case were consolidated before this court. They were not. This case must be decided on its own merits. Our discussion in this case nevertheless to some extent parallels the discussion by the Court of Appeals in *Duffey*. In his ruling granting

review on May 18, 2000, the Commissioner stayed further proceedings in this court in *Duffey* “pending this court’s decision in this case.”^{FN42}

FN42.*Id.*

The crime of barratry is governed by RCW 9.12.010 which reads:

Barratry.*Every person who brings on his or her own behalf, or instigates, incites, or encourages another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit, or who serves or sends any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process, is guilty of a misdemeanor; and in case the person offending is an attorney, he or she may, in addition thereto be disbarred from practicing law within this state.*^{FN43}

FN43. (Emphasis added.)

Petitioner State of Washington argues that the Superior Court erred in affirming the District Court order of dismissal with prejudice on a *Knapstad* motion of the criminal charge of barratry against Respondent Sullivan.^{FN44} Petitioner claims the facts in this case, in particular Respondent’s “serving” the law enforcement officers with documents designated “Demand for Particulars,” establish a prima facie case of barratry. Respondent answers that the trial court properly dismissed the barratry charge relying upon the Court of Appeals decision in *State v. Duffey*, a case *174 with facts substantially similar to this one.

FN44.*Knapstad*, 107 Wash.2d at 349-57, 729 P.2d 48.

Petitioner argues that under the barratry statute the State is not required to prove that Respondent’s pro se “Demand for Particulars” actually constitutes “judicial process.” It asserts the State need only prove Respondent’s document resembles or purports to be judicial process,^{FN45} and that is a question for the jury.^{FN46}

FN45. Br. of Pet’r at 17-18.

FN46.*See id.* at 13.

Under RCW 9.12.010, one who serves or sends “any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process” may commit the offense of barratry. The statute does not define “judicial process.” Nor is there any legislative history explaining the meaning of the term.^{FN47} Other statutes use the term **1019 “judicial process,” applying it in different ways. Some statutes use the term referring to actions the court takes to impose jurisdiction or compel compliance with its directives.^{FN48} Other statutes refer to judicial action indirectly.^{FN49} At least one statute applies the term broadly.^{FN50} No barratry statute from another state has been cited which contains the words “judicial process” or any provision similar to it.

FN47. The Legislature added the “judicial process” provision to the barratry statute by Laws of 1915, ch. 165, § 1. Although the statute was amended in 1995 to address issues of insurance fraud by Laws of 1995, ch. 285, § 27, the “judicial process” provision remains substantially unchanged. *See Duffey*, 97 Wash.App. at 37-38, 981 P.2d 1.

FN48.*See* RCW 19.150.080(2)(a); RCW 35.81.120(1); RCW 62A.9-311.

FN49.*See* RCW 9A.82.020(2)(a); RCW 10.95.185(7); RCW 11.86.051(1); RCW 19.16.250(13); RCW 62A.2A 525(3); RCW 63.19.060(3); RCW 74.20.010.

FN50.*See* RCW 4.24.350(1) referring to “misuse of judicial process by filing an action known to be false and unfounded.”

[2][3][4][5][6][7][8] “ ‘This court has the ultimate authority to determine the meaning and purpose of a statute.’ ”^{FN51} In interpreting statutory provisions, the primary objective is to *175 carry out the intent of the Legislature.^{FN52} When a statute is unambiguous, it is not subject to judicial construction and its meaning must be derived from the plain language of the statute alone.^{FN53} We do not add to or subtract from the clear language of a statute unless that is imperatively required to make the statute rational.^{FN54} Legislative definitions provided by the statute are controlling.^{FN55} In the absence of a statutory definition, we will give the term its plain and ordinary meaning^{FN56} ascer-

tained from a standard dictionary.^{FN57} We will avoid unlikely, absurd or strained consequences.^{FN58}

FN51. *State v. Alvarez*, 128 Wash.2d 1, 11, 904 P.2d 754 (1995) (quoting *State v. Hansen*, 122 Wash.2d 712, 717, 862 P.2d 117 (1993)).

FN52. *State v. Wadsworth*, 139 Wash.2d 724, 734, 991 P.2d 80 (2000).

FN53. *Alvarez*, 128 Wash.2d at 11, 904 P.2d 754 (citing *State v. Smith*, 117 Wash.2d 263, 270-71, 814 P.2d 652 (1991)).

FN54. *State v. Taylor*, 97 Wash.2d 724, 728, 649 P.2d 633 (1982).

FN55. *Am. Legion Post 32 v. City of Walla Walla*, 116 Wash.2d 1, 8, 802 P.2d 784 (1991) (citing *City of Seattle v. Shepherd*, 93 Wash.2d 861, 866, 613 P.2d 1158 (1980)).

FN56. *Am. Legion Post 32*, 116 Wash.2d at 8, 802 P.2d 784; *City of Spokane v. Fischer*, 110 Wash.2d 541, 543, 754 P.2d 1241 (1988).

FN57. *Am. Legion Post 32*, 116 Wash.2d at 8, 802 P.2d 784; *State v. Myers*, 133 Wash.2d 26, 33, 941 P.2d 1102 (1997) (citing *State v. Pacheco*, 125 Wash.2d 150, 154, 882 P.2d 183 (1994)).

FN58. *State v. Fjermestad*, 114 Wash.2d 828, 835, 791 P.2d 897 (1990).

[9] On its face, RCW 9.12.010 is not ambiguous. There is no need for judicial interpretation beyond its plain language. Although the term “judicial process” is not defined, this court may resort to dictionary definitions to ascertain the term’s plain and ordinary meaning.^{FN59} *Webster’s Third New International Dictionary* defines “judicial process” as “the series of steps in the course of the administration of justice through the established system of courts.”^{FN60} *Black’s Law Dictionary* defines “judicial process” as follows: “In a wide sense, this term may include all the acts of a court from the beginning to the end of its proceedings in a given cause; but more specifically it means

the writ, summons, mandate, or other process which is used *176 to inform the defendant of the institution of proceedings against him and to compel his appearance, in either civil or criminal cases.”^{FN61} A later edition of *Black’s Law Dictionary* defines “judicial” as “[o]f, relating to, or by the court” and defines “process” as “[t]he proceedings in any action or prosecution; [a] summons or writ, esp. to appear or respond in court.”^{FN62}

FN59. *Myers*, 133 Wash.2d at 33, 941 P.2d 1102.

FN60. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1223 (1969).

FN61. BLACK’S LAW DICTIONARY 1205 (6th ed.1990).

FN62. BLACK’S LAW DICTIONARY 850, 1222 (7th ed.1999).

In addition, a later edition of *Webster’s Third New International Dictionary* defines the term “judicial” as “of, relating to, or **1020 concerned with a judgment, the function of judging, the administration of justice, or the judiciary; ordered or enforced by a court or other legal tribunal.”^{FN63}

FN63. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1223 (3rd ed.1971).

Black’s Law Dictionary defines “judicial” in several ways:

Belonging to the office of a judge; as judicial authority. Relating to or connected with the administration of justice; as a judicial officer. Having the character of judgment or formal legal procedure; as a judicial act. Proceeding from a court of justice; as a judicial writ, a judicial determination. Involving the exercise of judgment or discretion; as distinguished from ministerial. ... [and][o]f or pertaining or appropriate to the administration of justice, or courts of justice, or a judge thereof, or the proceedings therein; as, judicial power, judicial proceedings.^{FN64}

FN64. BLACK’S LAW DICTIONARY 846

(6th ed.1990).

In the context of both civil and criminal proceedings, *Black's Law Dictionary* defines "process" as:

[A]ny means used by court to acquire or exercise its jurisdiction over a person or over specific property. Means whereby court compels appearance of defendant before it or a compliance with its demands.

When actions were commenced by original writ, instead of, as at present, by summons, the method of compelling the defendant to appear was by what was termed "original process," being founded on the original writ, and so called also to *177 distinguish it from "mesne" or "intermediate" process, which was some writ or process which issued during the progress of the suit. The word "process," however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ. The content of the summons, and service requirements, are provided for in Rule of Civil Proc. 4.^[FN65]

FN65.*Id.* at 1205.

In this case, the ordinary definition of "judicial process" is consistent with the general purposes of the barratry statute, which is to prohibit false lawsuits in any court, with intent to distress or harass a defendant, or serving or sending any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process. The language is plain and unambiguous.

Petitioner contends Respondent Sullivan's "Demand for Particulars" purports to be or resembles "legal process" which Petitioner asserts is synonymous with the term "judicial process." It claims the words "THIS IS LEGAL PROCESS, YOU ARE COMPELLED TO RESPOND" are clear indication of Respondent's intent that his document resemble or purport to be "judicial process." Petitioner asserts that Respondent's demand was somewhat similar to a summons, which would qualify as "judicial process."^{FN66} The "Demand for Particulars" had a caption indicating a court and named parties, directed the recipient to respond within a stated time, warned of consequences for failure to respond, contained the signature and address of the party sending it, and included "proof of service." Petitioner's documents did not

purport to be summonses nor did they in any manner resemble summonses.

FN66. Br. of Resp't at 18-19.

[10] Since September 1, 1992 cases involving "infractions" in courts of limited jurisdiction have been governed by Infraction Rules for Courts of Limited Jurisdiction (IRLJ). Under IRLJ 1.1(a) infractions are "noncriminal violations of law defined by statute" and under 1.1(c) the rules "supersede all conflicting rules and statutes covering *178 procedure for infractions unless a rule indicates a statute or rule controls." Infractions are governed exclusively by the IRLJ, consisting of Rules 1.1 through 6.7.

IRLJ 3.1(a) provides for issuance of subpoenas to witnesses by "a judge, court commissioner, or clerk of the court or by a party's lawyer." None of the documents in this case purported to be subpoenas.

IRLJ 3.1(b) provides for *discovery* as follows:

****1021** Upon written demand of the defendant at least 14 days before a contested hearing, the plaintiff's lawyer shall at least 7 days before the hearing provide the defendant or defendant's lawyer with a list of the witnesses the plaintiff intends to call at the hearing and a copy of the citing officer's sworn statement if it will be offered into evidence at the hearing. Upon written demand of the plaintiff's lawyer at least 14 days before the hearing, the defendant shall at least 7 days before the hearing provide the plaintiff's lawyer with a list of the witnesses the defendant intends to call at the hearing. No other discovery shall be required. Neither party is precluded from investigating the case, and neither party shall impede another party's investigation.

IRLJ 3.1(d) relates to sufficiency of essential facts constituting a specific infraction:

No notice of infraction shall be deemed insufficient for failure to contain a definite statement of the essential facts constituting the specific infraction which the defendant is alleged to have committed, nor by reason of defects or imperfections which do not tend to prejudice substantial rights of the defendant.

Regardless whether we characterize the documents issued by Respondent Sullivan as legal pleadings or legal process, Respondent, acting pro se, is required to follow applicable court rules. Whether through ignorance or by choice, Respondent completely disregarded court rules applicable to the infraction citations issued him. He was not entitled to a *bill of particulars* on the infraction citation. His crude attempt to use *discovery* to demand information on the infraction citations was contrary to the IRLJ. Petitioner*179 State might have sought sanctions for this violation, but apparently chose not to do so. Instead, Petitioner unwisely chose to charge Respondent with the criminal offense of barratry under RCW 9.12.010.

Respondent Sullivan may not properly issue any documents he creates or adapts unless he conforms to the requirements of all applicable statutes and rules of court. In total disregard of the IRLJ, Respondent purported to serve pseudo-legalistic documents. They contain language, terms, citations and expressions which make no sense at all. Perhaps most charitably they can be characterized as semi-literate gibberish.

Petitioner State claims other jurisdictions with statutes similar to our barratry statute have construed the scope of the term “process” broadly. ^{FN67} Petitioner principally relies upon a Missouri Court of Appeals decision, *State v. Joos*, ^{FN68} in which the defendant was found guilty of “simulating legal process.” In that case, the defendant prepared and served upon a state trooper a document purporting to be an order issued by a United States District Court for “arrest of judgment/stay of execution.” ^{FN69} The district court struck the document, concluding it sufficiently masqueraded as a bona fide order of that court. ^{FN70} The State then successfully prosecuted the defendant for violation of a Missouri statute prohibiting “simulating legal process.” The Missouri Court of Appeals affirmed, reasoning that “the word ‘process’ is used as a general term and denotes the means whereby a court compels a compliance with its demands.” ^{FN71} The Missouri statute is worded differently from Washington’s barratry statute and *State v. Joos* is distinguishable from this case on its facts.

^{FN67}. Br. of Pet'r at 19-23. Petitioner cited several cases in support of its position that “judicial process” should be defined broadly. None of those cases are on point.

Br. of Pet'r at 21-22.

^{FN68}.*State v. Joos*, 735 S.W.2d 776 (Mo.Ct.App.1987).

^{FN69}.*Joos*, 735 S.W.2d at 777-78.

^{FN70}.*Id.* at 778.

^{FN71}.*Id.* at 779.

*180 Respondent Sullivan's “Demand for Particulars” does not in fact simulate, resemble or purport to be a court order. Nothing in either of the several documents indicated they were issued by a court. They purported only to be demands for a bill of particulars issued by Respondent himself, acting pro se. By some imaginative stretch of logic, one might fathom a suggestion of court participation by Respondent's listing in brackets **1022 “Federal Rule of Criminal Procedure Rule 7(f)” under the subheading “Demand for bill of Particulars” and in another document “Notice of Refusal for Fraud Pursuant to F.R.C.P.9(b)” Under the facts of this case, however, we do not interpret those minimal references as invoking participation by any court.

Constitutionality of RCW 9.12.010

[11] A statute is presumed constitutional, and the burden is on the party challenging it as unconstitutionally vague to prove beyond a reasonable doubt that it fails to make plain the general area of conduct it prohibits. ^{FN72}

^{FN72}.*State v. Groom*, 133 Wash.2d 679, 691, 947 P.2d 240 (1997) (citing *State v. Thorne*, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996); *State v. Myles*, 127 Wash.2d 807, 812, 903 P.2d 979 (1995)); *State v. Halstien*, 122 Wash.2d 109, 118, 857 P.2d 270 (1993).

Respondent contends the barratry statute, RCW 9.12.010, is unconstitutional under the Fourteenth Amendment to the United States Constitution ^{FN73} because it is vague “on its face” and “as applied” to his conduct of serving documents designated “Demand for Particulars” upon the law enforcement officers who cited him for traffic infractions. ^{FN74} He

claims the barratry statute violates the due process clause because it does not give notice of the prohibited*181 conduct and does not provide ascertainable standards for enforcement. Petitioner counters that because the barratry statute does not implicate any First Amendment rights, this court need only determine whether the statute is unconstitutionally vague as applied to Respondent's conduct.^{FN75} However, Petitioner does not cite any authority to support its position, but merely concludes that the First Amendment right to petition does not extend to "frivolous actions."^{FN76}

^{FN73}. Respondent has not engaged in an analysis of State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986), necessary for determining whether the due process clause in the Washington Constitution, art. I, § 3 provides greater protection than the United States Constitution, amendment 14, § 1. Accordingly, we will only consider his due process claim under federal constitutional law. City of Spokane v. Douglass, 115 Wash.2d 171, 176-77, 795 P.2d 693 (1990).

^{FN74}. In Respondent's answer to Petitioner's motion for discretionary review, he challenges RCW 9.12.010 as unconstitutionally "overbroad" and "void for vagueness" on its face and as applied to his conduct in this matter. However, in subsequent briefing, he argues alternatively that if this court finds Petitioner's "broad" definition of "judicial process" applicable to RCW 9.12.010, the statute would then be rendered unconstitutionally overbroad, in addition to being void for vagueness on its face and as applied under the Fourteenth Amendment to the United States Constitution. "Answer to Statement of Grounds for Direct Review," at 2, 5-6; Br. of Resp't at 20-34. Because we conclude Petitioner's "broad" definition of "judicial process" is not applicable to the barratry statute, we do not address the overbreadth doctrine in this opinion.

^{FN75}. Br. of Pet'r at 16-17.

^{FN76}. *Id.* (citing United States v. Reeves, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834, 106 S.Ct. 107, 88 L.Ed.2d 87

(1985) (A First Amendment right to petition did not protect a citizen, who filed a common law lien against the residence of an Internal Revenue Service investigator, from being convicted of corruptly endeavoring to obstruct or impede the due administration of the IRS Code), appeal after remand, United States v. Reeves, 782 F.2d 1323, 1325-26, (5th Cir.), cert. denied, 479 U.S. 837, 107 S.Ct. 136, 93 L.Ed.2d 79 (1986)).

[12][13][14][15] "The due process clause of the Fourteenth Amendment requires [that citizens be afforded] fair warning of proscribed conduct."^{FN77} Fair warning of prohibited activity is required so citizens "may plan their activity accordingly and freely enjoy those activities which are not expressly illegal."^{FN78} "The purpose of the vagueness doctrine is to ensure that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced."^{FN79} Under the due process clause, a statute is unconstitutionally vague if (1) it does not define *182 the criminal offense with sufficient **1023 definiteness that ordinary persons can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.^{FN80} A statute is unconstitutionally vague if either test is not satisfied.^{FN81}

^{FN77}. City of Seattle v. Montana, 129 Wash.2d 583, 596, 919 P.2d 1218 (1996); Douglass, 115 Wash.2d at 178, 795 P.2d 693 (citing Rose v. Locke, 423 U.S. 48, 49, 96 S.Ct. 243, 244, 46 L.Ed.2d 185 (1975)).

^{FN78}. State v. Crediford, 130 Wash.2d 747, 766, 927 P.2d 1129 (1996) (Sanders, J., concurring).

^{FN79}. In re Contested Election of Schoessler, 140 Wash.2d 368, 388, 998 P.2d 818 (2000) (quoting Haley v. Med. Disciplinary Bd., 117 Wash.2d 720, 739-40, 818 P.2d 1062 (1991)).

^{FN80}. Douglass, 115 Wash.2d at 178, 795 P.2d 693 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); State v. Motherwell, 114 Wash.2d 353, 369, 788 P.2d 1066

(1990)).

FN81.Halstien, 122 Wash.2d at 117-18, 857 P.2d 270 (citing Douglass, 115 Wash.2d at 178, 795 P.2d 693).

Amicus Curiae Washington Association of Criminal Defense Lawyers filed a brief arguing in support of Respondent's claims of constitutional violations. We respond only to the claims actually made by Respondent.

[16][17] Under part one of the vagueness test, a statute is not sufficiently definite if it is framed in terms so vague that persons of "common intelligence" must necessarily guess at its meaning and differ as to its application.^{FN82} This test, however, does not require impossible standards of specificity or absolute agreement^{FN83} because some measure of vagueness is inherent in the use of our language.^{FN84} " 'Condemned to the use of words, we can never expect mathematical certainty from our language.' " ^{FN85} Part two of the vagueness test requires a court to examine the terms of the statute to see if they contain " 'minimal guidelines ... to guide law enforcement.' " ^{FN86} The relevant question in this case is whether the barratry statute proscribes conduct by resort to "inherently subjective terms."^{FN87} We conclude it does not.

FN82.Douglass, 115 Wash.2d at 179, 795 P.2d 693 (quoting Burien Bark Supply v. King County, 106 Wash.2d 868, 871, 725 P.2d 994 (1986)).

FN83.Id. at 179, 795 P.2d 693.

FN84.Haley v. Med. Disciplinary Bd., 117 Wash.2d at 740, 818 P.2d 1062.

FN85.Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

FN86.Douglass, 115 Wash.2d at 181, 795 P.2d 693 (quoting State v. Worrell, 111 Wash.2d 537, 544, 761 P.2d 56 (1988)); Myles, 127 Wash.2d at 812, 903 P.2d 979.

FN87.Douglass, 115 Wash.2d at 181, 795

P.2d 693 (quoting State v. Maciolek, 101 Wash.2d 259, 267, 676 P.2d 996 (1984)).

[18][19]*183 In examining Respondent's challenge to the constitutionality of RCW 9.12.010, the first step is to determine whether the statute is to be evaluated "as applied" to the particular case or to be reviewed "on its face."^{FN88} A challenged statute is facially vague if its terms " 'are so loose and obscure that they cannot be clearly applied in any context.' " ^{FN89} However, a statute that does not involve First Amendment rights must be evaluated in light of the particular facts of the case-as applied-requiring inspection of the actual conduct of the party challenging the statute.^{FN90}

FN88.Weden v. San Juan County, 135 Wash.2d 678, 708, 958 P.2d 273 (1998); Douglass, 115 Wash.2d at 181-82, 795 P.2d 693.

FN89.Weden, 135 Wash.2d at 708, 958 P.2d 273 (quoting Douglass, 115 Wash.2d at 182 n. 7, 795 P.2d 693).

FN90.Groom, 133 Wash.2d at 691, 947 P.2d 240;Halstien, 122 Wash.2d at 117, 857 P.2d 270;Douglass, 115 Wash.2d at 181-83, 795 P.2d 693.

[20] In this case, Respondent claims RCW 9.12.010 is unconstitutionally vague on its face^{FN91} because it affects his rights under the First Amendment to the United States Constitution^{FN92} and article I, section 5 of the Washington State Constitution.^{FN93} He merely concludes that "First Amendment protections**1024 extend to written documents ... [and][s]ince RCW 9.12.010 concerns the proscription of written documents, it does implicate a First Amendment right."^{FN94} He cites no authority for this argument. His mere request for a response to his "Demand for Particulars" does not put into operation his First Amendment *184 rights, nor are his rights under article I, section 5 of the Washington Constitution offended.

FN91. Br. of Resp't at 24.

FN92. The First Amendment to the United States Constitution provides:

FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

FN93. Article I, section 5 of the Washington State Constitution provides:

FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

FN94. Br. of Resp't at 24.

[21] When a challenged statute does not involve First Amendment rights, the statute is evaluated for vagueness “as applied” in light of the particular facts of the case.^{FN95} Respondent argues RCW 9.12.010 lacks sufficient definiteness as applied because the statute does not give proper notice of what behavior it prohibits—whether documents entitled “Demand for Particulars” constitute “judicial process.”^{FN96} He asserts that, for the purpose of gathering more information to defend against his traffic infractions, he served his “Demand for Particulars” signed by him, not purporting to be signed by a judge or issued from a court, upon the law enforcement officers who issued the traffic citations to him.^{FN97} He claims that, acting pro se, he was merely requesting information he considered necessary for understanding the precise nature of the charge filed against him under the traffic infraction citation.

FN95. Halstien, 122 Wash.2d at 117, 857 P.2d 270.

FN96. Br. of Resp't at 28-29.

FN97. Id.

[22][23][24] Statutes are not void for vagueness merely because all their possible applications cannot be specifically anticipated.^{FN98} A reviewing court will not invalidate a statute simply because it believes the

statute could have been drafted with greater precision.^{FN99} “[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which [that person’s] actions would be classified as prohibited conduct.”^{FN100} Although RCW 9.12.010 does not define the term “judicial process,” the statute is not unconstitutionally vague. When a statute does not define a term, the court may *185 ascertain its plain and ordinary meaning from a standard dictionary.^{FN101}

FN98. See Douglass, 115 Wash.2d at 179, 795 P.2d 693; City of Seattle v. Eze, 111 Wash.2d 22, 27, 759 P.2d 366 (1988).

FN99. Douglass, 115 Wash.2d at 179, 795 P.2d 693.

FN100. Schoessler, 140 Wash.2d at 389, 998 P.2d 818 (alteration in original) (quoting Eze, 111 Wash.2d at 27, 759 P.2d 366).

FN101. See Myles, 127 Wash.2d at 812-13, 903 P.2d 979.

[25] Although the meaning of “judicial process” is not defined, this is not a sufficient basis for concluding that RCW 9.12.010 is vague beyond a reasonable doubt. The terms of the challenged statute are considered in the context of the entire statute.^{FN102} The language of a statute “is afforded a sensible, meaningful, and practical interpretation.”^{FN103} We conclude that RCW 9.12.010 is not unconstitutionally vague.

FN102. Douglass, 115 Wash.2d at 180, 795 P.2d 693 (citing City of Seattle v. Huff, 111 Wash.2d 923, 929, 767 P.2d 572 (1989)).

FN103. Id. at 180, 795 P.2d 693.

Under the sufficiency requirement of the vagueness test, the barratry statute, RCW 9.12.010, defines the offense with sufficient definiteness that an ordinary person could determine whether Respondent’s “Demand for Particulars” constituted “judicial process.” The statute provides an ordinary person with constitutionally sufficient notice. The barratry statute, RCW 9.12.010, is not unconstitutionally vague on its face nor as applied to Respondent’s case.

[26] Respondent's "Demand for Particulars" did not constitute "judicial process" under the barratry statute. It consisted of almost incomprehensible language, contained many irrelevant and inartfully stated questions, referred to federal statutes and court rules of questionable relevance, used pseudo-legalistic terms, was signed by him and not by a judge, was not issued by a court, and requested a response direct to him.

****1025** The trial court correctly determined as a matter of law that Respondent Sullivan's purported service of documents characterized as "Demand for Particulars" upon law enforcement officers who cited him for traffic infractions did not meet the requirement of RCW 9.12.010 that the documents purport to be or resemble "judicial process." It is apparent under the facts of this case that Respondent, acting pro se, tried to imitate what he perceived would be ***186** documents or pleadings issued by lawyers. Although he did not follow applicable rules of court (IRLJ), in none of his documents did he indicate they were signed by or issued by a judicial officer nor that any conduct attendant to the documents was subject to judicial action. Respondent's "Demand for Particulars" did not constitute "judicial process." The trial court was correct in dismissing with prejudice the criminal complaint of barratry against Respondent Sullivan.

SUMMARY AND CONCLUSIONS

A party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt. Respondent Sullivan has not met his burden of establishing that RCW 9.12.010 is unconstitutionally vague. RCW 9.12.010 is not unconstitutionally vague simply because the term "judicial process" is not defined. Its meaning need not achieve mathematical certainty, but is measured against the purpose of RCW 9.12.010 to proscribe the use of any paper or document purporting to be or resembling judicial process.

The term "judicial process" lends itself to either a broad or narrow construction. There are no reasons in this case to justify a broad construction of the term. The question arises whether any construction of "judicial process" would include documents such as Respondent Sullivan's "Demand for Particulars," which he purported to serve upon the law enforce-

ment officers who cited him for traffic infractions. It does not. We adapt from *Black's Law Dictionary* the definition of "judicial process" as "all acts of a court from the beginning to the end of its proceedings in a given cause—the writ, summons, mandate or other process used to inform parties of institution of court proceedings and notices to compel appearance and participation in civil or criminal cases under applicable statutes and rules of court."

Respondent's "Demand for Particulars" did not constitute "judicial process" under the statute. The documents contained ***187** questionable and irrelevant citations of statutes and court rules, inartfully stated questions, were issued and signed by him and not by a judge, and requested responses direct to him. Acting pro se, Respondent imitated documents he perceived to be documents or pleadings that would be issued by a lawyer. He did not represent them as documents issued by a court or subject to judicial action.

In bombarding the citing officers with documents demanding responses, Respondent ignored or disregarded the IRLJ which exclusively governs procedures applicable to his traffic infraction citations. He cannot excuse his noncompliance with the rules by claiming ignorance of them, nor by the fact he was acting *pro se* without the assistance of a lawyer. However much we may disapprove of Respondent's conduct in his traffic infraction cases, his crude and inept attempt to demand a "bill of particulars" nevertheless does not rise to the level of the criminal offense of barratry under RCW 9.12.010. The State of Washington necessarily must find some other method of addressing such uncontrolled and harassing behavior by parties charged with traffic infractions under the IRLJ.

In this case, the trial court correctly determined that, as a matter of law, Respondent Sullivan's "Demand for Particulars" did not purport to be or resemble "judicial process." The trial court correctly dismissed with prejudice the charge of barratry against Respondent.

We affirm the decision of the Kitsap County Superior Court which upheld the order of the Kitsap County District Court dismissing with prejudice the criminal charge of barratry against Respondent Kelly Russell Sullivan, a/k/a Kelly Russell, Sullivan.

ALEXANDER, C.J., JOHNSON, MADSEN, SANDERS, IRELAND, BRIDGE, JJ., and GUY, J.P.T., concur. **1026*188 TALMADGE, J.^{FN*} (concurring).

FN* Justice Philip Talmadge is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. IV, § 2(a) (amend.38).

While I agree with the majority's disposition of this case, I write separately because we should adopt a narrower and clearer formulation of what constitutes "judicial process" for purposes of RCW 9.12.010.^{FN1} Moreover, the State had other remedies than those set forth in RCW 9.12.010 to deal with Kelly Sullivan's blatant misuse of the legal process.

FN1. RCW 9.12.010 states:

Every person who brings on his or her own behalf, or instigates, incites, or encourages another to bring, any false suit at law or in equity in any court of this state, with intent thereby to distress or harass a defendant in the suit, or who serves or sends any paper or document purporting to be or resembling a judicial process, that is not in fact a judicial process, is guilty of a misdemeanor; and in case the person offending is an attorney, he or she may, in addition thereto be disbarred from practicing law within this state.

The majority opinion accurately conveys Sullivan's misuse of the legal process. Sullivan sent lengthy documents described as "Demand[s] for a Bill of Particulars" to the police officers who had issued him traffic infractions for no other reason than to harass. In our courts, bills of particulars may be sought from *opposing counsel* in criminal matters. See CrR 2.1(c); (authorizing a court to direct the filing of a bill of particulars); CrRLJ 2.4(e) (same); see, e.g., State v. Brett, 126 Wash.2d 136, 156, 892 P.2d 29 (1995). Further, this type of pleading may only be filed pursuant to court rule in a criminal matter and is not allowed pursuant to the Infraction Rules for Courts of Limited Jurisdiction. Specifically, even in a criminal case (which this was not), such a document may not be directed to police officers. It may not masquerade

as a set of extra-judicial interrogatories to the officers issuing traffic infractions.

Rather than being merely inartful, Sullivan, in the service of his particular political bent, was intent on causing as much trouble to the traditional legal system as he could. Whether described as Freeman, Militia, Constitutionals, Patriots, or the like, these individuals hope to do all they can to disrupt our justice system in the hopes its collapse *189 will presage a utopia. See Edward F. Shea, "Common-law Courts?" 50 Wash. St. Bar News 18-19 (May 1996).

Sullivan was acting pro se, but that is no excuse for his conduct. Individuals purporting to represent themselves must be held to the same standards governing all who appear before a court. State v. Smith, 104 Wash.2d 497, 508, 707 P.2d 1306 (1985) (pro se defendant must comply with procedural rules) State v. Bebb, 44 Wash.App. 803, 806, 813, 723 P.2d 512 (self-representation is not a license to avoid compliance with court rules), *aff'd*, 108 Wash.2d 515, 740 P.2d 829 (1987). This extends to pretrial proceedings.

While Sullivan's conduct was a misuse of the legal process, I agree with the majority he did not commit the crime of barratry. The majority correctly finds RCW 9.12.010, Washington's barratry law, constitutional. It is not vague. See State v. Knowles, 91 Wash.App. 367, 957 P.2d 797 (1998) (threats to judge not constitutionally protected speech). The statute deals with serious misbehavior; people may not knowingly cause others to instigate frivolous legal actions or utilize sham judicial documents.

But the majority defines "judicial process" for purposes of the latter portion of RCW 9.12.010 as " 'all acts of a court from the beginning to the end of its proceedings in a given cause-the writ, summons, mandate or other process used to inform parties of institution of court proceedings and notices to compel appearance and participation in civil or criminal cases under applicable statutes and rules of court.' " Majority at 1025 (quoting BLACK'S LAW DICTIONARY). Under this broad definition, Sullivan plainly served documents that resembled judicial process on the officers, despite the fact that only a judge can authorize such bills of particulars. See CrR 2.1(c); CrRLJ 2.4(e). Using the majority's broad definitional approach, the demands for bills of particulars could purportedly be judicial process; in fact, they are not.

By the majority's own definition of "judicial process,"**1027 Sullivan could be arguably guilty of barratry.

The better approach to the definition of the term "judicial process" is to define it as those documents actually executed by a judge or by the court itself. If an individual attempts to *190 serve what appears to be a court order, but it is instead a false document, or issues a false letter purporting to be a letter from the court clerk or commissioner, that individual may be prosecuted for barratry. By contrast, "legal process" would include documents or pleadings not executed by a judge or the court.^{FN2}

FN2. The Legislature is, of course, free to amend RCW 9.12.010 to punish the filing of any sham or false legal pleading.

Even with this narrower definition, the State is not without tools to deter the misuse of the justice system by people like Sullivan. The documents here could readily have been quashed. Sanctions may, and indeed ought to, be imposed against persons like Sullivan for filing groundless documents. *See* CR 81 (civil rules for superior court supplement existing rules); CR 11; CRLJ 11. Indeed, numerous other statutory tools may be used. *See, e.g.,* RCW 4.84.185 (sanctions for frivolous action) or RCW 4.24.350 (counterclaim for malicious prosecution).

Sullivan harassed the officers in this case to further his peculiar brand of politics. He should have been sanctioned for such misuse of the legal system. The crime of barratry, however, as presently defined in RCW 9.12.010, is reserved for the filing of sham court orders or other court-generated pleadings, orders, or writings.

Wash.,2001.
State v. Sullivan
143 Wash.2d 162, 19 P.3d 1012

END OF DOCUMENT

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
When case is reviewed on stipulated facts, issues are solely questions of law and are reviewed de novo.

[3] Constitutional Law 92 ↪976

92 Constitutional Law

92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k976 k. Resolution of Non-Constitutional Questions Before Constitutional Questions. Most Cited Cases
(Formerly 92k46(1))
Where an issue may be resolved on statutory grounds, court will avoid deciding the issue on constitutional grounds.

[4] Infants 211 ↪275

211 Infants

211IX Agencies and Institutions for Correction or Rehabilitation
211k275 k. Custody, Control, and Treatment of Subject Persons. Most Cited Cases

Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates
310II(B) Care, Custody, Confinement, and Control
310k163 k. Education and Training. Most Cited Cases
(Formerly 310k4(5))
Rights accorded to persons aged 5 through 21 under basic education act do not apply to persons incarcerated in Washington State prisons; rather, educational rights of such incarcerated persons are governed by more recent statutes establishing system of corrections and providing for education programs for juvenile inmates. West's RCWA 28A.150.010 et seq., 28A.193.010 et seq., 72.09.010 et seq.

[5] Statutes 361 ↪184

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act.
Most Cited Cases
Court must interpret legislation consistently with its stated goals.

[6] Statutes 361 ↪223.1

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
Apparently conflicting statutes must be reconciled to give effect to each of them.

[7] Statutes 361 ↪223.1

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases

Statutes 361 ↪223.4

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 k. General and Special Statutes. Most Cited Cases
To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.

[8] Statutes 361 ↪223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(.5) k. In General. Most

Cited Cases

Courts consider the sequence of all statutes relating to the same subject matter in attempting to resolve apparent conflicts between statutes.

[9] Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates

310II(B) Care, Custody, Confinement, and Control

310k163 k. Education and Training. Most

Cited Cases

(Formerly 310k4(5))

Rights accorded under special education act to individuals with disabilities who are between ages of 3 and 22 do not apply to persons within that age range who are incarcerated in Washington State prisons; such inmates are outside the common school system. West's RCWA 28A.150.020, 28A.155.010 et seq., 28A.155.090(7).

[10] Constitutional Law 92 ↪2451

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)1 In General

92k2451 k. Interpretation of Constitution in General. Most Cited Cases

(Formerly 92k67)

Ultimate power to interpret, construe, and enforce State Constitution belongs to the judiciary.

[11] Schools 345 ↪148(1)

345 Schools

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in General

345k148(1) k. In General. Most Cited

Cases

Basic education act does not provide operative definition of "children" as that term is used in provision of State Constitution imposing duty on state to provide for education of all children residing within its borders. West's RCWA Const. Art. 9, § 1; West's RCWA 28A.150.010 et seq., 28A.150.220(5).

[12] Schools 345 ↪152

345 Schools

345II Public Schools

345II(L) Pupils

345k149 Eligibility

345k152 k. Age. Most Cited Cases

Term "children," as used in provision of State Constitution imposing duty on state to provide for education of all children residing within its border, includes individuals up to age 18. West's RCWA Const. Art. 9, § 1.

[13] Constitutional Law 92 ↪1075

92 Constitutional Law

92VII Constitutional Rights in General

92VII(B) Particular Constitutional Rights

92k1074 Right to Education

92k1075 k. In General. Most Cited

Cases

(Formerly 92k85)

Schools 345 ↪148(1)

345 Schools

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in General

345k148(1) k. In General. Most Cited

Cases

While state's paramount obligation under State Constitution to provide for basic education does not end with the establishment of a public school system, state is not obligated to provide an identical education to all children within the state regardless of the circumstances in which they are found. West's RCWA Const. Art. 9, § 1.

[14] Constitutional Law 92 ↪990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases (Formerly 92k48(1))

Constitutional Law 92 ↪ 1004

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases (Formerly 92k48(3))

Constitutional Law 92 ↪ 1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases (Formerly 92k48(1))
Where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.

[15] Constitutional Law 92 ↪ 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases (Formerly 92k47)
Court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would

be unconstitutional as applied to the facts of a particular case.

[16] Constitutional Law 92 ↪ 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases (Formerly 92k48(1))

A facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.

[17] Statutes 361 ↪ 63

361 Statutes
361I Enactment, Requisites, and Validity in General
361k63 k. Effect of Total Invalidity. Most Cited Cases
Practical effect of holding a statute unconstitutional on its face is to render it utterly inoperative.

[18] Constitutional Law 92 ↪ 1075

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1074 Right to Education
92k1075 k. In General. Most Cited Cases (Formerly 92k85)

Infants 211 ↪ 272

211 Infants
211IX Agencies and Institutions for Correction or Rehabilitation
211k272 k. Statutory Provisions. Most Cited Cases
Statute that requires state to provide inmates under 18 years of age with a choice of curriculum that will assist them in achieving high school diploma or general equivalency diploma is constitutional on its face, for purposes of compliance with provision of State Constitution imposing duty on state to provide for

education of all children residing within its borders. West's RCWA Const. Art. 9, § 1; West's RCWA 28A.193.010 et seq.

[19] Constitutional Law 92 ↪2450

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)1 In General

92k2450 k. Nature and Scope in General. Most Cited Cases

(Formerly 92k67)

It is not Supreme Court's role to micromanage education in Washington.

[20] Constitutional Law 92 ↪1075

92 Constitutional Law

92VII Constitutional Rights in General

92VII(B) Particular Constitutional Rights

92k1074 Right to Education

92k1075 k. In General. Most Cited

Cases

(Formerly 92k85)

Infants 211 ↪272

211 Infants

211IX Agencies and Institutions for Correction or Rehabilitation

211k272 k. Statutory Provisions. Most Cited

Cases

Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates

310II(B) Care, Custody, Confinement, and Control

310k163 k. Education and Training. Most Cited Cases

(Formerly 310k4(5))

Inmates failed to show that statute governing educational program for inmates under 18 years of age violated State Constitution's provision requiring education of children as applied, where inmates merely speculated about constitutional problems that could arise in application of statute but offered no facts to indicate constitutional violations had occurred.

West's RCWA Const. Art. 9, § 1; West's RCWA 28A.193.010 et seq.

[21] Constitutional Law 92 ↪657

92 Constitutional Law

92V Construction and Operation of Constitutional Provisions

92V(F) Constitutionality of Statutory Provisions

92k657 k. Invalidity as Applied. Most Cited Cases

(Formerly 92k38)

Under an "as applied" challenge, the party challenging the statute contends that the statute, as actually applied, violated the Constitution.

[22] Appeal and Error 30 ↪840(3)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k840 Review of Specific Questions and Particular Decisions

30k840(3) k. Review of Constitutional Questions. Most Cited Cases

Supreme Court will not address constitutional issues without benefit of citation to appropriate supporting authority.

[23] Constitutional Law 92 ↪3006

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)2 Relationship to Similar Provisions

92k3006 k. Federal/State Cognates. Most Cited Cases

(Formerly 92k209)

Federal and state equal protection clauses are construed identically and claims arising under their scope are considered as one issue. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[24] Constitutional Law 92 ↪3050

92 Constitutional Law

92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3050 k. In General. Most Cited

Cases

(Formerly 92k213.1(1))

First step in conducting any equal protection analysis is determining the appropriate standard of review. West's RCWA Const. Art. 1, § 12.

[25] Constitutional Law 92 ↪ 3062

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scrutiny
92k3062 k. Strict Scrutiny and Compelling Interest in General. Most Cited Cases

(Formerly 92k213.1(1))

To apply strict scrutiny in an equal protection challenge, court must first find that a fundamental right is being infringed or a suspect class is involved. West's RCWA Const. Art. 1, § 12.

[26] Constitutional Law 92 ↪ 1076

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1074 Right to Education
92k1076 k. Fundamental Nature of Right. Most Cited Cases
(Formerly 92k85)

Constitutional Law 92 ↪ 3104

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)1 Age
92k3104 k. Juvenile Justice. Most Cited

Cases

(Formerly 92k242.1(4))

Rational basis review was appropriate standard for equal protection challenge asserted by inmates to statute that, in its provisions for education of incarcerated persons under 18 years of age, treated incarcerated youths differently from nonincarcerated youths; statute did not infringe on inmates' funda-

mental right to education under State Constitution and did not create a suspect class. West's RCWA Const. Art. 1, § 12; Art. 9, § 1; West's RCWA 28A.193.010 et seq.

[27] Constitutional Law 92 ↪ 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases

(Formerly 92k213.1(2))

Under rational basis review in context of equal protection challenge, there is a presumption of constitutionality and a statute is upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. West's RCWA Const. Art. 1, § 12.

[28] Constitutional Law 92 ↪ 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases

(Formerly 92k213.1(2))

Rational basis test provides that a statutory classification will be upheld against equal protection challenge if any conceivable state of facts reasonably justifies the classification. West's RCWA Const. Art. 1, § 12.

[29] Constitutional Law 92 ↪ 3104

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)1 Age
92k3104 k. Juvenile Justice. Most Cited

Cases

(Formerly 92k242.1(4))

Infants 211 ↪ 272

211 Infants

211IX Agencies and Institutions for Correction or Rehabilitation

211k272 k. Statutory Provisions. Most Cited Cases

Rational basis exists for statute that provides for an educational program for incarcerated persons under 18 years of age that is different from program available to persons under 18 years of age in the normal school system, and thus that statute does not violate equal protection; incarcerated children may have different educational needs and may require different training programs more appropriate to their circumstances, and statute allows state to properly tailor its educational programs for members of inmate class. West's RCWA Const. Art. 1, § 12; Art. 9, § 1; West's RCWA 28A.193.010 et seq.

[30] Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates

310II(B) Care, Custody, Confinement, and Control

310k163 k. Education and Training. Most Cited Cases

(Formerly 310k4(5))

For equal protection purposes, rational basis existed for not requiring the provision of educational programs for incarcerated persons over age 18; inmates over age 18 were not "children" within meaning of provision of State Constitution imposing duty on state to provide education for children residing within its borders. West's RCWA Const. Art. 1, § 12; Art. 9, § 1; West's RCWA 28A.193.010 et seq.

[31] Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates

310II(B) Care, Custody, Confinement, and Control

310k163 k. Education and Training. Most Cited Cases

(Formerly 310k4(5))

Neither former nor amended version of Individuals with Disabilities Education Act (IDEA) requires state to provide special education services to persons over age 18 who are incarcerated in adult prisons. Individuals with Disabilities Education Act, § 601 et

seq., 612(a)(1)(B), as amended, 20 U.S.C.A. §§ 1400 et seq., 1412(a)(1)(B); 34 C.F.R. § 300.122; West's RCWA 28A.193.010 et seq.

[32] Civil Rights 78 ↪1069

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1059 Education

78k1069 k. Disabled Students. Most Cited Cases

(Formerly 78k127.1)

Compliance with IDEA constitutes compliance with provision of Rehabilitation Act prohibiting discrimination against an individual solely on basis of disability in program receiving federal financial assistance. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.; Rehabilitation Act of 1973, as amended, § 504(a), 29 U.S.C.A. § 794(a).

[33] Prisons 310 ↪163

310 Prisons

310II Prisoners and Inmates

310II(B) Care, Custody, Confinement, and Control

310k163 k. Education and Training. Most Cited Cases

(Formerly 310k4(5))

School districts, though authorized to contract to provide educational services to individuals over 18 who are incarcerated in facilities of the Department of Corrections, are not obligated under either federal or state law to provide education in Washington State prisons. West's RCWA Const. Art. 9, § 1; West's RCWA 28A.193.020-28A.193.040, 28A.193.060.

[34] Schools 345 ↪55

345 Schools

345II Public Schools

345II(C) Government, Officers, and District Meetings

345k51 District Boards

345k55 k. Powers and Functions in General. Most Cited Cases

School districts are creatures of statute and have only those powers and rights specifically granted to them

by statute.

****694*205** Andrea Devine Orth of Garvey, Schubert & Barer, Seattle, Amicus Curiae on behalf of American Civil Liberties Union of Washington; Arc of Washington State; The Children's alliance; The Juvenile Law Center; People First of Washington; The Sentencing Project; TeamChild; Washington Coalition of Citizens with Disabilities; Washington State Catholic Conference; Washington State Special Education Coalition; The Faculty of Western Washington University's Woodring College of Education, Department of Special Education; The Youth Law Center; Osa Coffey, Ph.D.; Barry Krisberg, Ph.D.; Peter E. Leone, Ph.D.; Robert B. Rutherford Jr., Ph.D.

***206** Christine Gregoire, Attorney General, Lisa Leann Sutton, Asst., Heather Klein, Asst., Thomas Young, Asst., Olympia, for Appellants.

Columbia Legal Services, Patricia J. Arthur, Seattle, David C. Fathi, Washington, DC, Heller, Ehrman, White & McAuliffe, Patricia H. Wagner, Angela M. Niemann, Seattle, Vandenberg, Johnson & Gandara, William A. Coats, Tacoma, Michael A. Patterson, Philip B. Greenan, Karen Adell Kalzer, Seattle, for Respondents.

IRELAND, J.

This case comes to the court on direct review from the trial court's summary judgment rulings. Plaintiffs (hereinafter "inmates"), a class of persons incarcerated in Washington State prisons who are either under 21 years of age, or disabled and under 22 years of age, brought suit concerning their right to education against Teresa Bergeson, the Washington State's Superintendent of Public Instruction, Joseph Lehman, the Secretary of Washington's Department of Corrections (together and hereinafter referred to as the "State"), and the school districts in which the prisons are located.

We hold that individuals under age 18 incarcerated in adult Washington State Department of Correction (DOC) facilities have a constitutional right to public education and ***207** that their constitutional right is satisfied by chapter 28A.193 RCW. We also hold, however, that individuals over age 18 incarcerated in DOC facilities do not have a statutory or constitutional right to public education. Furthermore, we hold that the State is not ****695** required under the Indi-

viduals with Disabilities Education Act, 20 U.S.C. §§ 1400-1436, or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), to provide special education services to DOC inmates between 18 and 22 years of age. Finally, we hold that the school districts may contract to provide educational services to individuals over age 18 incarcerated in DOC facilities, but are not statutorily or constitutionally obligated to do so. We reserve the issue of whether there is a constitutional right to *special* education for those between 18 and 22 until we have a case where the record and briefing are adequately developed.

I.

BACKGROUND

A. Stipulated Facts

As of April 1998, there were approximately 100 offenders under the age of 18 and 1,027 offenders under the age of 21 incarcerated in DOC facilities.^{FN1} The number of juvenile inmates under the age of 18 is expected to rise during the next several years due to the new mandatory declination provisions passed by the Legislature in 1997. Clerk's Papers (CP) at 1678 (citing Laws of 1997, ch. 338, § 7 (E3SHB 3900)). Of the 1,027 offenders under the age of 21, approximately 209 were believed to have either a high school diploma or a general equivalency diploma (GED).

^{FN1}. The trial court's summary judgment rulings were based on stipulated facts.

Prior to the passage of chapter 28A.193 RCW, the Office of the Superintendent of Public Instruction (OSPI) had no responsibility for educational programs in any adult prison. DOC, however, provided several educational opportunities to inmates, largely through contracts with local community ***208** colleges. DOC education programs included courses in adult basic education, GED preparation, English as a second language, vocational skills training, crime related programs, and job readiness training.

In 1998, the Legislature passed the Engrossed Substitute Senate Bill 6600. Laws of 1998, ch. 244 (codified at RCW 28A.193). This statute provides for the education of juveniles incarcerated in adult prisons.

RCW 28A.193.005. RCW 28A.193.020-030 requires OSPI to solicit proposals from educational entities to provide education to inmates under the age of 18 in Washington State prisons.

In accordance with chapter 28A.193 RCW, DOC and OSPI contracted with two school districts ^{FN2} to provide educational services for the 1998-99 school year at the two DOC facilities in which the inmates under 18 are located.

FN2. Around June of 1999, one of the school districts did not renew its contract. See Ex. 1, at 2 (district's resolution to not renew educational service provider contract), Mot. to Supplement the R., *Tunstall v. Bergeson*, No. 67448-5 (Wash. Supreme Ct. June 3, 1999). In September, the district was replaced by another educational service provider. See Ex. 2, at 2 (agreement between DOC and Special Education Services), Mot. to Supplement the R., *Tunstall v. Bergeson*, No. 67448-5 (Wash. Supreme Ct. Sept. 13, 1999).

B. Claims

Inmates brought this class action suit against the State and those school districts where DOC facilities are located. Inmates' class was certified to include:

All individuals who are now, or who will in the future be, committed to the custody of the Washington Department of Corrections, who are allegedly denied access to *basic or special education* during that custody, and who are, during that custody, *under the age of 21, or disabled and under the age of 22*.

CP at 203-04 (emphasis added).

The inmates alleged that the State's failure to provide them with basic and special education services violated article IX of the Washington Constitution; the basic education act, chapter 28A.150 RCW; the special education act, chapter 28A.155 RCW; the federal Individuals with Disabilities *209 Education Act (IDEA), 20 U.S.C. §§ 1400-1436, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a); and constitutional due process and equal protection. Fur-

thermore, the inmates alleged that recently enacted chapter 28A.193 RCW violates article IX.

**696C. Trial Court Decision

On stipulated facts and cross motions for summary judgment, the trial court granted summary judgment in favor of the inmates on their claims under the Washington Constitution and the basic education act. The trial court also invalidated chapter 28A.193 RCW as unconstitutional because it impermissibly limited the availability of basic education to inmates under the age of 18 and failed to provide for special educational opportunities. The trial court, however, held that the statutory and constitutional obligation to provide educational services to persons incarcerated in Washington prisons ran only to the State and dismissed the school districts. The trial court also dismissed all of the inmates' federal claims.

On appeal, as appellants and cross-respondents, the State appeals the trial court's rulings regarding the inmates' state law claims. The inmates, as respondents and cross-appellants, challenge the trial court's dismissal of the school districts and the dismissal of their federal claims. Finally, the school districts, as cross-respondents, defend their dismissal from the case. This court stayed the trial court's orders pending the outcome of this appeal.

D. Standard of Review

[1][2] In reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *E.g., Reid v. Pierce County* 136 Wash.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is upheld if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Green v. A.P.C. (American Pharm. Co.)*, 136 Wash.2d 87, 94, 960 P.2d 912 (1998) (citing, inter alia, CR 56(c)). Because this case is reviewed on stipulated facts, the issues are solely questions of law and *210 are reviewed de novo. See *Di Blasi v. City of Seattle*, 136 Wash.2d 865, 873, 969 P.2d 10 (1998) (citing case).

[3] Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds. *Senear v. Daily Journal-American*, 97 Wash.2d 148, 152, 641 P.2d 1180 (1982) (citing case). Therefore, we first examine

whether the inmate class is entitled to basic and special education under state statutes. Second, we review the inmates' claim that they are entitled to basic and special education under the state constitution. Third, we consider the inmates' claims that the education programs for juvenile inmates act, chapter 28A.193 RCW, violates Washington's equal protection clause. Fourth, we analyze the inmates' claims under the federal statutes. Finally, we determine what obligation, if any, is imposed upon school districts to provide basic or special education to inmates.

II.

THE INMATES' STATUTORY RIGHT TO BASIC AND SPECIAL EDUCATION

When the relevant statutory provisions are properly read together and as a whole, it is clear the Legislature did not intend that the basic and special education acts apply to individuals incarcerated in DOC prisons. Consequently, we hold that the basic education act and the special education act do not apply to the inmate class.

A. The Basic Education Act, Chapter 28A.150 RCW

[4] The inmates first argue that the plain language of the basic education act clearly “establishes an education system available to *all* students aged 5 through 21, and excluding none.” Response Br. of Resp'ts at 14 (citing RCW 28A.150.220(5)) (footnote omitted).^{FN3} Under the inmates' *211 theory, because children incarcerated in adult prisons are not specifically exempted from the basic education act, they are covered by the act, and are thus entitled to the same education offered**697 to all other children in Washington. We disagree.

^{FN3}. The relevant portion of RCW 28A.150.220(5) states that:

Each school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age ... and less than twenty-one years of age....

[5][6] While the basic education act does not *explicitly*

exclude youths incarcerated in adult facilities, the inquiry does not end there. A fundamental rule of statutory construction is that the court must interpret legislation consistently with its stated goals. Weyerhaeuser Co. v. Tri, 117 Wash.2d 128, 140, 814 P.2d 629 (1991). Another well-established principle of statutory construction provides that apparently conflicting statutes must be reconciled to give effect to each of them. *E.g.*, State v. Fagalde, 85 Wash.2d 730, 736, 539 P.2d 86 (1975); *see also* Fray v. Spokane County, 134 Wash.2d 637, 648, 952 P.2d 601 (1998) (courts avoid construing statutes in way that renders any statutory language “superfluous”) (citing case).

[7][8] To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute. *See In re Estate of Little*, 106 Wash.2d 269, 283, 721 P.2d 950 (1986) (more specific statute) (citing cases); Morris v. Blaker, 118 Wash.2d 133, 147, 821 P.2d 482 (1992).^{FN4} Along these same lines, courts also consider “the sequence of all statutes relating to the same subject matter.” Department of Labor & Indus. v. Estate of MacMillan, 117 Wash.2d 222, 229, 814 P.2d 194 (1991) (citation omitted). Based on these principles of statutory interpretation, we examine the Legislature's statutory scheme regarding education to determine whether the basic education act applies to the inmate class.

^{FN4}. Accord State v. Stackhouse, 88 Wash.App. 963, 968, 947 P.2d 777 (1997) (citing case).

The basic education act, originally enacted in 1977, sets up a general program of education that does not specifically address the educational needs of DOC inmates. *212 Chapter 28A.193 RCW, on the other hand, was enacted in 1998 with the intent “to provide for the operation of education programs for the *department of corrections' juvenile inmates*.” RCW 28A.193.005 (emphasis added). Under chapter 28A.193 RCW, individuals up to, and potentially including, age 18 who are incarcerated in DOC facilities may participate in DOC education programs. RCW 28A.193.030(3)-(4); *see also* RCW 72.09.460(2).^{FN5} Furthermore, the compulsory school attendance and admission law, chapter 28A.225 RCW, was amended in 1998 to specifically *exempt* individuals who are incarcerated in adult cor-

rectional facilities from mandatory school attendance. Laws of 1998, ch. 244, § 14; RCW 28A.225.010(1)(d).^{FN6}

FN5. The relevant portion of RCW 72.09.460(2), as amended in 1998, states that:

The [DOC] shall provide access to a program of education to all offenders who are *under the age of eighteen* and who have not met high school graduation or general equivalency diploma requirements *in accordance with chapter 28A.193 RCW*.

(Emphasis added.) *See also* Laws of 1998, ch. 244, § 10.

FN6. The relevant portion of RCW 28A.225.010(1)(d) states:

All parents in this state of any child eight years of age and under eighteen years of age shall cause such child to attend the public school of the district in which the child resides and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session *unless* :

....

(d) The school district superintendent of the district in which the child resides shall have excused such child from attendance because the child is ... *incarcerated in an adult correctional facility*

(Emphasis added.)

Applying the previously discussed rules of interpretation, we hold that chapters 28A.193 and 72.09 RCW, not the basic education act, apply to the inmate class. First, applying the basic education act to DOC inmates would render chapter 28A.193 RCW and portions of chapter 72.09 RCW superfluous. *See Fray*, 134 Wash.2d at 648, 952 P.2d 601. Second, chapters 28A.193 and 72.09 are the more recent and far more specific statutes regarding inmate education, and thus should be given preference. *See Little*, 106 Wash.2d

at 283, 721 P.2d 950; *Blaker*, 118 Wash.2d at 147, 821 P.2d 482.

*213 Finally, as stipulated to by the parties, the new mandatory declination provisions passed in 1997 were expected to significantly increase the number of juveniles under 18 incarcerated in DOC facilities. Relying upon the sequence in which these statutes were enacted, it is reasonable to conclude that the Legislature intended the more recent statutes**698 and amendments to address an unmet need - the education of juvenile DOC inmates. *See MacMillan*, 117 Wash.2d at 229, 814 P.2d 194.

In addition to their statutory construction arguments, the inmates contend that *Tommy P.*, which held that the basic education act applies to children incarcerated in juvenile detention facilities, mandates application of the basic education act to the inmate class. Response Br. of Resp'ts at 14-15 (citing *Tommy P. v. Board of County Comm'rs*, 97 Wash.2d 385, 391-93, 645 P.2d 697 (1982)).^{FN7} The inmates argue that *Tommy P.* stands for the proposition that children do not lose their rights to an education under the basic education act simply because they are incarcerated. Response Br. of Resp'ts at 14-15 (citing *Tommy P.*, 97 Wash.2d at 391-93, 645 P.2d 697). We disagree, noting at least three major flaws in the inmates' arguments.

FN7. Specifically, this court held that, "under the provisions of RCW Titles 13 and 28A, juveniles of school age have a right to education while detained in juvenile detention centers, both before and after adjudication and disposition." *Tommy P.*, 97 Wash.2d at 386, 645 P.2d 697.

First, contrary to inmates' assertions, the holding in *Tommy P.* does not rest on the *basic education act* ; rather, it is dependent upon the compulsory attendance law's applicability to juvenile detainees. RCW 28A.27 (recodified and amended by RCW 28A.225). This court specifically held: "the *compulsory education law* requires the provision of a program of education in juvenile detention centers." *Tommy P.*, 97 Wash.2d at 398, 645 P.2d 697 (emphasis added).^{FN8}

FN8. In addition to ignoring the other bases upon which the majority distinguishes *Tommy P.*, the dissent contradicts itself by

correctly recognizing that *Tommy P.* “re-frained” from considering the constitutional question, but then arguing that there are “[constitutional] principles underlying *Tommy P.* [that] should not be so easily abandoned.” Dissent at 710. A court’s decision is not constitutional in nature where the court explicitly avoided basing its decision on constitutional principles and relied on statutory grounds.

Second, as previously stated, the compulsory school *214 attendance and admission law, upon which *Tommy P.* was based, was amended in 1998 to specifically *exclude* individuals “incarcerated in an adult correctional facility.” RCW 28A.225.010(1)(d); *see also Tommy P.*, 97 Wash.2d at 394-98, 645 P.2d 697 (court held that, absent specific exemption, compulsory school attendance law applied to juveniles in detention facilities). Finally, *Tommy P.* involved offenders incarcerated in juvenile facilities, not youths who were declined to adult court or incarcerated in adult facilities. For these reasons we find *Tommy P.* distinguishable.

B. The Special Education Act, Chapter 28A.155 RCW

[9] The analysis and arguments regarding whether the special education act, chapter 28A.155 RCW, applies to the inmate class parallels those regarding the basic education act above. Like the basic education act, the special education act is stated in broad terms and does not specifically address the education of juveniles in DOC facilities. The special education act’s purpose is “to ensure that *all children with disabilities* as defined in RCW 28A.155.020 shall have the opportunity for an appropriate education at public expense as guaranteed to them by the Constitution of this state.” RCW 28A.155.010 (emphasis added). “Children with disabilities” includes individuals between the ages of 3 and 22 ^{FN9} who are:

FN9. Regarding age, RCW 28A.155.020 specifically states:

The superintendent of public instruction shall require each school district in the state to insure an appropriate educational opportunity for all children with disabilities between the ages of three and twenty-

one, but when the twenty-first birthday occurs during the school year, the educational program may be continued until the end of that school year.

in school or out of school who are temporarily or permanently retarded in normal educational processes by reason of physical or mental disability, or by reason of emotional maladjustment, or by reason of other disability, and those children who have specific learning and language disabilities resulting from perceptual-motor *215 disabilities, including problems in visual and auditory perception and integration.

RCW 28A.155.020.

In addition to not specifically *including* DOC inmates, the special education act is **699 reasonably read as actually *excluding* them. The special education act’s section titled “Superintendent of public instruction’s duty and authority” states that the superintendent is, among other things, required to:

Promulgate such rules as are necessary to implement the several provisions of [the basic and special education acts] and to ensure educational opportunities *within the common school system* for all children with disabilities who are not institutionalized.

RCW 28A.155.090(7) (emphasis added). When reasonably read, this provision excludes from the special education act children with disabilities *not* “within the common school system.” If the superintendent is not responsible for ensuring the “educational opportunities” of a certain group of individuals, it is reasonable to conclude that the group is not covered by the act. Otherwise, we would have the anomalous situation where the special education act applies to a group of individuals, but instructs the superintendent, the individual in charge of implementing the act, that he or she is not responsible for educating these same individuals. Finding that the special education act creates an exception for individuals not “within the common school system,” we must now determine whether the inmates fall under that exception.

The basic education act defines the “common school system” as that term is used in Title 28A RCW. *See* RCW 28A.150.020. As we have already held, individuals incarcerated in DOC facilities are not

covered by the basic education act. Thus, by definition the inmate class is *outside* “the common school system.” Relying on the rule of statutory construction that when similar words are used in different parts of a statute the meaning is presumed to be the same throughout, we find that the special education *216 act’s “common school system” is the same as that in the basic education act. See *State v. Akin*, 77 Wash.App. 575, 580-81, 892 P.2d 774 (1995) (citing *De Grief v. City of Seattle*, 50 Wash.2d 1, 11, 297 P.2d 940 (1956)). Consequently, we are constrained to find that the inmates are not “*within* the common school system” under the special education act, and thus fall under an exception to the act.

Based on the special education act’s silence regarding DOC inmates and its exclusion of students not “within the common school system,” we hold that the special education act does not apply to the inmate class. Because we do not favorably resolve the inmates’ claims to basic or special education on statutory grounds, we next analyze the inmates’ constitutional rights to basic and special education under article IX of the Washington Constitution. Within this next section we also determine whether chapter 28A.193 RCW is constitutional under article IX.

III.

INMATES’ STATE CONSTITUTIONAL RIGHT TO BASIC AND SPECIAL EDUCATION UNDER ARTICLE IX

In resolving the issue of whether article IX requires the State to provide basic and special education to persons up to age 21 or 22 who are incarcerated in adult DOC prisons, we must first define the term “children” for purposes of article IX. We hold that “children” under article IX includes individuals up to age 18, including those children incarcerated in adult DOC facilities. Furthermore, we hold that chapter 28A.193 RCW, by establishing an educational program tailored for the special needs of juvenile DOC inmates, satisfies article IX.

A. “Children” under Article IX

Regarding the definition of “children” under article IX, our constitution provides little guidance, leaving the term *217 undefined.^{FN10} Consequently, we must look elsewhere for guidance.

^{FN10}. “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” Wash. Const. art. IX, § 1.

At trial, the court held that the basic education act has defined “children” for the purposes of education, including article IX, as those persons up to age 22. The trial court noted that the Legislature “retains the right to restrict the age definition for children for **700 educational purposes and may change their definition as they see fit.” CP at 2222. Accordingly, the trial court concluded that as long as the Legislature defines “children” as persons up to age 22, the State’s constitutional duty to provide educational services runs to persons up to age 22 as well. CP at 2222, 2224. We disagree and find the trial court’s reliance on the basic education act problematic.

First, the basic education act does not actually *define* the term “children” for purposes of article IX. The Legislature merely identifies the age group to which the statute applies. Furthermore, the statute does not actually use the term “children” as is found in article IX. See RCW 28A.150.220(5) (the basic education act “shall be accessible to all *students* who are five years of age ... and less than twenty-one years of age ...”) (emphasis added).

Second, although the legislation declares that the basic education act *complies* with article IX, it does not declare education to age 21 or 22 is constitutionally *required*. See RCW 28A.150.200.^{FN11} This is clearly demonstrated by the Legislature’s subsequent enactment of chapter 28A.193 RCW. As with the basic education act, the Legislature found that chapter 28A.193 RCW satisfied its constitutional duty to provide an education under article IX. See *218RCW 28A.193.005.^{FN12} However, unlike the basic education act, the Legislature found that providing for the education of DOC inmates up to age 18, not 21, satisfied its constitutional duty. RCW 28A. 193.030(3)-(4); RCW 72.09.460(2). We presume that if the Legislature actually intended to create a constitutional definition of “children” in the basic education act, it would have been constrained by that definition when it enacted chapter 28A.193 RCW. See *State v. Fagalde*, 85 Wash.2d 730, 736, 539 P.2d 86 (1975)

(court's presume Legislature intended consistency between statutes).

FN11. “The requirements of the Basic Education Act are deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution ... and are adopted pursuant to Article IX, section 2 of the state Constitution....” RCW 28A.150.200.

FN12. The relevant portion of RCW 28A.193.005 specifically states that:

The legislature findings that this chapter fully satisfies any constitutional duty to provide education programs for juvenile inmates in adult correctional facilities. The legislature further finds that biennial appropriations for education programs under this chapter amply provide for any constitutional duty to educate juvenile inmates in adult correctional facilities.

[10][11] Finally, even if the Legislature had explicitly defined the term “children” under article IX, its definition would not be controlling. “The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.” Seattle Sch. Dist. No. 1 v. State, 90 Wash.2d 476, 496, 585 P.2d 71 (1978) (citing cases). Having found that the basic education act does not provide the operative definition of the term “children” under article IX, we examine other statutes to determine the common understanding of the term “children” in Washington.

Under current law, only individuals *under* age 18 are required to attend school. RCW 28A.225.010 (children up to age 18 required to attend school, subject to certain exceptions). This statute supports the idea that individuals are treated like adults once they hit age 18, as *choice* is commonly recognized as a hallmark of adulthood. Furthermore, as already noted, chapter 28A.193 RCW's “definition” of children counteracts any argument that the Legislature intended to establish a child age-limit regarding education above age 18. RCW 28A.193.030(3)-(4); RCW 72.09.460(2) (act mandates that DOC inmates receive education until age 18).

[12]*219 Finally, although not within the education

context, individuals over age 18 are generally emancipated and are able to marry without parental consent, to execute a will, to vote, to enter into a legally binding contract, to make medical decisions about their own care and those of their issue, and to sue and be sued. *See* RCW 26.28.010, .015(1)-(6) (under “Age of Majority” chapter, “all persons shall be deemed and taken to be full age for all purposes at the age of eighteen years[,]” unless otherwise provided).^{FN13} These statutes **701 further demonstrate that the common understanding of the definition of “children” for most purposes in Washington, including education, includes individuals up to age 18. Consequently, we hold that the term “children” under article IX includes individuals up to age 18.^{FN14}

FN13. *See also* chapter 13.64 RCW (under “Emancipation of Minors” chapter, residents sixteen years of age or older may petition for a declaration of emancipation which would allow them “to have the power and capacity of an adult,” RCW 13.64.060(1), (subject to certain exceptions).

FN14. We note that the dissent mischaracterizes our statutory analysis by completely ignoring all of the other statutes we cite supporting the definition of “children” under article IX as those under age 18. *See* Dissent at 712-713 (dissent criticizes majority's reliance on RCW 26.28.015 without mentioning other statutes cited by majority).

The State raises the alternative argument that whatever statutory or constitutional rights to an education the inmates may have had, they disqualified themselves through their own criminal conduct. Specifically, the State contends that by engaging in conduct which compels their removal from the school system, the inmates have, by their own conduct and not through any failing of the State, disqualified themselves from the educational opportunities provided them.^{FN15} We find the State's arguments unpersuasive and find it unnecessary to deal with this issue further since the Legislature has seen fit to provide an educational program to DOC inmates.

FN15. The State cites to language in Seattle School District No. 1 indicating that the State may discharge its constitutional duties regarding education “only by performance

unless that performance is prevented by the holder of the 'right.' ” Br. of Appellants at 16 (quoting Seattle Sch. Dist. No. 1, 90 Wash.2d at 513, 585 P.2d 71).

Having determined that the State is constitutionally *220 required to provide educational services to children incarcerated in DOC facilities up to age 18, we need to determine whether the State is meeting its obligation. Consequently, we next examine chapter 28A.193 RCW to determine whether it satisfies article IX. We hold that it does.

B. Chapter 28A.193 RCW and Article IX

[13] In determining whether chapter 28A.193 RCW satisfies article IX, we must first determine article IX's basic requirements. The inmates argue that chapter 28A.193 RCW violates article IX both “on its face” and “as applied” by creating a separate and inferior system of education for persons who are incarcerated in adult prisons in Washington. Under the inmates' theory, chapter 28A.193 RCW is *presumed unconstitutional* because it interferes with a “fundamental right.” See Br. of Resp'ts at 22. While we recognize that the State's paramount obligation to provide for basic education does not end with the establishment of a public school system, we also find the State is not obligated to provide an *identical* education to all children within the state regardless of the circumstances in which they are found.

1. The Inmates' Facial Challenge under Article IX

[14] It is a well-established general rule that where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *E.g., Island County v. State*, 135 Wash.2d 141, 146-47, 955 P.2d 377 (1998) (citing cases). This “demanding standard of review” is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment. See Island County, 135 Wash.2d at 147, 955 P.2d 377. “Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced ... that the statute violates the constitution.” *Id.* (citing cases).

[15][16][17] In addition to the above standard of review, the *221 court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional “as applied” to the facts of a particular case. See JJR Inc. v. City of Seattle, 126 Wash.2d 1, 3-4, 891 P.2d 720 (1995). “[A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally**702 be applied.” *In re Detention of Turay*, 139 Wash.2d 379, 417 n. 27, 986 P.2d 790 (1999) (quoting with approval Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J. dissenting)). The practical effect of holding a statute unconstitutional on its face is to render it “ ‘utterly inoperative.’ ” 139 Wash.2d at 417 n. 27, 986 P.2d 790. Here, to effectuate the facial challenge analysis we need to first determine what article IX requires, and then determine whether we are convinced beyond a reasonable doubt that there is no set of circumstances in which chapter 28A.193 RCW could satisfy article IX.

Article IX, section 2 clearly requires the State to create and “provide for a *general and uniform system of public schools*.” (emphasis added). We have long held that this provision imposes upon the State a fundamental duty to create a common school *system*. In Seattle Sch. Dist. No. 1, we held that all children in Washington “have a ‘right’ to be amply provided with an education [; that] ‘right’ is constitutionally paramount and must be achieved through a ‘general and uniform system of public schools.’ ” 90 Wash.2d at 513, 537-38, 585 P.2d 71; see also Newman v. Schlarb, 184 Wash. 147, 153, 50 P.2d 36 (1935) (duty imposed upon Legislature to provide “ ‘a general and uniform system of public schools.’ ”) (quoting School Dist. v. Bryan, 51 Wash. 498, 502, 99 P. 28 (1909)). The Legislature satisfied part of its general obligation under article IX through Title 28A RCW's “Common School Provisions,” which includes the basic education act.

However, as we stated earlier, the State's constitutional duty to provide educational services does not end *222 with the creation of a “general and uniform” school system. In addition to the requirements under article IX, section 2, the State has a “*paramount duty* ... to make *ample provision* for the educa-

141 Wash.2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528
(Cite as: 141 Wash.2d 201, 5 P.3d 691)

tion of *all children* residing within its borders....” Wash. Const. art. IX, § 1 (emphasis added); *see also Seattle Sch. Dist. No. 1*, 90 Wash.2d at 499, 585 P.2d 71. Nothing in this provision, however, mandates that the education must be *identical*. We recognized as much in *Tommy P.* when we held that a different education program in juvenile detention centers might be necessary to “reasonably address special needs of juvenile offenders.” 97 Wash.2d at 398, 645 P.2d 697.^{FN16}

^{FN16}. As also noted in Justice Talmadge's concurrence, Concurrence at 709 n. 2, there are numerous examples of how Title 28A RCW is an act flexible enough to meet the educational needs of a highly varied population. *See* RCW 28A.150.305 (suspended or expelled students may be required to attend alternative education programs, which may be operated by entities other than school districts); chapter 28A.165 RCW (remedial education under the “Learning Assistance Program”); chapter 28A.195 RCW (private schooling allowed); chapter 28A.200 allowed); and RCW 28A.150.220(7) (“residential schools” allowed).

[18] Having outlined the general requirements of article IX, the question remains whether we are convinced beyond a reasonable doubt that there is no set of circumstances in which chapter 28A.193 RCW could meet the constitutional minimum due under article IX. Here, the educational program outlined in chapter 28A.193 RCW:

must provide each offender a choice of curriculum that will assist the inmate in achieving a high school diploma or general equivalency diploma. The program of education may include but not be limited to basic education, prevocational training, work ethic skills, conflict resolution counseling, substance abuse intervention, and anger management counseling. The curriculum may balance these and other rehabilitation, work and training components.

RCW 72.09.460(2). The statute also outlines the infrastructure and support services required, and the proper allocation of money received from the Legislature's biennial appropriations. RCW 28A.193.005, .050, .080.

[19] The inmates have failed to prove beyond a *223 reasonable doubt that chapter 28A.193 RCW violates article IX. This statute makes ample provision for educational programs designed to address the special educational and rehabilitative needs of children incarcerated in adult prisons. As we have often held, it is not this court's role to micromanage education in Washington. *See **703Tommy P.*, 97 Wash.2d at 398, 645 P.2d 697 (Legislature's need to customize education programs recognized); *Seattle Sch. Dist. No. 1*, 90 Wash.2d at 520, 585 P.2d 71 (“While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.”). Consequently, we exercise judicial restraint and hold that under article IX's broad constitutional guidelines, chapter 28A.193 RCW is constitutional on its face. *See Seattle Sch. Dist. No. 1*, 90 Wash.2d at 518, 585 P.2d 71 (judiciary required to provide broad constitutional guidelines regarding education within which Legislature may work).

2. The Inmates “As Applied” Challenge under Article IX

[20] Regarding their “as applied” challenge, the inmates argue that chapter 28A.193 RCW is unconstitutional “as implemented by the State for the 1998-99 school year.” Br. of Resp't at 26-32. We disagree.

[21] The inmates' claim demonstrates a misunderstanding of the nature of “as applied” challenges. Under an “as applied” challenge, the party challenging the statute contends that the statute, as actually applied, violated the constitution. *See Turay*, 139 Wash.2d at 417 n. 27, 986 P.2d 790 (citing *Ada*, 506 U.S. at 1012, 113 S.Ct. 633 (Scalia, J., dissenting)). Here, the inmates fail to provide any specific facts demonstrating that the State's application of chapter 28A.193 RCW *has violated* article IX. Rather, the inmates merely speculate about constitutional problems that *could result* from RCW 28A.193's application.^{FN17}*224 Consequently, the inmates' “as applied” challenge must fail.^{FN18}

^{FN17}. For example, the inmates assert that because OSPI spent five months on the bidding and contracting process for the 1998-99 school year, there is the potential that this

process *could* take longer in the future and cause delays in providing educational programs. According to the inmates, these delays *would* unconstitutionally burden the prisoners' constitutional rights to an education.

FN18. In response to the inmates' concerns about potential gaps in coverage, and the dissent's concerns about the "competitive bidding system" allegedly created by chapter 28A.193 RCW, *see* Dissent at 713 n. 3, we note that nothing in our decision prohibits a subsequent "as applied" challenge after chapter 28A.193 RCW has a more developed track record. We simply find that such conjecture and speculation is inappropriate at this time. *See Turay*, 139 Wash.2d at 417 n. 28, 986 P.2d 790.

C. Special Education and Article IX

[22] The inmates assert that the Washington Constitution mandates that special education be provided to all children with disabilities under the age of 22. However, the inmates fail to cite any supporting legal authority for this proposition.^{FN19} It is well established that this court will not address constitutional issues "without benefit of citation to appropriate supporting authority." *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 680, 807 P.2d 830 (1991) (citing case). Consequently, given the importance and complexity of this issue, we decline to address it here and leave the matter open for future determination upon a properly developed record.

FN19. The inmates' only citation to "authority" is their reference to a statement contained in the findings of fact and conclusions of law from a 1983 case before the Thurston County Superior Court. Unpublished opinions, however, are not proper authority on appeal. *See* RAP 10.4(h).

IV.

CHAPTER 28A.193 RCW AND WASHINGTON'S EQUAL PROTECTION CLAUSE, ARTICLE I, SECTION 12

[23] The inmate class also argues that chapter 28A.193 RCW violates Washington's equal protection clause, article I, section 12. The inmates reiterate their argument that RCW 28A.193 infringes on a fundamental or absolute right, and thus is presumptively invalid. Under the inmates' theory, the State violates Washington's equal protection clause because it treats incarcerated youths differently from nonincarcerated youths while failing to justify the disparate treatment through a compelling state interest. *225 We disagree and hold that under the proper equal protection analysis, chapter 28A.193 **704 RCW does not violate Washington's equal protection clause.^{FN20}

FN20. There is no need to separately address the equal protection clause under the federal constitution because it is well established that the federal and state equal protection clauses are construed identically and claims arising under their scope are considered as one issue. *State v. Manussier*, 129 Wash.2d 652, 672, 921 P.2d 473 (1996).

[24][25] The first step in conducting any equal protection analysis is determining the appropriate standard of review. *Foley v. Department of Fisheries*, 119 Wash.2d 783, 789, 837 P.2d 14 (1992) (citing case). Contrary to the dissent's assertions, to apply strict scrutiny, we must first find that a fundamental right is being infringed or a suspect class is involved. *See O'Day v. King County*, 109 Wash.2d 796, 814, 749 P.2d 142 (1988); *City of Seattle v. State*, 103 Wash.2d 663, 670-71, 694 P.2d 641 (1985).

The dissent argues that "[w]hether the statute infringes on a fundamental right is a legal conclusion, not a legal premise. Properly stated, the threshold question is whether 'the allegedly discriminatory classification ... threatens a fundamental right.' " Dissent at 711 (quoting *State v. Shawn P.*, 122 Wash.2d 553, 560, 859 P.2d 1220 (1993)). The dissent's approach misinterprets the applicable analytical framework.

In *O'Day*, this court held that the trial court improperly applied strict scrutiny because the individual's fundamental right to free speech had "not been affected" by the statute. *O'Day*, 109 Wash.2d at 814, 749 P.2d 142. This court went on to hold that application of the relevant laws did not "infringe on any

fundamental interest for the purpose of equal protection analysis.” *Id.* (emphasis added) (citing case). Similarly, in *City of Seattle*, this court held its equal protection inquiry focuses on whether the relevant law “*infringes upon or burdens*” the individual’s fundamental right. See 103 Wash.2d at 670-71, 694 P.2d 641 (“any statute which *infringes upon or burdens* the right to vote is subject to strict scrutiny.” (emphasis added)).

It is clear from both these cases that infringement of a *226 fundamental right is a legal requirement to applying strict scrutiny review. On the other hand, *impermissible* infringement-infringement of a fundamental right by an overly broad law unsupported by a compelling state interest-is an ultimate legal conclusion in an equal protection analysis. See O’Day, 109 Wash.2d at 814, 749 P.2d 142; City of Seattle, 103 Wash.2d at 670-71, 694 P.2d 641. In other words, finding an infringement of the fundamental right is a necessary predicate to determining whether that right was *impermissibly* infringed. Consequently, the applicable standard of review depends upon whether chapter 28A.193 RCW *infringes* on the inmates’ fundamental right to education.^{FN21}

FN21. The inmates’ attempt to trigger a more stringent standard of review through the abstract invocation of a “fundamental right to education” is insufficient. Taken to its logical extreme, the inmates’ argument would subject *all* legislation involving *education* to strict scrutiny; this is inconsistent with prior precedent. See, e.g., Leonard v. City of Spokane, 127 Wash.2d 194, 197-98, 897 P.2d 358 (1995) (this court applied presumption of constitutionality in challenge to Community Redevelopment Act’s diversion of tax dollars from common schools to public improvements).

[26] As we previously held, however, chapter 28A.193 RCW does not infringe upon an inmate’s fundamental right to education under article IX. Consequently, the only alternative for applying strict scrutiny if the statute targeted a suspect class. However, in this case neither the inmates’ incarceration nor juvenile status creates a suspect class. See In re Personal Restraint of Stanphill, 134 Wash.2d 165, 174-75, 949 P.2d 365 (1998) (rational basis review applied to inmates’ equal protection claims); In re

Boot, 130 Wash.2d 553, 572-73, 925 P.2d 964 (1996) (rational basis review applied to juveniles’ claims). In the absence of infringement of a fundamental right or involvement of a suspect class, rational basis review applies.

[27][28] Under rational basis review, there is a presumption of constitutionality and a statute is upheld “unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives.” Shawn P., 122 Wash.2d at 561, 859 P.2d 1220. In other words, the rational basis test provides that “a **705 statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification.” Shawn P., 122 Wash.2d at 563-64, 859 P.2d 1220. *227 The party challenging the legislation has the burden of proving that the classification is “purely arbitrary.” State v. Coria, 120 Wash.2d 156, 172, 839 P.2d 890 (1992).

[29] Under these standards, we find the Legislature’s decision to treat individuals under age 18 in prison different with respect to education from individuals under age 18 who are in the normal school system completely justified. Incarcerated and nonincarcerated youths are *not* similarly situated for the purpose of education. As we have previously recognized, incarcerated children may have different educational needs and may require different training programs more appropriate to their circumstances. See Tommy P., 97 Wash.2d at 398, 645 P.2d 697 (educational program offered in juvenile detention facilities “should reasonably address the special needs of juvenile offenders”). Chapter 28A.193 RCW, in conjunction with RCW 72.09.460(2), allows the State to properly tailor its educational programs for members of the inmate class. We find that the State’s provision of education for incarcerated children through chapter 28A.193 RCW is rationally related to the legitimate state objective of meeting the unique education needs of the inmates.

[30] We similarly find the different treatment of individuals over age 18 who are in prison justified under the rational basis test. As detailed in our discussion of inmate rights under article IX, inmates over age 18 are not children, and thus have no fundamental right to education. While we may agree with the dissent that the Legislature *should* dedicate resources toward educating members of the inmates’ class, it is not our choice and the State is within its prerogative under

the rational basis standard to prioritize its resources regarding the education of individuals over age 18.

V.

THE STATE'S DUTY UNDER THE IDEA

[31] The inmates assert that the trial court erred in dismissing their claims under the IDEA, *22820 U.S.C. §§ 1400-1436. The inmates argue that the State has a duty under the IDEA to provide special education to disabled persons under age 22 who are incarcerated in Washington State prisons and that this duty existed under the IDEA both before and after the 1997 amendments to the act. We disagree and hold that the IDEA does not require the State to provide special education services to persons over age 18 who are incarcerated in adult prisons.

The IDEA was enacted to address the special educational needs of disabled children. The act's purpose is "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(c). One goal of the IDEA is to provide comparable education to disabled students as that provided to nondisabled students. States that comply with the IDEA are entitled to federal funding to assist in the provision of a free appropriate public education to disabled children residing within the state. 20 U.S.C. § 1412. In 1997, Congress amended the IDEA to expressly require states receiving funds under the act to provide a free appropriate public education (FAPE) to children with disabilities who are expelled or suspended from school. IDEA Amendments for 1997, Pub.L. No. 105-17, § 612, 111 Stat. 37, 60.

Contrary to the inmates' assertions, the pre-1997 amendments version of the IDEA did not require the State to provide special education to persons who have been incarcerated in adult correctional facilities for conduct wholly unrelated to their disability. See *Commonwealth of Virginia Department of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir.1997) (IDEA did not apply to disabled children expelled or suspended from school); accord *Doe v. Oak Park & River Forest High Sch. Dist.*, 115 F.3d 1273, 1277-79 (7th Cir.1997). The *Riley* court concluded that Congress must make the state's duty clear when it conditions the receipt of federal funds upon a federal mandate.

Riley, 106 F.3d at 561. The *Riley* court found that "neither the text **706 of section 1412(1), *229 the legislative history, nor the purpose of the IDEA even suggests" that Congress intended the IDEA apply to disabled children expelled from school. *Riley*, 106 F.3d at 561. The same is true regarding disabled children who are incarcerated in adult prisons. Based on Congress's failure to even suggest in the IDEA's text, legislative history or purpose that the IDEA applies to children incarcerated in adult facilities, we hold that the pre-1997 amendment version of the IDEA did not require the State to provide special educational services to members of the inmate class.

Having determined that the pre-1997 amendment version of the IDEA did not apply to members of the inmate class, we examine the IDEA after the 1997 amendments. In addition to explicitly including disabled children who are expelled or suspended from school, the 1997 amendments contain an exception to a state's duty to provide special educational services to disabled children. Under the exception, a state's duty to provide a FAPE to children with disabilities does not apply to (1) children aged 3 through 5 and 18 through 21 in a state where its application would be inconsistent with state law or practice; and (2) children aged 18 through 21 where state law does not require that special education related services under 20 U.S.C. § 1412(a)(1)(B) be provided to children with disabilities who, prior to their incarceration in an adult prison, (a) were not actually identified as being a child with a disability under § 1401(3) or (b) did not have an individualized education program under § 1412(a)(1)(B). 34 C.F.R. § 300.122 (citing 20 U.S.C. § 1412(a)(1)(B)).

The State argues that 20 U.S.C. § 1412(a)(1)(B)(i) relieves them of any statutory duty under the IDEA to provide special educational services to disabled children between the ages of 18 and 21 because such would be inconsistent with state law, specifically, RCW 28A.193.030(3). While the State is unable to point to cases interpreting the above exceptions to the IDEA, the State points to several cases interpreting the same language contained in a prior version of the IDEA. These cases interpreted the same language *230 now contained in § (a)(1)(B)(i) to mean that a state is not required to provide special education to persons over 18 if the state does not provide basic educational services to nondisabled students over age 18. See *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369,

1376-77 (8th Cir.1996) (interpreting former 20 U.S.C. § 1412(2)(B)); Timms v. Metropolitan Sch. Dist., 722 F.2d 1310, 1313-14 (7th Cir.1983) (interpreting same).

The inmates argue that state law, specifically RCW 28A.155, requires the State to provide special education to all children in Washington under age 22. However, as we have already held, RCW 28A.155 does not apply to students incarcerated in adult correctional facilities. Rather, chapter 28A.193 RCW is the relevant statute for juveniles incarcerated in adult facilities. Under the plain language of chapter 28A.193 RCW, the State is required to provide education only to juveniles incarcerated in adult facilities until age 18. See RCW 28A.193.030(4); RCW 72.09.460(2). Therefore, under the amended IDEA, the State is required to provide special education only to juveniles under age 18 as well. See Yankton Sch. Dist., 93 F.3d at 1376-77; Timms, 722 F.2d at 1313-14.

Here, the clear language of the educational provider contracts requires that the provider of educational services at the DOC facilities “[p]rovide special education, consistent with Chapter 392-172 WAC.” CP at 1697; see also Ex. 2, at 2 (agreement between DOC and special education services), Mot. to Supplement the R., Tunstall v. Bergeson, No. 67448-5 (Wash. Supreme Ct. Sept. 13, 1999). Consequently, the State is currently in full compliance with its duty under the IDEA to provide special education to disabled inmates who are under age 18. Therefore, we hold that the trial court properly dismissed the inmates' IDEA claims.

VI.

THE STATE'S DUTY UNDER § 504 OF THE REHABILITATION ACT OF 1973

[32] The inmates also argue that the State has a duty under § 504 of the Rehabilitation Act of 1973 to ensure that *231 disabled **707 children in prison receive a FAPE.^{FN22} It has been held that a state's duty under the IDEA and § 504 may be different. However, “It is well-settled that ... where the IDEA claims are subject to dismissal the § 504 claims based upon the same allegations, [§ 504 claims] must also be dismissed.” Doe v. Arlington County Sch. Bd., 41 F.Supp.2d 599, 608 (E.D.Va.1999) (citing, inter alia,

Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 562 (8th Cir.1996)). The inmate class has not cited, and this court has not found, any cases where a court held that § 504 was violated but the IDEA was not. Consequently, we hold that compliance in this case with the IDEA constitutes compliance with § 504 of the Rehabilitation Act of 1973, and thus the trial court properly dismissed the inmates' § 504 claims.^{FN23}

^{FN22}. The relevant language at issue in 29 U.S.C. § 794(a) provides that

No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

^{FN23}. The inmates moved for fees and costs against the State for the appeal of their federal claims. Because the inmates do not prevail on their federal claims, however, they are not entitled to an award.

VII.

THE SCHOOL DISTRICTS' OBLIGATIONS UNDER

FEDERAL AND STATE LAW

[33] As noted above, the trial court dismissed all claims brought against the defendant school districts concluding that the districts are not obligated under either federal or state law to provide education in Washington State prisons. We agree.

Under RCW 28A.193.020(1)(a), the school district in which the DOC facility is located has first priority to provide inmate education. If the school district declines, the contract is then offered to the educational service district in *232 which the DOC facility is located, and finally to other school districts, educational service districts, institutions of higher education, and private contractors. RCW 28A.193.020(1)(b)-(c). If none of these parties contracts with the State, the educational service district

in which the DOC facility is located is the default provider and is required to provide the educational services. RCW 28A.193.020(2).

[34] As school districts are “creatures of statute” and have only those powers and rights specifically granted to them by statute,^{FN24} we must examine the relevant statutory and constitutional provisions to determine whether the districts have a statutory or constitutional duty to provide education in Washington State prisons. It is clear after examining the relevant statutory and constitutional provisions that they have no such duties.

FN24. See Moses Lake Dist. v. Big Bend Community College, 81 Wash.2d 551, 556, 503 P.2d 86 (1972) (“a school district is a creature of the legislature. It exists solely for public purposes and may exercise only those power expressly granted by the legislature, those necessarily implied or incident to the powers granted, and those essential to the legislature's declared purpose.”) (citing cases).

The only relevant statutory reference to school districts regarding inmate education is found in chapter 28A.193 RCW. Chapter 28A.193 RCW, however, gives the districts the *authority* to provide educational services only to children incarcerated in DOC facilities and does not *obligate* the districts in any way. See RCW 28A.193.020, .030, .040, .060. As previously stated, the local educational service district, not the school district, is the default provider of educational services for juvenile inmates. RCW 28A.193.020(2). Furthermore, the school districts have no duty under Washington's constitution. Article IX makes no reference whatsoever to school districts.

The inmates also argue that school districts are the only entity qualified to provide educational services under article IX. This argument is clearly without merit because, as seen in many instances, the Legislature has found entities other than school districts qualified to educate our youth. In addition to chapter 28A.193 RCW, the Legislature allows *233 for alternates to the “common **708 school system” such as home schooling and private schools where the school districts are not involved. See RCW 28A.195 (“Private Schools”); RCW 28A.200 (“Home-Based Instruction”). Consequently, we hold that the *option* of

operating educational programs for inmates in the DOC facility should not be construed as a constitutional or statutory mandate.

VIII.

CONCLUSION

In sum, we hold that: (1) individuals incarcerated in DOC facilities are covered by chapter 28A.193 RCW, not the basic education act or the special education act; (2) the term “children” as used in article IX of the Washington Constitution includes individuals up to age 18, including individuals incarcerated in DOC facilities; (3) chapter 28A.193 RCW satisfies the requirements of article IX and does not violate equal protection; (4) neither the IDEA nor § 504 of the Rehabilitation Act of 1973 is violated by the lack of special education services to DOC inmates up to age 22; and (5) the school districts are not statutorily or constitutionally obligated to provide educational services to DOC inmates.

TALMADGE, J. (concurring)

I write separately to express my concern that certain loose language in Seattle Sch. Dist. No. 1 v. State, 90 Wash.2d 476, 585 P.2d 71 (1978), regarding the breadth of the constitutional provisions on education in article IX of the Washington Constitution, may have found full voice in the dissent.

The dissent perceives an individualized constitutional right to an education based on article IX and Seattle Sch. Dist. Dissent at 711. Moreover, as if that is not enough, the dissent contends this right is “fundamental.” Dissent at 712. The dissent's articulation of this right is dangerously imprecise in its content and breadth.

*234 What is the practical consequence of the dissent's individualized constitutional right to education? How does the dissent define the content of this right? Does the dissent mean to say that every child in Washington has a fundamental constitutional right to specific educational programs such as 12 years of meaningful instruction in English, mathematics, science, social studies, foreign language, economics, the arts, physical education, computer sciences, or the like? How does the dissent measure if the individual right to education has been met? If a child in the sixth grade fails to achieve at the sixth grade level in mathematics or English, is the child's fundamental

constitutional right to an education abridged? ^{FN1} If we do not assess the child's achievement of a constitutionally guaranteed education annually at each grade level, do we then wait until some other point in time, perhaps when the child graduates from high school? Or do we instead assess a child's achievement subject-by-subject? Will a cause of action lie to compel the State to pay for all necessary services to bring the child's achievement in school to this as yet undefined but constitutionally prescribed level? How will the dissent direct the Legislature to pay for such services?

^{FN1}. Indeed, long-standing Washington case law forbids a private cause of action for a student's individual failure to achieve. Camer v. Seattle Sch. Dist. No. 1, 52 Wash.App. 531, 762 P.2d 356 (1988), cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989).

The framers of Washington's Constitution had a more precise idea in mind when they addressed education. Article IX, section 1 of our Constitution states:

PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Section 2 of that article directs the Legislature to provide an appropriate educational system in Washington.

PUBLIC SCHOOL SYSTEM. The legislature shall provide *235 for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund **709 and the state tax for common schools shall be exclusively applied to the support of the common schools.

The framers made clear an elected superintendent of public instruction and an elected Legislature, not the judiciary, manage Washington's educational system. WASH. CONST. art. III, § 22 (superintendent "shall have supervision over all matters pertaining to the public schools, and shall perform such specific duties

as may be prescribed by law"). We have said: "The state exercises its sovereign powers and fulfills its duties of providing education largely by means of a public school system under the direction and administration of the State Superintendent of Public Instruction, State Board of Education, school districts and county school boards." Edmonds Sch. Dist. No. 15 v. City of Mountlake Terrace, 77 Wash.2d 609, 611, 465 P.2d 177 (1970).

Our case law clearly confirms the broad power of the Legislature to define educational opportunity for Washington students by giving meaning to a "common school education." Seattle Sch. Dist., 90 Wash.2d at 518-19, 585 P.2d 71. Moreover, the Legislature has broad discretion to define the means of providing educational opportunity to children.^{FN2} As early as 1935, we held the state can meet its duty under *236 article IX by selecting any method it sees fit to organize the educational system; we upheld a cooperative administrative structure for education involving state, county, and school district officers. Newman v. Schlarb, 184 Wash. 147, 153, 50 P.2d 36 (1935). See also State ex rel. DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno, 62 Wash.2d 790, 384 P.2d 608 (1963); Edmonds Sch. Dist. No. 15 v. City of Mountlake Terrace, 77 Wash.2d 609, 465 P.2d 177.

^{FN2}. The dissent's assertion that chapter 28A.193 RCW may violate article IX because that statute allows school districts and educational service districts (ESDs) to bid for contracts to provide educational opportunities for young people in prison is plainly wrong. First, the dissent does not understand the role of educational service districts. Contrary to the dissent's view, ESDs actually do provide a variety of educational services directly to students. See RCW 28A.310.010 (purposes of ESDs). See also RCW 28A.310.180 (ESDs may provide cooperative service programs, joint purchasing programs, and direct student services such as pupil transportation); RCW 28A.310.350 (core services of ESDs may include special education and transportation services, provision of learning resources, health education); RCW 28A.310.470 (superintendent of public instruction (SPI) may delegate to ESDs any program, project, or service authorized by Legislature to be performed by SPI).

Second, the dissent's interpretation of article IX's requirement of a general and uniform educational system is novel. If only a general and uniform educational system is constitutionally permissible in the dissent's view, making contracted services unconstitutional, then are parochial schools constitutionally infirm? After all, parochial schools provide educational services outside the control of school districts. See chapter 28A.195 RCW. How about home schooling? Home schools involve neither school districts nor schools. See chapter 28A.200 RCW. The dissent fails to understand Washington's diverse, pluralistic structure for the delivery of educational services.

In sum, where does the logic of the dissent's analysis lead? Is the constitutional right to a general and uniform educational system for youthful offenders only satisfied if those offenders are somehow removed from prison and placed in regular classrooms?

We have wisely chosen not to prescribe the content of an education mandated by the Washington Constitution in our earlier decisions on the scope of article IX. See, e.g., *Seattle Sch. Dist.*, 90 Wash.2d at 518, 520, 585 P.2d 71; *Tommy P. v. Board of County Comm'rs*, 97 Wash.2d 385, 398, 645 P.2d 697 (1982). Indeed, the content of educational opportunity changes over time, far beyond what this Court has the power to dictate. An 1889 common school education is different from such an education in 2000. For example, computer skills now critical to any contemporary Washington student were not contemplated in the agrarian Washington of 1889. This fact alone would suggest the dissent's articulation of a broad individual right goes too far.

The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*. The state has the paramount duty to make ample provision for this opportunity in the education of its children. The Legislature's paramount duty is to define this educational opportunity in the establishment of an educational system and to fund it. Individual children, their parents, and local school

districts each have standing to compel the Legislature to implement**710 this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.

*237 Under a more precise formulation of the constitutional interest of children, a child should not have a right to sue for an individualized level of educational achievement in a subject or at a grade level, as the dissent would appear to permit. But if the Legislature defined a common school education and failed to fund it at the defined level, or if a school district failed to offer classes in English or mathematics at a high school, for example, when such classes were determined by the state to be compulsory for a child's graduation from high school, then an individual action might lie to compel the enforcement of the constitutional mandate.

We should be exceedingly cautious about characterizing rights as "absolute" or "fundamental," lest we arrogate to the judiciary total responsibility for running Washington's education system. That is not what our constitutional framers intended. The judiciary cannot, and should not, "constitutionalize" education in Washington so as to place the administration and the funding of education beyond the responsibility of the executive and legislative branches to whom that responsibility was *expressly* entrusted by the framers. The courts are ill-equipped to annex such a duty from the other branches and to execute the considerable responsibilities associated with it.

Because the majority's disposition of the issues in this case is in accord with the delineation of article IX of the Washington Constitution set forth here, I concur in the majority opinion.

JOHNSON, J. (dissenting)-I respectfully dissent. The Washington State Constitution requires the State "to make ample provision for the education of all children residing within its borders...." Wash. Const. art. IX, § 1. We have long recognized this paramount constitutional duty of the State, see *Seattle Sch. Dist. No. 1 v. State*, 90 Wash.2d 476, 511-12, 585 P.2d 71 (1978), which the majority eviscerates by relying on unconvincing distinctions and *238 irrelevant statutes. By manipulating the definition of "child," the majority denies Washington children their constitutional right to education and equal protection of the law. The trial court's decision recognized the consti-

tutional right of children in Washington to a high school education, regardless of their criminal past. This decision is correct.

The majority loosely distinguishes *Tommy P. v. Board of County Comm'rs*, 97 Wash.2d 385, 645 P.2d 697 (1982). By drawing three unconvincing distinctions with this case, the majority disposes of respondent's argument "that *Tommy P.* stands for the proposition that children do not lose their rights to an education under the basic education act simply because they are incarcerated." Majority at 698. I disagree and would apply the approach established by *Tommy P.* to recognize the importance of this constitutional right.

The court in *Tommy P.* found that children in Washington had a statutory right to education under Title 13 RCW and Title 28A RCW. *Tommy P.*, 97 Wash.2d at 386, 645 P.2d 697. This court found the right to education in the specific provisions of both titles, and in the broad principles they stood for and, therefore, refrained from "considering whether the right may also be based on the United States Constitution or this state's constitution." *Tommy P.*, 97 Wash.2d at 391, 645 P.2d 697 (citing *Senear v. Daily Journal-Am.*, 97 Wash.2d 148, 641 P.2d 1180 (1982)). This restraint was in accord with the longstanding tradition in United States courts of avoiding constitutional questions when a decision can be based on statutory grounds. However, the principles underlying *Tommy P.* are of constitutional significance and should not be so easily abandoned.

The majority distinguishes *Tommy P.* by noting those plaintiffs were juvenile offenders, not children who had been "declined to adult court or incarcerated in adult facilities." Majority at 698. Whether an offender is a juvenile or a child declined to adult court is entirely irrelevant. By drawing this distinction, the majority deprives a child of the constitutional right to a high school education simply because he or she committed a serious**711 crime early in life. I *239 cannot agree with this erosion of such a significant constitutional right.

By drawing an inappropriate distinction between children on the basis of whether they have committed a crime or not, the majority compounds its error by applying an incorrect constitutional analysis. The majority applies something similar to a rational basis

review in this case and ignores our constitutional duty to apply heightened scrutiny to statutes that threaten fundamental rights. The majority cites cases that are only tangentially relevant to stand for the proposition that a statute must infringe upon a fundamental right before heightened scrutiny will be applied. See majority at 704. Whether the statute infringes upon a fundamental right is a legal conclusion, not a legal premise. Properly stated, the threshold question is whether "the allegedly discriminatory classification ... *threatens* a fundamental right." *State v. Shawn P.*, 122 Wash.2d 553, 560, 859 P.2d 1220 (1993) (emphasis added) (citing *State v. Schaaf*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987)). If the classification threatens a fundamental right, the statute is presumed *unconstitutional* and the State must establish that the statute is necessary to achieve a compelling governmental interest. See *Nielsen v. Washington State Bar Ass'n*, 90 Wash.2d 818, 820, 585 P.2d 1191 (1978). The State has failed to carry its burden.

The majority reads Wash. Const. art. IX, § 2 as establishing a fundamental right to a "common school system." Majority at 702. Put another way, an individual child's right to an ample education is recharacterized as merely a duty of the State to establish a common school system. This mistakes the means for the ends and misinterprets our precedent. In *Seattle Sch. Dist. No. 1 v. State*, this court held:

By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme.... Flowing from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" *240 permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further, since the "duty" is characterized as *paramount* the correlative "right" has equal stature.

....

Consequently, all children residing within the State's borders have a "right" to be amply provided with an education. That "right" is constitutionally paramount and must be achieved through a "general and uniform system of public schools."

Seattle Sch. Dist., 90 Wash.2d at 511-13, 585 P.2d 71 (footnotes omitted).

By characterizing the right as one to a “common school system,” the majority confuses the constitutional right to education with the constitutional right to a common school system. As both the plain text of article IX and our precedent show, the right at issue here is the right to an education. Because that right is fundamental, *see Seattle Sch. Dist.*, 90 Wash.2d at 513, 585 P.2d 71, strict scrutiny applies to any law that threatens that right. *See In re Personal Restraint of Young*, 122 Wash.2d 1, 26, 857 P.2d 989 (1993).

Because the right at issue appertains to “all children residing within [Washington’s] borders ...,” Wash. Const. art. IX, § 1, the first issue is the definition of “children.” RCW 28A.150.220 of the Washington basic education act of 1977 (Basic Education Act) provides that “[e]ach school district’s kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age ... and less than twenty-one years of age....” RCW 28A.150.220(3). Through the Basic Education Act, the Legislature effectuates Wash. Const. art. IX. *See* RCW 28A.150.200. This definition of “child” is expansive. The Legislature found it appropriate to define “child” for the purposes of article IX as any person between *five and 21 years of age*. RCW 28A.150.220(3).^{FN1} Although**712 the majority *241 is correct in noting it is the duty of this court to interpret the meaning of the word “child” in article IX, majority at 700, there is no reason to reject the definition offered by the Legislature. It does not conflict with any interpretation we have already given this portion of the constitution. Nor is this a case where the Legislature has attempted to intrude upon the judicial sphere of power. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

FN1.RCW 28A.155.020 allows children with certain disabilities to complete the school year in which they turn age 21.

Nonetheless, the majority chooses to retool the meaning of the word “children.” It holds “the common understanding” that “children” for our purposes “includes [only] individuals up to age 18.” Majority at 700. The statutory authority cited by the majority is

RCW 26.28.015, age of majority for enumerated specific purposes, *see* majority at 700, and selective miscellaneous statutes. The age at which an individual may contract, execute a will, vote, or sue is not relevant to whether he or she has a right to a high school education, and the Legislature has told us just that. Both the title of RCW 26.28.015 and the first five words of its text, “[n]otwithstanding any other provision of law ...,” declare the legal irrelevance of other statutory definitions of “child” for the purposes of article IX, the Basic Education Act, or chapter 28A.193 RCW.

The critical flaw in the majority’s analysis is shown by the fact it settles on the age of 18 as the upper limit of a “child.” RCW 28A.193.030(3) limits the duty of a juvenile educator of providing education programs “for inmates under the age of eighteen....” Although the majority never draws the connection, apparently it chooses 18 as the constitutional limit for childhood simply because the Legislature decided not to provide juvenile detention education for anyone older than 18. The majority’s conclusion is certainly not compelled by RCW 26.28.015; that statute shows nothing more than the fact one becomes a juridical actor in Washington at the age of 18. Again, in the *242 context of defining the scope of the constitutional right to an education, this is simply not relevant.

I would recognize the right to education is fundamental, *see Seattle Sch. Dist.*, 90 Wash.2d 476, 585 P.2d 71. Because that right properly appertains to individuals under 21 years of age, RCW 28A.150.220, the appropriate burden is for the State to show the statute (which threatens that right) is narrowly drawn to serve some compelling state interest. *Cf. Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wash.2d 685, 759-61, 530 P.2d 178 (1974) (Stafford, J., dissenting) (arguing that because the right to an ample education is fundamental, the State may not escape its duty to provide education regardless of whether a *compelling* interest is present).

Under this approach, the State “must establish that its classification is ‘necessary to promote a *compelling* governmental interest.’ Under strict scrutiny, ‘the governmental interest claimed to justify the discrimination is to be carefully examined ... to determine whether that interest is legitimate and substantial, and ... the means adopted to achieve the goal [must be]

141 Wash.2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528
(Cite as: 141 Wash.2d 201, 5 P.3d 691)

necessary and precisely drawn.”...’ ” *State v. Hernandez-Mercado*, 124 Wash.2d 368, 375-76, 879 P.2d 283 (1994) (quoting *Graham v. Richardson*, 403 U.S. 365, 376, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977) (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 605, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976)))) (footnotes omitted). In my judgment, the State has failed to do so.

There is no compelling state interest in discriminating against 19- to 21-year-old inmates. Of course, a different answer can be reached if the interest is more broadly drawn. As a whole, the statute obviously “provide[s] for the operation of education programs for the department of corrections’ juvenile inmates,” RCW 28A.193.005, which is clearly a compelling governmental interest. However, whether the statute does what it says it does is not the question for us. The question is whether the State has a *243 compelling interest in discriminating against 19- to 21-year-old juvenile inmates. It does not.

Chapter 28A.193 RCW threatens the fundamental right to an education. This statute places detention education programs on a **713 wholly different plane than public education programs. While the classroom setting and the mechanics of bringing teachers and resources to students will obviously be different in detention than in public schools, this statute is not about those mechanics. It is about outsourcing juvenile offender education to private entities without a strong mechanism to ensure that the education will in fact be delivered and will in fact be “general and uniform,” *i.e.*, equal to a public education the citizens of this state have a right to expect. The majority insists, “we have previously recognized [] [that] incarcerated children may have different educational needs and may require different training programs....” Majority at 705. And so we have. What the majority does not explain, and what I do not understand, is how recognition of that fact converts the commodification of juvenile offender education into a compelling interest.

Even if the State could establish a compelling interest in discriminating between the education of offenders and nonoffenders, the statute is not narrowly tailored to serve the interest asserted. There is no showing that denying education to juvenile offenders over 18

is necessary “to provide for the operation of education programs for the department of corrections’ juvenile inmates.” RCW 28A.193.005.

Equal protection requires that classification systems treat like people alike. *See State v. Blilie*, 132 Wash.2d 484, 493, 939 P.2d 691 (1997). Washington citizens have a right to finish high school until they are 21 or 22 years old. RCW 28A.150.220(3); RCW 28A.155.020. Incarcerated Washington residents are, however, denied the opportunity. RCW 28A.193.030(3). Instead of having until they are 21 or 22 years old to finish high school, youth in prison, who need education at least as much as those out of prison, have only *244 until they are 18.^{FN2} Denying an education to the very individuals who presumably most need it bears no rational relation to any penological, deterrent, or rehabilitative purpose.^{FN3}

FN2. As the majority notes, “[o]f the 1,027 offenders under the age of 21, approximately 209 were believed to have either a high school diploma or a general equivalency degree (GED).” Majority at 695. In other words, approximately 80 percent of the offenders under the age of 21 have no high school degree.

FN3. I am also concerned the competitive bidding system set up by RCW 28A.193.020 will not produce an education that is general and uniform. And that is precisely what Wash. Const. art. IX requires. The statute invites any interested education provider to bid for the business of educating juvenile offenders. If no bids are received or accepted, the local educational service district is required to provide education. RCW 28A.193.020(2). However, the educational service districts have no experience in actually providing education, and there is no statutory mechanism to aid them in becoming able to provide education. As the trial court found, unless a school district is the education provider, it is unlikely the program will even have the authority to award a high school diploma. *See Stipulated Facts 33, 36-42, 47* (Appellants’ Emergency Mot. for Stay Pending Appeal, app. D). I agree. In the end, an entity with no experience in educating children and no realistic hope of gain-

141 Wash.2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528
(Cite as: 141 Wash.2d 201, 5 P.3d 691)

ing any, other than through trial and error, is charged with educating juvenile offenders. Most disturbing and telling of all is that education was provided at only two prisons in the 1998-1999 school year, despite the statutory requirements of chapter 28A.193 RCW. Stipulated Facts 46, 47.

Chapter 28A.193 RCW allows for a system that is separate and unequal and violates article IX of the Washington Constitution, by failing to provide uniform, general, and ample education for all children. I would hold that all children have the same constitutional right to a high school education, regardless of their criminal past.

Wash.,2000.
Tunstall ex rel. Tunstall v. Bergeson
141 Wash.2d 201, 5 P.3d 691, 146 Ed. Law Rep. 528

END OF DOCUMENT

▷

Supreme Court of Washington,
 En Banc.

UNITED PARCEL SERVICE, INC., a corporation,
 Appellant,

v.

STATE of Washington, DEPARTMENT OF
 REVENUE, Respondent.
 No. 50494-6.

Aug. 16, 1984.

Board of Tax Appeals denied request of nationwide package delivery service that its vehicles be exempted from state use tax as vehicles used in substantial part for transporting therein persons or property for hire across boundaries of state, and delivery service petitioned superior court for review. The Superior Court, King County, Francis E. Holman, J., affirmed Board, and delivery service appealed. The Supreme Court, Utter, J., held that: (1) vehicles used solely within state of Washington could not qualify for exemption from the use tax; (2) use tax could be imposed on vehicles which crossed state lines on fewer than 25 percent of their trips; (3) application and construction of use tax exemption did not violate commerce clause of the United States Constitution; and (4) application and construction of use tax exemption did not violate equal protection clause of Washington State Constitution.

Affirmed.

West Headnotes

[1] Taxation 371 ↪3695

371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(G) Levy and Assessment

371k3695 k. Judicial Review and Relief Against Assessments. Most Cited Cases

(Formerly 371k1319)

Supreme court review of appeal of superior court affirmance of decision of State Board of Tax Ap-

peals, following formal hearing before the Board, is on the record of the administrative tribunal, not of the superior court. West's RCWA 34.04.130, 34.04.140, 82.03.180.

[2] Taxation 371 ↪3695

371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(G) Levy and Assessment

371k3695 k. Judicial Review and Relief Against Assessments. Most Cited Cases

(Formerly 371k1319)

On review of decision of State Board of Tax Appeals, following formal hearing, issues of law are reviewed under "error of law" standard which allows reviewing court to essentially substitute its judgment for that of administrative body, although substantial weight is accorded agency's view of the law. West's RCWA 34.04.130(6)(d).

[3] Taxation 371 ↪2300

371 Taxation

371III Property Taxes

371III(F) Exemptions

371III(F)1 In General

371k2298 Construction and Operation of Exemptions in General

371k2300 k. General Rules of Construction. Most Cited Cases

(Formerly 371k204(2))

Tax exemptions are narrowly construed.

[4] Statutes 361 ↪206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes are to be construed, wherever possible, so that no clause, sentence or word shall be superfluous, void, or insignificant.

and tax must be fairly related to services provided by state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[10] Commerce 83 ↪ 62.71

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k62.70 Taxation in General

83k62.71 k. In General. Most Cited

Cases

(Formerly 83k62.70)

State may, under appropriate conditions, tax intrastate activity even though activity is part of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[11] Commerce 83 ↪ 74.5(2)

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(E) Licenses and Taxes

83k74.5 Sales and Use Taxes

83k74.5(2) k. Particular Subjects and Transactions. Most Cited Cases

State use tax which exempts vehicles "used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state," does not violate commerce clause of United States Constitution, even though its effect is to tax vehicles of carriers whose efficiency stems from use of different kinds of vehicles, some operating within and some without state, and not those who use single vehicles to transport property from a point in state to a point in another state, where there is no favoritism towards local commercial interests in the statute. West's RCWA 82.12.0254; U.S.C.A. Const. Art. 1, § 8, cl. 3.

[12] Constitutional Law 92 ↪ 3057

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)6 Levels of Scrutiny

92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and Other Writ-

ten Regulations and Rules. Most Cited Cases

(Formerly 92k211(2))

To comply with equal protection clause of Washington Constitution, legislative classification must meet the three requirements: legislation must apply alike to all persons within designated class, there must be reasonable grounds for distinguishing between those who fall within class and those who do not, and disparity in treatment must be germane to subject of law in which it appears. West's RCWA Const. Art. 1, § 12.

[13] Taxation 371 ↪ 2135

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class

371k2135 k. In General. Most Cited

Cases

(Formerly 371k42(1))

Legislature has broad discretion in making classifications for purposes of taxation.

[14] Constitutional Law 92 ↪ 3560

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)6 Taxation

92k3560 k. In General. Most Cited

Cases

(Formerly 92k228.5)

Challenger under equal protection clause of Washington Constitution bears burden of showing there is no reasonable basis for questioned classification in a revenue statute; test is merely whether any state of facts can reasonably be conceived that would sustain the classification. West's RCWA Const. Art. 1, § 12.

[15] Constitutional Law 92 ↪ 3576

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)6 Taxation

92k3576 k. Sales and Use Taxes. Most

Cited Cases

(Formerly 92k229.4)

Constitutional Law 92 ↪ 3749

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)17 Tort or Financial Liabilities

92k3749 k. Liens, Mortgages, and Security Interests. Most Cited Cases
(Formerly 92k229.4)

Taxation 371 ↪ 3628

371 Taxation

371IX Sales, Use, Service, and Gross Receipts Taxes

371IX(B) Regulations

371k3625 Validity of Acts and Ordinances

371k3628 k. Gasoline and Motor Fuel.

Most Cited Cases

(Formerly 371k1214)

Distinction in use tax statute between vehicles used entirely within state of Washington and vehicles used in substantial part outside the state does not violate equal protection clause of State Constitution since it is logical, or at least conceivable, that vehicles used entirely within the state would benefit from services provided by state to a greater degree than would vehicles often used outside the state. West's RCWA 82.12.0254; West's RCWA Const. Art. I, § 12.

***356**188** Perkins, Coie, Stone, Olsen & Williams, John Binns, Seattle, Schnader, Harrison, Segal & Lewis, Ralph S. Snyder, Richard Birns, Philadelphia, for appellant.

Kenneth Eikenberry, Atty. Gen., Jeffrey Goltz, Asst. Atty. Gen., Olympia, for respondent.

UTTER, Justice.

The issue before us is whether certain vehicles owned or leased by appellant are exempt, under RCW 82.12.0254, from the use tax imposed by RCW 82.12.020. We hold they are not.

***357** Appellant United Parcel Service, Inc., seeks the benefit of a statutory exemption from the use tax imposed by RCW 82.12.020 on the use within this state, as a consumer, of tangible personal property. The exemption sought by UPS is that provided by RCW 82.12.0254 (formerly RCW 82.12.030(4)), which provides:

The provisions of this chapter shall not apply ... in respect to the use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer whether owned by or leased with or without driver to the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state if the first use of which within this state is actual use in conducting interstate or foreign commerce ...

UPS contends that it has been wrongfully denied the benefit of this exemption with respect to certain of its motor vehicles.

UPS operates a nationwide package delivery service on a "from and to all points" basis. In order to do this, UPS has developed an operating plan which works as follows: Packages to be picked up within an "operating area" are picked up at the shipper's address by a vehicle which UPS calls a "package delivery car" (the familiar brown van) and carried to an "operating center" which services that operating area. If a package is destined for an address within the same operating area, the package will remain at that center overnight and will be delivered on the next day by the ****189** same or another package delivery car operating out of that center.

When the package is destined for an address within another operating area, it is carried through a "feeder system". Sometimes, a transfer is made by a direct trip, but usually it is accomplished by passing the package through a centrally located "hub". A hub is a major dispatching and package-sorting center which services a large number of operating areas. At the hub, the package is sorted and then loaded onto another trailer for delivery to the operating center serving the consignee's address. Thus, packages are ***358** transferred from their points of origin to the nearest hub. They are then transported from hub to hub across the country until they reach the hub nearest

their destinations. From there they go to the proper operating center and finally to the destination itself.

Ordinarily, trips between operating centers and hubs and between different hubs are carried out by tractors and trailers rather than by package delivery cars. Such trips may be carried out in three different ways. The first is by the direct trip of a single tractor-trailer combination. The second is by loading trailers on railroad flatcars. This method requires two different tractors for the complete trip—one to deliver the trailer to the railroad and one to pick it up. In the third method, two tractor-trailers set out from different locations, meet somewhere between those locations, exchange trailers, and return to their starting points.

UPS uses three kinds of vehicles to provide its unitary interstate service: package delivery cars, tractors, and trailers. The package delivery cars, because they normally operate only within a single operating area, usually do not cross state lines. Tractors and trailers which transport packages between operating areas and hubs and between different hubs frequently do cross state lines on a regular basis, depending on the particular way in which they are used. As a general rule, UPS assigns new tractors to long hauls and older tractors to short-haul routes. In the state of Washington, tractor drivers document each state border crossing by filling out a "linecrossing card." All of the UPS vehicles—tractors, trailers, and delivery cars alike—are used for the same purpose: to carry packages from a point of pickup to a point of delivery.

Of the total number of packages handled by UPS in Washington, over 70 percent are either picked up in Washington for delivery outside the state or delivered within Washington having originated outside the state. Thus, less than 30 percent of the packages carried in Washington constitute intrastate commerce.

*359 The dispute in this case centers on use taxes paid by UPS with respect to its "package delivery cars" operating within the state of Washington and 39 of its tractors. These vehicles either do not ever leave the state or do so only on fewer than 25 percent of their trips. The Department determined that these vehicles do not qualify for the use tax exemption because they were not used "in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire

across the boundaries of this state ..." RCW 82.12.0254. Taxes were assessed in this dispute for the period from April 1, 1975, through March 31, 1979. The use tax paid on the 39 tractors amounts to \$39,357; the tax paid on the delivery vans is in the neighborhood of \$150,000.

UPS's petition for refund of the taxes paid was denied by the Department of Revenue in 1980, and by the Board of Tax Appeals in a decision dated October 26, 1981. The Board ruled that the Department of Revenue had properly assessed use tax on UPS vehicles shown to have been operating exclusively within the state. It also concluded that, with respect to vehicles not operating exclusively within the state, the Department properly assessed an annual use tax on vehicles which had crossed the borders of this state on less than 25 percent of their trips taken in the normal course of UPS business during the tax year. Finally, the Board held that the **190 Department's interpretation of the exemption statute and use of the "line-crossing test" violated neither the interstate commerce clause nor the equal protection clauses of the United States Constitution or the Constitution of the State of Washington. UPS petitioned for review in Superior Court pursuant to RCW 34.04.130. On January 4, 1983, the court entered a written order and judgment affirming the Board of Tax Appeals. This appeal followed.

[1][2] As this matter came before the Board of Tax Appeals for a formal hearing, judicial review of the Board's decision is governed by RCW 34.04.130 and 34.04.140, RCW 82.03.180. Review is on the record of the administrative tribunal itself, *360 not of the superior court. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wash.2d 317, 323-4, 646 P.2d 113 (1982), cert. denied 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983). Issues of law are reviewed under the "error of law" standard of RCW 34.04.130(6)(d). *Sellers*, at 325, 646 P.2d 113. This standard "allows the reviewing court to essentially substitute its judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law." *Sellers*, at 325, 646 P.2d 113.

[3] Central to our disposition is the rule that tax exemptions are narrowly construed. *Department of Rev. v. Schaake Packing Co.*, 100 Wash.2d 79, 83-4, 666 P.2d 367 (1983); *Group Health Coop. v. State Tax Comm'n*, 72 Wash.2d 422, 429, 433 P.2d 201 (1967).

I

The first question is whether the Board of Tax Appeals erred in ruling that appellant's vehicles which were used solely within the state of Washington could not qualify for exemption from the use tax.

Under RCW 82.12.0254, quoted above, a motor vehicle is exempt from use tax if:

1. the user holds an ICC permit;
2. the vehicle is used
 - a. in substantial part
 - b. in the normal and ordinary course of the user's business
 - c. for transporting therein persons or property for hire across the boundaries of the state; and
3. the first use of the vehicle in Washington is actual use in conducting interstate or foreign commerce.

The Department does not attempt to argue that the UPS vehicles have failed to meet the first and third of these elements. The controversy in this case centers on the second element, requiring that, in order to be exempt from the use tax, a vehicle must be:

used *in substantial part* in the normal and ordinary course of the user's business *for transporting therein persons or property for hire across the boundaries of* *361 *this state ...*

(Italics ours.)

UPS contends that this language merely requires that a vehicle be used in substantial part to carry property which will cross or has crossed a state boundary. According to UPS, a vehicle need not itself cross a state boundary in order to qualify for exemption from the use tax. In other words, the boundary-crossing language in this exemption statute applies to the property being carried rather than the vehicle carrying it. Thus, all UPS vehicles would qualify for the exemption; the vehicles would have been used in substantial part in conducting interstate commerce because over

70 percent of the parcels carried by UPS are interstate parcels. Stipulation of fact 4.1. Even the delivery vans, most of which never cross a state boundary, could qualify for the exemption under this interpretation of RCW 82.12.0254.

The Department, on the other hand, contends that the Legislature did not intend to exempt from the use tax all motor vehicles substantially involved, directly or indirectly, in interstate commerce; rather, the exemption was intended to apply only to those motor vehicles which actually cross the boundaries of this state while carrying persons or property for hire. In other words, the vehicle itself must cross the state line to be eligible for the exemption. **191 (Of course, the vehicle would have to be used "in substantial part" for crossing state boundaries while carrying cargo; one trip would not be enough to earn an exemption.)

[4] The language of RCW 82.12.0254 favors the Department's position. The exemption refers to the "use ... of any motor vehicle." The vehicle must be "used ... for transporting *therein* persons or property ... across the boundaries of this state ..." (italics ours). UPS's argument that only the persons or property, and not the vehicle, need cross state lines ignores the word "therein." Statutes are to be construed, wherever possible, so that "no clause, sentence or word shall be superfluous, void, or insignificant"*362 . Kasper v. Edmonds, 69 Wash.2d 799, 804, 420 P.2d 346 (1966), quoting Groves v. Meyers, 35 Wash.2d 403, 407, 213 P.2d 483 (1950).

Both UPS and the Department argue that a consideration of other exemptions from the sales and use tax which are not directly applicable in this case support their opposing interpretations of the provision here at issue. UPS points to the exemption for use of tangible personal property which becomes a "component part of any motor vehicle or trailer used" by an ICC permit holder. That exemption, also found in RCW 82.12.0254, contains no boundary-crossing requirement. UPS argues that it would be irrational to say that, while its delivery vans are not exempt from the use tax, new parts put on the vans are exempt. UPS also cites the exemption in RCW 82.12.0254 for "the use of any airplane, locomotive, railroad car, or watercraft used primarily in conducting interstate or foreign commerce ..." Again, this exemption contains no requirement that the airplanes, trains, or boats actually cross state boundaries. UPS argues that

RCW 82.12.0254 can be construed consistently as a whole only if no line-crossing requirement is imposed for exemption of motor vehicles as well.

[5][6] The State, however, refers to the elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. See Seeber v. Public Disclosure Comm'n, 96 Wash.2d 135, 139, 634 P.2d 303 (1981). The presence of boundary-crossing language in the motor vehicle carrier exemption, taken together with the absence of such language in the exemption for other types of carriers, would thus support the State's interpretation of RCW 82.12.0254. Moreover, the wisdom or social desirability of taxing motor vehicles used solely within the state, while exempting component parts of those vehicles, is not for the courts to decide. See St. Paul & Tacoma Lumber Co. v. State, 40 Wash.2d 347, 351, 243 P.2d 474 (1952). The issue is what the Legislature intended; that intent is to be deduced, *363 as far as is possible, from what the Legislature said. St. Paul, at 351, 243 P.2d 474.

We construe RCW 82.12.0254 to require that a vehicle actually cross the state boundaries in order to be eligible for exemption from the use tax. The package delivery vehicles operate totally within Washington and do not qualify for the exemption.

II

UPS next contends that the Board of Tax Appeals erred in upholding the decision by the Department of Revenue to impose a use tax on those vehicles belonging to UPS which crossed the state line on fewer than 25 percent of their trips. UPS argues that the Department's decision was arbitrary and capricious.

As discussed earlier, UPS vehicles used solely within the state cannot meet the threshold requirement for exemption because they are not used for transporting *therein* persons or property for hire *across state boundaries*. Many UPS vehicles, however, are used for transporting cargo across state boundaries. These vehicles (primarily tractor-trailers) are exempted from the use tax *if* such interstate use is "substantial". RCW 82.12.0254.

Historically, the Department of Revenue has chosen among several methods to determine**192 whether a

vehicle is used "in substantial part" in interstate commerce under RCW 82.12.0254. The various methods have included the number of trips across state lines, amount of interstate hauling revenue, and ton-miles traveled in interstate commerce. The method used by the Department in each case has depended upon the nature of the business involved. Stipulation of fact 5.2.

In this case, the Department determined that 39 of UPS's tractors were taxable. That determination was made as follows: The auditor first determined the mileage covered by each vehicle in each year in the audit period in the states of Washington, Oregon, and Idaho. If a vehicle's mileage in any one year was entirely within Washington, no *364 further audit was performed and use tax was assessed. If a vehicle's mileage was in the state of Washington and also in the other states, the auditor proceeded to determine that vehicle's trips in each year of the audit period which involved a crossing of the Washington State lines as a percentage of its total trips in that year. Use tax was assessed with respect to any vehicle which, in any year, had less than 25 percent line-crossing trips. The percentage of line-crossing trips was ascertained by referring to the line-crossing cards which UPS drivers are required to fill out upon crossing a state boundary.

UPS argues that use of the 25 percent line-crossing test is arbitrary and capricious because that test is the only one which the vehicles at issue here are unable to meet. They claim that many of their vehicles which do not cross state lines on 25 percent of their trips could pass the ton-mile or interstate hauling revenue tests sometimes used by the Department. Based upon this, they argue that the Department's refusal to use the ton-mile and interstate hauling revenue tests in this case is arbitrary and capricious because the Department has, in the past, used those same tests in determining "whether a vehicle is used 'in substantial part' in interstate commerce." Stipulation of fact 5.2.

The fact that the Department may have used various tests to determine whether a vehicle is used in substantial part in "interstate commerce", however, does not require the Department to use those same tests to determine whether a vehicle is used "in substantial part ... for transporting therein persons or property for hire across the boundaries of this state ..." The two

inquiries are quite different; the same measurement may not work for both. A vehicle (such as a UPS package delivery van) might be shown to be substantially involved in "interstate commerce" under the interstate hauling revenue test. Yet, that same vehicle might never have been used to actually transport property across state boundaries. This could only be shown by a line-crossing test such as that used by the Department.

*365 Moreover, a line-crossing test as a measure of the substantiality of a vehicle's use to carry cargo across state lines is far more practicable. Application of a revenue or ton-mile test to each vehicle that crossed a state line would require an immense amount of detailed data as to the contents of each particular vehicle. While UPS offered general statistics regarding its operations as a whole, the type of detailed information necessary for the use of a revenue or ton-mile test does not appear to have been available.^{FN1} All that is needed to apply the 25 percent line-crossing test, however, are the line-crossing cards filled out by UPS drivers when a state boundary is crossed.

^{FN1}. The detailed information which was made available by UPS referred to the contents of package delivery vans. Such vans rarely cross state lines, however; most of the line-crossing is done by tractor-trailers. Information regarding the contents of local delivery vans is of little help in the application of a revenue or ton-mile test to tractor-trailers.

[7][8] Agency action is "arbitrary and capricious" only if it is " 'willful and unreasoning action in disregard of facts and circumstances.' " Skagit Cy. v. Department of Ecology, 93 Wash.2d 742, 749, 613 P.2d 115 (1980). We do not find the Department of Revenue's application of a 25 percent **193 line-crossing test as a measure of the substantiality of a vehicle's use in hauling cargo across state boundaries to have been arbitrary and capricious.

III

The next issue raised by UPS is whether the Department's construction and application of RCW 82.12.0254 violates the commerce clause of the United States Constitution.

[9] The commerce clause, U.S. Const. art. 1, § 8, cl. 3, requires four things of a state tax on interstate commerce: (1) there must be a sufficient nexus between the interstate activities and the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. *366 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977); Chicago Bridge & Iron Co. v. Department of Rev., 98 Wash.2d 814, 826, 659 P.2d 463, appeal dismissed, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 718 (1983).

[10] UPS does not argue that the State of Washington is constitutionally unable to tax the vehicles here at issue. A state may, under appropriate conditions, tax intrastate activity even though that activity is part of interstate commerce. Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 745, 98 S.Ct. 1388, 1396, 55 L.Ed.2d 682 (1978).

[11] UPS does argue, however, that the Department's construction of RCW 82.12.0254 discriminates between different forms of interstate commerce, thus violating the commerce clause. UPS contends that the State's refusal to allow use tax exemptions to those vehicles which do not cross state boundaries results in a classification among interstate motor carriers based upon the manner in which they operate. A carrier operating its interstate business so as to use a single vehicle to transport property from a point in Washington to a point in another state will be eligible for the exemption while a carrier, such as UPS, whose efficiency stems from its use of different kinds of vehicles, some operating within and some both within and without the state, will be denied the exemption. UPS argues that placing upon the latter type of carrier a burden not borne by the former, when both use their vehicles in interstate commerce, violates the commerce clause.

UPS relies primarily on Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) to support its argument. In that case, the Supreme Court declared unconstitutional a New York tax on stock transfers and sales which gave a 50 percent reduction in the tax to transactions by nonresidents when the transactions involved in-state sales. Residents and nonresidents making out-of-state sales

but in-state transfers did not receive the deduction. The statute also limited the tax to \$350 when the transactions involved in-state sales. When the transaction*367 involved out-of-state sales, there was no limit on the tax. The Court found unconstitutional discrimination because the tax imposed “a greater tax liability on out of state sales than on in state sales ...” 429 U.S. at 332, 97 S.Ct. at 608. The Court held that a state could not “tax in a manner that discriminates between two types of interstate transactions *in order to favor local commercial interests over out-of-state businesses ...*” (Italics ours.) 429 U.S. at 335, 97 S.Ct. at 609.

There is no such favoritism toward local commercial interests in the use tax scheme before us in this case. “A state tax on interstate commerce is not discriminatory unless it affords a ‘differential tax treatment of interstate and intrastate commerce.’” *Chicago Bridge & Iron Co.*, 98 Wash.2d at 830, 659 P.2d 463, citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618, 101 S.Ct. 2946, 2954, 69 L.Ed.2d 884 (1981). Thus, RCW 82.12.0254 does not violate the commerce clause.

IV

Finally, we are faced with the issue of whether the Department's construction and **194 application of RCW 82.12.0254 violates the equal protection clause of the Washington State Constitution.

Const. art. 1, § 12 provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

[12] To comply with Const. art. 1, § 12, a legislative classification must meet three requirements: (1) the legislation must apply alike to all persons within a designated class, (2) there must be reasonable grounds for distinguishing between those who fall within the class and those who do not, and (3) the disparity in treatment must be germane to the object of the law in which it appears. *Sonitrol N.W., Inc. v. Seattle*, 84 Wash.2d 588, 589-90, 528 P.2d 474 (1974).

UPS contends that the second requirement has not been met in this case. It argues that, by exempting from the use tax only those vehicles which carry cargo across state lines, *368 the State has discriminated against carriers such as UPS which have, in the interest of efficiency, developed a delivery system whereby only a few vehicles actually cross state lines. Such a distinction between carriers is urged to be unreasonable because it is based solely on a difference in the method of operation of a certain business.

This argument is not persuasive. We have stated that “a classification based solely on a difference in the method of operation of a particular kind of business is permissible.” *Sonitrol*, at 591, 528 P.2d 474. In *Sonitrol*, the court held that a tax imposed upon centrally monitored burglar alarm systems did not violate the equal protection clause found in Const. art. 1, § 12, even though the tax was at a rate 70 times that imposed on local-alarm and foot-patrol burglar alarm systems.

[13] The Legislature has broad discretion in making classifications for purposes of taxation. *Texas Co. v. Cohn*, 8 Wash.2d 360, 386, 112 P.2d 522 (1941).

The difference between the classes need not be great. It may consist of physical and chemical dissimilarity of commodities or difference in the character or manner of their uses. Classification may also be permissible if it is reasonably related to some lawful taxing policy of the state, such as greater ease or economy in the administration or collection of a tax ... or the equalization of the burdens of taxation.

Cohn, at 386-87, 112 P.2d 522. In *Boeing Co. v. State*, 74 Wash.2d 82, 442 P.2d 970 (1968), this court upheld a use tax imposed on bailments of personalty not involving consideration, even though leases of personalty were not taxed. The basis of the subject classification was simply the fact that lessees paid for the use of the personalty while bailees did not. *Boeing*, at 87, 442 P.2d 970. In *Black v. State*, 67 Wash.2d 97, 406 P.2d 761 (1965), the court upheld a retail sales tax on the lease of a ship used as a floating motel despite the fact that similar transactions involving hotels on land were exempted from the tax. In *Hemphill v. Tax Comm'n*, 65 Wash.2d 889, 400 P.2d 297 (1965), appeal dismissed,*369383 U.S.

103, 86 S.Ct. 716, 15 L.Ed.2d 615 (1966), the court upheld a sales tax which was imposed on admission fees of amusement and recreation activities such as golf, ski lifts, skating, and billiards, but which excluded bowling.

[14] A challenger bears the burden of showing there is no reasonable basis for the questioned classification in a revenue statute. The test is merely whether any state of facts can reasonably be conceived that would sustain the classification. Hemphill, 65 Wash.2d at 891-92, 400 P.2d 297.

[15] In this case, a distinction has been made between vehicles used entirely within the state of Washington and vehicles used in substantial part outside the state. It is logical, or at least conceivable, that vehicles used entirely within the state would benefit from the services provided by the state to a greater degree than would vehicles often used outside the state. This ****195** justifies the line-crossing requirement for exemption from the use tax and the State's construction and application of RCW 82.12.0254 does not violate Const. art. 1, § 12.

The decision of the Board of Tax Appeals is affirmed.

We concur:

WILLIAM H. WILLIAMS, C.J., ROSELLINI,
BRACHTENBACH, DOLLIVER, DIMMICK and
PEARSON, JJ., and CUNNINGHAM and WIE-
LAND JJ. Pro Tem, concur.
Wash., 1984.

United Parcel Service, Inc. v. State, Dept. of Revenue
102 Wash.2d 355, 687 P.2d 186

END OF DOCUMENT

918 F.2d 84
(Cite as: 918 F.2d 84)

H

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
CITY OF SPOKANE, Defendant-Appellant.
No. 90-35118.

Argued and Submitted Oct. 5, 1990.
Decided Oct. 31, 1990.
As Amended on Grant of Appellee's Motion For
Clarification Nov. 27, 1990.

United States brought action against city to preclude its collection of tax on lawfully conducted gambling activities of local unit of Red Cross and to recover back taxes. The United States District Court for the Eastern District of Washington, Justin L. Quackenbush, Chief Judge, 734 F.Supp. 919, granted summary judgment in favor of United States, and city appealed. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) Red Cross was instrumentality of United States that was immune from local taxation, and (2) city had to return taxes collected.

Affirmed.

West Headnotes

[1] Federal Courts 170B ↪776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most

Cited Cases

Grant of summary judgment is reviewed de novo.

[2] Federal Courts 170B ↪776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most

Cited Cases**Federal Courts 170B ↪850.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts
and Findings
170Bk850 Clearly Erroneous Findings
of Court or Jury in General
170Bk850.1 k. In General. Most

Cited Cases

(Formerly 170Bk850)

On constitutional questions, Court of Appeals reviews findings of fact for clear error, and mixed questions of fact and law de novo.

[3] Federal Courts 170B ↪776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most

Cited Cases

Questions of law are reviewed de novo.

[4] Taxation 371 ↪2006

371 Taxation
371I In General
371k2004 Power of State
371k2006 k. United States Entities, Property, and Securities. Most Cited Cases
(Formerly 371k5)

No state can impose tax upon instrumentality of United States Government.

[5] Taxation 371 ↪2006

371 Taxation
371I In General
371k2004 Power of State
371k2006 k. United States Entities, Property, and Securities. Most Cited Cases
(Formerly 371k6)

918 F.2d 84
(Cite as: 918 F.2d 84)

Red Cross was instrumentality of United States that was immune from state and local taxation on lawfully conducted gambling activities despite city's reference to fact that Red Cross was not considered agency for purposes of Freedom of Information Act. 5 U.S.C.A. § 552.

[6] Courts 106 ↪ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
Court of Appeals' decision striking down city's tax on Red Cross' lawfully conducted gambling activities could be applied retroactively; decision did not establish new principle of law but merely restated fundamental principle that precluded taxation of United States governmental functions, and retroactive application would foster respect for such principle and would not result in inequity even though city might have already used some tax money.

[7] Taxation 371 ↪ 3555

371 Taxation

371VIII Income Taxes

371VIII(H) Payment

371k3555 k. Refunding Taxes Paid. Most Cited Cases
(Formerly 371k1097)

City that improperly taxed Red Cross' lawfully conducted gambling activities had to return taxes collected.

***85 Laurie Flinn Connelly and Michael A. Nelson**, Asst. City Attys., Spokane, Wash., for defendant-appellant.

Gary R. Allen, David English Carmack, and Kenneth W. Rosenberg, Attys., Tax Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Washington.

Before **SKOPIL**, **O'SCANNLAIN** and **FERNANDEZ**, Circuit Judges.

FERNANDEZ, Circuit Judge:

The United States brought this action against the City of Spokane ("the City") and Spokane's Manager of Finance, Peter Fortin, to preclude the collection of a tax on the gambling proceeds of a local unit of the American National Red Cross, and to recover back taxes, together with interest. The district court granted summary judgment in favor of the United States^{FN1} and the City appealed. We affirm.

FN1. *United States v. City of Spokane*, 734 F.Supp. 919 (E.D.Wash.1989).

BACKGROUND

The American National Red Cross is a unique charitable institution. It was created by the United States to perform such exceedingly important public functions as aiding "the sick and wounded of Armed Forces in time of war," and carrying on "a system of national and international relief in time of peace" to mitigate "the sufferings caused by pestilence, famine, fire, floods, and other great national calamities...." 36 U.S.C. § 3. Eight of its fifty governors are appointed by the President of the United States and one of those eight acts as the principal officer of the corporation. 36 U.S.C. § 5(a). While the organization must support itself from public donations and other sources, the United States does supply it with a permanent headquarters***86** building. 36 U.S.C. § 13. The financial reports of the organization are audited by the Department of Defense. 36 U.S.C. § 6.

The Inland Northwest Chapter of the American National Red Cross has been a chartered local organization since 1914. As such it is a local unit of the American National Red Cross. 36 U.S.C. § 4a. We will hereafter refer to the American National Red Cross as the "Red Cross" and the Chapter as the "INC". However, since the INC is a unit of the Red Cross, what we say about the rights and duties of the Red Cross also applies to the INC.

The State of Washington authorizes bona fide charitable or non-profit organizations to conduct bingo, pull-tab, and punchboard games. Wash.Rev.Code § 9.46.0311 (1988).^{FN2} The Red Cross is an organization that comes within that definition. Wash.Rev.Code § 9.46.0209. At the same time, the State of Washington authorizes cities to tax certain of

918 F.2d 84
(Cite as: 918 F.2d 84)

the proceeds of those gambling activities-Wash.Rev.Code § 9.46.110-and since 1982 the City has levied a gambling tax upon the INC. Spokane, Wash.Ord. § 8.40.020 (1982).

FN2. The citations to the Washington Code are to the current version of that law. Earlier versions were to the same effect, as far as the issues on this appeal are concerned.

For some time, the INC paid that tax without apparent protest, but in February of 1986 it did protest and requested a refund of all gambling taxes paid since July 1, 1980. The request was denied. The United States then brought this action to obtain the refund, with interest, and to enjoin any further levies.

Cross motions for summary judgment were filed, and the district court ultimately entered a judgment which required the disgorgement of prior exactions by the City, together with prejudgment interest from the date of the demand for refund. The district court further directed that the City cease further imposition of the tax. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

[1][2][3] We review the grant of summary judgment de novo. Kruso v. International Tel. & Tel., 872 F.2d 1416, 1421 (9th Cir.1989), cert. denied, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). On constitutional questions, this court reviews findings of fact for clear error, and mixed questions of fact and law de novo. State of Nevada Employees Ass'n Inc. v. Keating, 903 F.2d 1223, 1226 (9th Cir.1990); La Duke v. Nelson, 762 F.2d 1318, 1322 (1985), modified, 796 F.2d 309 (9th Cir.1986). Questions of law are reviewed de novo. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

DISCUSSION

Two major issues confront us. First, is the Red Cross an instrumentality of the United States which is im-

mune from this kind of taxation? Second, if it is, should the INC have been granted a refund of the back taxes? We will discuss each of these issues in turn.

A. *The Red Cross Is Immune from This Tax*

[4][5] One of the hoariest principles of federal-state governmental relations is that no state can impose a tax upon an instrumentality of the United States Government. As the Supreme Court, speaking through Chief Justice Marshall, eloquently stated in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819), that principle is bottomed upon certain important axioms:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is *87 declared to be supreme over that which exerts the control, are propositions not to be denied.

Nor can it be said that a little taxation, or taxation of just one function or instrumentality, is proper. M'Culloch also dealt with those possibilities. The Court said:

We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

M'Culloch, 17 U.S. (4 Wheat.) at 430. The Court continued:

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on

918 F.2d 84
(Cite as: 918 F.2d 84)

the states.

M'Culloch, 17 U.S. (4 Wheat.) at 432.

Nothing could be more forcefully established, and while those principles alone do not demonstrate that the Red Cross is an instrumentality of the United States, there can be no doubt that it is. The Supreme Court made that clear in Department of Employment v. United States, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966) where it said, “[W]e hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment.”

At first blush that would appear to dispose of this issue, but the City claims that accretions to the M'Culloch doctrine make it inapplicable to the INC activities which were taxed here. That claim is based upon a misreading of the authorities.

The City first points to Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961), a case in which the Supreme Court struck down a tax levy on the Federal Land Bank, an instrumentality of the United States. In so doing, the Court indicated that if the activity being performed is not within the authority granted to the instrumentality, for example if it were illegal, taxation may be appropriate. Federal Land Bank, 368 U.S. at 152-56, 82 S.Ct. at 287-89. That, however, has no application whatever to this case. There can be no doubt that the Red Cross can engage in activities designed to earn money. In fact, because it is not, for the most part, funded with tax dollars, it must engage in many fund raising activities if it is to survive. While we do not suggest that the Red Cross can engage in illegal activities in pursuit of its goals, there is nothing illegal about the gambling activities the INC engaged in here.

But the City claims that there is still another string to its bow, for some activities of agencies of the United States can be taxed. Here again, when gazing upon the authorities cited one must be purblind if one is to overlook the distinctions between those authorities and this case.

Thus, in James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), a private

independent corporation that had contracts with the United States complained about the taxation of its gross receipts. The Court declined to find that a tax on the private entity was a tax upon the government or its instrumentalities, even though the effect of the tax could, in theory, be felt by the government. James, 302 U.S. at 161, 58 S.Ct. at 221. That is not this case; the Red Cross is no mere private contractor, it is a United States instrumentality. The same analysis applies to United States v. New Mexico, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). There, too, a tax on the receipts of private contractors was attacked; there, too, the tax was sustained. The Court indicated *88 that the mere fact that a contractor acts as an agent of the government does not mean that it is an agency or instrumentality of the government. It does not mean that the contractor stands in the government's shoes. 455 U.S. at 735-36, 102 S.Ct. at 1383. The entities in question were not so integrated into the structure of the government that its tax immunity devolved upon them. Rather, it was realistic to view them as the private entities they were—entities “independent of the United States.” 455 U.S. at 738, 102 S.Ct. at 1385. When dealing with entities of that stripe, it is necessary to be extremely careful about parsing their various activities when they claim that a tax falls directly on the United States. The same does not apply when one is dealing with an acknowledged government instrumentality such as the Red Cross. To do so in that instance would engage the courts in the unfit inquiry that M'Culloch warned against. 17 U.S. (4 Wheat.) at 430. Private independent contractors may be agencies because they act as agents. They are not to be confused with instrumentalities like the Red Cross which are agencies because they were created to carry out functions of the government itself and are, therefore, imbedded in the structure of the government to that extent. ^{FN3} As the Supreme Court has said, “both the President and Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government.” Department of Employment, 385 U.S. at 359-60, 87 S.Ct. at 467. The Court agreed with that characterization.

FN3. California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 109 S.Ct. 2228, 104 L.Ed.2d 910 (1989), and Washington v. United States, 460 U.S. 536, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983), which also uphold taxation of a bankruptcy trustee's sales and private construction con-

918 F.2d 84
(Cite as: 918 F.2d 84)

tractors' income, respectively, apply the same principles and are to the same effect.

In a final bid to deflect the inexorable force of the law in this area, the City asserts that the Red Cross is not really a tax exempt instrumentality of the government, because we have said that it is not an agency for the purposes of the Freedom of Information Act. See Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir.1981). That is an astonishing proposition. It suggests that we, in effect, overturned Department of Employment when we decided Irwin Memorial Blood Bank. We did no such thing. What we did decide was that given the purposes and the background of the Freedom of Information Act, the Red Cross was not an agency within the meaning of that statute. To extrapolate from that holding to the area of the law which we must deal with here would be a serious logical and semantic error. It would insist that an entity incorporated by an act of Congress to carry out essentially public functions is not exempt from taxation as it struggles to accomplish those purposes. It would insist upon that even when the entity's activities are lawful, necessary and in pursuit of its duties as an instrumentality of the United States. It would insist upon that based on the fallacy that a word which has a meaning in one context must have the selfsame meaning when transplanted to an entirely different context. We must eschew that extrapolation.

It follows that the City improperly imposed the gambling tax upon INC.

B. *The City Must Disgorge the Taxes It Collected*

The City asserts that even if the tax is invalid, it should not be required to reimburse the INC for the taxes which have already been collected. Discussion of that claim requires analysis of two sub-issues. Should the decision here be given retroactive effect, and, if so, what remedy is proper?

While the issues sometimes seem to be entangled, the Supreme Court has recently been at some pains to untangle them. See American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). In American Trucking, the Court pointed out that retroactivity must be decided by use of the analysis outlined in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). That

does not, however, answer the remedy *89 question, a question usually left to the states themselves to work out. American Trucking, 110 S.Ct. at 2330. See also Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 782-84 (9th Cir.), cert. denied, 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986), where we, in effect, recognized and applied the distinctions.

[6] Because we need not consider the question of remedy if the effect of our decision is not retroactive, we will first consider retroactivity.^{FN4}

FN4. There is much jurisprudential debate about the propriety of any such analysis in the area of the constitution. See American Trucking, 110 S.Ct. at 2343 (Scalia, J., concurring). We, of course, cannot enter the arena. We leave the battle to other gladiators.

Our retroactivity analysis must apply the three-part Chevron Oil test:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision ... could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S.Ct. at 355 (citations omitted).

Our decision striking down this tax does not meet the tests of nonretroactivity. We overrule no precedent here and we do not decide an issue of first impression. As we have shown, our determination regarding the status of the Red Cross does not proceed from some obscure and half-formed idea only now wrested into the light of day. Rather, it proceeds from a long, if sometimes wavy, line of Supreme Court authority. This alone indicates that retroactivity is required. See

918 F.2d 84
(Cite as: 918 F.2d 84)

Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 110 S.Ct. 3202, 3205, 111 L.Ed.2d 734 (1990) (per curiam). However, we will also look to the other elements. We are dealing with a fundamental principle that precludes the taxation of United States governmental functions. Retroactive operation of our decision will surely foster a proper respect for that principle by encouraging local entities to tread carefully when they impose taxes on entities like the Red Cross. Finally, no inequity results from retroactive application. It is true that the City may already have used the tax money, but at the very least it should have entertained the gravest doubts about its right to collect the tax in the first place. Against that is the inequity to the INC which would be wrought were it forced to forego its claim to recover.^{FN5} Therefore, this decision will apply retroactively.

FN5. There is no assertion that this action is barred by the statute of limitations. Nor is there a claim that payment under protest was required by Washington law. Cf. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 2243-44 n. 4, 110 L.Ed.2d 17 (1990).

[7] We turn then to the question of relief. That the INC is entitled to relief can hardly be questioned. It is true that the exact form of relief is often left to the local governmental entity when a tax is struck down as unconstitutional. However, that is typically done in cases where there is a commerce clause violation which can be remedied in any one of a number of ways. See, e.g., Ashland Oil, 110 S.Ct. at 3205; American Trucking, 110 S.Ct. at 2330; McKesson Corp., 110 S.Ct. at 2252. That approach has no application here, for here, purely and simply, a tax has been exacted from a federal instrumentality. The only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded. That was the course adopted in Department of Employment, 385 U.S. at 357, 87 S.Ct. at 466. It is the course the district court adopted; it is the course we adopt today.

*90 CONCLUSION

The Red Cross is a United States Government instrumentality which is immune from state and local taxation when it is lawfully pursuing its mandated purposes. Here, the INC was engaged in fundraising

by lawfully conducting certain gambling activities. The City erred when it levied a tax on those activities.

Thus, the City must cease making that levy and must refund back taxes paid by the INC since November 21, 1982, together with interest from February 28, 1986, the date that the INC made its demand.

AFFIRMED.

C.A.9 (Wash.), 1990.
U.S. v. City of Spokane
918 F.2d 84

END OF DOCUMENT

Appendix 3
Additional Statutes

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency, or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 exs. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

Notes:

Findings – Short title – Intent – 1995 c 403: See note following RCW 34.05.328.

Part headings not law – Severability – 1995 c 403: See RCW 43.05.903 and 43.05.904.

Effective date – 1989 c 175: See note following RCW 34.05.010.

1/14/2010

RCW 4.84.030: Prevailing party to reco...

RCW 4.84.030

Prevailing party to recover costs.

In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements; but the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of the district court when commenced in the superior court.

[1987 c 202 § 121; 1890 p 337 § 1; 1883 p 42 § 1; Code 1881 §§ 506, 507; 1854 p 201 §§ 368, 369; RRS § 476.]

Notes:

Intent – 1987 c 202: See note following RCW 2.04.190.

Appendix 4
Additional Other Authorities

§19.7(14) / Briefs on the Merits: The Rules

The court will not consider an assignment of error that is not supported in the argument section, including citation to authority and reference to the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The court may refuse to consider an argument if the argument is not sufficient to properly decide the issue. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 61, 837 P.2d 618 (1992).

(12) Request for attorney fees and expenses

A party must comply with RAP 18.1 to request costs or fees on appeal. RAP 18.1 requires a party to devote a section of the opening brief to the request for the fees and expenses. RAP 18.1(b). This issue should be briefed in the same manner as any other issue on appeal, including argument and citation to applicable statutes or case law sufficient to advise the court of the grounds for awarding fees. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). The argument should, however, be as succinct as possible, so that it does not detract from the underlying merits of the appeal. See chapter 26 of this deskbook.

(13) Conclusion

The conclusion of the brief should include a precise statement of the specific relief sought by appellant. If there are multiple issues, the appellant should indicate the specific relief sought for each issue, if the applicable relief differs. The brief should tell the appellate court whether it can resolve any remaining matters, in whole or in part, or whether they must be remanded for further proceedings.

(14) Appendix

An appendix to a brief is not required, but it is helpful to append materials that are central to the appeal. In a judge-tried case, it is generally helpful to include the findings of facts and conclusions of law in the appendix. If instructions are at issue, the appendix should include the questioned instructions and other relevant instructions needed to place the questioned instructions in context. It may be helpful to include applicable statutes, ordinances, rules, and regulations. See RAP 10.4(c). An appendix may also include relevant portions of the record such as a key exhibit. The appendix is not included in the page limitations applicable to briefs. Its judicious use, therefore, will assist in making the brief "self-contained," and conserve space within the brief itself for interpretation and analysis of the appended documents. See RAP 10.3(a)(7); 10.4(b). But an appendix may not contain argument